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# *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*

Paul STEPHEN DEMPSEY\* and Svante O. JOHANSSON\*\*

*In recent years, the European Union (EU) has promulgated several 'consumer protection' regulations that address a variety of airline passenger issues, including flight delay, cancellation, and denied boarding. The new rules require airlines to grant financial compensation to passengers in the event of denied boarding or flight delay or cancellation, assist them in revising their travel plans by giving them the choice between a rescheduling of the ticket or a refund, and pay for their board and lodging. However, both the Warsaw and the Montreal Conventions for the Unification of Certain Rules for International Carriage by Air directly address the issue of air carrier compensation to passengers for damages suffered as a consequence of 'delay', and explicitly provide that the remedies specified therein are exclusive. As all Member States of the EU have ratified those Conventions, it would seem that the promulgation of conflicting EU Regulations raises serious legal questions regarding the relation with the international conventions.*

*The overall conclusion the authors draw from the examination of the EU Regulations and the case law they produced is that EU law conflicts with the international conventions and the exclusivity of their application.*

*The position of the European Court of Justice (ECJ) in interpreting the EU Regulations does not facilitate a uniform application of different rules. In case after case, the Court has stated that the jurisprudence surrounding the Warsaw and the Montreal Conventions, broadly speaking, is irrelevant when interpreting the Regulations. It is incomprehensible that these Regulations, and their interpretation by the ECJ, would be so fundamentally inconsistent with the explicit provisions of the Conventions. If the Court had taken a more consensual approach, the EU rules might have complemented, rather than conflicted with, the Conventions.*

## 1. INTRODUCTION

In recent years, the European Union (EU) has promulgated several 'consumer protection' regulations that address a variety of airline passenger issues, including flight delay, cancellation, and denied boarding. In 2002, the Commission proposed a new regulation regarding air carriage that eventually became Regulation (EC) 261/2004,<sup>1</sup> repealing the old Regulation (EEC) 295/91. Its purpose is to compensate passengers suffering the inconvenience of

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<sup>1</sup> The proposal can be found in OJ L 140 of 30 May 2002. The proposal became Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of a flight and repealing Regulation (EEC) 295/91, OJ L 46 of 17 Feb. 2004.

being delayed or refused boarding through mandatory payment and provision of certain auxiliary services. More precisely, the Regulation requires airlines to grant financial compensation to passengers in the event of denied boarding or flight delay or cancellation, assist them in revising their travel plans by giving them the choice between a rescheduling of the ticket or a refund, and pay for their board and lodging.

However desirable this new Regulation may be, it raises serious legal questions regarding the relation with the international conventions that address carrier liability for passenger injuries, including delay in air carriage. Those Conventions *for the Unification of Certain Rules Relating to International Carriage by Air* (i.e., the *Warsaw Convention* of 1929 and the *Montreal Convention* of 1999) directly address the issue of air carrier compensation to passengers for damages suffered as a consequence of 'delay' and also explicitly provide that the remedies provided thereunder are exclusive. All Member States of the EU have ratified those Conventions. For Brussels to promulgate regulations in conflict with those Conventions would contravene their international obligations of its EU Member States and therefore be *ultra vires*.

This article examines the EU Regulations regarding delay in air passenger carriage contrasted with their international counterpart. As the regulations have begun to produce judicial opinions, the effect of the different regulations in the light of these cases will also be evaluated. The overall thesis is that such complementary regulations, in so far as they cover the same area as a convention, conflict with the international conventions and the exclusivity of their application.

## 2. THE ISSUE: EXCLUSIVE APPLICATION OF THE INTERNATIONAL CONVENTIONS OR NOT

If an international convention provides that its remedies are exclusive, then any inconsistent domestic law of ratifying States addressing the same subject must be void.<sup>2</sup> This is particularly true with respect to international conventions that seek to harmonize private international rules across jurisdictions.

To determine whether or not a convention is exclusive, it is important to consider the scope of the convention, its applicability, and the special issues that are dealt with in the convention. If the question at issue is not addressed by the convention, remedies may be found in applicable domestic law.

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<sup>2</sup> Article 27 of the Vienna Convention on the Law of Treaties provides: 'A party may not invoke the provisions of its internal law for its failure to perform a treaty'. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 8 I.L.M. 679. Scholars have summarized the principle as follows: 'To the extent that international law derives its binding force from agreements freely entered into by States, they automatically assume two major duties: (i) *pacta sunt servanda*, i.e., conscientious fulfilment of international obligations, and (ii) responsibility for the breach of international rules. Furthermore, any domestic law is void if it conflicts with a peremptory, imperative *jus cogens* or superior norm of general international law from which no derogation is permitted and which only a subsequent norm of general international law having the same character can modify'. Ema Orji, 'Issues on Ethnicity and Governance', *Fordham International Law Journal* 25 (2001): 431. 'Since domestic law must accord with international law, domestic law cannot violate *jus cogens* norms'. Salman Bal, 'International Free Trade Agreements and Human Rights', *Minnesota Journal of Global Trade* 10 (2001): 62. Many jurisdictions have held that where an international treaty conflicts with a domestic statute, the treaty prevails over domestic law. See, e.g., *Cook v. United States*, 288 US 102 (1933).

In different international conventions, the question is dealt with in various ways. In air law, exclusivity is addressed in Article 24 of the Warsaw Convention and Article 29 of the Montreal Convention. These Articles aim at ensuring that the liability regime, appropriately balancing various interests, is not undermined by contract or statutory provisions.

Article 19 of the Warsaw Convention provides: 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.' Article 24 of the Warsaw Convention of 1929 provides: 'In the cases covered by Articles 18 and 19 any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this Convention.'<sup>3</sup>

The Montreal Convention of 1999 was drafted with the objective of modernizing and replacing the Warsaw Convention. However, these provisions, though renumbered, were left virtually untouched. Article 19 of the Montreal Convention provides, *inter alia*, that 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.' Article 29 of that Convention provides, *inter alia*, 'any action for damages, *however founded*, whether under this Convention or in contract or in tort *or otherwise*, can only be brought subject to the conditions and such limits of liability as are set out in this Convention. . .'.<sup>4</sup> Furthermore, Article 22(1) of the Montreal Convention limits carrier liability to 4,150 Special Drawing Rights (SDR).<sup>5</sup>

Neither the Warsaw nor the Montreal Convention explicitly mentions the term 'cancellation', 'denied boarding', or 'bumping', though one could reasonably include them within the concept of 'delay' addressed in Articles 20 and 19 of the Warsaw and the Montreal Conventions, respectively. Moreover, one must bear in mind that among the most important purposes of the relevant international conventions with rules relating to air carriage is achievement of global uniformity of law.<sup>6</sup> As the US Supreme Court observed in *Zicherman v. Korean Airlines*,<sup>7</sup> 'it was a primary function of the Warsaw Convention to foster uniformity in the laws of air travel. . .'.<sup>8</sup> Similarly, quoting *Floyd*,<sup>9</sup> in *El Al v. Tseng*,<sup>10</sup> the Supreme Court found that '[t]he cardinal purpose of the Warsaw Convention. . . is to achieve uniformity of rules governing claims arising from international air transportation'.<sup>11</sup> These are, after all, Conventions *for the Unification of Certain Rules Relating to International Carriage by Air*.

<sup>3</sup> Emphasis supplied.

<sup>4</sup> Emphasis supplied.

<sup>5</sup> This limit may be breached if the carrier engaged in wilful misconduct. Article 22(5) Montreal Convention.

<sup>6</sup> Dempsey, *Public International Air Law* (McGill, 2008), 4–5, 66–67; Dempsey & Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (McGill, 2005), 49–53.

<sup>7</sup> *Zicherman v. Korean Airlines*, 516 US 217, 230 (1996).

<sup>8</sup> *Ibid.*, 230.

<sup>9</sup> *Eastern Airlines Inc. v. Floyd*, 499 US 530, 552.

<sup>10</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 US 155 (1999) [hereinafter *Tseng*].

<sup>11</sup> *Ibid.*, 169.

### 3. THE GENERAL CONCEPT OF DELAY

The concept of delay in transport can be difficult to grasp.<sup>12</sup> This can, in many ways, be ascribed to the fact that delay has much in common with non-performance and, as such, is firmly rooted in the law of contracts. In Anglo-American law, as well as in Scandinavian law, delay may include not only late fulfilment of the obligation but also non-performance altogether. In continental law, an obligation must be possible to fulfil. Delay appears when the performance of the obligation is due to late fulfilment of the obligation. However, non-performance is normally not included in the definition of delay in those jurisdictions.

These differences in judicial viewpoints colour the interpretation of what constitutes 'delay'. Courts have struggled with the effort to regulate delay exhaustively by international conventions.<sup>13</sup> The principal dividing line seems to be between delay (in the narrow understanding) and non-performance. However, the borderline is not normally clear cut.

At one end of the spectrum, we have the *late arrival* of a flight attributable to congestion at destination, weather, or similar reasons. On the other end of the spectrum, we have a flight that is cancelled altogether. The former situation clearly constitutes delay; the latter clearly constitutes non-performance of the contract of carriage. A grey area lies in between.

It should be noted that delay, even in a narrow sense, might have a cause that can be described as bumping of passenger (i.e., denying a passenger with a confirmed reservation a seat, due to overbooking, cancellation, or similar reasons). In such circumstances, the carrier often will offer a *replacement flight*. These situations, between delay and non-performance, are more difficult to categorize. In order to keep the two concepts separate, it has been suggested that the contract of carriage is not any contract, but one with precise flight number and time table.<sup>14</sup> Delay can thus be considered only where a flight is carried out with the same aircraft that was initially cancelled or rescheduled, or where a new aircraft was substituted therefore; not where the passenger was booked on another flight. Thus, no rebooking is required; neither is a new boarding card. This exemplifies the difficulties in establishing a firm definition of the concept of 'delay'.<sup>15</sup> It should also be noted that the Courts have shown little interest in drawing a clear line between delay and non-performance under contracts for air carriage.

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<sup>12</sup> Delay is discussed in Sundberg, *Air Charter* (1961); Grönfors, *Tidsfaktom vid Transportavtal* (1974); Grönfors, in *European Transport Law* (1974), 400; Sisula-Tulokas, *Dröjsmålskador vid Passagerartransport* (1985); Johansson, *An Outline of Transport Law* (2008), ss 5.5.2 and 12.4.1; and Nielsen, *Passageransvaret ved International Lufbefordring* (2009).

<sup>13</sup> Minutes of the International Conference on Unification of Certain Rules for International Carriage by Air held in Montreal, 10–28 May 1999, 83.

<sup>14</sup> Geimulla & Schmid (eds), Art. 19 Montreal Convention, fn. 98.

<sup>15</sup> Schmid, 'Die Verordnung (EG) Nr. 261/2004 – Europäischer Verbraucherschutz mit Nachbesserungsbedarf', *Zeitschrift für Luft- und Weltraumrecht* (2005): 373, 375 and Haanappel, 'The New EU Denied Boarding Compensation Regulation of 2004', *Zeitschrift für Luft- und Weltraumrecht* (2004): 22, 27.

#### 4. 'DELAY' UNDER THE WARSAW AND MONTREAL CONVENTIONS

##### 4.1. THE ABSENCE OF A DEFINITION

Article 19 of both the Warsaw and the Montreal Conventions explicitly addresses 'Delay'. It provides that the carrier is liable for damage caused by delay in the carriage of passengers, baggage, and cargo.<sup>16</sup> Delay is not defined in either Conventions but can normally be understood as untimely arrival at destination.<sup>17</sup> However, in order to tell what untimely means, one cannot simply turn to the scheduled time tables, as they are not strictly binding. It has been suggested that delay constitutes substantially exceeding the time that would normally be required for a comparable transport.<sup>18</sup> This seems to be in accordance with court cases where delay has been interpreted to mean 'abnormal delay'.<sup>19</sup>

##### 4.2. DEFENCES AND LIMITATIONS

Article 19 of the Montreal Convention also provides that the carrier enjoys a defence if it proves it took all necessary measures to avoid the damage or that it was impossible to do so, a defence that was universally available for all claims under Article 20 of the Warsaw Convention.<sup>20</sup> Under the Montreal Convention, passengers can recover actual damages up to 4,150 SDRs for personal delay and 1,000 SDRs for baggage delay<sup>21</sup> or more if it was proven that the carrier engaged in wilful misconduct ('done with intent to cause damage or recklessly and with knowledge that damage would probably result').<sup>22</sup> For delay of cargo, one can recover actual damages up to 17 SDRs per kilogram, but no more, as the ceiling for cargo is unbreakable.<sup>23</sup>

Article 20 of the Warsaw Convention relieved the carrier of liability where it took 'all necessary measures to avoid the damage or that it was impossible. . .to take such measures'. Though under the Montreal Intercarrier Agreement of 1966, air carriers waived the 'all necessary measures' defence in personal liability cases, the defence was retained in baggage and cargo cases.<sup>24</sup>

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<sup>16</sup> The first sentence of Art. 19 has its genesis in the Warsaw Convention, which was unchanged by the Hague, *Guatemala City*, or *Montreal Protocols*. The Warsaw Convention provides in Art. 19: 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods'.

<sup>17</sup> Geimulla & Schmid (eds), *Ibid.*, Art. 19, fn. 6.

<sup>18</sup> Grönfors, *European Transport Law* (1974), 400 et. seq.

<sup>19</sup> See, e.g., *Jahanger v. Purolator Sky Courier*, 615 F. Supp. 29 (E.D. Pa. 1985), citing Mankiewicz, *The Liability Regime of the International Air Carrier* (1981).

<sup>20</sup> The 'all necessary measures' defence was originally found in Art. 20 of Warsaw, though it was not restricted to delay. The addition of this defence to delay originated in the *Guatemala City Protocol* (which extended it to passengers, baggage, and cargo) and was carried forward into *Montreal Protocol No. 4* (which deleted cargo from the applicability of the defence).

<sup>21</sup> Articles 22(1) and (2) Montreal Convention.

<sup>22</sup> Article 22(5) Montreal Convention.

<sup>23</sup> Article 22(3) Montreal Convention.

<sup>24</sup> M. Myers & Tracy R. Barrus, 'A Practitioner's Guide to the Law Governing Airline Baggage and Cargo Cases', *Defense Counsel Journal* 54 (1987): 330, 334.



For delay of passengers and their baggage, *Montreal Protocol No. 4* (amending the Warsaw Convention) reaffirmed the ‘all necessary measures’ defence; the carrier shall not be liable where it proves that it took all necessary measures to avoid the damage or it was impossible for him to do so.<sup>25</sup> For cargo, however, the all necessary measures defence was eliminated. So too, the Montreal Convention of 1999 eliminates the defence *except* for delay and baggage claims.<sup>26</sup>

However, the Montreal Convention of 1999 significantly amended the language.<sup>27</sup> The traditional defence that the carrier or its agents has ‘taken *all necessary measures* to avoid the damage or that it was impossible for them to’ do so, has been replaced by language exonerating the carrier if it or its agents ‘took *all measures that could reasonably be required* to avoid the damage or that it was impossible’ to do so,<sup>28</sup> in effect codifying some of the jurisprudence that had emerged under the Warsaw Convention. ‘All necessary measures’ appears facially to be a more exacting standard than ‘all measures that could reasonably be required’. Courts have held that the Warsaw phrase ‘all necessary measures’ means ‘all reasonable measures’.<sup>29</sup> The Convention ‘cannot literally require a defendant to take all necessary measures, because if all such measures had actually been taken, the plaintiff’s injury – the damage – would have not occurred’.<sup>30</sup> The defendant air carrier must prove ‘an undertaking embracing all precautions that in sum are appropriate to the risk, that is, measures reasonably available to defendant and reasonably calculated, in cumulation to prevent the subject loss’.<sup>31</sup>

Hence, under the Warsaw and the Montreal Conventions, the carrier ordinarily can exonerate itself where, for example, it proves that inclement weather caused the delay. Courts have held that liability would be inappropriate for weather-related delays, such as those that result from fog, hurricanes, typhoons, or volcanic eruptions.<sup>32</sup> In contrast, with respect to damage to or loss of unchecked baggage, the carrier is liable only for its fault, or that of its servants or agents.<sup>33</sup>

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<sup>25</sup> *Montreal Protocol No. 4* provides, in Art. XVII, that Art. 20 of the Convention shall be deleted and replaced by the following:

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

<sup>26</sup> Whalen, ‘The New Warsaw Convention: The Montreal Convention’, *Air and Space Law XXV* (2000): 304, 306.

<sup>27</sup> Dempsey & Milde, 176–178. Article 19 Montreal Convention:

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.

<sup>28</sup> Emphasis supplied.

<sup>29</sup> *Obuzor v. Sabena Belgian World Airlines*, 1999 WL 223162 (S.D.N.Y. 1999); *Manufacturer’s Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y. 1977).

<sup>30</sup> *In re September 11 Litigation*, 500 F. Supp. 2nd 356, 359 (S.D.N.Y. 2007).

<sup>31</sup> *Manufacturer’s Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y. 1977).

<sup>32</sup> *DeVera v. Japan Airlines*, 1994 WL 689330 (S.D.N.Y. 1994); *Jahanger v. Purolator Sky Courier*, 615 F. Supp. 29 (E.D. Pa. 1985); *Obuzor v. Sabena Belgian World Airlines*, 1999 WL 223162 (S.D.N.Y. 1999).

<sup>33</sup> Article 17(2) Montreal Convention.

## 4.3. DOES 'BUMPING' CONSTITUTE DELAY OR CONTRACTUAL NON-PERFORMANCE?

One issue that has arisen in the jurisprudence is whether 'bumping' a passenger because of deliberate overbooking or otherwise constitutes 'delay' under Article 19, or whether it constitutes non-performance of the contract. If it constitutes delay, the remedies are those prescribed under Article 22 of the Montreal Convention – 4,150 SDRs (approximately USD 6,700 or EUR 4,150), or more if the carrier engaged in wilful misconduct under Article 22(4), or nothing if the carrier took 'all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures' under Article 19. A last minute rebooking on an alternative international flight, plus hotel and meals occasioned by the delay, may well exceed this amount. Any proposed recovery under local law would be prescribed under the 'however founded' language of Article 29. However, if the failure of the carrier to perform is instead deemed to constitute a complete non-performance of the contract of carriage, then the case is taken wholly outside the Warsaw or Montreal regime, and the aggrieved passenger may pursue his domestic law remedies. Courts have split on the issue.<sup>34</sup>

Examining the *travaux préparatoires* of the Warsaw Convention, the US Court of Appeals for the Seventh Circuit in *Wolgel v. Mexicana Airlines* concluded that:

it became clear among the delegates that there was no need for a remedy in the Convention for total non-performance of the contract, because in such a case the injured party has a remedy under the law of his or her home country. The delegates therefore agreed that the Convention should not apply to a case of non-performance of a contract.<sup>35</sup>

Noting that the essential message of the United States Supreme Court in *El Al v. Tseng*<sup>36</sup> was that 'the application of the Convention is not to be accomplished by a miserly parsing of its language', the US Federal District Court in *Paradis v. Ghana Airways*<sup>37</sup> distinguished *Wolgel* on two grounds: (1) the passenger in *Wolgel* was bumped on the outbound leg of his round trip itinerary, whereas the passenger in *Paradis* was bumped on the return leg; and (2) though the passenger in *Wolgel* was not accorded alternative transportation by the carrier, while the passenger in *Paradis* was. The *Paradis* court held that '[a] passenger cannot convert a mere delay into contractual non-performance by choosing to obtain a more punctual conveyance'.<sup>38</sup>

However, not all return-leg flight delays have been so interpreted. In *Mullaney v. Delta Air Lines*,<sup>39</sup> a passenger purchased a round trip ticket from New York-Rome-Paris-New York. The Paris-New York leg was cancelled due to a strike that grounded

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<sup>34</sup> Bundesgerichtshof, NJW 1979.495, already under the Warsaw Convention held that the contract was a firm deal. If a new flight was offered it was outside the reign of the Convention's rules on delay. In similar vein, *Hendel v. Iberia* (Canada Provincial Court), RFDA 1980 215.

<sup>35</sup> *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444 (7th Cir. 1987). See also *Mahaney v. Air France*, 474 F. Supp. 532 (S.D.N.Y. 1979).

<sup>36</sup> *El Al Israel Airlines Ltd. v. Tseng*, 525 US 155, 119 S.Ct. (1999).

<sup>37</sup> 348 F. Supp. 2d 106 (S.D.N.Y. 2004).

<sup>38</sup> 348 F. Supp. 2d at 112. For an affirmation of *Paradis*, see *Oparaji v. Virgin Atlantic Airways*, 2006 US Dist. Lexis 68636 (2006).

<sup>39</sup> *Mullaney v. Delta Air Lines*, 2009 US Dist. Lexis (S.D.N.Y. 2009).

all flights. The court refused to consider the event a ‘delay’ but instead viewed it as ‘non-performance’ of the contract of carriage, not preempted by the exclusivity mandates of the Convention. According to the court, ‘Plaintiff is seeking damages resulting from Delta’s refusal to provide him with *any* flight home after having taken his money for a ticket – in short, for failure to perform its obligation to provide carriage in exchange for money it had received. That is not delay – it is non-performance.’<sup>40</sup>

The court in *Weiss v. El Al Israel Airlines*<sup>41</sup> examined the *travaux préparatoires* of the Montreal Convention of 1999 and concluded:

The minutes of the International Conference on Air Law at Montreal, 10–28 May 1999, indicate that the drafters of the Montreal Convention were aware of the difficulty in defining delay and were willing to leave the determination of what does and does not constitute delay to the national courts. The minutes reflect that upon request from the Representative of China to incorporate a previously drafted definition of delay into what was to become Article 19, the Chairman of the Conference, supported by the Chairman of the Drafting Committee, commented that because of the impossibility of drafting a precise definition for delay, the proposed definition would be struck in favor of leaving the definition to national courts. . . .

The academic literature indicates that the courts that have dealt with this question in other signatory countries have almost uniformly accepted that bumping constitutes contractual nonperformance redressable under local law and not delay for which the convention supplies the exclusive remedy.<sup>42</sup>

Still, other courts have been unpersuaded by *Weiss*. The court in *Igwe v. Northwest Airlines*<sup>43</sup> found that the plaintiffs, in failing to present themselves on time to claim their reserved seats, and in failing to accept the carrier’s offer of alternative transportation, ‘acted too hastily in rejecting KLM’s conciliatory offers to be able to claim complete non-performance by the airline’.<sup>44</sup> Hence, their remedy was for bumping under the Montreal Convention, and their state common law claims were dismissed with prejudice.<sup>45</sup>

In conclusion, it seems that the reading of the minutes of the conference in Warsaw<sup>46</sup> may support the proposition that bumping is not covered under the Warsaw Convention as it constitutes non-performance of the contract of carriage. In certain circumstances when the customer is offered a replacement carriage, the courts have found that the convention

<sup>40</sup> *Ibid.*, 5.

<sup>41</sup> 433 F. Supp. 2nd 361 (S.D.N.Y. 2006).

<sup>42</sup> 433 F. Supp. 2nd at 367. For a confused reading of the Convention provisions on delay and preemption, see *Mraz v. Lufthansa German Airlines*, 2006 US Dist. Lexis 3961 (E.D.N.Y. 2006). See also *Kandiah v. Emirates* [2007] O.J. No. 2540; 2007 ON.C. Lexis 2635, a case with a strange set of facts involving a round trip flight from Canada to Sri Lanka via Dubai and Zurich. On the return, the carrier refused to board the passenger on his Dubai-Zurich flight until he proved he held permanent residence status in Canada. The passenger ran out of medication after a few days and was hospitalized. Then, the carrier picked him up and invited him to continue on his itinerary to Zurich but instead forced him aboard an aircraft bound back to Colombo, Sri Lanka. It took him more than a month to get back to Canada, and he lost his job in the interim, and his health deteriorated. The Ontario, Canada, court held that this was not a case of delay under the Convention.

<sup>43</sup> 2007 US Dist. Lexis 1204 (S.D. Tex. 2007).

<sup>44</sup> *Ibid.*, 14.

<sup>45</sup> *Ibid.*, 15.

<sup>46</sup> Cf. Horner & Legrez, *Second International Conference on Private Aeronautical Law (Minutes)* (1975), 75–77.

might be applicable in any case. The same seems to be the status of the Montreal Convention.<sup>47</sup>

##### 5. UNITED STATES' REGULATION ON OVERSALES AND DENIED BOARDING COMPENSATION

In the 1960s, the US Civil Aeronautics Board (CAB) adopted regulations addressing the practice of 'overbooking', whereby air carriers sold more than the number of available seats on a flight (oversales).<sup>48</sup> This practice was motivated, in part, by 'no-shows', or in other words, the tendency of some travellers to book a reservation but not actually board the aircraft. The airlines sell perishable inventory and want to fill every available seat with a warm, fare-paying derrièrè. The regulations attempted to reduce the number of passengers involuntarily 'bumped' (denied boarding) without interfering unduly with carrier marketing and sales practices. These rules were amended by the CAB in 1978 and 1982, and again in 2008 by the US Department of Transportation (USDOT), successor to much of the jurisdiction of the CAB when it was sunset in 1985.<sup>49</sup>

The USDOT's Oversales Regulations<sup>50</sup> apply to carriers operating in domestic and foreign air transports (if the segment originates in the United States) with aircraft having a capacity of thirty or more passengers.<sup>51</sup> The rules have three essential features:

- (1) If a flight is oversold, the airline must first seek volunteers who are willing to relinquish their seats in exchange for whatever compensation the airline may offer (typically discounts on future ticket purchases or coupons for free flights).<sup>52</sup>
- (2) If an insufficient number of passengers volunteer to surrender their seats, the airline must employ non-discriminatory means (written 'boarding priority rules') to determine who will be involuntarily bumped,<sup>53</sup> and
- (3) An involuntarily bumped passenger may be eligible for denied boarding compensation depending on the price of the ticket and length of the delay. If the carrier can arrange alternative transportation to get the passenger to his or her destination within one hour of the scheduled arrival time of the oversold flight, no compensation is required. If the arrival time of the passenger is between one and two hours of the scheduled arrival time (or between one and four hours for international flights), the airline must pay the passenger 100% of the passenger's one-way fare to the next stopover or final destination, up to a

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<sup>47</sup> Minutes of the International Conference on Unification of Certain Rules for International Carriage by Air held in Montreal (10–28 May 1999), 83. See also Haanappel, 22, 27.

<sup>48</sup> See Dempsey & Thoms, *Law & Economic Regulation in Transportation* (Quorum, 1986), 268–273.

<sup>49</sup> See Department of Transportation, *Oversales and Denied Boarding Compensation*, 73 Fed. Reg. (18 Apr. 2008).

<sup>50</sup> 49 CFR Part 250.

<sup>51</sup> 49 CFR s. 250.2.

<sup>52</sup> 49 CFR s. 250.2b.

<sup>53</sup> 49 CFR s. 250.3.

maximum of USD 400. If the carrier cannot meet the two- or four-hour deadline, compensation doubles to 200% of the passenger's one-way fare, up to a maximum of USD 800. Such compensation is in addition to the passenger's ticket, which can be used for alternative transportation or a refund.<sup>54</sup>

Certain exceptions to the rule exist. Passengers who fail to comply with the carrier's contract of carriage contained in the tariff regarding ticketing, reconfirmation, check-in, or acceptability for transportation are ineligible for denied boarding compensation. Thus, if the passenger arrives late, or is visibly intoxicated, he may be denied boarding and denied compensation as well. Moreover, if the carrier substitutes smaller capacity aircraft because of 'operational or safety reasons', no compensation is required.<sup>55</sup>

Passengers must be informed that acceptance of compensation may relieve the carrier from any additional liability for its failure to honour his confirmed reservation. However, the passenger may decline the compensation provided under these rules and seek damages in court.<sup>56</sup> For domestic flights, of course, the passenger could seek damages for breach of contract under domestic law, and for international itineraries, the passenger could seek compensation under the delay rules of Articles 20 and 19 of the Warsaw and Montreal Conventions, respectively.

Unlike the EU, the United States does not require passenger compensation for flight delays or cancellations. Carriers instead identify the assistance they may provide to passengers (e.g., ticket refunds, hotel accommodations, meals, alternative transportation to destination, meals, and such) in their tariffs. To incentivize timeliness, the USDOT has promulgated rules requiring air carriers to report data of delays of more than fifteen minutes.<sup>57</sup> The data are publically disseminated to inform passengers of which carriers, and which airports, are chronically late. It is assumed that such publicity will force carriers that are insufficiently prompt to suffer dampened consumer demand for their service, and thereby motivate them towards punctuality.

## 6. EU REGULATION ON FLIGHT CANCELLATION, DELAYS, AND DENIED BOARDING

The Regulation<sup>58</sup> (EC) 261/2004<sup>59</sup> is applicable to *all* flights departing from an EU Member State and to *all* flights to a Member State where the operator is a Community

<sup>54</sup> 49 CFR s. 250.5. However, airlines typically impose a refund penalty that often may exceed the value of the coupon for which a refund is sought.

<sup>55</sup> 49 CFR s. 250.6.

<sup>56</sup> 49 CFR s. 250.9. See, generally, <<http://airconsumer.dot.gov/publications/flyrights.htm#delayed>> (visited 21 Nov. 2009).

<sup>57</sup> 14 CFR Part 234.

<sup>58</sup> Since the Commission proceeded by way of Regulation, the instrument is of general application and is binding in its entirety and directly applicable in Member States without any need for national action as per Art. 110.2 of the Treaty Establishing the European Community (C325/33).

<sup>59</sup> See, e.g., Wouters, 'A New European Regulation 261/2004 on Compensation and Assistance in the Event of Denied Boarding, Cancellation or Long Delay of Flights, Extends the Rights of Air Passengers', *European Transport Law* (2004): 151 ff.; Broberg, 'Air Passengers' Rights in the European Union: The Air Carriers' Obligations vis-a-vis Their Passengers under Regulation 261/2004', *The Journal of Business Law* (2009): 727 ff.; Arnold, 'Application of Regulation (EC) No. 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights', *Air and Space Law* (2007): 93 ff.;

carrier.<sup>60</sup> Practically speaking, it applies to all EU ‘community air carriers’ as well as all foreign-flag carriers serving airports within the twenty-seven Member States. The regulation requires reimbursement to the passenger of up to EUR 600 depending upon the stage length of the flight.<sup>61</sup> The regulation also includes requirements for re-routing of passengers to their destination at the earliest opportunity<sup>62</sup> and provision of meals, accommodations, and telecommunications under certain circumstances.<sup>63</sup>

*Flight Cancellations.* In all instances where a flight is cancelled,<sup>64</sup> the passenger must be offered under a choice of reimbursement of re-routing under Article 8.<sup>65</sup> Meals and communications must be provided to all passengers. Where the passenger will depart the following day, overnight hotel accommodation and transportation must be offered.<sup>66</sup> The EU takes the position that its flight cancellation regulation does not conflict with the remedies under the Warsaw and Montreal Conventions for delay,<sup>67</sup> and their liability ceilings,<sup>68</sup> provisions relieving the carrier for liability if it has taken ‘all necessary measures’

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Schmid, 373 ff.; Schmid, ‘Die Berechnung der Großkreis-Entfernungen zur Bestimmung der Höhe des Ausgleichsanspruchs nach der Verordnung (EG) Nr. 261/2004 vom 11. Februar 2004’, *Zeitschrift für Luft- und Weltraumrecht* (2006): 81 ff.; Haanappel, 22.ff.

<sup>60</sup> For the Regulation to apply, under Art. 3 the passenger must hold a ticket with a fare available to general public to include frequent flyer/commercial programme offerings. The passenger must respect published cut-off times and have a confirmed reservation. The issue has come before the ECJ in Case C-173/07, *Emirates Airlines v. Schenkel*, [2009] All ER (EC) 436 of whether a flight from non-EU country to the EU on a non-Community carrier falls within the scope of the Regulation where the travel itinerary commenced at an airport within the EU, thus falling in line with the scope of the Warsaw and Montreal Conventions under their Art. 1, para. 2. The ECJ held that the regulation, which provides that it is to apply to passengers departing from an airport located in the territory of a Member State to which the Treaty applies, must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that regulation. See also below in text.

<sup>61</sup> Under Art. 7, for journeys of less than 1,500 km, the airline must pay the passenger EUR 250 (or half of that, if travel is rescheduled for arrival within two hours). For all other intra-EU journeys and extra EU journeys between 1,500 km and 3,500 km, the airline must pay EUR 400 (or half of that, if travel is rescheduled for arrival within three hours). Extra EU journeys beyond 3,500 km require payment of EUR 600 (or half of that, if travel is rescheduled for arrival within four hours).

<sup>62</sup> Under Art. 8, the carrier must either re-route the passenger to destination at the earliest opportunity or at a later date according to passenger’s convenience or reimburse the full ticket purchase price including any flown flight sector that became purposeless in the original travel plan. If a passenger is re-routed to another airport in the same urban area, then the carrier must pay for transportation to the original airport or an agreed third location.

<sup>63</sup> Under Art. 9, the carrier must provide meals and refreshments, hotel accommodation where necessary, two communications (telephone/fax/e-mail), and special attention should be brought to reduced mobility persons and those accompanied by children.

<sup>64</sup> Cancellation is defined in Art. 2, para. 1 as the non-operation of a flight that was previously planned and on which at least one place was reserved.

<sup>65</sup> Article 5.

<sup>66</sup> Passengers are also entitled to compensation pursuant to Art. 7 unless:

- Two weeks notice is given.
- One to two weeks of notice is given and re-routed arrival time is scheduled within 4 hours.
- Less than one week of notice is given and re-routed arrival time is scheduled within 2 hours.
- Cancellation is caused by extraordinary circumstances that could not have been avoided even by all reasonable measures.

The Commission has noted in its Communication of 4 Apr. 2007 that there is a risk that the airlines may too easily invoke the *force majeure* provision to exclude their liability for cancellation. The courts have generally been generous in the interpretation of this provision (e.g., Strike action by airline staff was deemed unavoidable in *Rigby v. Iberia*, West London County Court, 17 Apr. 2009).

<sup>67</sup> Article 19 Montreal Convention, first sentence, *supra* n. 19.

<sup>68</sup> Article 22(1) Montreal Convention and above in text.

to avoid the loss or that it was impossible to do so,<sup>69</sup> provisions precluding the recovery or punitive or exemplary damages,<sup>70</sup> or provisions declaring that the remedies available under the Conventions are exclusive.<sup>71</sup>

*Flight Delays.* Where a flight's departure is delayed by two hours for a flight of less than 1,500 km, three hours for all other intra-EU flights and extra EU flights up to 3,500 km, or four hours for all other flights, the air carrier must offer meals and two telecommunications. Where departure will be on the following day, hotel accommodation and transport to hotel must be provided. If the delay is to exceed five hours, passengers are allowed the right to a refund of their ticket value including any flown sector that no longer serves any purpose.<sup>72</sup> Here again, the EU contends that its flight delay regulation does not conflict with the provisions addressing delay, compensation for delay, the prohibition of punitive damages, or the exclusivity of remedy provisions of the Warsaw and Montreal Conventions.<sup>73</sup>

*Denied Boarding.* The regulation requires airlines to call for volunteers<sup>74</sup> before involuntary denied boarding.<sup>75</sup> Compensation of volunteers is to be established by agreement between the airline and the volunteer. If there are insufficient volunteers, the airline must select passengers not to board for travel.<sup>76</sup> The EU<sup>77</sup> insists that its denied boarding regulation does not conflict with the Warsaw and Montreal Conventions.<sup>78</sup> Recall that Article 22 of the Montreal Convention limits recovery for delay to the carriage of persons for actual damages up to 4,150 SDRs, recovery for delay of baggage to 1,000 SDRs, and recovery for delay of cargo to 17 SDRs per kilogram.<sup>79</sup> These limits do not apply to delay of passengers or baggage if the carrier engaged in wilful misconduct.<sup>80</sup>

In a complaint brought before the European Court of Justice (ECJ), the International Air Transport Association (IATA) argued that the Regulation (EC) 261/2004 violated the Montreal Convention. The Regulation in question was upheld by the ECJ in

<sup>69</sup> Article 19 Montreal Convention, second sentence, *supra* n. 19.

<sup>70</sup> Article 29 Montreal Convention provides, *inter alia*, 'punitive, exemplary or any other non-compensatory damages shall not be recoverable'.

<sup>71</sup> Article 29 Montreal Convention.

<sup>72</sup> Article 6. Complaints have been lodged with the Commission that the regime makes it beneficial for airlines to treat effective cancellations as long delays, which may be more inconvenient to passengers since re-routing is not provided. The motivation of the carrier being that no compensation is owed for long delay. The Commission, however, refuted this claim in its Communication of 4 Apr. 2007, COM (2007) 168, stating there was no evidence of such practice.

<sup>73</sup> See Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport*.

<sup>74</sup> A volunteer is defined under Art. 2(k) Regulation (EC) 261/2004 as: a person who has presented himself for boarding under the conditions laid down in Art. 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits. The volunteers are entitled to care required under Art. 8.

<sup>75</sup> Article 4.1 Regulation (EC) 261/2004. Denied boarding is defined in Art. 2(j) as a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Art. 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.

<sup>76</sup> In this case, compensation must be given in accordance with Art. 7 and care given in accordance with Arts 8 and 9 Regulation (EC) 261/2004.

<sup>77</sup> In addition, others seems to have taken the same position, e.g., Schmid, Die Verordnung (EG) Nr. 261/2004 – Europäischer Verbraucherschutz mit Nachbesserungsbedarf, *Zeitschrift für Luft- und Weltraumrecht* (2005) 379.

<sup>78</sup> The European Union takes the position that provisions of the Regulation on denied boarding do not offend the Warsaw or Montreal Convention. The Commission has successfully prosecuted Sweden and Luxembourg before the ECJ for failure to implement enforcement under the Regulation (Case C-333/06 and C-264/06, respectively).

<sup>79</sup> *Muoneke v. Air France*, 2009 US App. Lexis 10244 (5th Cir. 2009), 6.

<sup>80</sup> Article 22 Montreal Convention.

*Queen v. Department of Transport*.<sup>81</sup> The Court took the position that passenger delay causes two types of damages: (1) ‘damage that is almost identical for every passenger, redress for which may take the form of standardized and immediate assistance or care for everybody concerned’; and (2) ‘individual damage. . . redress for which requires a case-by-case assessment of the damage caused and consequently only be the subject of compensation granted subsequently on an individual basis’.<sup>82</sup> The court reasoned that the Regulation addressed the former, while the Montreal Convention addressed the latter. The court did not believe:

that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardized 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.<sup>83</sup>

The court also observed that these ‘standardized and immediate assistance and care measures’ would not prohibit aggrieved passengers bringing an action under the Montreal Convention.<sup>84</sup> In other words, passengers were free to receive double recovery under both the EU rules and the Montreal Convention.

The ECJ has a reputation for generously upholding aviation regulations promulgated by the ever-growing and power-thirsty Brussels bureaucracy,<sup>85</sup> but the reasoning in this case is beyond the pale. First, the regulation at issue is not standardized, but particularized, depending upon the distance flown and time of delay. Second, while it may be appropriate for a regulatory authority to fine an air carrier for violating consumer protection regulations, the penalties imposed upon carriers for delay by this regulation are paid to the passengers rather than to a governmental authority and, therefore, appear to be an effort to compensate passengers for the damages they incurred because of suffering inconvenience, rather than levy an administrative fine upon airlines. Actually, they are compensation to passengers for *delay*, precisely the issue addressed in Article 19 of the Montreal Convention, which explicitly provides a remedy for ‘Delay’, though the EU Regulation is devoid of the carrier defence of ‘all measures that could reasonably be required to avoid the damage’ or impossibility to take such measures. If they are not compensation, they are penalties, and as such run afoul of the

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<sup>81</sup> ECJ Celex Lexis 10 (2006); Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport*.

<sup>82</sup> *Ibid.*, para. 43.

<sup>83</sup> *Ibid.*, para. 45.

<sup>84</sup> *Ibid.*, para. 47. As well as upholding the validity of Art. 6 of the Convention on delay, the ECJ also upheld the Regulation against other objections filed by the complainants. The ECJ found that the Regulation did not breach the obligation of Community legislature to provide reasons for provisions since the general purpose of the Regulation to protect air passenger rights was sufficient without more specific justification for each choice of action. Validity could not be challenged on grounds of proportionality since the Commission has wide discretion in the development of a common transport policy. Voluntary insurance is not an adequate substitute to airline care, since insurance would not grant immediate relief as prescribed by the Regulation. Inconvenience is not correlated with the price of ticket, and therefore, this should not have been a factor in determination of carrier obligations (in contrast with the USDOT’s approach to denied boarding). Furthermore, differentiated compensation based on price of the ticket would violate the foundational principle of equal treatment. Compensation for flight cancellation was deemed by the ECJ not manifestly inappropriate since the carrier benefits from *force majeure* exclusion of liability provision. According to the ECJ, the differences of rules from those applicable to other modes of transport were justified in view of the idiosyncrasies and greater inconvenience/lack of alternatives to air transportation.

<sup>85</sup> See Dempsey, *European Aviation Law* (Kluwer, 2004).



prohibition of ‘punitive, exemplary or any other non-compensatory damages’ of Article 29 of the Montreal Convention. If, as the ECJ contends, they are supplementary to damages recoverable by passengers under Article 19, they violate the requirement in Article 29 that ‘any action for damages, however founded, whether under this Convention or in contract or in tort *or otherwise*, can only be brought subject to the conditions and such limitations of liability as are set out in this Convention. . .’,<sup>86</sup> and necessarily affront the uniformity of law that is the fundamental purpose of the Montreal Convention of 1999 and its predecessor Warsaw Convention. Further, if supplementary, the overall amounts recovered by a passenger under both the EU Regulations and the Montreal Convention may well exceed the 4,150 SDR ceiling provided in the Convention, a result clearly antithetical to the liability ceilings set forth in the Convention.

A more intellectually defensible approach would have been for the ECJ to have maintained that the Flight Cancellation and Denied Boarding regulations do not address ‘delay’, as these are birds of a different feather and, therefore, do not offend the provisions in the Montreal Convention explicitly addressing delay. Instead, the ECJ concluded that not even the EU delay regulations conflict with the Montreal Convention’s delay provisions or Montreal’s exclusivity mandate,<sup>87</sup> or indeed, its principal purpose – to facilitate the development of uniform rules of private international Air Law.

However popular the Regulation may be among European consumers, it is unfortunate that a governmental institution that participated in the negotiation of the Convention attempting to unify international air carrier liability law, and whose Member States unanimously ratified it, would draft regulations that would undermine it. Indeed, in another case, the ECJ has held that ‘the Community is a signatory to the Montreal Convention and is bound by it. . .’.<sup>88</sup> Given the ECJ’s weakly reasoned decision, the only remedy at this point would be for an aggrieved State to bring an action against Member States to the Montreal Convention before the International Court of Justice.<sup>89</sup>

Other cases interpreting Regulation (EC) 261/2004 decided by the ECJ appear to be as weakly reasoned. In *Wallentin-Hermann v. Alitalia*,<sup>90</sup> the ECJ reaffirmed its prior holdings that its regulation did not conflict with Article 19 of the Montreal Convention, the former providing for ‘standardized and immediate compensatory measures’, and the latter providing ‘for damages by way of redress on an individual basis’.<sup>91</sup> Article 19 of the Montreal Convention provides for a defence from an action for delay if the carrier proves it took ‘all measures that could reasonably be required to avoid the danger or that it was impossible’ to do so. Regulation (EC) 261/2004 includes the following provision: ‘As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases

<sup>86</sup> Article 29 Montreal Convention [emphasis supplied].

<sup>87</sup> Wegter, ‘The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention’, *Air and Space Law* (2006): 133.

<sup>88</sup> Case C-173/07, *Emirates Airlines v. Schenkel* [2009] All ER (EC) 436, para. 49.

<sup>89</sup> Dempsey, ‘Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation’, *Georgia Journal of International & Comparative Law* 32 (2004): 231.

<sup>90</sup> ECJ Case C-549/07, *Wallentin-Hermann v. Alitalia* (2008).

<sup>91</sup> *Ibid.*

where an event has been caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.<sup>92</sup> In other words, as under the Montreal Convention, the carrier should not be liable under the Regulation if it took ‘all reasonable measures’ to avoid the loss, a phrase very similar to Article 19’s ‘all measures that could reasonably be required’. One might therefore expect that an equivalent defence would be available to air carriers under both the Regulation and the Montreal Convention.

Yet surprisingly, the ECJ in *Wallentin-Hermann* concluded that:

Article 5(3) of Regulation No 261/2004 refers to the concept of ‘extraordinary circumstances’, whereas the concept does not appear in either Article 19 or any other provision of the Montreal Convention. . . . [Hence,] the Montreal Convention cannot determine the interpretation of the grounds of exemption under that [sic] Article 5(3).<sup>93</sup>

The ECJ went on to find that extraordinary circumstances justifying a flight cancellation do not include technical problems in the aircraft unless the problems stem from events ‘not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control’.<sup>94</sup> Presumably, this would include airport closures, air navigation congestion, political instability, inclement weather, security risks, and strikes, so long as the airline could not reasonably have avoided the flight cancellation.<sup>95</sup> Despite the fact that the regulation explicitly referred to the commonality between the Montreal Convention’s ‘all necessary measures’ defence, and the Regulation’s ‘extraordinary circumstances’ defence, the ECJ concluded that the Montreal Convention and jurisprudence arising thereunder were entirely irrelevant to the interpretation of the Regulation.

More recently, in *Sturgeon v. Condor Flugdienst*,<sup>96</sup> the ECJ held that a flight may not be regarded as cancelled merely based on the duration of the delay if all other aspects of the flight remain unchanged. According to the court, ‘a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where there is a departure in accordance with the original planning’.<sup>97</sup> This conclusion conceivably might lend weight to an argument that the EU’s ‘cancellation’ rules do not conflict with the Warsaw and Montreal Conventions’ ‘delay’ rules, and the exclusivity provisions of the Conventions, though the ECJ nowhere discusses the issue.<sup>98</sup> The ECJ does find that if the airline arranges for passengers to be transported on another flight, the original flight may

<sup>92</sup> Article 12 Regulation (EC) 261/2004.

<sup>93</sup> Case C-549/07, *Wallentin-Hermann v. Alitalia*, paras 30 and 33 (2008).

<sup>94</sup> *Ibid.*, para. 1.

<sup>95</sup> See Balfour, ‘The “Extraordinary Circumstances” Defense in EC Regulation 261/2004 after *Wallentin-Hermann v. Alitalia*’, *Zeitschrift für Luft- und Weltraumrecht* 58, no. 2 (2009): 224, 230, Schmid, ‘May a Technical Fault with an Aircraft Be Considered as “Extraordinary Circumstances” in the Meaning of the Regulation (EC) No. 261/2004?’, *Air and Space Law* (2007): 376 ff. and Milner, ‘Regulation EC 261/2004 and “Extraordinary Circumstances”’, *Air and Space Law* (2009): 215, 218.

<sup>96</sup> Judgment in Joined Cases C-402/07 and C-342/07, *Sturgeon v. Condor Flugdienst* (2009).

<sup>97</sup> *Ibid.*, para. 34.

<sup>98</sup> *Bundesgerichtshof* found – following the preliminary ruling of the ECJ in Case C-402/07 and C-342/07 *Sturgeon v. Condor* – in favour of the plaintiff’s claim for compensation on its judgment in Case XA ZR 95/06, delivered 18 Feb. 2010. During the proceedings before the Court Condor had submitted that the ECJ exceeded its competence. *Bundesgerichtshof* saw no reason for yet another reference to the ECJ as there were no doubts that Regulation (EC) 261/2004 was valid and compatible with the Montreal Convention. According to *Bundesgerichtshof*, ECJ had made clear that the Regulation provides for compensation in cases of inordinate delay if interpreted according to the principle of equal treatment.

be deemed cancelled. Passengers subject to either a flight delay or cancellation are entitled to the same compensation under the Regulation, subject to ‘extraordinary circumstances’ (which the court defined as ‘all reasonable measures...namely circumstances beyond the actual control of the air carrier’)<sup>99</sup> being proven. If the passenger arrives no more than four hours after scheduled arrival, his compensation will be reduced by half. Again, the ECJ insists that a technical problem on an aircraft is not deemed an ‘extraordinary circumstance’ unless it results from events not inherent in the carrier’s normal activity and beyond its actual control. Perhaps an air traffic control breakdown might qualify.

One final decision should be mentioned here. In *Emirates Airlines v. Schenkel*, the ECJ considered the question of whether Regulation (EC) 261/2004 applied to a return trip from a non-Member State origin by a non-community carrier on a round trip itinerary (Düsseldorf-Manila-Düsseldorf).<sup>100</sup> The ECJ held that the provision defining ‘international carriage’ under Article 1(2) of the Montreal Convention is irrelevant in determining the jurisdictional application of the Regulation. It also concluded that the Regulation does not apply in ‘the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the EC Treaty applies travel back to that airport on a flight from an airport located in a non-member country’.<sup>101</sup>

Finally, the Regulation contemplates that air carriers paying damages under it may seek reimbursement from third parties who might, for example, be responsible for a flight delay or cancellation. Thus, for example, air navigation service providers may find themselves potentially subject to liability for costs incurred by air carriers.<sup>102</sup>

## 7. CONCLUSIONS

The most fundamental purpose of private international transportation conventions is the uniformity of international law within their respective field of application. This is also true with respect to the Warsaw and the Montreal Conventions for the Unification of Certain Rules Relating to International Carriage by Air. In order to fulfil this purpose, the Convention in question must be exclusive in matters covered by it. State parties to such a Convention are bound by international law to respect this feature of the Convention in order to facilitate its principal purpose.

The EU insists that its Regulation forces air carriers to assume from the outset certain disbursements that become necessary as a result of delay in carriage of passengers, whereas the Warsaw and the Montreal Conventions impose liability on the carriers to compensate all real consequential losses up to a capped amount. This interpretation was proffered by the ECJ in Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport* in which the Court held that the Regulation

<sup>99</sup> *Ibid.*, para. 69.

<sup>100</sup> Case C-173/07, *Emirates Airlines v. Schenkel* [2009] All ER (EC) 436.

<sup>101</sup> *Ibid.*, paras 54, 454–455.

<sup>102</sup> See Schubert, ‘Liability of Air Navigation Services for Air Traffic Delays and Flight Cancellations’, *Annals of Air and Space Law* XXXII (2007): 65.

compensates inconvenience shared by all passengers rather than the individual losses subject to claim under the Conventions. The passenger who is provided with care under the Regulation retains all rights to claim for other consequential losses resulting from the delay under the applicable international regime. An outstanding issue remains whether the carrier could include its regulation-mandated care expenditure on the passenger when capping its liability under the Conventions. The Regulation differs from the Warsaw and Montreal Conventions in that Articles 20 and 19, respectively, of these Conventions provide for an exclusion of liability wherever the carrier can show it took all measures to avoid damage or it could not take such measures. Under the Regulation, the carrier remains obliged to assume the cost of 'care' losses irrespective of the cause of delay or its unavoidability.

As mentioned above, neither the Warsaw nor the Montreal Convention explicitly mentions the term 'cancellation'. The delay provisions of the Conventions have been read by the EU as being passenger specific, whereas due to the distinction drawn by the inclusion of a separate head of cancellation in the Regulation, delay refers to the cancellation of a scheduled aircraft movement. The EU takes the position that the provision of mandatory disbursements under the Regulation is distinct from the remedies available under the Conventions in that the carrier is not liable for passenger delay under the Warsaw and the Montreal Conventions where the delay was unavoidable (i.e., where the carrier 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'); in such circumstances, the carrier would not be obliged to cover such expenses (actual damages incurred) for the passenger. In contrast, the Regulation provides fixed compensatory amounts. These are not correlated to actual losses and are owed irrespective of whether the passenger suffered any loss as a result of the cancellation. Therefore, the EU insists that whereas the Warsaw and the Montreal Conventions seek to provide damages, the Regulation focuses on compensating for inconvenience and imposing sanctions upon airlines that cancel flights based on commercial considerations. The passenger retains the right to sue under the Warsaw or the Montreal Convention up to the capped limits on liability set forth therein for other consequential damages flowing from his delay due to cancellation.

The EU further insists that neither the Warsaw nor the Montreal Convention provides a complete code of liability but instead unify certain rules. It might be that bumping due to denied boarding is not dealt with explicitly by either Convention even though by the time the Montreal Convention was drafted in 1999, this was a common practice due to overbooking of flights. Although Articles 20 and 19 of the Warsaw and the Montreal Conventions, respectively, provide that the carrier is liable for damage caused by the delay in the carriage of passengers, baggage, or cargo, the EU insists that this is an inadequate provision to establish rules in denied boarding since it would confer an overly broad meaning to the term delay while understating the particularity of denied boarding. The EU takes the position that denied boarding is distinct from delay since the carrier must shoulder greater responsibility for its previous recklessness in overbooking the flight for projected economic gain. The cause of delay will almost always be accidental, whereas overbooking is a deliberate tactic of airlines to maximize income. To treat delays resulting

from denied boarding in the same manner as weather, ATC, and mechanical delays would be to disregard this blameworthiness. Moreover, where a flight is simply delayed, the passenger will take off at the earliest safe moment on his scheduled flight, where a passenger is denied boarding there is an elevated risk that he will have to be re-routed via an intermediary stop or will leave on a different departing service, which may be on the following or a subsequent day. Thus, the inconvenience may be greater than that suffered in case of normal delay. If that is the case, it is surprising that the Regulation compensates denied boarding the same as cancellation or delay.

The EU helped negotiate and signed the Montreal Convention; it was approved by the Council;<sup>103</sup> the ECJ has taken the position that the Montreal Convention is legally binding upon it;<sup>104</sup> and its twenty-seven Member States unanimously have ratified the Convention. It is therefore incomprehensible that these ‘consumer protection’ regulations, and their interpretation by the ECJ, would be so fundamentally inconsistent with the explicit provisions of the Convention. The Convention expressly addresses ‘delay’, the defences thereto, and the exclusivity of its remedies, which is its fundamental purpose – to unify the rules of air carrier liability internationally.

In comparison, the United States *Oversales and Denied Boarding Compensation Regulation* does not take such a broad view as the EU Regulation. The scope is limited in order to avoid the most obvious discordance with the Warsaw and the Montreal Conventions, viz. delay. By this, the United States Regulation does not confront the exclusivity of the international Conventions.

There is also pragmatic danger in what the EU is doing here – imposing additional liability expenses upon carriers in addition to those available to passengers under the Warsaw and the Montreal Conventions. Airlines have not fared well financially since deregulation and liberalization of air transport.<sup>105</sup> To the extent that the economic burdens imposed by the cumulative weight of two liability regimes exacerbate this financial distress, where the carrier perceives a mechanical problem to be non-life threatening and the expense of delay or flight cancellations are high, it may be incentivized to fly aircraft that should instead be repaired. Only after the flight is flown will we know whether deferring the maintenance was not life threatening.

Finally, the ECJ position in interpreting the Regulation (EC) 261/2004 will not facilitate a uniform application of different rules. In case after case, the Court has stated that the jurisprudence surrounding the Warsaw and the Montreal Conventions, broadly speaking, is irrelevant when interpreting the Regulation. If the Court would have taken a more consensual approach, the two sets of rules might have had a future side by side. A ‘delay’ is after all, however sinuous the reasoning might be, only a ‘delay’. As it now stands, Montreal is about to lose the game of exclusivity to Brussels. Brussels’ triumphant assertion of power and authority sacrifices global uniformity in the rule of law.

<sup>103</sup> Council Decision (EC) 2001/539 (OJ 2001 L194, 38).

<sup>104</sup> Case C-173/07, *Emirates Airlines v. Schenkel* [2009] All ER (EC) 436.

<sup>105</sup> Paul Stephen Dempsey, ‘The Financial Performance of the Airline Industry Post-Deregulation,’ *Houston Law Review* 45 (2008): 421.