A FRAGMENTED LEGAL REGIME OF AIR CARRIER LIABILITY IN INTERNATIONAL TRANSPORTATION OF PASSENGERS: DELAY, CANCELLATION, AND DENIED BOARDING

Aleksandra Puścińska

Institute of Air and Space Law
McGill University, Montréal, Canada
August 2016

A thesis submitted to McGill University
in partial fulfilment of the requirements of
the degree of Masters of Laws (LL.M.)

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Abstract

The proliferation of regional and national consumer protection regimes is a direct result of the continuously growing demand for passenger air travel and an increasing number of flight disruptions. The existing legal framework of rules on air carrier liability in international transportation of passengers explicitly governs 'damage occasioned by delay', but it is unclear whether it also applies to flight cancellations and denied boarding. While a certain degree of fragmentation is an inherent characteristic of a pluralist legal system, a plethora of applicable rules may result in overlapping provisions and conflicting obligations.

This Thesis first discusses the issue of fragmentation of rules on delay, cancellation, and denied boarding in the context of private international air law conventions unifying certain rules applicable to international carriage by air, namely the constitutive instruments of the Warsaw System, and the 1999 Montreal Convention. It then examines a regional regime for air passenger protection established by the European Union, and relevant national rules adopted in the United States. The dissertation evaluates if, and to what extent, the objective of complementing the existing international conventional law has been achieved, and highlights the areas of regulatory overlap, duplication, or conflict between the applicable laws. Finally, the paper conducts a critical assessment of the International Civil Aviation Organisation's role in fostering common regulatory approaches to consumer protection in air transport.

The analysis of the research presented in this paper suggests that, at the present time, there is no need for a new convention on air passenger rights. Instead, the global community should encourage States to ratify the Montreal Convention of 1999 and strive for a regulatory convergence in developing compatible regional and national systems, based on common standards and preserving an equitable balance of interests, in keeping with the spirit of the 1999 Montreal Convention, as expressed in its preamble.

Résumé

La prolifération de régimes régionaux et nationaux relatifs à la protection des droits des passagers aériens est dû à la croissance du nombre de ces passagers et du nombre de vols perturbés. Le cadre juridique en vigueur concernant la responsabilité du transporteur aérien dans le transport international de passagers gouverne expressément les dommages dus aux retards. Il reste cependant difficile de déterminer si ce régime s'applique aussi aux vols annulés et aux refus d'embarquement. Bien qu'un certain degré de fragmentation est une caractéristique inhérente à un système juridique pluraliste, la pléthore de règles applicables peut aussi conduire à des dispositions qui divergent et se chevauchent.

Cette thèse développe dans un premier temps le problème de la fragmentation des règles sur les retards, annulations et refus d'embarquement dans le contexte des conventions de droit aérien international unifiant certaines règles applicables au transport aérien international, à savoir les règles du système de Varsovie et la convention de Montréal de 1999 (convention de Montréal). Elle examine ensuite un régime national de la protection des droits des passagers aériens établi par l'Union Européenne et les règles adoptées aux Etats Unis. Cette dissertation évalue si, dans une certaine mesure, l'objectif de parfaire le droit international en vigueur a été atteint et souligne les loi règlementaires applicables qui se recoupent, sont dupliquées, ou s'opposent. Enfin, cette thèse propose une évaluation critique du rôle de l'Organisation de l'Aviation Civile Internationale pour favoriser une règlementation commune en matière de protection des droits des passagers aériens.

L'analyse de la recherche présentée dans cette thèse propose qu'il n'est actuellement pas nécessaire de développer une nouvelle convention régulant le droit des passagers aériens. La communauté internationale devrait plutôt encourager les états à ratifier la convention de Montréal et aspirer à une convergence règlementaire en développant des systèmes régionaux et nationaux

compatibles basés sur des principes communs et un équilibre des intérêts équitable, tout en gardant à l'esprit la convention de Montréal articulé dans son préambule.

Acknowledgements

First and foremost, I would like to express my most sincere gratitude to Professor (Dr.) Paul Stephen Dempsey whom I was extremely fortunate to have as my faculty advisor for the time of completing this Thesis. I am most appreciative of his invaluable advice and guidance, which were essential to my progress, and grateful for his patience and support that fuelled my motivation along this process. I am truly thankful for the time he devoted to the supervision of my work and the insight he provided me with over this period. My special thanks go to my two reviewers, Professor (Dr.) Ludwig Weber and John Balfour for taking the time to read my Thesis, and for their precious feedback. Their comments and expertise were of great assistance in improving this manuscript.

I am also greatly indebted to my beloved family; my parents who have shown unwavering support for my efforts not only during the completion of this Thesis but throughout my entire education. I am forever thankful to them, my grandmother and my sister for being genuinely interested in my research and encouraging me to pursue an LL.M. degree. It is their helpful guidance and love that I could always rely on, which allowed me to reach this point in my academic and professional development.

My deepest gratitude and special thanks go to Robert Lawson QC, for taking a chance on me and for the mini pupillage I completed under his supervision. It allowed me to witness first-hand the issues related to the complicated relationship between the EU Regulation No. 261/2004 and the 1999 Montreal Convention during two UK Court of Appeal cases, *Dawson v Thomson Airways Ltd.* and *Jet2.com Ltd v Huzar*. This experience was the inspiration behind my Thesis and sparked my interest in the issue of fragmentation of international rules on air carrier liability in the transportation of passengers.

I give many thanks to the Staff at the Canadian Transportation Agency, International Agreements and Tariffs Department. I wish to acknowledge the opportunity they provided me with – a chance to develop my ideas and gain practical experience in the field of consumer protection, particularly in the context of economic regulation of air transport in Canada.

My heartfelt thanks go to my good friends, Ms Katarzyna Uchman and Mr Aleksander Makal, for your lasting friendship and continuous belief in me and my efforts. My dear friends, classmates and fellow IASL students, Lieutenant Colonel Paul Dawson, Major Simone Davis, Ms Philippine Dumoulin, Mr Stephen Hill, Ms María Iannini, Ms Kinga Kolasa-Sokołowska and Ms Kerianne Wilson, I am truly grateful to each and every one of you for being such good friends, offering me your advice and enduring support. I owe special thanks to Ms Philippine Dumoulin, who generously agreed to devote her time to translate the abstract of this Thesis into French. Last but not least, I am deeply grateful to Maria D'Amico for the numerous times she offered a helpful hand.

Finally, I would like to acknowledge a very generous financial support I received from the Boeing Fellowship – I would not have been able to pursue this LL.M. without it.

List of Abbreviations

ADA	Airline Deregulation Act of 1978
ADR	Alternative Dispute Resolution
AG	Advocate General
ANSP	Air Navigation Service Provider
ATA	Air Transport Association of America Inc.
ATC	Air Traffic Control
BTS	Bureau of Transportation Statistics
CAB	Civil Aeronautics Board
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports (Europe)
DOT	Department of Transportation
ECJ	European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EFTA	European Free Trade Area
FAA	Federal Aviation Administration
FCA	Federal Court of Appeal (Canada)
FRD	Federal Rules Decisions (US)
IATA	International Air Transportation Association
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ILM	International Legal Materials (US)
IMF	International Monetary Fund
LCC	Low Cost Carrier
LNTS	League of Nations Treaty Series
MC99	Montreal Convention of 1999
SDR	Special Drawing Rights
TFEU	Treaty on the Functioning of the European Union

VCLT	Vienna Convention on the Law of Treaties of 1969
WC29	Warsaw Convention of 1929

Introduction

Consumer protection, and, in particular, air passenger rights have received an increased attention from the regulators in recent years. Continuously growing demand for air travel,[1] and changes in the economic and regulatory landscape of transportation by air, have led to enhanced connectivity and increase in the diversity of air services offered, in particular with the entry of the low cost carriers.

The overall air traffic growth, however, results in congestion at airports, air traffic control (ATC) restrictions and additional airport security measures. Those factors, along with outdated infrastructure;[2] airport closures; acts of nature, including inclement weather and natural disasters; technical malfunctions; labour and union strikes; acts of third parties, such as immigration and customs, or government and law enforcement officials, to name but a few, contribute to an increasing number of flight disruptions.

As observed by the United States Court of Appeals for the Eleventh Circuit, "rare is the passenger unacquainted with the ubiquity of air travel delay".[3] More than for any other mode of transportation, in aviation, time is of the essence and passengers are willing to bear the higher cost of the airline ticket, if it means they will get to their destination faster. Flight disruptions are an inconvenience to passengers, causing stress, frustration, and anger, but more importantly, they constitute a breach of a contract of carriage. Through consumer protection

[1] By 2030, the global air transport is anticipated to grow about 5% each year. See European Commission, "Air", online: European Commission <http://ec.europa.eu/transport/modes/air/index_en.htm>; See also IATA, Press Release, 4, "Demand for Air Travel in 2015 Surges to Strongest Result in Five Years" (4 February 2016), online: IATA <http://www.iata.org/pressroom/pr/Pages/2016-02-04-01.aspx>.

[2] See International Air Transport Association (IATA), Association of Asia Pacific Airlines (AAPA) & Latin American and Caribbean Air Transport Association (ALTA), *Consumer Protection: A Joined Up Approach Required Between Government and Industry*, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2 & 2.3, Working Paper No 68, Doc ATConf/6-WP/68 (1 March 2013), online: ICAO < http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp068_en.pdf> [*ATConf/6-WP/68*], at 3 para 3.2.

[3] *Campbell v Air Jamaica Ltd.*, 760 F (3d) 1165, 1172 (11th Cir 1997).

regimes, the regulators aim to ensure there is an appropriate balance between the industry competitiveness, and remedies available to passengers.

An increasing number of disparate consumer protection regimes on delays, cancellations and denied boarding, however, creates a significant financial burden on the airline industry.[4] According to the International Air Transport Association (IATA),[5] "proliferation of independent passenger rights regimes could cost airlines up to USD 12 billion by 2017".[6] In comparison to aviation accident litigation, cases involving flight irregularities or denial of boarding brought under national or regional air passenger protection regimes result in much smaller damage awards. Just like aviation accident cases, however, compensation claims for delays, cancellations and denied boarding can potentially turn into class action lawsuits.[7] In spite of the relatively low limits of compensation, a carrier's total compliance expenses may suddenly become quite substantial. For example, the cost of compensation on a popular European flight operated by British Airways from London Heathrow Airport (LHR), UK to Madrid-Barajas International Airport (MAD), Spain, performed by a Boeing 767-300 with a seating capacity of 189 seats that was delayed for more than three hours due to a mechanical failure would amount to EUR 47,250, not including the cost of required care.

Class action lawsuits are very common in United States of America (US), while, other jurisdictions, such as the United Kingdom (UK) for example, have mechanisms allowing a stay of proceedings where an appeal in a related case is pending before a court. In a landmark case decided by the UK Court of Appeal, *Jet2.com Ltd v Huzar*,[8] the plaintiff suffered a 27-hour

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[4] International Air Transport Association (IATA), *A Proposal for a Set of High-level, Non-prescriptive Core Principles on Consumer Protection*, ICAO Assembly, 38th Sess, Agenda Item 40, Working Paper No 73, Doc A38-WP/73 (5 August 2013), online: ICAO http://www.icao.int/Meetings/a38/Documents/WP/wp073_en.pdf [*A38-WP/73*].

[5] The International Air Transport Association (IATA) is a global trade association composed of 265 airline members, which account for 83% of total air traffic. See online: IATA <www.iata.org>.

[6] IATA, *Annual Review 2015*, 71st Annual General Meeting (June 2015), online: IATA < http://www.iata.org/about/Documents/iata-annual-review-2015.pdf >, at 26.

[7] See e.g. *Daniel v Virgin Atlantic Airways Ltd.*, 59 F Supp (2d) 986 (ND Cal 1998). See also Thomas J., Whalen. "The New Warsaw Convention: The Montreal Convention" (2000) 25 Air & Space L 12, at 18.

[8] *Jet2.com Ltd v Huzar*, [2014] EWCA Civ 791 [*Huzar*].

delay due to a technical issue with the aircraft.[9] After reviewing the jurisprudence of the European Court of Justice (ECJ) on the issue, the Court of Appeal concluded that the carrier could not rely on the 'extraordinary circumstances' defence under Article 5(3) of Regulation 261.[10] The court reasoned that mechanical problems with an aircraft, "whether foreseeable or not, which arose as a matter of course in the ordinary operation of the airline carrier's activity were inherent in the nature of that activity and not extraordinary".[11] The decision created a judicial precedent, binding on all future Regulation 261 delay claims in England and Wales, including at least a hundred other cases that were stayed pending the *Huzar* hearing. Since the air carrier lost the case, and its application for permission to appeal to the UK Supreme Court was denied,[12] it had to pay compensation to all the claimants, both in the *Huzar* case, and in the other cases that were stayed. In addition to the obligation to pay compensation, in certain situations, the air carrier may also need to provide care and assistance, including meals, beverages, accommodation, and means of communication, which often constitutes an even larger cost for the industry.

It makes sense to protect consumers against 'unfair' or pernicious airline practices in case of denied boarding due to overbooking, which is done intentionally in order to increase the revenue and allow air carriers to hedge against 'no-show' passengers. Most flight irregularities, however, are beyond air carriers' control.[13] IATA estimated that airlines were responsible for only 40% of all delays in Europe; other 60% was caused by external factors, including weather conditions and ATC decisions.[14] Moreover, regulation in the area of flight irregularities often

[9] *Huzar*, at para 3.
[10] EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, [2004] OJ L 46/1 [Regulation 261], art 5(3).
[11] *Huzar*, *supra* note 8.
[12] The Supreme Court, "Permission to appeal decisions", online: The Supreme Court <https://www.supremecourt.uk/news/flight-delay-compensation-pay-tv-retailers-in-administration.html>.
[13] *ATConf/6-WP/68, supra* note 2 at 3 para 3.2.
[14] *ATConf/6-WP/68, supra* note 2 at 3 para 3.3.

adopts a 'tunnel vision', which focuses solely on the airlines, instead of considering all air transport participants and stakeholders, such as airports, ATCs and ground handling personnel. Since 1980s, there has been a general trend towards liberalisation of international air transport regulation.[15] Nevertheless, some aspects of the aviation industry, such as safety or security, remain highly regulated. The framework of rules governing air carrier liability in international transportation is one of the areas where uniformity of applicable standards has been a priority for the international community since the very beginning of commercial aviation.

There are a number of multilateral private international air law treaties that set out the rules defining the nature and extent of air carrier liability in international transportation of passengers, baggage and cargo. The resulting framework can be divided into two systems. First, the so called Warsaw System, which consists of the original Warsaw Convention of 1929,[16] as modified by the supplementary Protocols.[17] Second, the Montreal Convention 1999,[18] is a self-standing document that was adopted at a diplomatic conference hosted by the International

[15] ICAO, "Regulatory and Industry Overview", at 1, online: ICAO <http://www.icao.int/Meetings/a38/Documents/REGULATORY%20AND%20INDUSTRY%20OVERVIEW.pdf >.

[16] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 LNTS 11, 49 US Stat 3000, TS No 876, ICAO Doc 7838 (entered into force 13 February 1933) [*Warsaw Convention*].

[17] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929*, 28 September 1955, 478 UNTS 371, ICAO Doc 7632 (entered into force 1 August 1963); *Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 18 September 1961, 500 UNTS 31, ICAO Doc 8181 (entered into force 1 May 1964); *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929*, 25 September 1975, 2097 UNTS 28, ICAO Doc 9145 (entered into force 15 February 1996); *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955*, 25 September 1975, 2097 UNTS 69 (entered into force 15 February 1996); *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc 9147 (not in force); *Montréal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955*, 25 September 1975, 2145 UNTS 36, ICAO Doc 9148 (entered into force 14 June 1998).

[18] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, S Treaty Doc No 106-45 (2000), ICAO Doc 9740 (entered into force 4 November 2003).

Civil Aviation Organisation (ICAO)[19] in an attempt to unify and modernise the Warsaw System.[20] Nevertheless, the air carrier liability rules applicable to international transportation, particularly those governing flight delays, cancellations and denied boarding, remain fragmented. This is partly due to a variety of possible combinations of applicable rules, different States having ratified some, but not all instruments. There are also differences in national courts' interpretation of the applicable 'uniform' international conventional law provisions.

To fill the perceived legislative gap, some jurisdictions have adopted their own regulations regarding cancellations, denied boarding, tarmac delays or long delay of flights, further exacerbating the fragmentation. According to the Working Paper presented by the International Air Transport Association (IATA)[21] at the 38th ICAO General Assembly in 2013,[22] 55 jurisdictions have adopted some form of an aviation-specific air passenger protection regime,[23] and the number has now increased to more than 60 countries, according to the IATA Annual Report of 2016.[24] The proliferation of regional and domestic regimes on air carrier liability, exacerbates the issue of fragmentation of norms, and creating overlaps between the existing international and other national systems, both legally and geographically. Conflicts between applicable rules and obligations seem inevitable. There are also differences in the level and sophistication of the regulations.

Variations in consumer protection provisions between the regimes, particularly with regard to the scope of air carrier liability and available remedies, stem from diverse policy rationales and

[19] International Civil Aviation Organisation (ICAO) is a United Nations specialised agency established in 1944 by the Chicago Convention to promote safe and orderly growth of international civil aviation. See online: ICAO < http://www.icao.int>.
[20] Bin, Cheng. "The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part. I)" (2000) 49:3 ZLW 287 at 293.
[21] The International Air Transport Association (IATA) is a global trade association composed of 265 airline members, which account for 83% of total air traffic. See online: IATA <www.iata.org>.
[22] *A38-WP/73, supra* note 4.
[23] *A38-WP/73, supra* note 4 at 2.
[24] IATA, *Annual Review 2016*, 72nd Annual General Meeting (June 2016), online: IATA <http://www.iata.org/publications/Documents/iata-annual-review-2016.pdf> at 27.

objectives. ICAO noted that "the consumer protection regimes implemented in different regions are strongly influenced by the specific features of the region or State concerned, whether they are of a regulatory, commercial or operating nature".[25] Correia and Rouissi add that various social, political and economic conditions across different jurisdictions also play an important role.[26] Despite differences in regulatory and enforcement approaches between States, however, most regulations on air carrier liability with respect to flight irregularities and denied boarding have a similar purpose,[27] namely to protect the rights of air passengers, and ensure a high level and quality of service. This is an important consideration in search for the solutions to the issues created by fragmentation.

Despite its negative connotation, particularly in the academic circles, the fragmentation of law should not be perceived as a threat to the existing international treaty law governing the nature and limits of air carrier liability in international air transportation. A well-functioning system of norms does not have to be fully harmonised; there is room for regional and national normative regimes which are compatible with one another. Burke-White argues that fragmentation can strengthen the functionality of the existing international legal framework regulating air transportation by establishing "a pluralist legal system [that] accepts a range of different and equally legitimate normative choices by national governments and international institutions and tribunals, but it does so within the context of a universal system".[28]

According to the International Law Commission's study on fragmentation of international law:

> Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal

[25] ICAO Secretariat, Effectiveness of *Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2 & 2.3, Information Paper No 1, Doc ATConf/6-IP/1 (27 February 2013), online: ICAO < http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6.IP.001.en.pdf>, [*ATConf/6-IP/1*] at 14.

[26] Vincent Correia & Noura Rouissi. "Global, Regional and National Air Passenger Rights – Does the Patchwork Work?" (2015) 40 Air & Space L 123, at 124.

[27] *ATConf/6-IP/1*, supra note 25 at 11.

[28] William W., Burke-White. "International Legal Pluralism" (2004) 25:4 Mich J Intl L 963, at 963.

> security. Moreover, only a coherent legal system treats legal subjects equally. Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, *pluralism should be understood as a constitutive value of the system*. Indeed, in a world of plural sovereignties, this has always been so.[29]

This Thesis discusses the fragmentation of international air carrier liability regime, sometimes referred to as the 'patchwork of rules', in relation to three seemingly distinct situations, namely delays (including tarmac delays), cancellations and denied boarding. Some have suggested there is a need for an international convention to govern the issues not covered by the current liability provisions, such as flight cancellations and denied boarding.[30] This dissertation neither makes, nor supports, at this time, a proposal for a new private international air law convention unifying rules on air carrier liability. While unification of certain standards regarding cancellation and denied boarding may be desirable in the future, one must first consider other options that may be easier to achieve, and faster to implement. Establishing a uniform global system of passenger rights is not the best solution. It takes a long time to negotiate and adopt an international convention, and even if it is presented to the ICAO Member States, they may not ratify it. The issues that arise due to a multitude of applicable rules need to be addressed now, and not in ten years' time. In any event, there is no guarantee that a new convention will be widely ratified, which would defeat the objective of unification.

Furthermore, passengers and air carriers have diverse, oftentimes competing, interests. For example, while clarity of available rights and corresponding obligations is particularly

[29] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UNGA, 2006, UN Doc A/CN.4/L.682, para 491 (emphasis added).
[30] Adejoke O., Adediran. "The Need for an International Legal Regime for Flight Cancellation and Denied Boarding" (2015) 50 Ann Air & Sp L 863.

important to consumers, it might not be the main concern for the airlines. Although transparency enhances predictability and legal certainty regarding applicable rules, it may also have an adverse effect on the overall cost of compliance. A fixed lump-sum compensation regime, where it is relatively easy for passengers to make a claim through a standardised form, that is not time- or resource-consuming, might increase the overall cost for air carriers, because the number of claims will rise. In that respect, there would be little to no incentive for airlines to support an introduction of a new convention or even a clarification of the existing rules.

While the achievement of total uniformity is virtually impossible, a certain level of regulatory convergence is required. In the context of this Thesis, convergence is defined as a gradual process of alignment of individual regimes through the adoption of guidelines, shared principles, common policies and recommended practices rather than centralised regulation. Harmonisation, on the other hand, is understood as a process of developing rules and norms that are uniform across all regimes. Convergence of standards is preferred over uniformity, or harmonisation of rules, because uniformity is not essential, but convergence would remedy the existing chaos created by various simultaneously applicable norms, by providing a common basis for further regulation. On the international level, the applicable consumer protection norms are developed through multilateral conventions, as interpreted by national courts and tribunals, and non-binding guidelines (soft-law), such as those laid down by ICAO. Regulation on the national and regional levels allows for other, somewhat similar approaches to consumer protection, such as legislation, regulation, tariffs and contracts of carriage, as well as common law (case law), which are, however, more attuned to the specific circumstances of the aviation market in question. Neither the Montreal Convention, nor the Warsaw System of liability were designed to provide immediate assistance and care to passengers whose flight is delayed. It is, furthermore, unclear to what extent the international conventional law covers cases of flight cancellation and denied boarding.

The following discussion will consider some of the problems created by the fragmentation of the contemporary system. A lack of uniformity increases compliance cost for the airlines which have to observe different, sometimes even conflicting, obligations,[31] familiarise their staff with applicable rules, and pay higher insurance premiums, due to the fact that the insurance cover ultimately has to meet the highest liability limit.

The issues mentioned in this introduction will be analysed in the context of international, regional and national regimes on air carrier liability. The passenger rights framework established by the European Union on care and assistance in the event of denied boarding, cancellation and long flight delays, and the US regulations on oversales, denied boarding compensation and tarmac delays are examples of regional and national regulation in this area. The EU and the US were chosen because of the similarities between those two markets and the availability and accessibility of information sources. Moreover, both the EU and the US regulatory regimes are established systems, with a considerable practical experience. The US oversales and denied boarding rules date back to 1960s, while the original EU regulation on denied boarding was adopted already in 1991.

The Thesis highlights some good practices and argues that, while a uniform system may not be practicable at this point, compatible regional and domestic aviation specific regimes that do not overstep their jurisdictional boundaries, both legal and geographical, can harmoniously co-exist and complement the framework established by the international conventional law.

This manuscript is composed of four Chapters.

Chapter I reviews the existing international conventional law system and examines how it functions. This part focuses on the material scope of the international conventions on air carrier liability, which explicitly regulate instances of flight delay, but have also, in some instances,

[31] *ATConf/6-IP/1*, *supra* note 25 at 11.

been interpreted by national courts to apply to flight cancellations and denied boarding. The applicable provisions are considered in light of the treaty interpretation rules codified in the Vienna Convention on the Law of Treaties 1969, and their application in practice is examined through selected national jurisprudence. This Chapter looks at the way in which damages occasioned by delay are regulated. This part demonstrates that even within the international system there is no actual uniformity.

International framework on air carrier liability is supplemented by regional systems. EU Regulation 261 is an example of such a scheme. Chapter II reviews the provisions of the Regulation and its relationship with international conventions. It concludes that EU Regulation provisions on delay conflict with international regime, which is exclusive. However, it seems that neither of the provisions on flight cancellations, nor on denied boarding directly conflict with the international rules. This example shows how fragmentation of rules may, on the one hand, result in conflicting norms and adversely affect legal certainty of the existing framework, while, on the other hand, providing specific air passenger protections in other areas, which are not explicitly addressed in the international system.

The international framework is supplemented by national systems, which apply equally to domestic and international transportation. For example, the US has detailed rules on tarmac delays and denied boarding. Chapter III analyses the US regulations and concludes that they do not conflict with the international framework, but rather complement it. This Chapter also identifies a potential overlap between the US oversales regulations and EU Regulation provisions on denied boarding to show another consequence of fragmentation, namely that the norms introduced on regional and national levels may overlap.

The lack of US federal law on cancellation illustrates another aspect of the relationship between international framework and national regimes, namely that the absence of national regulatory provisions is not a solution either, because it requires adjudication on a case-by-case basis. This

Thesis discusses national regime rules only to the extent they have an impact on air carrier liability in international transportation; rules governing domestic air carriage are beyond the scope of this paper.

Chapter IV analyses the extent to which the global patchwork of norms has had the desired effect of establishing a well-functioning consumer protection framework and what is being done by both ICAO and IATA to improve it. This Chapter concludes that there is no need for a new convention on passenger rights, and that efforts to fully unify applicable norms are not practicable. At this point in time, the global community should strive for convergence of norms, not harmonisation. The Chapter also suggests further steps that may be considered in addressing the issues of duplication, overlap and conflict, created by the plethora of applicable rules, and prevent such occurrences in the future. This Thesis does not attempt to find a solution to the fragmentation of rules as such, because it submits that a certain degree of fragmentation is an inherent characteristic of a pluralist legal system.

Chapter 1 International Rules on Air Carrier Liability for Flight Delays, Cancellations and Denied Boarding

1.1 Introduction

The origins of the existing legal regime governing carrier liability in international air transport can be traced back to the First International Conference on Private Air Law that took place in Paris from 27 October to 6 November 1925.[1] The meeting was convened by the French government to discuss the need for a transnational legal regime unifying rules on air carrier liability, given an inherently international nature and a multitude of foreign elements involved in air transportation.[2] The Conference established a committee of legal experts, called Comité International Technique d'Experts Juridiques Aériens (CITEJA), which prepared a draft treaty.[3] In 1929, the Second Conference on Private Air Law, held in Warsaw, adopted the Convention for the Unification of Certain Rules Relating to International Carriage by Air, applicable to passengers, baggage and cargo, now known as the Warsaw Convention of 1929.[4] Emphasizing the significance of this

[1] http://www.icao.int/secretariat/postalhistory/the_warsaw_system_on_air_carriers_liability.htm. ICAO, "The Postal History of ICAO", online: ICAO <http://www.icao.int/secretariat/postalhistory/the_warsaw_system_on_air_carriers_liability.htm>.

[2] Peter H. Sand, Jorge de Sousa Freitas & Geoffrey N. Pratt. "An Historical Survey of International Air Law before the Second World War" (1960-61) 7:1 McGill LJ 24 [Sand, "Historical Survey"], at 36; Michael, Milde. *International Air Law and ICAO* (Hague, the Netherlands: Eleven International Publishing, 2012) [Milde, "International Air Law"], at 282; Paul Stephen, Dempsey & Michael Milde. *International Air Carrier Liability: The Montreal Convention of 1999* (Montréal, QC: McGill University Centre for Research in Air & Space Law, 2005) [Dempsey & Milde, "International Air Carrier Liability"], at 11-12.

[3] Sand, "Historical Survey", *supra* note 2, at 36; Milde, "International Air Law", *supra* note 2, at 282; Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 11-12; Peter P. C., Haanappel. *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (The Hague: Kluwer Law International, 2003) [Haanappel, "Law and Policy"], at 69.

[4] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 LNTS 11, 49 US Stat 3000, TS No 876, ICAO Doc 7838 (entered into force 13 February 1933) [*Warsaw Convention*].

development, Milde observed that "without this vital unification, international civil aviation would be an unregulated playground of conflicts of laws and jurisdictions".[5]

Today, the rules governing carrier's liability in the international air transport of passengers, baggage and cargo, including liability for damage caused by delay, are laid down in a number of multilateral private international air law conventions adopted under the auspices of the International Civil Aviation Organization (ICAO). The Montreal Convention of 1999 represents the most recent attempt to modernise and harmonise the patchwork of liability rules applicable to international air transportation. Nevertheless, the issues related to fragmentation, as well as duplicate, overlapping and conflicting rules are somewhat similar to those first encountered by the French government, and other States in the 1920s.

This Chapter aims to challenge the assumption that, with the adoption of Montreal Convention of 1999, the rules on air carrier liability in private international law have been effectively harmonised. Haanappel uses an expression '"disunified" system' to describe the Warsaw Convention, together with its amending and supplementary documents.[6] It is submitted that this phrase applies to the contemporary framework of air carrier liability rules, laid down in the 1929 Warsaw Convention, as amended, and the 1999 Montreal Convention, which is 'disunified' in three important aspects. First, different States have ratified and conform to different Conventions. Consequently, depending on the itinerary, in particular the places of departure, destination, and in case of a round trip, also an agreed stopping point, the applicable regime might be the original Warsaw

[5] Michael, Milde. "'Warsaw' system and limits of liability – Yet another crossroad?" (1993) 18 Ann Air & Sp L 201 at 207.
[6] Haanappel, "Law and Policy", *supra* note 3, at 68.

Convention, the Warsaw Convention as modified by one of the later instruments of the Warsaw System,[7] the Montreal Convention 1999, or even domestic law.

Second, the titles of both the Warsaw and Montreal Conventions, clearly state that the treaties harmonise only *certain* rules relating to international carriage by air.[8] Article 19, in both documents, refers to the 'damage occasioned by delay'.[9] It is unclear, however, whether the provision also applies to cancellation of flights and instances of denied boarding, and the minutes of both the Warsaw and Montreal Conventions suggest that the drafters meant to leave the interpretation of the concept of 'delay' to national courts.[10] Moreover, there are many provisions, such as Article 29(2) of the Warsaw Convention, and the corresponding Article 35(2) of the Montreal Convention, establishing a two-year period of limitations, that expressly mandate the application of local law (*lex fori*).[11]

Third, judicial interpretations of the same provision vary between civil and common law systems, between States within a legal system, or even between national courts within a single State. This issue is particularly relevant to the question of the material scope of Article 19 of both the Warsaw and Montreal Conventions, which establishes presumptive liability of the air carrier for 'damage occasioned by delay', but does not further define 'delay'. Inconsistency in judicial interpretation and application of Article 19 creates ambiguity that affects legal certainty of the international conventional system, and creates confusion among both passengers and air carriers.

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[7] For a list of possible combinations see Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 1-2.

[8] See also *Sidhu v British Airways*, [1997] AC 430 at 443.

[9] *Warsaw Convention*, *supra* note 4, art 19; *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, S Treaty Doc No 106-45 (2000), ICAO Doc 9740 (entered into force 4 November 2003) [*Montreal Convention*], art 19.

[10] *Weiss v El Al Israel Airlines Ltd*., 433 F Supp (2d) 361 (SD NY 2006), aff'd 309 Fed Appx 483 (2d Cir 2009) [*Weiss*].

[11] *Warsaw Convention*, *supra* note 4, arts 21, 24(2), 25(1), 28(2), and 29(2); *Montreal Convention*, *supra* note 9 arts 29, 33(4), 35(2). See also Dempsey & Milde, "International Air Carrier Liability", *supra* note 2 at 59-60.

This Chapter examines the issue of fragmentation of rules relating to international carriage of passengers by air in the context of air carrier liability for flight delays, cancellations and denied boarding.

1.2 Private International Air Law Conventions: 'Warsaw System' and the Montreal Convention of 1999

The framework of air carrier liability in international transportation of passengers, cargo and baggage is outlined in the following private international air law conventions, which, as noted above, can be divided into two 'systems'.[12] First system, collectively referred to as the 'Warsaw System', comprises: the original Warsaw Convention of 1929 (the Warsaw Convention or WC29),[13] as amended by the Hague Protocol of 1955 (the Hague Protocol or HP55),[14] as supplemented the Guadalajara Convention of 1961 (the Guadalajara Convention or GC61),[15] the Guatemala City Protocol 1971,[16] and as amended by the four Montreal Protocols of 1975.[17] The

[12] Dempsey & Milde, "International Air Carrier Liability", *supra* note 2.
[13] *Warsaw Convention*, *supra* note 4.
[14] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929*, 28 September 1955, 478 UNTS 371, ICAO Doc 7632 (entered into force 1 August 1963) [*Hague Protocol*].
[15] *Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 18 September 1961, 500 UNTS 31, ICAO Doc 8181 (entered into force 1 May 1964) [*Guadalajara Convention*].
[16] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955*, 8 March 1971, 10 ILM 613 (1971) (not in force).
[17] *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929*, 25 September 1975, 2097 UNTS 28, ICAO Doc 9145 (entered into force 15 February 1996); *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955*, 25 September 1975, 2097 UNTS 69 (entered into force 15 February 1996); *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc 9147 (not in force).; *Montréal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at the Hague on 28 September 1955*, 25 September 1975, 2145 UNTS 36, ICAO Doc 9148 (entered into force 14 June 1998).

second system is consolidated in a single instrument, namely the Montreal Convention of 1999 (the Montreal Convention or MC99).[18]

Today, both the Warsaw System, in its various configurations, and the Montreal Convention are in force; the adoption of the MC99 did not repeal the original Warsaw Convention, or its amending and supplementing instruments. The Montreal Convention simply supersedes the Warsaw System with respect to 'one-way' flights between two MC99 State Parties, as well as 'round trips' departing from a MC99 State Party with a stopover in a third country.[19]

In the preface to the seminal treatise on international air carrier liability under Montreal Convention 1999, published in 2005, Dempsey and Milde remark that despite the entry into force of the Montreal Convention in 2003, "the 'Warsaw System' survives among a large number of States and conflicts of different unifications of law continue to create a complex and confusing patchwork that amount to 'disunification' of law".[20] As illustrated in the following paragraph, in 2016, eleven years later, this statement still holds true in some respects.

The Warsaw Convention is still the most widely adopted treaty on international air carrier liability. As of mid-2016, 152 States, or almost 80 percent of all ICAO Member States,[21] are parties to the original Warsaw Convention of 1929.[22] The Hague Protocol 1955, modifying the Warsaw Convention, has 137 parties,[23] whereas the Guadalajara Convention 1961 has 86 ratifying State

[18] *Montreal Convention*, *supra* note 9.
[19] *Montreal Convention*, *supra* note 9, art 55; Schmid, Ronald & Elmar Giemulla, eds. *Montreal Convention* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006), at 12.
[20] Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at viii.
[21] As of August 2016, ICAO has 191 Contracting States. See ICAO, "Member States", online: ICAO <http://www.icao.int/about-icao/Pages/member-states.aspx>.
[22] ICAO, "Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw On 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague On 28 September 1955", online: ICAO <http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf >.
[23] Ibid.

parties.[24] The 1975 Montreal Protocols Number 1, 2 and 3 have 51, 52, and 60 parties respectively.[25] Two instruments of the Warsaw System, the 1971 Guatemala City Protocol and the 1975 Montreal Protocol No.3, received an insufficient number of ratifications to enter into force. Despite ICAO's frequently repeated plea to Member States to ratify the Montreal Convention,[26] as of August 2016, the treaty has 120 parties,[27] or, stated differently, ratifications from merely 62 percent of ICAO membership.[28] While most major aviation markets are covered by the provisions of the Montreal Convention, there are still some key aviation States that have not ratified the MC99, including Bangladesh, Indonesia, Russian Federation, Sri Lanka, Thailand and Viet Nam.[29] More than one third of ICAO Member States still adheres to some version of the old Warsaw system, and several States, most notably Thailand, have not adopted any of the international

[24] ICAO, "Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by A Person Other Than the Contracting Carrier Signed at Guadalajara on 18 September 1961", online: ICAO <http://www.icao.int/secretariat/legal/List%20of%20Parties/Guadalajara_EN.pdf>.

[25] ICAO, "Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 Signed at Montreal on 25 September 1975", online: <http://www.icao.int/secretariat/legal/List%20of%20Parties/AP1_EN.pdf>; ICAO, "Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 Signed at Montreal on 25 September 1975", online: <http://www.icao.int/secretariat/legal/List%20of%20Parties/AP2_EN.pdf>; ICAO, "Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by The Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971 Signed at Montreal on 25 September 1975", online: <http://www.icao.int/secretariat/legal/List%20of%20Parties/AP3_EN.pdf>.

[26] An example of ICAO urging States to adopt MC99 can be found in Resolution A38-14, Appendix A, Section 1 and Resolution A38-20, the latter of which is devoted in its entirety to the 'promotion of the Montreal Convention 1999', ICAO, *Promotion of the Montreal Convention 1999*, ICAO Assembly Res A38-20, 38th Sess, ICAO Doc 10022, V-7, online: ICAO <www.icao.int/publications/Documents/10022_en.pdf>.

[27] Montreal Convention parties include 119 States and one Regional Economic Integration Organisation, i.e. the European Union, pursuant to Article 53(2) of the Montreal Convention, which allows ratification of the treaty by Regional Economic Integration Organisations.

[28] ICAO, "Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal On 28 May 1999", online: ICAO <http://www.icao.int/secretariat/legal/list%20of%20parties/mtl99_en.pdf>; IATA forecasts 6 more countries will ratify Montreal Convention in 2016, namely Ghana, Indonesia, Russia, Sri Lanka, Thailand, and Vietnam. See IATA, *Annual Review 2016*, 72nd Annual General Meeting (June 2016), online: IATA <http://www.iata.org/publications/Documents/iata-annual-review-2016.pdf>, at 27.

[29] IATA, "A Universal Liability Regime for International Carriage by Air – Montreal Convention 1999 (MC99)", online: <https://www.iata.org/policy/Documents/position-paper-mc99.pdf>.

Conventions.[30] The disparities in adherence to international conventions on air carrier liability create a "fractured, contentious, costly environment",[31] where carriage by air in 2016 may still governed by an 87-year-old set of rules and liability limits, agreed and adopted in 1929. Much has changed in the meantime, both with regard to airline operations and available technology.

1.3 Treaty interpretation

Before embarking upon an analysis of the substantive provisions of private international air law conventions related to air carrier liability for delay, cancellation and denied boarding in transportation of passengers, it is, first, important to consider the canons on treaty construction.

As international multilateral agreements concluded between States and governed by international law,[32] the Warsaw Convention 1929, the supplementary Convention and Protocols, as well as the Montreal Convention 1999 are subject to the international rules for treaty interpretation set out in the Vienna Convention on the Law of Treaties 1969 (VCLT).[33]

The basic principles are codified in Articles 31 to 33 of the Vienna Convention 1969,[34] and reflect pre-existing customary international law.[35] As such, the rules apply to treaties which predate the

[30] As of August 2016, the following countries have not ratified any of the conventions on liability in international carriage of persons, baggage and cargo by aircraft: Andorra, Antigua and Barbuda, Bhutan, Burundi, Central African Republic, Djibouti, Eritrea, Guinea-Bissau, Haiti, Kiribati, Marshall Islands, Micronesia (Federated States of), Nicaragua, Palau, Saint Kitts and Nevis, Saint Lucia, San Marino, Sao Tome and Principe, Somalia, South Sudan, Tajikistan, Thailand, Timor-Leste.

[31] Asociación Latinoamericana de Derecho Aeronáutico y Espacial (ALADA), Promotion of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention Of 1999), Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 1, 1.1, 2 & 2.3, Working Paper No 68, Doc ATConf/6-WP/102 (14 March 2013), online: ICAO <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.102.1.en.pdf>.

[32] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [*Vienna Convention 1969* or *VCLT*], art 2(1)(a).

[33] *VCLT*, *supra* note 32, art 1.

[34] *VCLT*, *supra* note 33 arts 31-33; Richard K. Gardiner. *Treaty Interpretation*, 2nd ed (Oxford, United Kingdom: Oxford University Press, 2015) [Gardiner, "Treaty Interpretation"], at 3-4.

[35] *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)*, [1991] ICJ Rep 53, at 70, para 48; *Avena and Other Mexican Nationals (Mexico v United States of America)*, [2004] ICJ Rep 12, at 48, para 83; *Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway* (*Belgium v Netherlands*), [2005] 28 RIAA at 35, p 62, para 45; Gardiner,

entry into force of the VCLT,[36] and are legally binding on all States, even those that are not parties to the VCLT.[37]

The 'general rule of interpretation' in Article 31 VCLT gives priority to the text, overall structure and purpose of the treaty.[38] The provisions of the Warsaw and Montreal Conventions must be construed 'in *good faith* in accordance with [their] *ordinary meaning* (…) in their *context* and in the light of [the treaty's] *object and purpose*'.[39] Article 31(2) clarifies that the 'context' includes not only the main text of the treaty, but also its preamble and annexes. Post-ratification practice in implementing the treaty, such as jurisprudence interpreting and applying the provisions of Warsaw and Montreal Conventions,[40] which demonstrates the agreement of the State parties as to the meaning of particular terms or provisions, must be considered.[41] Finally, the Conventions have to be interpreted in light of the applicable rules of international law.[42]

Many provisions of the Montreal Convention kept the substantive wording of the Warsaw Convention, as amended, because the drafters wanted to preserve the 70 years of jurisprudence interpreting and applying the rules on air carrier liability.[43] Consequently, the case law interpreting

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"Treaty Interpretation", *supra* note 34, at 15; Paul S. Dempsey. *Aviation Liability Law*, 2d ed (Markham, Ontario: LexisNexis Canada, 2013) [Dempsey, "Aviation Liability Law"], at 343.

[36] *Kasikili/Sedudu Island (Botswana v Namibia)*, [1999] ICJ Rep 1045, at 1060, para 20; Gardiner, "Treaty Interpretation", *supra* note 34, at 14-17.

[37] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, [2002] ICJ Rep 625, at 645-646, para 37; Gardiner, "Treaty Interpretation", *supra* note 34, at 7, 14-17; Dempsey & Milde, "International Air Carrier Liability", *supra* note 2 at 45; see e.g. *Chubb & Son, Inc. v Asiana Airlines*, 214 F (3d) 301 (2d Cir 2000) (Even though the US has signed, but not ratified the VCLT, the US Court of Appeals relied on the VCLT "as an authoritative guide to the customary international law of treaties" at 308-309); *Fujitsu Ltd. v Federal Express Corp.*, 247 F (3d) 423 at 433 (2d Cir 2001).

[38] Corten, Olivier & Pierre Klein. *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), at 807.

[39] *VCLT*, *supra* note 33, art 31(1) (emphasis added).

[40] Gardiner, "Treaty Interpretation", *supra* note 34, at 11; Dempsey & Milde, "International Air Carrier Liability", *supra* note 2 at 64.

[41] *VCLT*, *supra* note 33, art 31(3)(b).

[42] *VCLT*, *supra* note 33, art 31(3)(c).

[43] Jr George N., Tompkins. "Montreal Convention 1999 Court Decisions since MC99 Came Into Force" (2008) 33:6 Air & Space L 468 [Tompkins, "Montreal Convention 1999"] at 468; Jr George N., Tompkins. "The Continuing Development of Montreal Convention 1999 Jurisprudence" (2010) 35:6 Air & Space L 433 [Tompkins,

the Warsaw Convention provisions is relevant to, and has been relied upon by national courts in the construction of the corresponding articles of the Montreal Convention.[44]

'Supplementary means of interpretation,' including preparatory work ('travaux préparatoires'),[45] such as minutes, or negotiating and drafting history, and general circumstances of the conclusion of a treaty, may be used to confirm the meaning afforded by the general rule of interpretation in Article 31 VCLT.[46] They may also be relied upon to determine the meaning of a term or provision of a treaty, where the application of the general rule results in ambiguity, obscurity, or produces a result that is manifestly absurd or unreasonable.[47]

The Montreal Convention is equally authoritative in Arabic, Chinese, English, French, Russian and Spanish,[48] and its provisions are presumed to have the same meaning in each of its six official language versions.[49] Due to the drafting history of the Convention, as well as the fact that the ICAO Legal Bureau only reviewed the English version of the treaty prior to its adoption, some commentators have suggested that this version is 'more authentic' than the other five.[50]

"Development of Montreal Convention"], at 433; I H. P, Diederiks-Verschoor, Pablo M. Leon & M A. Butler. *An Introduction to Air Law* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2012) [Diederiks-Verschoor, "Introduction to Air Law"] at 220; see also *Watts v American Airlines Inc.,* 2007 WL 3019344 (SD Ind 2007), ("Despite the fact that the Montreal Convention is a new treaty, it contains provisions which embrace similar language as the Warsaw Convention so as not to result in a complete upheaval of the "common law" surrounding the Warsaw Convention.").

[44] Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 7; Tompkins, "Montreal Convention 1999", *supra* note 43.

[45] Gardiner, "Treaty Interpretation", *supra* note 34, at 25.

[46] *VCLT*, *supra* note 33, art 32; Gardiner, "Treaty Interpretation", *supra* note 34, at 347 et seq; Dempsey, "Aviation Liability Law", *supra* note 35, at 354-355; Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 53.

[47] *VCLT*, *supra* note 33, art 32(b).

[48] *VCLT*, *supra* note 33, art 33(1).

[49] *VCLT*, *supra* note 33, art 33(3).

[50] Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 49.

1.3.1 Purpose of the 1929 Warsaw and 1999 Montreal Conventions

The interpretation and consequent application of the provisions of the 1929 Warsaw Convention and 1999 Montreal Convention governing liability of the air carrier liability in international air transportation must fulfil, among other considerations, the object and purpose of the two instruments.[51] The main objective of a treaty is often expressed in its title and preamble.[52] The official French title of the 1929 Warsaw Convention reads: "Convention pour l'unification de certain règles relatives au transport aérien international," which has been translated into English as: "Convention for the Unification of Certain Rules Relating to International Carriage by Air".[53] The full title of the 1999 Montreal Convention is virtually identical: "Convention for the Unification of Certain Rules for International Carriage by Air". The similarity between both titles emphasizes the fact that both Conventions share a common purpose of harmonising the rules on air carrier liability in international transportation.

1.4 'International carriage' - which liability regime applies?

The scope of application of Warsaw and Montreal Conventions is outlined in Article 1 of each Convention. Private international air law conventions on air carrier liability apply to 'all international carriage of persons, baggage or cargo performed by aircraft for reward'.[54] The places of departure and destination, and, in case of a round trip, any agreed stopping place, determine whether and which conventional regime applies to a particular itinerary.[55]

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[51] *VCLT*, *supra* note 33, art 31(1).
[52] Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 58; Dempsey, "Aviation Liability Law", *supra* note 35, at 350.
[53] Warsaw Convention, Authentic French text and English translation as reproduced in Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 291.
[54] *Montreal Convention*, *supra* note 9, art 1(1); *Warsaw Convention*, *supra* note 4, art 1(1) which refers to 'goods' instead of 'cargo'.
[55] *Montreal Convention*, *supra* note 9, art 1(2); *Warsaw Convention*, *supra* note 4, art 1(2).

The determination of which system of liability applies in a given case is often very complex. Purely domestic flights, i.e. travel between two points within the territory of a single State, without an agreed stopping place in a third country, do not satisfy the requirement of 'internationality', and, consequently, are not covered by the Conventions. The liability of the carrier for domestic air transportation is predicated on the applicable national law.[56]

In case of a round trip, with a stopover in a third country, the most recent Convention ratified by the State of departure will govern air carrier's liability, regardless of whether the third country is also a party to that treaty.

In case of a one-way flight between two States, the air carrier liability will be governed by the most recent treaty regime that is common to the States in which the points of origin and destination are located ('highest common denominator'). Depending on the particular circumstances of the case, the international carriage in question may be governed either by the Warsaw System (the original Warsaw Convention, or as amended), the Montreal Convention, national law, if the States in question do not share a common Convention.[57] This aspect of 'disunification' of international rules on air carrier liability may result in a situation where two passengers on the same flight, who experience the same delay will be subject to different liability limits, because one of them is travelling on a return flight from China to Thailand, and the other is flying one-way.

1.5 Exclusivity of International Conventions

The exclusivity of the Montreal Convention is established in Article 29, which provides, in relevant part, that "in the carriage of passengers, baggage and cargo, any action for damages, *however founded*, *whether under this Convention or in contract or in tort or otherwise*, can only

[56] Ibid.
[57] *Chubb & Son, Inc. v Asiana Airlines*, 214 F (3d) 301 (2d Cir 2000), Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 47.

be brought subject to the conditions and such limits of liability as are set out in this Convention".[58] With regard to claims under Article 19 WC29, the corresponding provision of the Warsaw Convention, Article 24(1), states that "any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this Convention".[59] The unfortunate addition of the phrase 'whether under this Convention or in contract or in tort or otherwise' in Article 29 MC99 was only intended as an emphasis of the exclusive and pre-emptive effect of the Convention, and was not meant to affect the judicial interpretation or application of the equivalent provision in the Warsaw Convention.[60]

Form the wording of both Article 24(1) WC29, and Article 29 MC, it is clear that the Conventions create an independent cause of action. If a carriage by air falls within the scope of either the Warsaw or Montreal Conventions, a claim for damage due to Article 19 delay is governed by conditions and limits outlined in that instrument.[61]

The issue of exclusivity of the cause of action under the Warsaw Convention, and its pre-emptive effect on all claims under local law was unanimously upheld by the UK House of Lords in a seminal case of *Sidhu v British Airways*.[62] Lord Hope, who gave the only reasoned opinion, found that while the Warsaw Convention was only a partial harmonisation of the applicable rules, "in

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[58] *Montreal Convention*, *supra* note 9, art 29 (emphasis added).
[59] *Warsaw Convention*, *supra* note 4, art 24(1) (emphasis added).
[60] Montreal Conference Minutes, at 235. Jr George N. Tompkins. *Liability Rules Applicable to International Air Transportation As Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (Austin, TX: Wolters Kluwer Law & Business, 2010) [Tompkins, "Liability Rules"], at 49-52; Paradis v Ghana Airways Ltd., 348 F Supp (2d) 106, 111 (SD NY 2004), aff'd 194 Fed Appx 5 (2d Cir 2006). ("Article 29 of the Montreal Convention simply clarified the language of the Montreal Protocol's amendment to Article 24(1) of the Warsaw Convention.") [*Paradis*]; GPO, *Convention for International Carriage by Air: Message from the President of the United States Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999* (Washington: US GPO 2000), online <https://www.congress.gov/106/cdoc/tdoc45/CDOC-106tdoc45.pdf> at 30.
[61] Tompkins, "Liability Rules", *supra* note 60, at 93-94; Lawrence B. Goldhirsch. *The Warsaw Convention Annotated: A Legal Handbook* (The Hague, the Netherlands: Kluwer Law International, 2000) [Goldhirsch, "Warsaw Convention"], at 144.
[62] *Sidhu v British Airways*, [1997] AC 430 [*Sidhu*].

those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law".[63] Consequently, the court determined that if the application of the Convention did not provide a remedy, the air carrier could not be held liable under local law instead.[64]

The leading authority in the US is the Supreme Court decision in *El Al Israel Airlines, Ltd. v Tseng*,[65] which involved a personal injury claim, following an intrusive security search. The Supreme Court conducted a thorough review of the text of Article 24 WC29,[66] its negotiating and drafting history,[67] considered the object and purpose of the treaty,[68] and referred to the House of Lords decision in *Sidhu* as a persuasive precedent from another State Party.[69] In conclusion, the US Supreme Court upheld the pre-emptive effect of the Warsaw Convention on local law, and stated that the treaty "precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention".[70]

The pre-emptive and exclusivity effect of the private international air conventional law is particularly relevant to the interpretation and application of Article 19 'delay' cases with regard to cases involving either a 'cancellation' or 'denial of boarding', which are not explicitly provided for in that provision. If those two situations fall within the scope of the Warsaw, and Montreal Conventions, then the instruments provide an exclusive remedy, subject to the conventional

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[63] *Sidhu*, *supra* note 62, at 453.
[64] *Ibid* ("The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention.").
[65] *El Al Israel Airlines, Ltd. v Tseng*, 525 US 155 (1999) [Tseng]; See also Dempsey & Milde, "International Air Carrier Liability", *supra* note 2, at 210-211; Tompkins, "Liability Rules", *supra* note 60, at 96-99.
[66] *Tseng*, supra note 65, at 167.
[67] *Ibid*, at 167-169.
[68] *Ibid*, at 169-170.
[69] *Ibid*, at 173.
[70] *Ibid*, 156; See also George N. Jr., Tompkins. "Are the Objectives of the 1999 Montreal Convention in Danger of Failure?" (2014) 39:3 Air & Space L 203, at 206.

conditions and liability limits. Consequently, any local law of the State Parties that provides a private right of action for 'delay', 'cancellation' or 'denied boarding' offends the exclusivity principle, and is therefore pre-empted.[71] If, however, those two events are not within the ambit of the Conventions, then the passenger is allowed to pursue an action under local law, and is not limited by the conditions or liability ceilings established in the treaties.

1.6 Delay, Cancellation and Denied Boarding: principles and the extent of air carrier liability

Chapter III of both the Warsaw and Montreal Conventions contains provisions governing the liability of the air carrier in respect of passengers, baggage and cargo, and lays down the rules to determine the quantum of damages payable.[72] The nature, conditions and extent of the liability of the carrier for damage caused by 'delay' in the international carriage of passengers by air is regulated primarily by Articles 19, 20 and 22 of the Warsaw Convention, and corresponding Articles 19 and 22 of the Montreal Convention.

Article 19 of the Montreal Convention provides:

> 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.[73]

The first sentence of this provision, which corresponds to Article 19 of the Warsaw Convention, establishes prima facie liability of the carrier 'for damage occasioned by delay'.[74] The occurrence

[71] Paul Stephen, Dempsey & Svante O. Johansson. "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage" (2010) 35:3 Air & Space L 207 [Dempsey & Johansson, "Montreal v Brussels"], at 208.
[72] *Montreal Convention*, *supra* note 9, Chapter III.
[73] *Montreal Convention*, *supra* note 9, art 28.
[74] *Montreal Convention*, *supra* note 9, art 19; *Warsaw Convention*, *supra* note 4, art 19.

of a flight delay in and of itself is not enough to trigger the application of the Conventions. In order for the presumption of liability to attach, the passenger has a burden of proving the following three elements: a delay, damages, and causal link between the two, namely that the alleged damage was proximately caused by the delay.[75] The presumption of liability is rebuttable; the second sentence of Article 19 MC99 lays down the 'all reasonable measures defence', which allows the carrier to fully exonerate itself by showing that it took all reasonable precautions, or that it was impossible to take such measures.[76]

1.6.1 Defining delay

The principal issue with Article 19 of the Warsaw and Montreal Conventions is the material scope of the term 'delay'. Neither the Warsaw System instruments, nor the Montreal Convention define the concept of 'delay'. The drafters left it deliberately left it open-ended. Regrettably, the Montreal Conference of 1999 did not clarify the meaning of 'delay,' or whether it encompasses 'cancellation' or 'denied boarding'. Having reviewed the drafting history and minutes of the MC99, a US District Court observed 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".[77]

Delay must be distinguished from non-performance. If the contract of carriage is not executed at all (non-feasance), as opposed to being performed later than anticipated (misfeasance), there seems to be a general agreement in both the jurisprudence and academic literature that there is no Article

[75] Goldhirsch, "Warsaw Convention", *supra* note 61 at 100.
[76] *Montreal Convention*, *supra* note 9, art 19; *Warsaw Convention*, *supra* note 4, art 20.
[77] *Weiss, supra* note 10, at 368; see also Diederiks-Verschoor, I H. P. "The Liability for Delay in Air Transport" (2001) 26 Air & Space L 300 [Diederiks-Verschoor, "Liability for Delay"], at 175.

19 delay, and the plaintiff can bring a claim for non-performance of the contract of carriage under national law.[78]

The *travaux préparatoires* of the Warsaw Convention seem to support this interpretation. The reading of the minutes of the Second International Conference on Private Aeronautical Law in Warsaw indicates that the total non-performance of the contract of carriage falls outside of the scope of the Warsaw Convention, because the delegates felt that cases of non-carriage were adequately addressed by the claimant's own national law.[79] Hence, deciding whether the event is properly characterised as delayed carriage or non-carriage is important, because the two have different legal consequences. On the one hand, the contract has been executed, but in an untimely manner.[80] The air carrier is presumptively liable, up to an amount specified in the Convention, under MC99 4,150 SDRs, for a quantifiable economic loss caused by a delay in international carriage of passengers.[81] On the other hand, the liability of the air carrier for non-performance of the contract of carriage is governed by the agreed terms and conditions of the contract of carriage, and applicable domestic law. It is outside the material scope of the Conventions, and, therefore, is not pre-empted by Article 24 WC29 and Article 29 MC99.

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[78] *Weiss, supra* note 10; *Mullaney v Delta Air Lines, Inc.*, 258 FRD 274 (SD NY 2009); Schmid, Ronald & Elmar Giemulla, eds. *Montreal Convention* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006) [Schmid, "Montreal Convention"], Article 19 at 35; Cotter, Christopher E. "Recent Case Law Addressing Three Contentious Issues in the Montreal Convention" (2012) 24:4 Air & Space Lawyer 9; Dempsey, "Aviation Liability Law", *supra* note 35, at 630-631; Haanappel, Peter P. C. "The New EU Denied Boarding Compensation Regulation of 2004." (2005) 54:1 ZLW 22 [Haanappel, "New Regulation of 2004"], at 26-27.

[79] Robert C., Horner & Didier Legrez. *Second International Conference on Private Aeronautical Law Minutes* (South Hackensack, N.J: Fred B. Rothman & Co., 1975) at 76-77; see also Guerreri, Giuseppe "Overbooking, Overselling and Denial of Boarding" (1989) 16 Ann Air & Sp L 191 at 195; Dempsey & Johansson, "Montreal v Brussels", *supra* note 71 at 214; *Wolgel v Mexicana Airlines*, 821 F (2d) 442 (7th Cir 1987) [*Wolgel*], para 444.

[80] Diederiks-Verschoor, I H. P, Pablo M. Leon & M A. Butler. *An Introduction to Air Law* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2012), at 176.

[81] Schmid, "Montreal Convention", supra note 78 Article 19 at 35.

1.6.2 Cancellation and denied boarding: Article 19 delay or non-performance?

Article 19 of both the Warsaw and Montreal Conventions expressly addresses carrier liability for 'delay', but, due to a lack of definition, it is unclear whether the term also covers 'cancellation' or 'denial of boarding', or whether those two events amount to a non-performance of the contract of carriage. There is a considerable degree of variation in the treaty interpretation on this issue among States, and, as one court humorously noted, 'unfortunately, the cases do not line up like ducks in a row'.[82]

1.6.2.1 Cancellation

In most cases there is a clear dividing line between a delay, which constitutes a delayed performance of the contract of carriage, and cancellation, which amounts to a non-performance of the contract.[83] If the carriage was never performed, as opposed to being performed later, the Warsaw and Montreal Conventions do not seem apply. The private international air law Conventions do not create a cause of action for failure to perform a contract of carriage. The plaintiff may seek damages for breach of contract under national law, even though the damage was incurred in the course of international transportation by air. Under domestic law, however, there are usually no limits of liability similar to those established in Article 22 MC99 and Article 22 WC29, and there is a potentially unlimited exposure to liability for the air carrier.

There are, however, some grey areas, where there is no clear boundary between delayed performance and non-performance of contract of carriage.[84]

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[82] *Vumbaca v Terminal One Group Ass'n L.P.*, 859 F Supp (2d) 343 (EDNY 2012).
[83] Dempsey, "Aviation Liability Law", *supra* note 35, at 630; Haanappel, "New Regulation of 2004", *supra* note 78 at 26-27.
[84] Dempsey, "Aviation Liability Law", *supra* note 35, at 630; Dempsey & Johansson, "Montreal v Brussels", *supra* note 71 at 210.

If, following a cancellation, a passenger is offered alternative transportation, the courts have held that those cases are within the ambit of Article 19 of the Conventions, and any domestic law claims are pre-empted.

In *Paradis v Ghana Airways, Ltd*,[85] the plaintiff's return flight from Sierra Leone to the US was cancelled. The plaintiff was told to make arrangements with the air carrier's office the next business day, because there were no other flights leaving that day. Due to prior commitments, which included a bar exam review course, the plaintiff and his group were anxious to return to the US, and booked a flight with another air carrier leaving that same night. The US District Court found that the plaintiff's state law breach of contract claim was pre-empted by the Warsaw and Montreal Conventions. Even though the flight was cancelled, the court held that the claimant "did not afford the air carrier an opportunity to perform its remaining obligations pursuant to the contract" and that "a passenger cannot convert a mere delay into contractual non-performance by choosing to obtain more punctual conveyance".[86]

The US District Court in *In re: Nigeria Charter Flight Contract Litigation*,[87] held that a cancellation of a charter flight, where the carrier did not provide an alternate transportation, was not an Article 19 MC99 delay, but rather a complete non-performance of the contract of carriage. Consequently, passengers' state law claims fell outside of the scope of the Montreal Convention, and were not pre-empted. Based on an exhaustive review of previous case law, the court identified three types of circumstances that favoured a finding of Article 19 delay, rather than non-performance: (1) an air carrier 'ultimately provided plaintiff with transportation'; (2) 'plaintiff

[85] *Paradis, supra* note 60.
[86] *Ibid.*
[87] *In re: Nigeria Charter Flight Contract Litigation* 520 F Supp (2d) 447 (EDNY, 2007).

secured alternate transportation without waiting to find out whether the defendant airlines would transport them,' or (3) 'plaintiffs refused an offer of a later flight'.[88]

In *Mullaney v Delta Air Lines, Inc*.,[89] the inbound leg of a return journey was cancelled due to employee strike, and the passenger brought a state law claim based on New York's consumer protection statute, promissory estoppel and unjust enrichment. The US District Court held that the cancellation constituted a breach of contract due to non-performance, rather than delay, and that therefore it was not pre-empted by the Montreal Convention. *Mullaney* court remarked that "where the facts pleaded in the complaint add up to non-performance, rather than simply delay, the Convention does not pre-empt other claims".[90] The court distinguished previous cases where passengers obtained an alternative flight on a different airline without allowing the carrier to mitigate the breach of contract by carrying the passenger on a later flight. In *Mullaney*, the plaintiff waited for three days before booking a ticket with another carrier, after which time Delta's flights were still grounded due to an on-going strike.

1.6.2.2 Denied boarding

Already in 1976, Mr. Justice Powell in *Nader v Allegheny Airlines, Inc*. noted that deliberate overbooking of flights is 'a common industry practice'.[91] A seat on a flight cannot be inventoried; it is a perishable commodity. Therefore, air carriers are eager to fill up seats that would otherwise be empty, because once the aircraft takes off, any unfilled seat is 'spoiled'.[92] Overbooking a flight allows air carriers to ensure higher load factors and offset revenue losses due to 'no-show'

[88] *Ibid.*
[89] *Mullaney v Delta Air Lines, Inc.*, 258 FRD 274 (SD NY 2009) [*Mullaney*].
[90] *Ibid*.
[91] *Nader v Allegheny Airlines, Inc.*, 426 US 290, 96 S Ct 1978, 48 L Ed (2d) 643 (1976).
[92] Dempsey, Paul Stephen & Laurence E. Gesell. *Airline Management: Strategies for the 21st Century* (Chandler, AZ: Coast Aire Publishing, 2012) at 59.

passengers[93] and last-minute changes or cancellations.[94] While denied boarding most commonly results from an intentional overbooking, it can also occur due to a technical error with the air carrier's booking system,[95] or operational and safety reasons, such as a change of gauge caused by a technical issue with an aircraft, where it has to be substituted with an aircraft of lesser capacity.

The existence, nature and extent of air carrier liability under both Warsaw and Montreal Conventions for denial of boarding is unclear. While most national courts have found that denial of boarding amounts to non-performance of the contract of carriage vis-à-vis that passenger, and as such falls outside the scope of the Conventions,[96] some cases have presented issues similar to those discussed above in the context of cancellation of flights.

According to Goldhirsch, the US is the only jurisdiction where the courts have not equivocally labelled denied boarding as either Article 19 delay or a non-performance of the contract of carriage, hence outside the scope of the Conventions.[97]

In *Wolgel v Mexicana Airlines*,[98] the US Court of Appeals for the Seventh Circuit found that denied boarding, amounting to a total non-performance of the contract of carriage, was not covered by Article 19 of the Warsaw Convention.

The US Court of Appeals for the Second Circuit in *King v American Airlines*,[99] did not decisively rule on the issue, and refused to recognise the findings of the trial court. The district court in that case concluded that, based on previous decisions which found that Article 19 applies to claims

[93] A no-show passenger is a person holding a reserved space on a flight, who, without notifying the airline of a cancellation or change, does not present themselves for the flight.
[94] *Weiss, supra* note 10.
[95] Schmid "Montreal Convention", *supra* note 78, Article 19 at 33.
[96] *Weiss, supra* note 10, at 368.
[97] Goldhirsch, "Warsaw Convention", *supra* note 61, at 109.
[98] *Wolgel, supra* note 79.
[99] *King v American Airlines Inc.*, 284 F (3d) 352 (2nd Cir 2002).

where passengers have been 'bumped', plaintiff's claim in *King* was pre-empted by the Warsaw Convention.[100] The Second Circuit held it was not necessary to consider Article 19 cause of action. In *Weiss v El Al Israel Airlines Ltd*.,[101] the US District Court followed the Seventh Circuit decision in *Wolgel.* The court reviewed the minutes of the MC99, noting that the drafters of the treaty left the issue of defining delay to national courts. It then noted that "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 non-performance redressable under local law and not delay for which the Convention supplies the exclusive remedy".[102] Consequently, the *Weiss* court held that denied boarding ('bumping') was not covered by Article 19.

The United States District Court in *Igwe v Northwest Airlines, Inc.*,[103] addressed the split between the decisions in *Paradis* on the one hand, and *Weiss* and *Wolgel* on the other hand. It noted that the main consideration in the previous cases was whether the air carrier provided the plaintiff with a reasonable alternative transportation, and that the passenger in *Wolgel* did not receive either an alternative transportation, or compensation.[104] The court found that the facts in *Igwe* were similar to those in *Paradis*, because the plaintiffs failed to present themselves on time for check-in, and "acted too hastily in rejecting KLM's conciliatory offers to be able to claim complete non-performance by the airline".[105] Therefore, the court concluded that on the facts of the case, the plaintiffs remedy for 'bumping' was limited to Article 19 of the Montreal Convention, and the state law claims were pre-empted accordingly.

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[100] *King v American Airlines Inc.*, 146 F Supp (2d) 159 (ND NY 2001), aff'd 284 F (3d) 352 (2nd Cir 2002).
[101] *Weiss, supra* note 10.
[102] *Weiss, supra* note 10, at 368.
[103] Igwe v Northwest Airlines, Inc., 2007 WL 43811 (SD Tex 2007) [*Igwe*]; DeMay, Jonathan E. "Recent Developments in Aviation Law" (2008) 73:2 J Air L & Com 131, at 226; Tompkins, "Liability Rules", *supra* note 60, at 58; Tompkins, Jr George N. "'Bumping' - Denied Boarding - and Article 19 of the Montreal Convention" (2007) 32:3 Air & Space L 231.
[104] *Igwe*, supra note 103, at 3.
[105] *Ibid*, at 4.

In conclusion, while the general view in contracting States seems to be that denied boarding constitutes a total non-performance of the contract of carriage, some courts in the US found that Article 19 of the Conventions will apply to cases involving denial of boarding where the air carrier provided an alternative transportation. Through this interpretation, the US courts aim to protect the carrier that executes, albeit untimely, the contract of carriage by offering a substitute performance. By construing Article 19 of the Conventions to include this particular instance of denial of boarding, the courts have ensured that the air carrier is shielded from potentially unlimited liability under domestic law, and can invoke the 'all reasonable measures' defence.

1.6.3 Defences to liability

Under Article 19 of the Montreal Convention, the air carrier can avoid liability altogether if it proves the absence of fault on its part,[106] namely that it took 'all reasonable measures' to avoid the damage, or that it was impossible to do so. The original wording of the corresponding provision in the Warsaw Convention seems to impose a higher standard by requiring air carriers to prove 'all necessary measures' were taken.[107] If the carrier had taken all *necessary* measures to avoid the damage, it would not have occurred in the first place. The courts have, however, interpreted the WC29 defence to mean 'all reasonable measures', and in that respect the Montreal Convention does not constitute any change from the previous system.

Under the international conventional law, if the delay was caused by, for example, acts of nature, such as inclement weather[108] or natural disasters,[109] the carrier would be able to rely on the defence,

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[106] Bin, Cheng. "The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part II)" (2000) 49:4 ZLW, 484 at 488.
[107] *Warsaw Convention*, *supra* note 4, art 20(1).
[108] Tribunal de Bruxelles, Bruxelles, 20 December 1966, *Wegge v Sabena*, (1966), RFDA 353; see also Schmid, "Montreal Convention", supra note 78 Article 19 at 17.
[109] *DeVera v Japan Airlines*, 1994 WL 698330 (SD NY 1994) (flight cancelled due to a typhoon and volcanic eruption).

because it either took all reasonable measures, or it was impossible for it to do so.[110] Similarly, the courts have held that 'all reasonable measures defence' was satisfied in cases involving a mechanical failure, where the air carrier attempted repairs and ordered a replacement aircraft,[111] a broken hydraulic pump that, according to the manufacturer's specifications required a maintenance check after 230 flight hours, but failed only after 179 hours,[112] or a design defect of an engine, where the crew decided to divert the aircraft back to the point of origin for safety reasons.[113] Conversely, the courts found it impossible for air carriers to take 'all reasonable measures' in cases of delay due to an air traffic control mandate,[114] or action of the immigration officials.[115]

Article 20 MC99 and Article 21 WC29 create a contributory negligence defence, exonerating an air carrier from liability, in whole or in part, provided the passenger contributed to the damage by their own negligence or wrongful act or omission. This defence would be applicable in cases where the passenger was denied boarding, because they were late for check-in.[116]

1.6.4 The amount and extent of recoverable damage – limits of air carrier liability

Under the original Warsaw Convention, an air carrier's liability for delay in the carriage of passengers is capped at 125,000 French Gold Francs.[117] Article 24(1) WC29 clearly stipulates that any action for damages under Article 19 WC29 is 'subject to limits' specified in the Convention, thus precluding claims in excess of liability ceiling specified in Article 22(1) WC29.[118]

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[110] Diederiks-Verschoor, "Introduction to Air Law", *supra* note 43, at 180.
[111] Lee v American Airlines, 355 F (3d) 386 (5th Cir 2004).
[112] CA, Aix-en-Provence, 23 November 1984, *Martel c Cie Air Inter* (1984) RFDA 298; See also Diederiks-Verschoor, "Liability for Delay", *supra* note 77, at 306.
[113] *Roh v Korean Air*.
[114] *Cohen v. Delta Air Lines, Inc.,* 751 F Supp (2d) 677 (2010) (SD NY 2010).
[115] *Edem v Ethiopian Airlines Enterprise*, No. 08 CV 2597 RJD LB, 2009 WL 4639393 (ED NY 2009), aff'd, 501 F App'x 99 (2d Cir 2012); Tompkins, "Development of Montreal Convention", *supra* note 43, at 437; Diederiks-Verschoor, "Liability for Delay", *supra* note 77, at 306.
[116] Diederiks-Verschoor, "Introduction to Air Law", *supra* note 43, at 182.
[117] *Warsaw Convention*, *supra* note 4, art 22;
[118] Goldhirsch, "Warsaw Convention", *supra* note 61, at 143.

The quantum of liability was consequently reduced.[119] Paragraph 1 of Article 22 of the Montreal Convention circumscribes air carrier's maximum liability for damage resulting from delay to 4,150 Special Drawing Rights (SDRs) per passenger.[120] Every five years, in accordance with the so called 'escalator clause' in Article 24(1) MC99, ICAO reviews the liability limits, and decides whether to adjust the amounts to keep pace with inflation.[121] The second periodic review in 2014 did not result in an increase of the limits set in 2009 during the first review,[122] hence the current liability cap for damage resulting from delay is 4,694 SDRs per passenger (approximately 6,503 USD, or 5,905 EUR).[123]

Articles 22 of the Warsaw and Montreal Convention specify liability ceilings up to which the carrier will be liable for damage caused by delay the in transportation of passengers, but the passenger can only recover the actual damage suffered, which needs to be established in each case by the passenger. The exact quantum of damages is assessed under *lex fori*. As stipulated in the preamble, the Convention provides for 'equitable compensation based on the principle of restitution'; hence the passenger may only recover for the loss actually incurred. Punitive damages are also explicitly prohibited under both Warsaw and Montreal Conventions.

Article 22(5) provides that the limit may be pierced, resulting in an unlimited liability, if the passenger proves wilful misconduct on the part of the carrier, namely that the damage occurred

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[119] Thomas J., Whalen. "The New Warsaw Convention: The Montreal Convention" (2000) 25 Air & Space L 12 [Whalen, "New Warsaw Convention"], at 18.

[120] Special Drawing Rights (SDR), created by the International Monetary Fund (IMF) in 1969, is not a currency, but rather an international reserve asset. The value of the SDR is determined by reference to a basket of four currencies, namely the US dollar, euro, Japanese yen, and pound sterling. The IMF plans to add the Chinese renminbi in October 2016. See IMF, "Special Drawing Right (SDR)", online: <http://www.imf.org/external/np/exr/facts/sdr.htm>.

[121] *Montreal Convention*, *supra* note 9, arts 24 and 53(5).

[122] George N. Tompkins, '2015 Summary of MC99 Court Decisions' (2016) 41 Air and Space Law, Issue 2, pp. 129–141.

[123] IMF, "Exchange Rate Archives by Month", online: <https://www.imf.org/external/np/fin/data/param_rms_mth.aspx>.

due to 'an act or omission (…) done with intent to cause damage or recklessly and with knowledge that damage would probably result'.[124] In practice, however, it would be very difficult for the passenger to prove wilful misconduct on the part of the carrier. Normally passengers will not have access to information that could help establish wilful misconduct. Moreover, the air carrier will rarely act so egregiously as to intentionally cause a flight delay.[125]

The current state of affairs creates a disparity in the applicable rules whereby two passengers on the same flight, sitting next to each other on a plane, may be subject to drastically different liability limits. For example, a round trip from Indonesia with a stopover in Malaysia,[126] will be governed by the Warsaw Convention provisions on delay and liability limits set in that Convention in 1929, because Indonesia still has not ratified any of the more recent treaties.

1.6.4.1 Types of recoverable damages

Article 19 in either the Warsaw or the Montreal Convention does not stipulate what type of damages is recoverable. Instead, the enquiry in each case is fact-specific.

Pursuant to Article 29 MC99, only compensatory damages are recoverable. Punitive, exemplary or any other non-compensatory damages are not recoverable.[127] Similar to claims under Article 17,[128] in cases involving Article 19 delay, majority of jurisdictions do not allow recovery of damages for purely mental injuries that are not accompanied by physical harm.[129]

The case law is split on the issue whether and to what extent 'inconvenience' damages are recoverable under Article 19. The United States Court of Appeals for the Fifth Circuit in *Lee v*

[124] *Montreal Convention*, *supra* note 9, art 22(5).
[125] Whalen, "New Warsaw Convention", *supra* note 119.
[126] https://www.garuda-indonesia.com/other-countries/en/contact/condition-of-contract.page?
[127] *Montreal Convention*, *supra* note 9, Article 29.
[128] *Eastern Airlines v Floyd*, 499 US 530, 111 S Ct 1489 (1991).
[129] Dempsey, "Aviation Liability Law", *supra* note 35, at 791.

American Airlines, Inc., denied recovery for "inconvenience and loss of a refreshing, memorable vacation",[130] because the claims were for mental anguish damages, and there was no real economic loss that was easily quantifiable. In *Vumbaca v Terminal One Group Association*,[131] passengers filed a class action lawsuit against an airport terminal operator, deemed to be acting as 'the agent of the carrier', for damages resulting from a seven-hour tarmac delay, during which the passengers were confined to an aircraft during a snowstorm at John F. Kennedy International Airport. The US District Court for the Eastern District of New York held that while economic harms were recoverable under Article 19 of the Montreal Convention, emotional harms were not. In *Lukács v United Airlines Inc.*,[132] the plaintiff's flight was cancelled due to mechanical problems, and, as a result, he was prevented from attending an academic conference. The court denied plaintiffs' claims for "inconvenience or mental anguish" and "missed academic, research and learning opportunities," because they were not compensable under the Montreal Convention.

1.7 Conclusion

The analysis shows that the private international air law rules on air carrier liability are not as harmonious as they may initially seem.

The international conventional law system is difficult to apply in practice, because different States adhere to different treaties, and determining which law governs a particular itinerary involves a complex analysis of the applicable treaty provisions. Moreover, while rules establishing carrier's presumptive liability for damage caused by delay are similar in all documents, the extent of damages recoverable, i.e. maximum compensation thresholds, is different depending on which

[130] *Lee v American Airlines, Inc*, 355 F (3d) 386 at 387 (5th Cir 2004); Jae Woon Lee & Joseph Charles Wheeler. "Air Carrier Liability for Delay: A Plea to Return to International Uniformity" (2012) 77 J Air L & Com 43 at 77.
[131] *Vumbaca v Terminal One Group Ass'n L.P.*, 859 F Supp (2d) 343 (ED NY 2012).
[132] *Lukacs v United Airlines Inc.*, [2009] MJ No 43, 2009 MBQB 29 (Man QB).

treaty regime applies. Due to the fact that some countries still have not ratified the Montreal Convention, and some, like Thailand, for example, are not party to any of the international liability conventions, the rules establishing air carrier obligations and corresponding passenger rights in international air transport are only partially harmonised, even with regard to flight delays, which are the only type of flight disruption explicitly governed by the international regime.

The Conventions afford a presumptive liability of the carrier in case of delay, but limit recovery through ceilings on liability. It is unclear, however, whether cancellation and denied boarding are within the scope of Article 19 of Warsaw and Montreal Conventions. Ambiguous scope of provisions may lead to conflicts with regional and national systems established to fill in a perceived gap in coverage.

Probably the biggest difficulty with application of the international system to individual cases involving flight irregularities and denial of boarding is that the Warsaw System and Montreal Convention provide a mechanism for recovery of actual damages following a delay. It was not designed to address the day to day frustrations and inconveniences of passengers faced with long flight delays by, for example, mandating the air carrier to offer care and assistance in cases involving massive flight disruptions. Therefore, a supplementary regime of some kind, imposing an obligation on the carrier to provide upfront assistance in case of flight disruptions, or compensation for denial of boarding due to oversales is almost inevitable.

Chapter 2 The European Union and EFTA Member States

2.1 Introduction

In the areas of transport[1] and consumer protection,[2] the European Union (EU) has a shared competence, meaning that both the EU and its Member States have a regulatory authority with respect to those two areas. However, once the EU exercises its competence, taking a legislative action, it pre-empts the Member State's conflicting national law.[3] Pursuant to the provisions of the Treaty on the Functioning of the European Union (TFEU)[4] and the Charter of Fundamental Rights of the European Union,[5] the EU law and policy, including regulation of aviation, must 'promote the interests of consumers,'[6] and 'ensure a high level of consumer protection'.[7]

The air carrier liability and corresponding air passenger rights are addressed in three key pieces of legislation: the Montreal Convention of 1999,[8] Regulation (EC) No 2027/97,[9] as modified by Regulation (EC) No 889/2002,[10] and Regulation (EC) No 261/2004.[11]

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[1] *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ C 326/01 [*TFEU*], arts 4(2)(g) and 100.
[2] *TFEU*, *supra* note 1, art 4(2)(f)
[3] *Commission v Germany*, C-60/86, [1988] ECR I-3921; See also *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, C-6/03, [2005] ECR I-02753 (a stricter measure imposed by the national law was valid, as long as it followed the objectives of the EU Directive).
[4] *TFEU*, *supra* note 1, arts 12, 114, 169.
[5] *Charter of Fundamental Rights of the European Union*, [2012] OJ C 326/02 [*Charter*], art 38.
[6] *TFEU*, *supra* note 1, art 12.
[7] *TFEU*, *supra* note 1, arts 114(3) and 169(1); *Charter*, *supra* note 5.
[8] See Chapter 1 above 12.
[9] EC, *Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents*, [1997] OJ, L 285/1 [*Regulation 2027/97*].
[10] EC, *Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents*, [2002] OJ L 140/2 [*Regulation 889/2002*].
[11] EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, [2004] OJ L 46/1 [*Regulation 261*].

2.2 The EU, Montreal Convention of 1999 and the amended Regulation (EC) No 2027/97

The 28 Member States of the European Union (EU),[12] and all Member States of the European Free Trade Association (EFTA),[13] except for Lichtenstein,[14] have ratified the Montreal Convention.[15] The European Union itself, in its capacity as a Regional Economic Integration Organisation,[16] became one of the contracting parties in 2004.[17] Regulation (EC) No 2027/97 on air carrier liability,[18] as amended by Regulation (EC) No 889/2002,[19] transposed the Montreal Convention into EU law. Consequently, as of 28 June 2004,[20] any flight performed by a Community carrier (EU carrier), both international, either between EU Member States, or between an EU Member State and a third country; or domestic, i.e. within a single EU Member State,[21] is governed by a uniform system of liability under MC99.[22]

[12] As of August 2016, the European Union (EU) countries are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. See European Union, "About the EU", online: European Union <http://europa.eu/about-eu/countries/index_en.htm>.

[13] As of August 2016, the European Free Trade Association (EFTA) countries are: Iceland, Liechtenstein, Norway and Switzerland. See EFTA, "The EFTA States", online: EFTA <http://www.efta.int/about-efta/the-efta-states>.

[14] As of August 2016, the Principality of Liechtenstein has only ratified the Warsaw Convention 1929, and The Hague Protocol 1955. See ICAO, "Status of Liechtenstein with Regard to International Air Law Instruments", online: ICAO <http://www.icao.int/secretariat/legal/Status%20of%20individual%20States/liechtenstein_en.pdf>.

[15] ICAO, "Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal On 28 May 1999", online: ICAO <http://www.icao.int/secretariat/legal/list%20of%20parties/mtl99_en.pdf>.

[16] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, S Treaty Doc No 106-45 (2000), ICAO Doc 9740 (entered into force 4 November 2003) [*Montreal Convention*], art 53(2).

[17] ICAO, "Status of the European Union with Regard to International Air Law Instruments", online: ICAO <http://www.icao.int/secretariat/legal/Status%20of%20individual%20States/european_union_en.pdf>.

[18] *Regulation 2027/97*, *supra* note 9.

[19] *Regulation 889/2002*, *supra* note 10.

[20] *Rodríguez v Air France*, C-83/10, [2011] ECR I-09469 [*Rodríguez*], para 4.

[21] *Regulation 889/2002*, *supra* note 10, art 1.

[22] EC, Commission Notice, Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, [2016] C(2016) 3502 final [EC, Interpretative Guidelines], at 5.

2.3 Regulation (EC) No 261/2004

Historically, the development of the EU's regional air passenger protection system has been closely related to the process of air services liberalisation.[23] The 'EU-level re-regulation'[24] in the area of air passenger protection began in 1991 with the original Council Regulation (EEC) No 295/91 (Regulation 295).[25] In a language similar to that of the US oversales and denied boarding regulations, Regulation 295 addressed the liability of the air carrier only with respect to denial of boarding.[26] Thirteen years later, it was repealed by Regulation (EC) No 261/2004 (Regulation 261 or EU261),[27] which, among other things, broadened the application of the rules to include passengers arriving in the EU from a third country on all flights operated by an EU carrier[28] and increased the flat-rate compensation amounts.[29] Perhaps most importantly for the current discussion, it extended the scope of the air carrier liability rules on compensation and assistance to include not only cases of denied boarding, but also cancellation and long delay of flights.

Regulation 261 entered into force on 17 February 2005,[30] establishing a seemingly uniform legal regime across 28 Member States of the EU and 4 EFTA Member States.[31] Under Article 288 TFEU, Regulation 261 is a binding act of secondary EU legislation that is directly

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[23] EC, *Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport*, [1991] OJ L 36/5 [*Regulation 295*], preamble, recital 1; Vincent, Correira & Noura Rouissi. "Global, Regional and National Air Passenger Rights – Does the Patchwork Work?" (2015) 40 Air & Space L 123, at 125; Peter P. C., Haanappel. "The New EU Denied Boarding Compensation Regulation of 2004." (2005) 54:1 ZLW 22 [Haanappel, "New Regulation of 2004"]. at 28.

[24] Sacha Garben, "The Turbulent Life of Regulation 261" in Michal, Bobek & Jeremias Prassl, eds. *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016), at 262.

[25] *Regulation 295*, *supra* note 23.

[26] *Regulation 295*, *supra* note 23, art 1.

[27] *Regulation 261*, *supra* note 11, art 18.

[28] *Regulation 261*, *supra* note 11, recital 6 and art 3(1)(b).

[29] *Regulation 261*, *supra* note 11, art 7.

[30] *Regulation 261*, *supra* note 11, art 19.

[31] Regulation 261 applies to Iceland, Liechtenstein and Norway pursuant to the Agreement on the European Economic Area (EEA Agreement). See *Agreement On The European Economic Area*, [1994] OJ L 1/3. Regulation 261 applies to Switzerland pursuant to the Agreement between the European Community and the Swiss Confederation on Air Transport 1999 (entered into force on 1 June 2002). See *Agreement between the European Community and the Swiss Confederation on Air Transport* 1999, [2002] OJ L 114/73.

applicable in all EU Member States, which means that it does not require implementation through national legislation.[32]

The preamble recitals shed some light on the intention behind the EU legislation, its purpose and objectives.[33] The rationale behind the adoption of Regulation 261 is spelled out in recitals 3 and 4. Due to a high number of passengers experiencing flight disruptions and being denied boarding,[34] the EU decided to "raise the standards of protection (…) both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market".[35] By prescribing minimum standards in cases involving denied boarding, cancellation and long delay of flights,[36] Regulation 261 strives to guarantee "a high level of protection for passengers" to mitigate "serious trouble and inconvenience".[37]

Regulation 261 has been characterised as 'the most litigated EU air transport legislation ever'.[38] It has been interpreted and applied by national courts of EU Member States, and, pursuant to the preliminary ruling procedure, the European Court of Justice (ECJ)[39] has delivered a number of judgments interpreting and 'clarifying' ambiguous provisions in the Regulation. Some decisions have been very controversial, and met with a fierce criticism from the airline industry and academia, either because they appear to be in conflict with the rules governing air carrier

[32] *TFEU*, *supra* note 1, art 288.
[33] Haanappel. "New Regulation of 2004", *supra* note 23, at 22.
[34] EC, Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, [2013] COM(2013) 130 final, online: EUR-Lex <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52013PC0130> [EC, Proposal for Amending Regulation].
[35] *Regulation 261*, *supra* note 11, preamble, recitals 3 and 4.
[36] *Regulation 261*, *supra* note 11, art 1.
[37] *Regulation 261*, *supra* note 11, preamble, recitals 1 and 2; *IATA & ELFAA v Department for Transport*, C-344/04, [2006] ECR I-403 [*IATA & ELFAA*], para 69; *Emirates Airlines v Schenkel*, C-173/07, [2008] ECR I-05237 [*Schenkel*], para 35.
[38] P.P. C. Haanappel, Compensation for Denied Boarding, Flight Delays and Cancellations Revisited (2013) 62 ZLW 38, at 38.
[39] The Court of Justice (ECJ) is a body of the Court of Justice of the European Union (CJEU) that hears references for a preliminary ruling, appeals, and has the power to annul EU legal acts. See European Union, "Court of Justice of the European Union (CJEU)", online: European Union < https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.

liability under private international air law conventions[40] or because they seem to expand the scope of the Regulation beyond the original intent of the EU legislators.[41] Both Regulation and the ECJ decisions interpreting it have been criticised by national authorities, judiciaries and many academic commentators for an unbalanced approach, which imposes an undue burden on the industry, and lack of respect for international law provisions.[42]

In March 2013, the European Commission published a proposal to amend Regulation 261 and Regulation 2027/97.[43] Over the past three years, however, not much progress has been made on the adoption of the proposed reforms, because of the dispute between the UK and Spain over application of the proposed regulation to Gibraltar airport.[44] As a temporary measure, in June 2016, the European Commission issued Interpretative Guidelines, which aim to clarify some of the provisions of the Regulations 261/2004 and 2027/97, that have given rise to confusion and ambiguities in applicable rules.[45]

2.3.1 Scope of application

Personal, material and territorial scope of Regulation 261 is defined in Article 3.[46] The rules apply to all passengers departing from an airport in the EU,[47] and to passengers departing from airports outside the EU on any flight operated by a Community carrier (EU carrier).[48] Regulation 261 does not cover passengers arriving in the EU from a third country on a flight

[40] See e.g. *IATA & ELFAA*, *supra* note 37. *Nelson v Deutsche Lufthansa*, Joined Cases C-581/10 & C-629/10, EU:C:2012:657 [*Nelson*].
[41] *Sturgeon v Condor Flugdienst*, Joined Cases C-402/07 & C-432/07, [2009] ECR I-10923 [*Sturgeon*].
[42] See e.g. Kinga, Arnold and Pablo Mendes de Leon. "Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!" (2010) 35:2 Air & Space L 91; Paul Stephen, Dempsey & Svante O. Johansson. "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage" (2010) 35:3 Air & Space L 207.
[43] EC, Proposal for Amending Regulation, *supra* note 34.
[44] Under current Regulation 261, Article 1(3), Gibraltar airport is excluded from the scope of its application. See IATA, Press Release, 35, "Industry Welcomes Clarity on EU Passenger Rights" (10 June 2016), online: <http://www.iata.org/pressroom/pr/Pages/2016-06-10-01.aspx>.
[45] EC, Interpretative Guidelines, *supra* note 22.
[46] *Regulation 261*, *supra* note 11, art 3.
[47] *Regulation 261*, *supra* note 11, art 3(1)(a).
[48] *Regulation 261*, *supra* note 11, art 3(1)(b). Pursuant to Article 2(c) of Regulation 261, a Community carrier is an air carrier that holds an operating licence issued by an EU Member State.

operated by a non-EU air carrier.[49] The liability is imposed on the 'operating air carrier',[50] i.e. the carrier that "performs or intends to perform a flight",[51] regardless of whether it is also a 'contracting carrier' that made a contract of carriage with the passenger.[52] For example, in case of a codeshare flight from Canada (third country) to the EU operated by Lufthansa (EU carrier), marketed by both Lufthansa and Air Canada (non-EU carrier), that was subject to an arrival delay of three and a half hours, only Lufthansa will be liable under EU261. If that same flight was operated by Air Canada, on the other hand, Regulation 261 would not be applicable.

The application of EU261 is conditional upon the passenger holding a confirmed reservation on the flight,[53] and presenting themselves for check-in in a timely manner.[54] Tickets obtained through frequent flyer or other commercial programmes are subject to Regulation 261 provisions, while gratuitous carriage, including 'deadheading' airline staff members,[55] and passengers travelling at discounted fares not available to the general public, such as airline employees,[56] are not covered.[57] Unlike its predecessor,[58] Regulation 261 applies to both scheduled and non-scheduled flights.[59]

2.3.1.1 Regulation 261 'flight'

There is a significant difference in the scope of application between the international air law Conventions (WC29 and MC99), and Regulation 261. In *Emirates Airlines v Schenkel*,[60] the

[49] *Schenkel, supra* note 37.
[50] *Regulation 261*, *supra* note 11, art 3(5).
[51] *Regulation 261*, *supra* note 11, art 2(b).
[52] *Regulation 261*, *supra* note 11, art 3(5).
[53] This condition does not apply to a passenger who has been transferred to another flight. See *Regulation 261*, *supra* note 11, art 3(2)(b).
[54] *Regulation 261*, *supra* note 11, art 3(2). 'Timely manner' refers to either a time specified by the carrier, or, if no time has been specified, at least 45 minutes before the published departure time.
[55] 'Deadheading' refers to airline practice of repositioning employees by carrying them as non-revenue passengers. See Dempsey, Paul Stephen & Michael Milde. *International Air Carrier Liability: The Montreal Convention of 1999* (Montréal, QC: McGill University Centre for Research in Air & Space Law, 2005), at 67.
[56] EC, Interpretative Guidelines, *supra* note 22, at 7.
[57] *Regulation 261*, *supra* note 11, art 3(3).
[58] *Regulation 295/91, supra* note 23.
[59] *Regulation 261*, *supra* note 11, preamble recital 5.
[60] *Schenkel, supra* note 37, para 40.

ECJ held that a round trip cannot be regarded as a single 'flight'.[61] The outbound and inbound legs of such journey must be considered separately for the purpose of assessing whether Regulation 261 is applicable.[62] In light of that decision, under EU261, each flight segment of a trip constitutes a separate flight, even if they were subject to a single booking.[63] The ECJ rejected the findings of the referring court that the construction of the term 'flight' was subject to the definition of 'international carriage' in Article 1(2) of the Montreal Convention.[64] It observed that the Convention does not mention the concept of 'flight',[65] and that under Article 1(3) MC99, successive carriage may be regarded as 'one undivided carriage' if the parties consider it a single operation, regardless of whether it was subject to a single contract or series of contracts of carriage.[66] In that regard, the scope of Montreal Convention extended to an entire 'journey', and the air carrier liability rules laid down in that Convention would govern both outbound and inbound legs of the trip. Therefore, the ECJ found that the Montreal Convention was not relevant to the determination of the concept of 'flight' under EU 261.[67]

2.3.1.2 Possible overlap – compensation and assistance received in a third country

There is an exception to the application of Regulation 261 provisions on assistance and compensation with regard to passengers arriving in the EU from a third country on a flight operated by an EU carrier.[68] Because of a possible overlap between Regulation 261 and air passenger rights legislation in that third country, Article 3(1)(b) EU261 specifies that passengers who "received benefits or compensation *and* were given assistance in that third country" are not entitled to rights under Regulation 261.[69] Thus if passengers obtained both

[61] *Schenkel, supra* note 37, para 47.
[62] *Schenkel, supra* note 37, para 40.
[63] *Schenkel, supra* note 37, para 53; EC, Interpretative Guidelines, *supra* note 22, at 6.
[64] *Schenkel, supra* note 37, para 42-46.
[65] *Schenkel, supra* note 37, para 44.
[66] *Schenkel, supra* note 37, para 45; *Montreal Convention*, *supra* note 15, art 1(3).
[67] *Schenkel, supra* note 37, para 46.
[68] *Regulation 261*, *supra* note 11, art 3(1)(b).
[69] *Regulation 261*, *supra* note 11, art 3(1)(b) (emphasis added).

'benefits or compensation' and 'care', Article 3(1)(b) prevents double recovery. If, however, passengers received only one of those entitlements, for example, they were given a travel voucher, a 'benefit', but did not get vouchers for meals or beverages, under the right to care, they will be able to recover the cost incurred as a result from the air carrier.[70] Even if the passenger obtained some form of compensation that will not in and of itself render the remedies under Regulation 261 unavailable. Following the ECJ decision in *van der Lans v KLM*,[71] the burden is on the air carrier to show that the third country compensation corresponds to the purpose of Regulation 261, and was offered under comparable conditions.[72]

2.3.2 Denied boarding

According to Regulation 261, 'denied boarding' occurs when an air carrier refuses to carry a passenger, unless there are reasonable grounds for such a denial, including, but not limited to,[73] inadequate travel documentation, health, safety or security reasons.[74] The application of the original Regulation 295/91 was limited exclusively to cases of denied boarding due to air carrier overbooking a flight.[75] In accordance with the expressly stated objective of reducing the number of passengers denied boarding against their will,[76] the definition in Article 2(j) Regulation 261 omits any express reference to overbooking. In *Finnair v Lassooy*[77] the ECJ concluded that Regulation 261 covers "all circumstances in which an air carrier may refuse to carry a passenger,"[78] including overbooking, and "those where boarding is denied on other grounds, such as operational reasons".[79] In that respect, the scope of Regulation 261 is much

[70] EC, Interpretative Guidelines, *supra* note 22, at 6-7.
[71] *van der Lans v KLM*, C-257/14, EU:C:2015:618 [*van der Lans*].
[72] *van der Lans, supra* note 71, para 28.
[73] The list in Article 2(j) is non-exhaustive. See *Cachafeiro v Iberia*, C-321/11, [2012] EU:C:2012:609 [*Cachafeiro*], para 29.
[74] *Regulation 261*, *supra* note 11, art 2(j).
[75] *Regulation 261*, *supra* note 11, art 1.
[76] *Regulation 261*, *supra* note 11, recitals 3, 4, 9.
[77] *Finnair v Lassooy*, C-22/11, [2013] 1 CMLR 18 [*Lassooy*].
[78] *Cachafeiro, supra* note 73, para 24.
[79] *Lassooy*, *supra* note 77, para 26; *Cachafeiro*, *supra* note 73, para 27.

broader than the international conventional law regime,[80] or the US oversales and denied boarding rules,[81] both of which provide an exception to air carrier liability where it refuses to carry a passenger not only for safety, but also operational reasons.

The air carrier's obligations in case of denied boarding are outlined in Article 4 EU261, and closely resemble the procedures laid down in the US oversales and denied boarding compensation rules.[82] First, the air carrier must ask for volunteers[83] willing to forfeit their seats in exchange for mutually agreed compensation.[84] Then, if there are still more passengers than there are available seats on an aircraft, the operating carrier is allowed to 'bump' passengers against their will.[85]

Regarding available remedies, Regulation 261 distinguishes between voluntary denied boarding (VDB) and involuntary denied boarding (IDB). In addition to the benefits negotiated with the passenger for willingly surrendering their reservation, in case of VDB, the air carrier must also offer the passenger a choice between a refund of the ticket price, re-routing or rebooking at a later date in accordance with Article 8 EU261.[86] In case of IDB, i.e. when a passenger is denied boarding against their will, the operating carrier must compensate the passenger forthwith pursuant to Article 7 EU261. The ECJ in *Finnair v Lassooy* was adamant that the 'extraordinary circumstances' exception to operating carrier's obligation to pay compensation does not apply in case of denied boarding.[87] Moreover, the operating carrier must refund, re-route or rebook the passenger in line with Article 8 EU261, and provide assistance under Article 9 EU261.

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[80] *Montreal Convention*, *supra* note 15, art 19; *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 LNTS 11, 49 US Stat 3000, TS No 876, ICAO Doc 7838 (entered into force 13 February 1933) [*Warsaw Convention*], art 20(1).
[81] 14 CFR § 250.6(b).
[82] 14 CFR § 250.2b.
[83] *Regulation 261*, *supra* note 11, art 2(k).
[84] *Regulation 261*, *supra* note 11, art 4(1).
[85] *Regulation 261*, *supra* note 11, art 4(2).
[86] *Regulation 261*, *supra* note 11, art 4(1).
[87] *Lassooy*, *supra* note 77, para 40.

2.3.3 Flight Cancellation

'Cancellation' is defined in Article 2(l) EU261 as the 'non-operation of a flight which was previously planned and on which at least one place was reserved'.[88] It encompasses both complete non-operation of a flight, and situations where an aircraft takes off, but subsequently returns to the point of departure, irrespective of the reason.[89] Article 5 EU261 imposes liability on the operating carrier for cancellation of flights,[90] which includes an obligation to provide assistance outlined in Article 9 EU261,[91] and to offer the passenger a choice between a refund, re-routing or rebooking in line with Article 8.[92] The passengers are also entitled to compensation within the limits of Article 7 EU261, unless they received an advance notice of the cancellation, as specified in Article 5(1)(c),[93] or the flight was cancelled as a result of "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".[94]

2.3.4 Long delay of flights

Article 6 of Regulation 261 outlines categories of flight delay that fall within the scope of EU261, and enumerates types of care and assistance an air carrier must provide to a passenger in each case.[95] A flight delay must be distinguished from a cancellation; an appropriate determination should be made on a case-by-case basis.[96] According to the ECJ's

[88] *Regulation 261*, *supra* note 11, art 2(l).
[89] *Rodríguez, supra* note 20, para 35.
[90] *Regulation 261*, *supra* note 11, art 5.
[91] *Regulation 261*, *supra* note 11, art 5(1)(b).
[92] *Regulation 261*, *supra* note 11, art 5(1)(a).
[93] *Regulation 261*, *supra* note 11, art 5(1)(c). The air carrier is not required to compensate passengers if they are notified of the cancellation: (i) at least two weeks in advance; (ii) between two weeks and seven days in advance, and is offered re-routing with delay at departure of less than 2 hours, and less than 4 hours at arrival; or (iii) less than seven days in advance and is offered re-routing with delay at departure of less than 1 hour, and less than 2 hours at arrival.
[94] *Regulation 261*, *supra* note 11, art 5(3).
[95] *Regulation 261*, *supra* note 11, art 6.
[96] EC, Interpretative Guidelines, *supra* note 22, at 10.

jurisprudence,[97] regardless of the duration of the delay, if a flight is operated according to the carrier's original scheduling, it is governed by Article 6 EU261, and does not qualify as Article 5 EU261 cancellation.[98] The flight might be regarded as cancelled, however, if it is "'rolled over' onto another flight,"[99] meaning that "the planning for the original flight is abandoned,"[100] and the passengers are transferred onto another flight that was planned independently.[101]

The obligations of the operating carrier are determined according to the extent of the delay at *departure*, and the flight length, regardless of the fault of the air carrier.[102] The air carrier's liability is triggered when the delay at departure reaches: two hours for short haul flights,[103] three hours for all intra-EU flights over 1,500 kilometres,[104] as well as medium haul flights between the EU and a third country,[105] and, finally, four hours for all other flights.[106] In those instances, the operating carrier must arrange for care under Article 9 EU261.[107] If the overall delay at departure reaches five hours, the air carrier must also offer to reimburse the passenger in accordance with Article 8(1)(a) EU261.[108]

2.3.4.1 Delay at arrival in excess of 3 hours – right to compensation

The language of Article 6 EU261 is clear. As opposed to the provision on cancellation,[109] a long flight delay does not entail either an obligation to pay compensation under Article 7 EU261 for late arrival at destination, or a corresponding defence of 'extraordinary circumstances' which exonerates the carrier from such a liability. In a highly controversial

[97] *Sturgeon, supra* note 41, para 34.
[98] *Sturgeon, supra* note 41, paras 34 and 39.
[99] *Sturgeon, supra* note 41, para 36.
[100] *Sturgeon, supra* note 41, para 36.
[101] *Sturgeon, supra* note 41, para 36.
[102] *Regulation 261*, *supra* note 11, art 6(1); Peter P. C., Haanappel. "The New EU Denied Boarding Compensation Regulation of 2004." (2005) 54:1 ZLW 22 at 31.
[103] *Regulation 261*, *supra* note 11, art 6(1)(a)
[104] *Regulation 261*, *supra* note 11, art 6(1)(b).
[105] Flights between 1,500 and 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 6(1)(b).
[106] All flights over 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 6(1)(c).
[107] *Regulation 261*, *supra* note 11, art 6(1)(i)-(ii).
[108] *Regulation 261*, *supra* note 11, art 6(1)(iii)
[109] *Regulation 261*, *supra* note 11, art 5.

decision,[110] delivered on 19 November 2009, the Grand Chamber of the ECJ, composed of fifteen judges, held that passengers who suffer a delay of three hours or more at *arrival*, may rely on Article 7 EU261 to claim compensation.[111] Despite its earlier statement in the same case that "cancelled flights and delayed flights are two quite distinct categories",[112] and in spite of the clear wording of Regulation 261, the ECJ reasoned that "it cannot automatically be presumed that passengers whose flights are delayed do not have a right to compensation and cannot (…) be treated as passengers whose flights are cancelled".[113] Comparing the consequences of those two flight irregularities,[114] the court concluded that both cause similar damage to passengers, namely 'loss of time', which 'can be redressed only by compensation'.[115] Based on a reference to long delays in the context of extraordinary circumstances in recital 15 of the EU261 preamble,[116] the non-binding part of the Regulation, and recognising that EU261 sought to achieve a balance between passenger rights and air carrier interests,[117] the court determined that the 'extraordinary circumstances' exception is applicable *mutatis mutandis* in case of long flight delays in excess of three hours.[118] The ECJ's interpretation of Article 6 EU261 in *Sturgeon* was subsequently confirmed in its 2012 ruling in *Nelson v Deutsche Lufthansa.*[119] Moreover, in *Air France v Folkerts,*[120] the court stated that the *departure* delay, which triggers all other obligations of the air carrier under Article 6 EU261, is irrelevant for the purpose of the air carrier's obligation to pay compensation in line with Article 7 EU261.[121] Air carrier's liability is contingent on the *arrival* delay only. Thus,

[110] See e.g. Sacha Garben, "The Turbulent Life of Regulation 261" in Michal Bobek & Jeremias Prassl, eds. *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016), at 266.
[111] *Sturgeon, supra* note 41, paras 61, 69. See also *Nelson*, *supra* note 40, para 40.
[112] *Sturgeon, supra* note 41, para 33.
[113] *Sturgeon, supra* note 41, para 46.
[114] *Sturgeon, supra* note 41, para 50, 54.
[115] *Sturgeon, supra* note 41, para 52.
[116] *Regulation 261*, *supra* note 11, preamble, recital 15.
[117] *Sturgeon, supra* note 41, para 67.
[118] *Sturgeon, supra* note 41, para 69.
[119] *Nelson*, *supra* note 40, para 40.
[120] *Air France v Folkerts*, C-11/11, EU:C:2013:106 [*Folkerts*].
[121] *Folkerts*, *supra* note 120, paras 37-38, 47.

regardless of whether the flight was delayed on *departure*, if it is delayed by more than three hours on *arrival* at the final destination, the air carrier must pay compensation to the passengers in accordance with Article 7 EU261, unless the carrier can prove that the delay was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures have been taken".[122]

In *Sturgeon,* the ECJ engaged in judicial activism, substantially expanding the scope of Regulation 261, by adding the right to compensation under Article 7 EU261 to the remedies available to passengers in case of a flight delay. The Court's ruling goes beyond the traditional notions of the interpretation and application of the existing law, and instead creates a new right that did not exist in the original text of EU261, as enacted by the European Parliament and the Council through proper legislative channels. It not only disregards the principle of the separation of powers,[123] but also thwarts the fundamental maxim of the rule of law,[124] namely legal certainty.

Lenaerts,[125] currently sitting President of the ECJ, defended the court's decision in *Sturgeon*, explaining that "a joint reading of the principle of equal treatment and the objectives pursued by Regulation 261/2004 favoured pushing the bounds of interpretation to the utmost (though not beyond the limits of *contra legem*) in order not to adversely affect the high level of protection already put in place by the EU legislator".[126] Weiler cautions, however, against this 'culture of rights' approach adopted by the ECJ and Lenaerts,[127] which tends to view the

[122] *Regulation 261*, *supra* note 11, art 5(3).
[123] See *Germanwings v Amend*, C-413/11, EU:C:2013:246; Jiri Malenovský, "Regulation 261: Three Major Issues" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016) 239 [Jiri Malenovský, "Regulation 261] at 42.
[124] John Balfour. "Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004" (2010) 35:1 Air & Space L 71 [Balfour "Airline Liability"], at 75.
[125] In 2015, judge Lenaerts was elected the President of the European Court of Justice.
[126] Lenaerts 'The Court's Outer and Inner Selves' in Maurice Adams, Henri de Waele & Johan Meeusen, eds. *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford and Portland, Oregon: Hart Publishing, 2013) at 26.
[127] JHH Weiler 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams, Henri de Waele & Johan Meeusen, eds. *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford and Portland, Oregon: Hart Publishing, 2013) at 245.

legislation only from the passengers' perspective, disregarding additional obligations and costs imposed on the industry. Most of the commentators agree with Weiler's view. According to Balfour, the ECJ disregarded the unambiguous wording of Regulation 261, and effectively rewrote it.[128] Lawson and Marland remarked that "the ECJ held, in effect, that the right to compensation contained in Article 7 of the Regulation 261 is to be read into Article 6, (…) notwithstanding that this is clearly contrary to what Regulation 261 actually says…. On any reasoned analysis, in so doing, the Fourth Chamber indulged in an act of judicial legislation".[129] The obligation to compensate for a delay of more than three hours on *arrival* led to further litigation in 2014. The Landesgericht Salzburg (Salzburg Regional Court) made a request for a preliminary ruling in *Germanwings v Henning*,[130] asking the ECJ about the specific meaning of 'arrival time',[131] which is not defined in EU261, but is nevertheless used to delineate the scope of air carrier's obligations not only under Article 6 EU261, as interpreted by the ECJ in *Sturgeon*,[132] but also Articles 2 ('Definitions'), 5 ('Cancellation') and 7 ('Right to compensation') of Regulation 261.[133] The case involved a delayed flight which was scheduled to arrive at 14:40, but instead landed at 17:38, finally reaching its parking position at 17:43. The plaintiff argued that the 'arrival time' meant 'in-block time',[134] and that, accordingly, the flight was delayed exactly three hours and three minutes. The air carrier, on the other hand, submitted that the clock stopped at 'touchdown', thus the delay was only two hours and fifty-eight minutes, and, being under three hours, it did not trigger the obligation to pay

[128]Balfour "Airline Liability", *supra* note 124, at 73.
[129] Lawson, R, and T Marland. "The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon - in Harmony or Discord?" (2011) 36:2 Air & Space L 99, at 100.
[130] *Germanwings v Henning*, C-452/13, EU:C:2014:2141 [*Henning*]. The ECJ judgment was delivered despite the national court's withdrawal of the request for a preliminary ruling due to the parties' out-of-court settlement. See Jiri Malenovský, "Regulation 261", *supra* note 123, at 31.
[131] *Henning, supra* note 130, para 11.
[132] *Sturgeon, supra* note 41.
[133] *Henning, supra* note 130.
[134] In-block time refers to the moment in time when the aircraft reaches its parking position and the brakes are engaged. See EUROCONTROL, "EUROCONTROL ATM Lexicon", online: EUROCONTROL <http://www.eurocontrol.int/lexicon/lexicon/en/index.php/Actual_In-Block_Time>.

compensation.[135] The ECJ held that 'arrival time' was tantamount to the moment when the aircraft doors were opened, and the passengers were allowed to disembark,[136] rather than the time when the aircraft lands; or reaches its parking position and comes to a stop; or when the chocks are applied.[137]

2.3.4.2 Tarmac delays

Regulation 261 does not explicitly mention tarmac delays. According to the European Commission, however, the right to care under Article 9 applies by implication to passengers on board the aircraft stranded on the tarmac, hence, in the event of a qualifying tarmac delay, the operating carrier must provide meals and refreshments 'in a reasonable relation' to the delay.[138] Moreover, if a tarmac delay exceeds five hours, passengers have a right to reimbursement of the ticket price under Article 8(1)(a) EU261.[139]

2.3.5 Passenger rights and carrier obligations – remedies under Regulation 261

2.3.5.1 Right to information

Regulation 261 imposes an obligation on the operating carrier to properly inform passengers of their rights.[140] At check-in, whether at the counter, a self-service kiosk, or on-line,[141] the air carrier must display a visible and legible notice, clearly advising passengers that they have a right to ask for a text specifying their entitlements under Regulation 261.[142]

In addition to the general notice requirement outlined in Article 14(1) EU261, in the event of an actual denial of boarding, flight cancellation, departure delay of more than two hours or

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[135] *Henning, supra* note 130, para 9.
[136] *Henning, supra* note 130, para 27.
[137] *Henning, supra* note 130, para 23.
[138] EC, Press Release, "Air Passenger Rights Revision - Frequently Asked Questions" (13 March 2013), online: European Commission <http://europa.eu/rapid/press-release_MEMO-13-203_en.htm>, See also *Regulation 261*, *supra* note 11, art 9(1)(a).
[139] EC, Press Release, "Air Passenger Rights Revision - Frequently Asked Questions" (13 March 2013), online: European Commission <http://europa.eu/rapid/press-release_MEMO-13-203_en.htm>. See also *Regulation 261*, *supra* note 11, art 6(1)(iii).
[140] *Regulation 261*, *supra* note 11, art 14.
[141] EC, Interpretative Guidelines, *supra* note 22, at 12.
[142] See *Regulation 261*, *supra* note 11, art 14(1).

arrival delay of more than three hours, the operating carrier must furnish every affected passenger with a written explanation regarding the rules governing their right to compensation and assistance. The notification should also include contact details of the appropriate national enforcement body (NEB) responsible for handling passenger complaints pursuant to Article 16 of Regulation 261.[143]

Providing incorrect, incomplete, or misleading information directly to the passenger, or publishing such information in an advertisement, or through a website,[144] constitutes a violation of Article 15(2) EU261.[145] According the Interpretative Guidelines published by the European Commission,[146] it may also amount to an unfair or misleading business-to-consumer commercial practice prescribed by Directive 2005/29/EC (Unfair Commercial Practices Directive).[147]

2.3.5.2 Right to compensation

The right to compensation is encompassed in Article 7 of Regulation 261, which contains the rules for assessing the extent of disbursements in cases of flight irregularities and denial of boarding.[148] The provision establishes an automatic, flat-rate compensation scheme. A passenger does not need to prove any actual damage suffered, because Regulation 261 is meant to compensate damage 'constituted by the inconvenience caused by delay'[149] and 'consisting in a loss of time',[150] which according to the ECJ case law, is distinct from 'damage occasioned

[143] *Regulation 261*, *supra* note 11, arts 14(2) and 16.
[144] EC, Interpretative Guidelines, *supra* note 22, at 12.
[145] *Regulation 261*, *supra* note 11, art 15(2).
[146] EC, Interpretative Guidelines, *supra* note 22, at 12.
[147] EC, *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'),* [2005] OJ L 149/22.
[148] *Regulation 261*, *supra* note 11, art 7.
[149] *IATA & ELFAA*, *supra* note 37, para 45.
[150] *Sturgeon, supra* note 41, para 52.

by delay' within the meaning of Article 19 of the Montreal Convention.[151] The amount of compensation ranges between EUR 250 – 600 per passenger, and is estimated according to flight distance,[152] and, in case of re-routing, time of arrival at the ultimate destination.[153] The passenger is entitled to EUR 250 (approximately USD 277) for short haul flights,[154] EUR 400 (approximately USD 443) for all intra-EU flights over 1,500 kilometres,[155] as well as medium haul flights between the EU and a third country,[156] and, finally, EUR 600 (approximately USD 665) for long haul flights between the EU and a third country.[157] In case of re-routing under Article 8 EU261, the fixed amount of compensation may be reduced by 50%, if the actual time of arrival does not exceed the originally scheduled arrival time by: two hours for short haul flights,[158] three hours for all intra-EU flights over 1,500 kilometres,[159] as well as medium haul flights between the EU and a third country,[160] and, finally, four hours for all other flights.[161] For example, if a flight between the EU and the US is subject to an arrival delay of more than three but less than four hours, the compensation payable is EUR 300 per passenger.[162]

The express wording of Article 1(1) EU261 emphasizes that the measures laid down in Regulation 261 constitute '*minimum* rights' only.[163] Article 12 elaborates on this premise stating that the application of EU261 is without prejudice to any existing right or claim to further compensation for breach of contract of carriage under applicable private international air law Conventions or national law.[164] The right to further compensation is extinguished

[151] *Nelson*, *supra* note 40, para 55.
[152] The distance must be calculated according to the great circle route method. See *Regulation 261*, *supra* note 11, art 7(4).
[153] *Regulation 261*, *supra* note 11, art 7(2).
[154] All flights of 1,500 kilometres or less. See *Regulation 261*, *supra* note 11, art 7(1)(a).
[155] *Regulation 261*, *supra* note 11, art 7(1)(b).
[156] Flights between 1,500 and 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 7(1)(b).
[157] All flights over 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 7(1)(c).
[158] *Regulation 261*, *supra* note 11, art 7(2)(a)
[159] *Regulation 261*, *supra* note 11, art 7(2)(b).
[160] Flights between 1,500 and 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 7(2)(b).
[161] All flights over 3,500 kilometres. See *Regulation 261*, *supra* note 11, art 7(2)(c).
[162] See *Sturgeon, supra* note 41, para 63.
[163] *Regulation 261*, *supra* note 11, art 1(1); see also *Rodríguez, supra* note 20, para 37.
[164] *Regulation 261*, *supra* note 11, art 12(1); see also *Rodríguez, supra* note 20, para 38.

where, in case of denied boarding, the passenger volunteered to give up their reservation in response to the air carrier's offer pursuant to Article 4(1) EU261.[165]

Article 12(1) EU261 ensures that the passenger is able to recover the full amount of damages incurred where it exceeds the 'standardised and immediate' measures[166] under Regulation 261. The ECJ in *Rodríguez v Air France*,[167] clarified that under EU261 the operating carrier is liable to provide not only compensation, but also assistance and care, thus where the air carrier fails to fulfil its obligations under Article 8 ('right to reimbursement or re-routing') or Article 9 ('right to care'), the Regulation itself, and not Article 12 'further compensation', constitutes a proper basis of claim.[168] In order to prevent double recovery in respect of the same damage, however, Article 12(1) EU261 specifies that the quantum of further reimbursement may be reduced by the amount of total compensation received pursuant to Regulation 261.

2.3.5.3 Right to reimbursement and re-routing

Under Article 8(1) EU261 the air carrier must offer passengers the following three choices: (i) a refund of the ticket price within seven days, and, if relevant, a return flight to their point of departure;[169] (ii) substitute comparable transportation to the passenger's ultimate destination at the earliest opportunity;[170] or (iii) rebooking on a flight at a later date to the passenger's final destination, under comparable conditions and subject to seat availability.[171]

2.3.5.4 Right to care

The right to care under Article 9 EU261, entitles passengers to receive free meals and beverages in proportion to the waiting time;[172] if necessary, an overnight accommodation and

[165] *Regulation 261*, *supra* note 11, art 12(2).
[166] *Rodríguez, supra* note 20, para 38; *IATA & ELFAA*, *supra* note 37, para 47.
[167] *Rodríguez, supra* note 20.
[168] *Rodríguez, supra* note 20, para 43–44.
[169] *Regulation 261*, *supra* note 11, art 8(1)(a).
[170] *Regulation 261*, *supra* note 11, art 8(1)(b).
[171] *Regulation 261*, *supra* note 11, art 8(1)(c).
[172] *Regulation 261*, *supra* note 11, art 9(1)(a).

transportation from and to the airport;[173] as well as, access to communication facilities (two telephone calls, faxes or e-mails).[174]

Regulation 261 establishes a strict liability regime with respect to the air carrier's obligation to provide care and assistance. In *McDonagh v Ryanair*,[175] the ECJ determined that while the presence of 'extraordinary circumstances,' in this particular case an airspace closure following a volcano eruption, relieves the carrier of an obligation to pay compensation under Article 7 EU261,[176] carrier must still provide Article 9 care, regardless of the circumstances.[177] The court unequivocally concluded that Article 9 EU261 applies even if the cause of the flight disruption was not within the air carrier's control.[178]

In light of the ECJ's interpretation of right to care provision in *McDonagh v Ryanair*, the air carrier acts as a de facto insurer. There are no temporal or monetary constraints on air carrier's responsibilities towards its passengers;[179] thus the scope of liability is potentially unlimited.[180] ICAO observed that, in terms of financial consequences, the most onerous obligation under Regulation 261 is the duty to provide care under Article 9 EU261, and particularly the cost of hotel accommodation.[181] For example, in *McDonagh v Ryanair*, the plaintiff claimed EUR 1129.41 to recoup expenses incurred after her flight was cancelled.[182]

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[173] *Regulation 261*, *supra* note 11, art 9(1)(b).
[174] *Regulation 261*, *supra* note 11, art 9(2).
[175] *McDonagh v Ryanair*, C-12/11, EU:C:2013:43 [*McDonagh*].
[176] *McDonagh, supra* note 175, para 31.
[177] *McDonagh, supra* note 175, para 66; see also *Eglītis v Latvijas Republikas Ekonomikas ministrija*, C-294/10, [2011] ECR I-03983, paras 23-24.
[178] *McDonagh, supra* note 175, para 66.
[179] *McDonagh, supra* note 175, paras 40, 42-43.
[180] *McDonagh, supra* note 175; See also Alan Meneghetti and Thomas van der Wijngaart, "Disproportionate Jurisprudence: The CJEU's Approach to Proportionality in Regulation 261/2004" in Mendes de Leon, Pablo, ed. *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law: Essays in Honour of John Balfour* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2013) at 170.
[181] ICAO Secretariat, *Effectiveness of Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2.3, Information Paper No 1, Doc ATConf/6-IP/1 (27 February 2013), online: ICAO < http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6.IP.001.en.pdf>, at 10.
[182] *McDonagh, supra* note 175, para 15.

2.3.6 Extraordinary circumstances – air carrier defence

Article 5(3) EU261 provides an exception to the air carrier's obligation to compensate passengers in case of a cancellation if it was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures have been taken".[183] Pursuant to the ECJ decision in *Sturgeon*, the exemption from the obligation to pay compensation also applies to flights delayed by more than 3 hours on arrival.[184]

The European Union jurisprudence has adopted a very strict interpretation of the exemption, and the ECJ, in no uncertain terms, distinguished it from the 'all reasonable measures' defence under the Montreal Convention.[185] The difference between the international and regional regimes is illustrated by the application of the EU261 'extraordinary circumstances' exception to technical problems with an aircraft, a topic that has been particularly controversial.

In *Wallentin-Hermann v Alitalia*, the plaintiff's flight was cancelled due to an 'engine defect in the turbine', which took eleven days, a dispatch of spare parts and specialist engineers to fix it. The ECJ held, however, that a cancellation of a flight due to a mechanical issue with an aircraft did not fall within the scope of the defence, "unless that problem [stemmed] from events which, by their nature or origin, [were] not inherent in the normal exercise of the activity of the air carrier concerned and [were] beyond its actual control".[186] By contrast, if a similar case involving a flight delay due to technical problems was brought under the Montreal Convention, this particular set of circumstances, where the air carrier did everything in its power to repair the aircraft, would probably fall within the scope of the 'all reasonable measures' defence.

The unfortunate ruling in *Wallentin-Hermann* was recently confirmed in *van der Lans v KLM*,[187] where the ECJ held that a technical issue that "occurred unexpectedly, which is not

[183] *Regulation 261, supra* note 11, art 5(3).
[184] *Sturgeon, supra* note 41, para 69.
[185] *Montreal Convention*, *supra* note 15, art 19; *Wallentin-Hermann v Alitalia*, C-549/07, [2008] ECR I-11061 [*Wallentin-Hermann*], para 33.
[186] *Wallentin-Hermann, supra* note 185, para 34.
[187] *van der Lans, supra* note 71.

attributable to poor maintenance and which was also not detected during routine maintenance checks, [did] not fall within the definition of 'extraordinary circumstances'".[188] As a result, it will be virtually impossible for the operating carrier to rely on Article 5(3) EU261 exemption in case of flight delay or cancellation caused by a mechanical problem with the aircraft. Despite the ECJ's well-intended objective to limit the circumstances in which the air carrier can escape its liability using the force majeure exception, the narrow interpretation of the defence inevitably leads to situations whereby aviation safety might be compromised. Faced with substantial economic losses in case of a flight delay or cancellation, particularly one that requires an overnight stay, a financially distressed air carrier may be incentivised to operate an aircraft without immediate repairs.

2.3.7 Third party actions (recourse against 3rd parties: indemnity or contribution)

Article 13 of Regulation 261 recognizes that the operating air carrier may be able to recover the cost of compliance with EU261 from a third party. Such an entity might be liable to the air carrier in part (action for contribution) or in full (action for indemnity), in accordance with the applicable national law. Although Article 13 does not establish a new cause of action against third parties, merely recognising that there might be such a right under applicable national law,[189] the onerous obligations imposed by the Regulation on air carriers may result in an increased number of third party actions.

Regulation 261 expressly refers to tour operators as an example of third parties against whom an air carrier might have a right of redress.[190] Other parties may include air navigation service providers (ANSPs);[191] aircraft manufacturers, where a technical defect with an aircraft caused

[188] *van der Lans, supra* note 71, para 49.
[189] *Regulation 261*, *supra* note 11, preamble recital 8.
[190] *Regulation 261*, *supra* note 11, art 13.
[191] Schubert, Francis P. "The Liability of Air Navigation Services For Air Traffic Delays and Flight Cancellations: The Impact of EC Regulation 261/04" (2017) 32 Ann Air & Sp L 65.

a long flight delay or cancellation;[192] or ground handling companies, for example where the contractor failed to provide de-icing services.[193]

2.3.8 Enforcement mechanisms – sanctions under Regulation 261

In addition to providing an individual right of action for compensation against the operating carrier, Regulation 261 also mandates enforcement of its provisions through 'effective, proportionate and dissuasive' sanctions imposed by the individual Member States.[194] Under Article 16 EU261 each State must designate a national enforcement body (NEB) to monitor general compliance with Regulation 261 with regard to flights operated to and from that Member State.[195] NEBs also handle complaints from passengers whose EU261 rights were infringed, although they are not required to take administrative enforcement action in response to each individual complaint.[196] Regulation 261 does not establish common standards with regard to the type or quantum of penalties, and, as a result, there are significant differences across jurisdictions. According to data collated in the 2014 Commission Staff Working Document, air carriers were subject to both civil and criminal penalties, with the average maximum penalty of EUR 43,617.[197] The disparities between Member States were most prominent from the comparison of the maximum pecuniary sanctions, with the highest fine ceilings in Belgium, up to EUR 24 million, compared to only EUR 563 in Romania.[198]

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[192] *van der Lans*, *supra* note 71, para 47.
[193] Ulrich Steppler, "Running out of de-icer: damages for non-performance", (9 February 2011), International Law Office, online: ILO <http://www.internationallawoffice.com/Newsletters/Aviation/Germany/Arnecke-Siebold-Rechtsanwlte/Running-out-of-de-icer-damages-for-non-performance?redir=1>.
[194] *Regulation 261, supra* note 11, art 16(1)-(3), preamble recitals 21-22. Francesco, Rossi dal Pozzo. *EU legal framework for safeguarding air passenger rights* (Cham, Switzerland: Springer, 2015) at 185.
[195] *Regulation 261, supra* note 11, art 16(1)
[196] *Ruijssenaars v Staatssecretaris van Infrastructuur en Milieu*, Joined Cases C-145/15 & C-146/15, EU:C:2016:187.
[197] EC, Commission Staff Working Document, Complaint handling and enforcement by Member States of the Air Passenger Rights Regulations, [2014] SWD(2014) 156 final, online: European Commission <http://ec.europa.eu/transport/themes/passengers/air/doc/swd(2014)156.pdf> [EC, "Complaint handling and enforcement"], at 34.
[198] EC, "Complaint handling and enforcement", *supra* note 197, at 34.

2.4 The Montreal Convention of 1999 and EU Regulation 261 – the clash between international and regional regimes

The analysis of the Warsaw System and the Montreal Convention in the first Chapter of this Thesis, revealed that the cardinal purpose of the private international air law conventional frameworks is to unify certain rules on air carrier liability in international transportation by air.[199] In order to ensure harmonised interpretation and application of these rules, and that the international scheme is not undermined by conflicting internal laws of the State parties, the Warsaw Convention in Article 24(1),[200] and the Montreal Convention in Article 29, as interpreted and applied by national courts, establish, in broad terms, the exclusive application of the Conventions, both with respect to the basis of claims, and available remedies.[201] In this context it may be useful to recall the particular wording of the relevant provisions. The germane part of Article 24 WC29 reads as follows: "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".[202] The corresponding provision of the MC99, Article 29, closely follows the language of its predecessor, and states, in the pertinent part, 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 limits of liability as are set out in this Convention".[203] Consequently, in cases where either the Warsaw System or the Montreal Convention apply, they establish a mandatory basis of claims and provide an exclusive remedy, pre-empting any local law that purports to govern the same subject matter.

The following section reviews selected provisions of Regulation 261, as construed by the European Court of Justice in its jurisprudence, in light of the exclusive nature of the

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[199] See Chapter 1, *above* 12.
[200] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 LNTS 11, 49 US Stat 3000, TS No 876, ICAO Doc 7838 (entered into force 13 February 1933) [*Warsaw Convention*], art 24(1).
[201] See Chapter 1, *above* 12.
[202] *Warsaw Convention*, *supra* note 200, art 24(1) (emphasis added).
[203] *Montreal Convention*, *supra* note 15, art 29.

international conventional law.[204] The first part examines the material scope of application of both the international and regional regimes to determine whether Regulation 261 provisions on denied boarding, cancellation and delay are compatible with the Warsaw System and the Montreal Convention. The second part focuses on remedies, in particular the right to compensation under Article 7 EU261, its relationship with the principle of restitution,[205] and liability ceilings set out in Article 22 of the MC99.[206] The last part discusses the issue of limitation of actions under Regulation 261, and compares it with the Warsaw and Montreal Conventions. Based on this analysis, the section concludes that there are some potentially serious inconsistencies between the international and regional regimes that undermine the exclusivity of the framework of air carrier liability established by the private international air law conventions.

2.4.1.1 Delay

Pursuant to Article 19 of both the Warsaw and Montreal Conventions, the air carrier liability for 'damage occasioned by delay' in international transportation of passengers is subject to the 'conditions and limits' specified in those treaties.[207] Although Article 19 of the Conventions expressly refers only to 'delay', some US courts have applied it in cases where, following a denial of boarding or flight cancellation, the air carrier offers an alternative transportation. Most of the national courts, however, have adopted a narrow, textual interpretation of the provision, holding that the scope of the Conventions does not extend to flight cancellations or denied

[204] Dempsey, Paul Stephen & Svante O. Johansson. "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage" (2010) 35:3 Air & Space L 207; Jr George N., Tompkins. "A Tribute to the Legacy of Or Wassenbergh The Flight of the 1999 Montreal Convention—On Course?—Stalled?—Encountering Turbulence?—The Course Ahead" (2015) 40:1 Air & Space L 83 at 91.
[205] *Montreal Convention*, *supra* note 15, preamble, recital 3.
[206] *Montreal Convention*, *supra* note 15, art 22(1).
[207] *Montreal Convention*, *supra* note 15, art 19; *Warsaw Convention*, *supra* note 200, art 19.

boarding.[208] Regulation 261, by contrast, covers all three situations, imposing liability on the operating air carrier in the event of denied boarding, cancellation and long flight delay.[209]

In *IATA & ELFAA v Department for Transport* (*IATA & ELFAA*),[210] the International Air Transport Association and European Low Fares Airline Association brought a challenge to the validity of Regulation 261, alleging that it was in conflict with the 1999 Montreal Convention.[211] The plaintiffs argued that Article 6 of Regulation 261, specifying air carrier's obligations regarding assistance to passengers in case of long flight delays, was invalid, because it was legally incompatible with Articles 19, 22 and 29 of the Montreal Convention, on delay, limitation of liability and exclusivity of the Convention. In its judgment, the European Court of Justice held that there was no conflict between Article 6 EU261 and relevant provisions of the MC99, because the scope of application of the two regimes was different. As John Bafour astutely observed, the Court's decision in *IATA & ELFAA* is based on a "fundamental fallacy", reinforced by the subsequent ECJ jurisprudence, which further "exacerbated the tensions between the judgment and the Montreal Convention".[212]

First, the ECJ drew a highly questionable distinction between two types of damage that may be caused by a long delay: (i) "damage that is almost identical for every passenger," which requires standardized and immediate assistance or care, and (ii) damage where compensation is granted on a case-by-case, i.e. individual basis.[213] The court held that the Montreal Convention was applicable only to the second type of damage,[214] and did not pre-empt a regulatory action by the EU addressing the first type.[215] Instead, the ECJ in *IATA & ELFAA*

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[208] See discussion in Chapter 1, *above* 12.
[209] *Regulation 261*, *supra* note 11, art 1.
[210] *IATA & ELFAA*, *supra* note 37.
[211] *IATA & ELFAA*, *supra* note 37, para 20.
[212] John Balfour, "Luxembourg v Montreal: Time for The Hague to Intervene" in Michal, Bobek & Jeremias Prassl, eds. *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016), at 65-66.
[213] *IATA & ELFAA*, *supra* note 37, para 43.
[214] *IATA & ELFAA*, *supra* note 37, para 44.
[215] *IATA & ELFAA*, *supra* note 37, para 45.

found that, in addition to the standardised damages recoverable under Regulation 261, passengers were also entitled to bring a further claim, 'should the same delay also cause them damage conferring entitlement to compensation' under Article 19 MC99.[216] Second, the court asserted that Regulation 261 and the Montreal Convention had different temporal application. The ECJ took an untenable position that "the system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention".[217] Thus, the court concluded that the 'standardised and immediate' compensatory measures under Article 6 EU261 were consistent with the international regime on air carrier liability under the MC99.

Referring to the "standardised and immediate assistance or care" in case of damage that is identical for all passengers, covered by Regulation 261, but not the Montreal Convention, the ECJ gave examples of assistance required by Article 9 paragraphs (1) and (2), namely "refreshments, meals and accommodation and (…) telephone calls".[218] The court conveniently ignored the air carrier's obligation to reimburse passengers in accordance with Article 8(1)(a) EU261 in case of flight delays of five hours or more,[219] which usually encompasses different amount of damages, depending on the price of the ticket that each passenger paid.[220] Moreover, unlike the provision of meals, refreshments, accommodation, and other assistance, the reimbursement of the ticket price is likely to take place at a 'later stage', perhaps even at the same time as the payment of compensation under Article 19 of the Montreal Convention.

It is also important to note that the main point of contention in *IATA & ELFAA* case was the delay provision of Regulation 261, Article 6. Neither Article 4 on 'denied boarding', nor Article 5 on 'cancellation' were contested as being pre-empted by the MC99 exclusivity clause.[221]

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[216] *IATA & ELFAA*, *supra* note 37, para 47.
[217] *IATA & ELFAA*, *supra* note 37, para 46. See also *Nelson*, *supra* note 40, para 57.
[218] *IATA & ELFAA*, *supra* note 37, para 43.
[219] Balfour, "Luxembourg v Montreal: Time for The Hague to Intervene", supra note 212, at 67.
[220] *Regulation 261*, *supra* note 11, art 8(1)(a).
[221] *Montreal Convention*, *supra* note 15, art 29.

The ECJ decision in *IATA & ELFAA* attracted a lot of harsh criticism, both from the academic commentators, pointing out that the ECJ twisted the international law rules in order to ensure the validity of Regulation 261,[222] and from Member States' national courts, confused by the ECJ's questionable reasoning. The uncertainty regarding the relationship between Regulation 261 with the Montreal Convention, and compatibility of their provisions, led to two joined references for a preliminary ruling in 2010, one form a British, and the other from a German national court. The ECJ in the *Nelson* case considered whether provisions for standardised compensation under Regulation 261, both in case of delay[223] and cancellation,[224] were valid in light of the second sentence of Article 29 MC99, which prohibits recovery of non-compensatory damages. [225] Referring to the *IATA & ELFAA* case, the court noted that even though the previous decision only addressed the validity of care and assistance measures, it did not exclude the possibility that other measures, including the Article 7 EU261 right to compensation, were also outside the ambit of private international air law Conventions on air carrier liability.[226] The court drew an analogy between 'loss of time,' which according to *Sturgeon* constitutes an 'inconvenience', and 'inconveniences' described in the *IATA & ELFAA* case. Consequently, it concluded that 'loss of time' did not constitute a 'damage occasioned by delay' under Article 19 MC99,[227] and, as such, the air carrier's obligation to compensate passengers for flight delays was compatible with Article 29 MC99.[228]

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[222] See e.g. Kinga, Arnold and Pablo Mendes de Leon. "Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!" (2010) 35:2 Air & Space L 91; Jorn J., Wegter, "The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention" (2006) 31 Air & Space L 133; Dempsey & Johansson, "Montreal v Brussels", *supra* note 204; Balfour, "Luxembourg v Montreal: Time for The Hague to Intervene", *supra* note 212.
[223] *Regulation 261*, *supra* note 11, art 6, as interpreted by the ECJ in *Sturgeon*, and Article 7.
[224] *Regulation 261*, *supra* note 11, arts 5 and 7.
[225] *Nelson*, *supra* note 40.
[226] *Nelson*, *supra* note 40, para 47.
[227] *Nelson*, *supra* note 40, para 49
[228] *Nelson*, *supra* note 40, para 55.

In *Moré v KLM*, the court confirmed the previous decisions in *IATA & ELFAA* and *Nelson*, stating that "Regulation No 261/2004 establishes a system to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay and cancellations to flights cause, which operates at an earlier stage than the Montreal Convention and, consequently, is independent of the system stemming from that convention".[229]

Recalling the discussion in Chapter one above concerning the nature of 'delay', it is difficult to comprehend how 'loss of time' is not embraced within the concept of damage occasioned by an untimely performance of the contract of carriage. Moreover, if 'loss of time' was in fact an 'inconvenience' distinct from damage caused by delay, its recovery would be precluded by Article 29 of the Montreal Convention, precisely because it did not satisfy the conditions necessary to establish air carrier's liability under exclusive private international air law regime.

2.4.1.2 Remedies

The overlap and the resulting conflict in the material scope of application of the international conventional law and Regulation 261 is further exacerbated by the disparities in the conditions and limits of the air carrier liability under each regime. The third recital of the preamble of the Montreal Convention emphasizes "the need for equitable compensation based on the principle of restitution",[230] while the fifth recital further reiterates the instrument's objective of "achieving an equitable balance of interests" between the air carrier and its passengers. The MC99 establishes presumptive liability of the air carrier for 'damage occasioned by delay',[231] but the compensation award is limited to actual damages, up to a maximum of 4,694 SDRs per passenger (approximately 6,503 USD, or 5,905 EUR).[232] Article 29 unambiguously prohibits the recovery of 'punitive, exemplary or any other non-compensatory damages' in order to

[229] *Moré v KLM*, C-139/11, EU:C:2012:741 [*Moré*], para 32.
[230] *Montreal Convention*, *supra* note 15, preamble, recital 3.
[231] *Montreal Convention*, *supra* note 15, art 19.
[232] *Montreal Convention*, *supra* note 15, art 22(1); See Chapter 1, *above* 12.

prevent an unjust enrichment of the plaintiff,[233] in keeping with the principle of restitution.[234] In contrast, Regulation 261 establishes a flat-rate compensation scheme that requires the operating carrier to make a 'standardised and lump-sum payment'[235] whenever a passenger is involuntarily denied boarding, their flight is cancelled without an appropriate notice or they experience a delay of more than three hours in arriving at their destination. The level of monetary compensation is fixed in Article 7 EU261, and, contrary to the principle of restitution, the amount is no way related to the airfare, or the actual damage suffered by the passenger.[236] In some cases, particularly with respect to flights operated by low cost carriers, offering extremely cheap plane tickets, the compensation payable under EU261 may constitute punitive or exemplary damages prohibited under international conventional regime. Depending on a particular set of circumstances, remedies under Regulation 261 may also include a refund, re-routing or rebooking according to Article 8 EU261; as well as appropriate care and assistance in line with Article 9 EU261, the cost of which might significantly exceed the liability ceilings laid down in Article 22 of the Montreal Convention.[237]

2.4.1.3 Limitation of actions

Unlike the instruments of the Warsaw System or the 1999 Montreal Convention,[238] Regulation 261 does not contain a provision addressing the limitation of actions.[239] The issue was considered by the ECJ in *Moré v KLM*,[240] a flight cancellation case. Following its previous decision in *Nelson*,[241] the ECJ reasoned that since Regulation 261 compensation measures fell outside the ambit of the Warsaw and Montreal Conventions, the two-year limitation period

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[233] Paul Stephen, Dempsey & Michael Milde. *International Air Carrier Liability: The Montreal Convention of 1999* (Montréal, QC: McGill University Centre for Research in Air & Space Law, 2005), at 62.
[234] *Montreal Convention*, *supra* note 15, art 29.
[235] *Rehder v Air Baltic*, C-204/08, [2009] ECR I-06073 [*Rehder*], para 27.
[236] *Regulation 261*, *supra* note 11, arts 7.
[237] *McDonagh, supra* note 175, paras 40, 42-43.
[238] *Warsaw Convention*, *supra* note 200, art 29(2); *Montreal Convention*, *supra* note 15, art 35.
[239] *Moré v KLM*, C-139/11, EU:C:2012:741, paras 14, 24.
[240] *Moré, supra* note 239.
[241] *Nelson*, *supra* note 40, para 55.

prescribed by those instruments did not apply either.[242] The court further emphasized that Regulation 261 is a self-standing system, and, thus, its provisions must be interpreted independently of the rules laid down in the international conventional law on air carrier liability.[243] Since there was no specific EU261 provision on the period of prescription, the ECJ concluded that the time limit for bringing an action under Regulation 261 was determined by *lex fori*, the domestic procedural rules of each Member State.[244] In *Moré*, for example, the relevant limitation period under the Spanish law was ten years.[245]

The EU Member States' national courts have since applied the ECJ reasoning in *Moré v KLM* to other flight irregularities covered by Regulation 261. In *Dawson v Thomson Airways Ltd*.,[246] the plaintiff brought a claim against the operating carrier for compensation under Article 7 EU261 almost six years after his flight from Gatwick, UK to the Dominican Republic was delayed by more than six hours due to crew shortages.[247] In response, the defendant argued that under English law the plaintiff's action was time-barred by virtue of the two-year limitation period under Article 35 of the Montreal Convention, which was applicable to all claims involving air carrier liability for delay in international transportation of passengers.[248] The Cambridge County Court (Yelton J) ruled that the applicable limitation period was six years under the domestic statute of limitations,[249] rather than the two-year time limit specified in the Montreal Convention, and, consequently, awarded compensation to the plaintiff.[250] The UK Court of Appeal upheld the decision of the trial court.[251] Delivering a unanimous judgment, Lord Justice Moore-Bick concluded that in accordance with the binding ECJ rulings in *IATA*

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[242] *Nelson*, *supra* note 40, paras 28-29; *Montreal Convention*, *supra* note 15, art 35; *Warsaw Convention*, *supra* note 200, art 29.
[243] *Moré, supra* note 239, para 32.
[244] *Moré, supra* note 239, para 25-26.
[245] *Moré, supra* note 239, para 15.
[246] *Dawson v Thomson Airways Ltd.,* [2014] EWCA Civ 845 [*Dawson*].
[247] *Dawson*, *supra* note 246, para 2.
[248] *Dawson*, *supra* note 246, para 3; *Montreal Convention*, *supra* note 15, art 35.
[249] *Limitation Act 1980* (UK), c 58, Pt I, s 9.
[250] *Dawson*, *supra* note 246, para 17.
[251] *Dawson*, *supra* note 246, para 26.

& ELFAA,[252] *Sturgeon*,[253] *Nelson*[254] and *Moré*,[255] and considering the court's reasoning in those cases,[256] the operating carrier's liability under Article 7 EU261 had to be construed and applied separately from the Montreal Convention framework, including the rules on limitation of actions.[257] Therefore, the trial court was correct in finding that the plaintiff's EU261 compensation claim was timely.

In handing down the decision, Moore-Bick LJ critically observed that as a result of the ECJ jurisprudence, "the limitation periods applicable to claims under Article 19 of the Montreal Convention and claims under Article 7 of Regulation No 261/2004 will frequently differ".[258] The period of prescription for claims that stem from the same flight irregularity will vary not only depending on the basis of action, namely whether the lawsuit is brought pursuant to EU261 or MC99, but also based on the jurisdiction where the EU261 action is commenced. For example, if a flight from Paris, France to London, UK experiences a four-hour delay on arrival at Heathrow Airport, the operating carrier may face a potential liability exposure to passenger claims with four different time limits. First, all actions for compensation under Article 19 of the Montreal Convention must be brought within two years.[259] Moreover, following the ECJ decision in *Rehder v Air Baltic*,[260] the plaintiff may choose to pursue their EU261 claim for compensation either before the court of the place of departure or place of arrival. Therefore, in this particular fact pattern, an EU261 compensation claim brought in France will be subject to a five-year time limit,[261] but if the action is commenced in the UK, it

[252] *IATA & ELFAA*, *supra* note 37.
[253] *Sturgeon, supra* note 41.
[254] *Nelson*, *supra* note 40.
[255] *Moré, supra* note 239.
[256] *Dawson*, *supra* note 246, para 23.
[257] *Dawson*, *supra* note 246, para 24.
[258] *Dawson*, *supra* note 246, para 25.
[259] *Montreal Convention*, *supra* note 15, art 35.
[260] *Rehder, supra* note 235.
[261] Art 2224 C civ; See also Fabien Le Bot. "France" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016) at 163.

will be timely for one more year, because the applicable limitation period will be six years.[262] Finally, pursuant to Article 4(1) of Regulation (EC) No 1215/2012 (Brussels I),[263] an EU261 compensation claim may also be filed in the state of the air carrier's domicile, where it may be governed by yet another period of prescription.

The ECJ's decision in *Moré v KLM* is based on the same erroneous premise as the court's previous case law, which held that the Montreal Convention of 1999 and Regulation 261 create two distinct, yet concurrently applicable frameworks governing the same aspect of air carrier liability, namely damage occasioned by delay in international transportation of passengers. Pursuant to Article 19 MC99, read in conjunction with Article 29 MC99, all claims for damages due to flight delays are subject to the conditions and limits laid down in the Montreal Convention. Any action under the Convention, including a flight delay compensation claim, is extinguished after two years. Asserting that the prescription period must be determined by *lex fori*, the law of the court seized of the dispute, the ECJ ignored the plain and unambiguous wording of Article 35 MC99.

The court's interpretation is not only incompatible with the international conventional law, but also frustrates the expressly stated objective of Regulation 261 itself, namely "to ensure that air carriers operate under harmonised conditions".[264] The extent of the operating carrier's exposure to liability under EU261 substantially differs depending on the Member States' domestic statute of limitations. It may lead to situations whereby passengers, who may be aware of the procedural rules, will engage in forum shopping to bring their time-barred claim in another jurisdiction that has more generous limitation of actions provisions.

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[262] *Limitation Act 1980* (UK), c 58, Pt I, s 9.
[263] EC, *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2012] OJ L 351/1, art 4(1).
[264] *Regulation 261*, *supra* note 11, recital 4.

2.5 Conclusion

This Chapter focused on the EU Regulation 261 which is an example of regional regime imposing liability on the carrier and providing corresponding passenger rights in cases of long flight delays, cancellations and denied boarding. Because the stated objectives of the Regulation are different from the unification purpose of both Warsaw and Montreal Conventions, the European Union legislation adopted a divergent approach to air carrier liability. The objective of the EU261 is primarily to provide a high level of protection to air passengers, while also establishing a harmonised framework of rules for air carriers.[265] Accordingly, in comparison to the private international air law Conventions, which strive for 'an equitable balance of interests', Regulation 261 it is much more consumer-friendly. It imposes a number of stringent obligations on the air carriers, and establishes a much more detailed regime in comparison to the international framework. In accordance with its preamble, EU261 is very protective of the rights and entitlements of the passengers, but not without serious detriments to the airline industry. For example, it provides for a virtually unlimited air carrier liability to offer care and assistance, applicable even in cases involving extraordinary circumstances.

The international conventional law unifies only certain rules on air carrier liability. Article 19 of both the Warsaw and Montreal Conventions covers 'damage caused by the delay'. While some courts in the US have extended its application to cases involving cancellation and denial of boarding where the air carrier provides alternative transportation, most jurisdictions adopt a view that both cancellation and denied boarding constitute a total non-performance of the contract of carriage, and as such are outside the ambit of the international Conventions. A regional passenger rights regime, such as EU261, can help fill a lacuna, by regulating areas that are not expressly provided for in the Conventions, such as flight cancellations or denial of

[265] *Regulation 261*, *supra* note 11, recitals 1 and 4.

boarding. A comprehensive framework of consumer protection established by the Regulation has served as a model for legislation in other jurisdictions such as Turkey, India or Nigeria.[266] The system of air carrier liability established by private international air law conventions was not designed to provide immediate assistance and care to passengers, which is particularly important in cases involving flight irregularities. Hence, regional regimes, such as Regulation 261 have an important role to play. However, both international and regional regimes should able to mutually coexist and complement each other. Regional regimes must be compatible with the exclusive international framework, and must not subject the air carriers to conflicting obligations. The pending revision process of Regulation 261 should be used as an opportunity to address some of the issues identified in the last section of this Chapter to ensure compatibility of the two frameworks.

[266] Brian Havel & John Q Mulligan. "Extraterritorial Application: Exporting Consumer Protection Standards" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016) 239 at 252-253, 255.

Chapter 3 United States of America

3.1 Introduction

Congress did not pass a comprehensive passengers' rights bill, akin to Regulation 261.[1] Instead, different parts of US federal legislation, and regulations promulgated by the US Department of Transportation (DOT) establish air carrier liability and corresponding passenger rights.

Before 1985, the area of aviation consumer protection was regulated by the Civil Aeronautics Board (CAB).[2] The Civil Aeronautics Board Sunset Act of 1984 abolished the CAB,[3] and transferred a substantial part of the Board's regulatory and enforcement functions, including those related to consumer protection, to the DOT Office of the Secretary of Transportation.[4] The DOT's authority with regard to economic regulation of aviation is based on the Federal Aviation Act of 1958,[5] which was recodified in 1994 by Congress in Title 49 of the US Code (USC).[6]

In December 2009, the DOT promulgated a final rule on Enhancing Airline Passenger Protections (EAPP#1).[7] It was a direct regulatory response to several extremely lengthy tarmac delays,[8] one of which happened on 14 February 2007, and quickly became infamously known as the 'Valentine's Day Blizzard' delay. Passengers on several planes were stranded in the

[1] EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, [2004] OJ L 46/1 [*Regulation 261*].
[2] Paul Stephen, Dempsey & William E. Thoms. *Law and Economic Regulation in Transportation*. (Westport, Conn: Quorum Books, 1986) [Dempsey & Thoms, "Law and Economic Regulation"], at 273.
[3] *Civil Aeronautics Board Sunset Act of 1984*, Pub L No 98-443, 98 Stat 1704.
[4] Paul Stephen, Dempsey & Laurence E. Gesell. *Airline Management: Strategies for the 21st Century* (Chandler, AZ: Coast Aire Publishing, 2012), at 264; Dempsey & Thoms, "Law and Economic Regulation", *supra* note 2, at 273.
[5] *Federal Aviation Act of 1958*, Pub L No 85-726, 72 Stat 731 (codified as amended at 49 USC s 1300 *et seq*.).
[6] *Act of July 5, 1994,* Pub L No 103-272, 108 Stat 761.
[7] *Enhancing Airline Passenger Protections*, 74 Fed Reg 68983 (2009) (codified at 14 CFR § 234, 253, 259, and 399).
[8] Jennifer, Henry & Mary Gardner. "The New Tarmac Delay Rule and the Volcanic Ash Cloud Over European Airspace: One Year Later" (2011) 76 J Air L & Com 633 [Henry, "New Tarmac Delay Rule"], at 635.

middle of the tarmac at New York City's John F. Kennedy International Airport, unable to deplane for as long as seven hours, because the aircraft could not to return to the gates due to snow.[9] The first rule was amended in April 2011 by the Second Final Rule on Enhancing Airline Passenger Protection (EAPP#2),[10] which came into force on January 24, 2012.

The tarmac delay and oversales rules promulgated by the DOT are examples of a domestic regulatory regime that applies simultaneously with international rules on air carrier liability in the transport of passengers.

Air carrier liability for delay on international flights, as well as the extent and amount of compensation, is covered by the rules laid down in the Montreal Convention of 1999.[11] Some one-way itineraries may be governed by the Warsaw Convention of 1929,[12] as amended. The United States is a party to the original Warsaw Convention of 1929, The Hague Protocol of 1955, the Montreal Protocol No. 4 of 1975, and the Montreal Convention of 1999.[13] There is no separate regime, or federal law governing flight cancellations.

This Chapter reviews the abovementioned rules on denied boarding compensation, tarmac delays, as well as cancellations and flight delays in general. It analyses the relationship between the US domestic law and private international air law conventions on air carrier liability in international transportation of passengers. It concludes that while the US rules are compatible with both Warsaw and Montreal Conventions' framework, there are still certain areas, notably flight cancellation, where air carriers are not subject to a uniform set of rules defining their

[9] MIT ICAT, "Tarmac Delay Policies: A Passenger-Centric Analysis", online: MIT <https://dspace.mit.edu/bitstream/handle/1721.1/100800/ICAT-2016-01.pdf?sequence=1> at 3; Henry, "New Tarmac Delay Rule", *supra* note 8, at 76.

[10] *Enhancing Airline Passenger Protections*, 76 Fed Reg 23110 (2011) (codified at 14 CFR § 244, 250, 253, 259, and 399) [*EAPP#2*].

[11] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, S Treaty Doc No 106-45 (2000), ICAO Doc 9740 (entered into force 4 November 2003) [*Montreal Convention*],

[12] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 LNTS 11, 49 US Stat 3000, TS No 876, ICAO Doc 7838 (entered into force 13 February 1933) [Warsaw Convention].

[13] ICAO, "Status of the United States with Regard to International Air Law Instruments", online: ICAO <http://icao.int/secretariat/legal/Status%20of%20individual%20States/united_states_en.pdf>.

liability, and passengers are forced to rely on the provisions of the contract of carriage and applicable contract law provisions for remedies.

3.2 Oversales and denied boarding compensation regulations

The US federal law does not prohibit overbooking per se, and an air carrier can issue more tickets for a flight than there are available seats. Overselling a flight increases load factors, minimises the economic impact of 'no-show' passengers for the air carriers, and allows them to offer competitive prices. It also benefits the passengers who can change and cancel their reservations, book a flight of their choice, get a refund and enjoy reasonably priced air travel. It may, however, result in situations where passengers are denied boarding, despite having a confirmed reservation for the flight. According to the Bureau of Transportation Statistics (BTS), out of almost 603 million enplaned passengers in 2014, 450 thousand, or 0.08% of all passengers, were denied boarding, and only 55 thousand of those were situations of involuntary denial of boarding.[14]

Recognising the economic realities of the aviation industry,[15] the DOT adopts and enforces regulations to oversee what would otherwise be considered an 'an unfair or deceptive practice or an unfair method of competition' under 49 USC Section 41712.[16] The rules ensure that air carriers follow fair and non-discriminatory procedures before denying boarding to passengers with confirmed reservations, and tender adequate compensation for involuntary denied boarding (IDB).

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[14] See United States Department of Transportation, Office of the Assistant Secretary for Research and Technology, Bureau of Transportation Statistics "National Transportation Statistics", online: US DOT <http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_64.html>. Data based on the Air Travel Consumer Reports (annual issues published every year in February), US DOT, Office of Aviation Enforcement and Proceedings, Aviation Consumer Protection Division, see United States Department of Transportation, "Air Travel Consumer Reports", online: Transportation.gov <https://www.transportation.gov/airconsumer/air-travel-consumer-reports>.

[15] US, Department of Transportation, Office of the Secretary, *Consent Order* (Docket OST 2013-0004) (Washington, DC: Department of Transportation, 2013), online: Transportation.gov <https://www.transportation.gov/sites/dot.gov/files/docs/eo_2013-6-18.pdf>.

[16] 49 USC § 41712.

The US Civil Aeronautics Board (CAB) adopted the original oversales and denied boarding rules in 1960's.[17] It was the first denied boarding compensation scheme ever established.[18] The rationale behind regulatory action was to "reduce the number of passengers involuntarily denied boarding to the smallest practicable number without prohibiting deliberate overbooking or interfering unnecessarily with the carriers' reservations practices".[19] Following the sunset of the CAB in 1985, the rules have been revised and enforced by the DOT.[20]

Denial of boarding due to overbooking is regulated pursuant to the US Department of Transportation (DOT) Oversales and Denied Boarding Compensation rule, codified in Title 14 of the Code of Federal Regulations (CFR) Part 250.[21] As stated in 14 CFR § 250.2a, the air carrier must "ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily".[22] The regulations apply to all nonstop flight segments (domestic and international) originating at a US airport operated by an air carrier, whether US or foreign, using an aircraft with designed passenger seat configuration of 30 or more seats.[23] In order to be eligible for denied boarding compensation the passenger must have a 'confirmed reserved space' on the flight in question,[24] and observe the terms and conditions of the contract of carriage, particularly regarding ticketing, check-in, reconfirmation and acceptability for transportation.[25] Thus, similarly to the denied boarding provisions under Regulation 261 in the EU, under US rules, the air carrier may validly refuse to transport a

[17] *Oversales and Denied Boarding Compensation*, 72 Fed Reg 65237 (2007) (to be codified 14 CFR § 250); Paul S., Dempsey. *Aviation Liability Law*, 2d ed (Markham, Ontario: LexisNexis Canada, 2013), at 636; Paul Stephen, Dempsey & Svante O. Johansson. "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage" (2010) 35:3 Air & Space L 207 [Dempsey & Johansson, "Montreal v Brussels"], at 215.

[18] Peter P. C., Haanappel. "The New EU Denied Boarding Compensation Regulation of 2004." (2005) 54:1 ZLW 22 at 29.

[19] *Oversales and Denied Boarding Compensation*, 73 Fed Reg 21026 (2008) (codified at 14 CFR § 250); Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 215.

[21] 14 CFR § 250.

[22] 14 CFR § 250.2a.

[23] 14 CFR § 250.2.

[24] 14 CFR § 250.1.

[25] 14 CFR § 250.6.

passenger who does not present themselves for check-in in a timely manner, is sick, unruly or visibly intoxicated,[26] or does not have a valid travel document or a visa.

In the event of overbooking, similarly to Article 4(1) EU261, the air carrier must first solicit volunteers to willingly surrender their seats in return for any compensation offered by the air carrier, for example travel vouchers.[27] The carrier must inform the volunteer of all material restrictions imposed on any free or reduced rate ticket offered as compensation.[28]

Where an insufficient number of passengers willingly agrees to relinquish their reservations, the air carrier may involuntarily deny boarding to other passengers in line with its boarding priority rules. The air carrier's policy and factors to be taken into account when deciding which passengers may be subject to IDB must be non-discriminatory.[29]

Denied boarding compensation (DBC) amounts for IDB are specified in 14 CFR § 250.5, and, unlike in the EU, are calculated in proportion to the ticket price and the extent of delay at the first stopping place, whether it is a stopover or passenger's final destination.[30] Both in case of domestic and international flights, the air carrier is not required to provide DBC if it is able to offer a substitute comparable transportation to carry the passenger to their destination with a delay at arrival of no more than one hour after the originally scheduled time.[31] If the arrival delay is between one and two hours for domestic flights, or one and four hours for international flights, the air carrier must tender compensation in the amount of 200% of the one-way ticket to the first stopover or the passenger's ultimate destination, but not exceeding USD 675 (approximately EUR 609).[32] Where the delay is longer than two and four hours for domestic

[26] Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 216; Paul Stephen, Dempsey & Laurence E. Gesell. *Public Policy and the Regulation of Commercial Aviation* (Chandler, AZ: Coast Aire Publications, 2013) [Dempsey & Gesell, "Public Policy"], at 592.
[27] 14 CFR § 250.2b(a).
[28] 14 CFR § 250.2b(c)
[29] 14 CFR § 250.3
[30] 14 CFR § 250.5(a)–(b).
[31] 14 CFR § 250.5(a)(1) and 250.5(b)(1) and 250.6(d).
[32] 14 CFR § 250.5(a)(2) and 250.5(b)(2).

and international carriage respectively, the DBC doubles to 400% of the one-way fare, up to a maximum of USD 1,350 (approximately EUR 1,218).[33]

The rules contain provisions similar to the 'escalator clause' in Article 24(1) of the Montreal Convention, which mandates a review of the maximum DBC ceilings every two years. The last review took place in 2015, and increased the limits from USD 650 and USD 1,300 to USD 675 and USD 1350 respectively.[34]

Similarly to the air carrier liability rules under the Warsaw, and Montreal Conventions, the air carrier is exempted from the obligation to provide denied boarding compensation to passengers where denial of boarding resulted from 'weight/balance restrictions' or a change of gauge due to 'operational or safety reasons'.[35] Under Regulation 261, by contrast, the air carrier would only be allowed to invoke 'safety reasons' as an exception; 'operational reasons', such as a mechanical failure, would not permit the carrier to escape liability.[36]

The DOT oversales and denied boarding compensation rules are without prejudice to plaintiff's pre-existing right to bring a claim for being 'bumped' from a flight either under applicable international law or national law provisions.[37] While accepting compensation offered by the carrier usually extinguishes any further claims, the passenger can reject the carrier's offer, and instead bring an action in court or seek recovery for breach of contract 'in some other manner'.[38] In case of denial of boarding on all domestic flights, or an international flight where the carrier does not provide substitute transportation, the passenger may be able to bring a

[33] 14 CFR § 250.5(a)(3) and 250.5(b)(3).
[34] *Revisions to Denied Boarding Compensation, Domestic Baggage Liability Limits, and Civil Penalty Amounts*, 80 Fed Reg 30144 (2015) (codified at 14 CFR § 250, 254 and 383).
[35] 14 CFR § 250.6.
[36] EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, [2004] OJ L 46/1 [*Regulation 261*], art 2(j).
[37] 14 CFR § 250.9(b), 'Passenger's Options'; Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 216.
[38] 14 CFR § 250.9(b), 'Passenger's Options'; *Weiss v El Al Israel Airlines Ltd*., 433 F Supp (2d) 361, 370 (SD NY 2006), aff'd 309 Fed Appx 483 (2d Cir 2009) [*Weiss*].

breach of contract claim under applicable state contract law.[39] In light of the US jurisprudence interpreting Article 19 of both the Warsaw and Montreal Conventions,[40] where denied boarding occurs on an international flight, and the air carrier offers alternative transportation, the passenger could file a claim for compensation under applicable international conventional law. In such a case, however, the passenger would have to prove actual damage.[41] This provision is particularly relevant in cases where the damage resulting from the denial of boarding exceeds compensation amounts specified in the regulations.[42]

Failure to comply with 14 CFR § 250 also constitutes "an unfair and deceptive practice and unfair method of competition," and is a violation of 49 USC § 41712, subject to the DOT enforcement action, which may result in civil penalties, and hefty fines.[43]

3.2.1 Relationship with the 1999 Montreal Convention, and EU Regulation 261

In 1960s, when the CAB promulgated the original rules on oversales and denied boarding compensation, the US was already a State party to the original Warsaw Convention and a signatory to the Hague Protocol.[44] Under the narrow construction of Article 19 of the Warsaw Convention, and now also Article 19 of the Montreal Convention, denial of boarding constitutes non-performance of the contract of carriage, rather than 'delay'.[45] For this reason, it falls outside the scope of the exclusive international conventional regime, and is governed by applicable domestic law. According to this interpretation, the US oversales and denied

[39] Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 216; Cotter, Christopher E. "Recent Case Law Addressing Three Contentious Issues in the Montreal Convention" (2012) 24:4 Air & Space Lawyer 9.
[40] See Chapter 1, *above* 12.
[41] Montreal Convention, *supra* note 11, art 19; Warsaw Convention, *supra* note 12, art 19; See also Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 216.
[42] *Stone v Cont'l Airlines*, 10 Misc (3d) 811, 804 NY S (2d) 652, 655 (NY Civ Ct 2005).
[43] United States Department of Transportation, "Aviation Enforcement Orders", online: Transportation.gov <https://www.transportation.gov/airconsumer/enforcement-orders>.
[44] ICAO, "Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw On 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague On 28 September 1955", online: ICAO <http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf >.
[45] See discussion in Chapter 1, *above* 12.

boarding compensation rules do not seem to be in conflict with the international conventional rules on air carrier liability.

In light of the broad meaning given by some of the courts in the US to the delay provisions in international treaties,[46] however, there seems to be a conflict between DOT oversales rules and the Warsaw and Montreal Conventions in cases where a passenger on a round trip between the US and EU is denied boarding due to overbooking, but the carrier offers an alternative transportation that is delayed more than one hour on arrival at the first stopover or final destination, depending on the passenger's itinerary. Although the US is only a signatory, and not a State party, to the 1969 Vienna Convention on the Law of Treaties,[47] it is nevertheless bound by the customary international law principles codified in that Convention.[48] Pursuant to the fundamental principle of *pacta sunt servanda*,[49] and its corollary rule that local law may not be used as a justification for failure to carry out an obligation under a treaty,[50] thus the US is bound to perform its obligations in good faith. If denied boarding due to overbooking in fact constitutes a 'delay' under Article 19 of the Conventions, any domestic law that gives the passenger a legal basis to bring a claim for compensation is pre-empted by the 'however founded' language in Article 24 WC29, and Article 29 of the MC99 respectively.

Similar to US tarmac delay rules,[51] the CFR provisions on oversales do not create a private right of action that would allow passengers to bring a claim for damages directly against the

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[46] See discussion in Chapter 1, *above* 12.

[47] The US signed the VCLT on 24 April 1970, but never ratified the Convention. See United States Department of State, "Vienna Convention on the Law of Treaties", online: US Department of State <http://www.state.gov/s/l/treaty/faqs/70139.htm> [US, Vienna Convention].

[48] The official website of the US Department of State expressly states that "the United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties". See US, Vienna Convention, *supra* note 47.

[49] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [*VCLT*], art 26. See also Olivier, Corten & Pierre Klein. *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), at 661-663.

[50] *VCLT*, *supra* note 49, art 27.

[51] Thomas, Dickerson. "Travel Law: Flight Delays: Stop Making the Passengers Pay: US DOT Should Adopt EU 261" (12 March 2014), online: NY Courts.gov <http://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/TRAVEL_LAW_flight_delays.pdf> [Dickerson, "Flight Delays"].

carrier.[52] The issue was examined by the US District Court in *Weiss v El Al Israel Airlines, Ltd.*[53] The court held that passengers, who were denied boarding due to air carrier overbooking a flight, did not have a federal right of action under DOT oversales and denied boarding compensation regulations. Having reviewed prior case law to determine whether the statute, under which DOT oversales rule were promulgated, demonstrated Congress's "intent to create not just a private right but also a private remedy",[54] the *Weiss* court concluded that "the sole enforcement mechanism intended for a violation of the regulations at issue (and the FAA in general)[55] is a civil action commenced by the Secretary of Transportation or Attorney General".[56] While denied boarding compensation under DOT rules must be paid directly to the passenger, the regulation does create a direct enforcement mechanism for the plaintiffs. A right to bring a claim for breach of contract against the air carrier pursuant to 14 CFR § 250.9(b) is based on the pre-existing cause of action, either under international conventional law, or state contract law provisions, depending on whether the flight is international or domestic. It is separate from the DOT regulations. Consequently, the US oversales and denied boarding compensation rules do not offend the exclusivity of the Warsaw and Montreal Conventions.

There is an overlap between the US denied boarding rules and EU Regulation 261 regarding denied boarding compensation on flights from the US to the EU operated by a Community carrier. Under 14 CFR § 250.2 US regulations apply to foreign air carriers, including EU carriers, operating a passenger service from the US.[57] Pursuant to Article 3(1)(b) EU261, the European Union rules on denied boarding are applicable to passengers departing from an airport in a third country, such as the US, on a flight performed by an EU carrier.[58]

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[52] *Weiss, supra* note 38; Dickerson, "Flight Delays", *supra* note 51.
[53] *Weiss, supra* note 38.
[54] *Alexander v Sandoval,* 532 US 275, 286, 121 S Ct 1511, 1519, 149 L Ed (2d) 517 (2001).
[55] *Federal Aviation Act of 1958*, Pub L No 85-726, 72 Stat 731 (codified as amended at 49 USC § 1300 *et seq*.).
[56] *Weiss, supra* note 38, at 371.
[57] 14 CFR § 250.2
[58] *Regulation 261*, *supra* note 1, art 3(b).

In response to the concerns raised by several foreign carriers regarding the possible overlap the other jurisdictions' rules, the DOT asserted that the US and EU regulations were not in any direct conflict.[59] Noting the exception in Article 3(1)(b) EU261, the DOT stated that: "to the extent that flights of EU carriers from the US to an EU state may also be subject to the EU oversales rule, those carriers should be able to comply with both the US and EU rules (e.g., by paying the higher compensation amount if the required amounts differ)".[60]

3.3 Tarmac delays

The rules on tarmac delays are codified in 14 CFR § 259 entitled 'Enhanced Protections for Airline Passengers'.[61] The DOT introduced the provisions to "mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers' accountability to consumers".[62] A 'tarmac delay' is defined as "the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane".[63] The tarmac delay rule (TDR) applies to any US and foreign air carrier that operates passenger services to or from a US airport using an aircraft with designed passenger seat configuration of 30 or more seats.[64] An air carrier covered by the TDR must have a Contingency Plans for Lengthy Tarmac Delays, for every US airport at which it operates.[65] The air carrier must allow passengers to deplane if the aircraft has been sitting on the tarmac for more than 3 hours in case of domestic flights,[66] and 4 hours if the flight is international.[67] There are three broad exceptions to this requirement, namely safety, security, or air traffic control-related reasons.[68]

[59] EAPP#2, *supra* note 10, at 23141.
[60] EAPP#2, *supra* note 10, at 23113 and 23141.
[61] 14 CFR § 259.
[62] 14 CFR § 259.1.
[63] 14 CFR § 259.3.
[64] 14 CFR § 259.2.
[65] 14 CFR § 259.4(a).
[66] 14 CFR § 259.4(b)(1).
[67] 14 CFR § 259.4(b)(2).
[68] 14 CFR § 259.4(b)(1)(i)–(ii) and 259.4(b)(2)(i)–(ii).

Moreover, an air carrier must provide: food and water if the delay exceeds two hours,[69] working lavatories,[70] adequate medical attention, notifications at 30-minute intervals regarding the status of the delay and the reason for it.[71] If an aircraft remains at the gate, after 30 minutes, and every 30 minutes thereafter, the air carrier must inform the passengers that they are allowed to disembark.[72]

Under 14 CFR § 259.4(f), an air carrier's failure to comply with the rules and its own Contingency Plan amounts to an 'unfair and deceptive practice and unfair method of competition' prescribed by 49 USC § 41712 and, consequently, is subject to enforcement action by the DOT.[73] Pursuant to 14 CFR § 383, DOT may impose civil penalties up to $27,500 per violation, payable to the US government.[74]

Both US and foreign air carriers covered by the TDR are required to file monthly reports on all tarmac delays of 3 hours or more at a US airport in accordance with 14 CFR § 244.[75]

3.3.1 Relationship with the 1999 Montreal Convention, and EU Regulation 261

Similar to the DOT Oversales and Denied Boarding Compensation regulations, the DOT rules on tarmac delays do not create a private right of action against the air carrier.[76] The authority to bring enforcement actions lies exclusively with the DOT that can impose civil penalties up to USD 27,500 per violation, payable directly to the government. In that regard, the US tarmac delay rules are similar to Article 16 EU261 sanctions which may be imposed by a national

[69] 14 CFR § 259.4(b)(3).
[70] 14 CFR § 259.4(b)(4).
[71] 14 CFR § 259.4(b)(5).
[72] 14 CFR § 259.4(b)(6).
[73] 14 CFR § 259.4(f).
[74] 14 CFR § 383.2
[75] 14 CFR § 244
[76] Dickerson, "Flight Delays", *supra* note 51, at 6; Anolik, Alexander, "The Obligations of Airlines and the Rights of Passengers", GP Solo 30:3 (May/June 2013), online: <http://www.americanbar.org/publications/gp_solo/2013/may_june/the_obligations_airlines_and_rights_passengers.html>.

enforcement body of a Member State if a carrier fails to comply with Regulation 261. An important distinction between the two regimes, however, is that, the EU rules impose an obligation on the air carrier to compensate the passenger directly, and create a corresponding private right of action, which is separate from the exclusive air carrier liability regime established by the private international air law Conventions. The US tarmac delay rules, by contrast, do not require any compensation payments to be made to the passengers. Therefore, unlike the EU Regulation 261, the DOT tarmac delay rules are not in conflict with the provisions of the Warsaw and Montreal Conventions on delay and exclusivity.[77]

In response to the proposed introduction of EAPP#2 in 2011, some air carriers suggested that there was a potential conflict between the proposed DOT measures and the existing EU Regulation 261.[78] According to the DOT, however, the tarmac delay rules were compatible with regulations in other jurisdictions, including the EU. First, the DOT observed that most of the air carrier's care and assistance obligations under Article 9 EU261, namely provisions of a hotel accommodation, telecommunications, are either not relevant or would not be available on board of an aircraft stranded on the tarmac.[79] Second, with regard to the obligation to provide meals and refreshments proportional to the waiting time, the DOT construed the EU Regulation 261 provisions in a narrow sense, and concluded the rules were meant to apply "in the airport terminal during a normal (i.e., non-tarmac) flight delay before passengers have been boarded".[80] Even though there was an overlap in the scope of application between the EU and the DOT rules, the DOT determined the two were not incompatible, and that "on a tarmac delay at a US airport, EU and non-EU carriers can comply with all provisions of both rules".[81]

[77] Montreal Convention, *supra* note 11, art 19 and 29; Warsaw Convention, *supra* note 12, art 19 and 24.
[78] EAPP#2, *supra* note 10, at 23113.
[79] EAPP#2, *supra* note 10, at 23113.
[80] EAPP#2, *supra* note 10, at 23113.
[81] EAPP#2, *supra* note 10, at 23113.

3.4 Long flight delays and cancellations

There is no US federal regulation, similar to the DOT rules on tarmac delays and oversales, requiring air carriers to assist or compensate passengers in the event of long flight delays or cancellations.[82] Moreover, the Airline Deregulation Act of 1978 (ADA)[83] pre-empts local and state regulation of 'prices routes or services of an air carrier' to prevent the states from re-regulating the airline industry.[84]

Flight delays, and, in line with the US case law discussed above in Chapter one, cancellations where the air carrier offers alternative transportation, are governed by the private international air law conventions. Pursuant to Article 55 MC99,[85] an international round-trip from the United States, with an agreed stopping place in another country, is subject to the liability provisions of the Montreal Convention. As a treaty ratified by the US, the 1999 Montreal Convention is the supreme law of the land,[86] and overrides inconsistent state law, as well as contract of carriage provisions. It is a self-executing treaty,[87] meaning that upon ratification it became judicially enforceable in US federal courts, which have original jurisdiction over claims under the Convention. International one-way air travel is subject to either the Warsaw System, the Montreal Convention, or, if the US and a third country have not ratified a common Convention, relevant domestic law, in accordance with the rules discussed in Chapter one above.

While some cancellation claims may be governed by the provisions of the Warsaw and Montreal Conventions,[88] others will fall outside of the international conventional liability

[82] Dempsey & Johansson, "Montreal v Brussels", *supra* note 17, at 216.
[83] *Airline Deregulation Act of 1978*, Pub L No 95-504, 92 Stat 1705 (codified 49 USC § 1371 et seq.).
[84] See e.g. *Air Transport Association of America Inc. v Cuomo,* 520 F (3d) 218 (2d Cir 2008) (The United States Court of Appeals for the Second Circuit held that the ADA pre-empted the Passenger Bill of Rights enacted by the State of New York); *Morales v TWA*, 504 US 374, 112 S Ct 2031 (1992); Dempsey & Gesell, "Public Policy", *supra* note 26, at 577.
[85] Montreal Convention, *supra* note 11, art 55.
[86] *United States Constitution*, art VI, cl 2 (the Supremacy Clause); See also Jr George N., Tompkins. "The Continuing Development of Montreal Convention 1999 Jurisprudence" (2010) 35:6 Air & Space L 433, at 433.
[87] Paul B. Larsen, John E. Gillick & Joseph C. Sweeney. Aviation Law: Cases, Laws and Related Sources (Leiden, the Netherlands: Martinus Nijhoff Pub, 2012) at 323.
[88] See Chapter 1, *above* 12.

regime. Those cases will be governed by the terms and conditions specified in the carrier's contract of carriage, which include provisions on air carrier obligations and corresponding passenger entitlements.

3.4.1 Conclusion

The US has adopted provisions on air carrier obligations in the event of tarmac delays applicable to both US and foreign air carriers. It has also promulgated, as early as 1960s, a detailed set of rules on denial of boarding due to air carriers' deliberate practice of overbooking. Neither of the abovementioned regimes creates a private right of action that would allow a passenger to rely on those rules in bringing a claim directly against the carrier. Instead, the rules ensure a centralised oversight by a cabinet-level executive agency, the United States Department of Transportation. Because of this enforcement mechanism, the regulators have ensured that the domestic laws in the US do not conflict with the private international air law Conventions to which the US is a state Party. There is, nevertheless, a potential overlap between the US national regime and the EU framework on passenger rights encompassed in Regulation 261, particularly with regard to denied boarding compensation. While the DOT has concluded that the overlap does not entail any significant consequences for the air carriers, it does create a certain degree of uncertainty as to the applicable rules and the extent of potential liability. Moreover, a lack of harmonised national rules on flight cancellation, while beneficial to the air carriers, may not provide an adequate level of protection to the passengers, who have to be able to navigate complex provisions of air carriers' tariffs.

Chapter 4 Is It Time for an Overhaul?

4.1 Introduction

Having examined the framework of air carrier liability in international transportation of passengers with regard to delay, cancellation and denied boarding encompassed in the Warsaw System of conventions and the Montreal Convention, as well as supplementary rules created by one regional and one national systems, this Thesis has only looked at a small part of the patchwork of legal rules on air carrier liability that co-exist and govern international travel by air. Even based on this small sample, however, it is obvious that there are areas of duplication, overlap, and even conflict between the applicable rules. The Montreal Convention of 1999 has been in force for almost 15 years, and the way it was drafted did not foresee the need to address certain important issues related to consumer and air passenger protection. The number of growing national and regional regimes poses a question whether there might be a need for a new international instrument addressing those issues on a global level.

This Chapter is divided into three parts. The first part considers recently adopted non-binding ICAO Core Principles on Consumer Protections, and the reasons behind their adoption. The second part explains why there is no need for an international convention on cancellation and denied boarding. Finally, the third part suggests some steps and possible improvements to the existing international system of rules.

4.2 ICAO Core Principles on Consumer Protection

In June 2015, following recommendations from the sixth meeting, the Worldwide Air Transport Conference (ATConf/6)[1] and the mandate provided by the Resolution A38-14 of the

[1] Worldwide Air Transport Conference (ATCONF), Agenda Item 2.3. See ICAO, Report on Agenda Item 2.3, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2.3, ATConf/6-WP/104 (20 March 2013), online: <http://www.icao.int/Meetings/atconf6/Documents/FinalReport/ATConf6_wp104-2-3_en.pdf>.

ICAO General Assembly 38th Session,[2] the ICAO Council adopted the Core Principles on Consumer Protection (ICAO Principles).[3] The aim of the two-page document is to improve the level of regulatory convergence of national and regional measures on consumer protection issues in air transportation across all 191 ICAO Member States.[4] The principles are intended as a policy guidance,[5] for both States and industry stakeholders, to aid in the development of new and the review of the existing air passenger protection regimes. The guidelines can be divided into two parts, a preamble of sorts and a list of specific consumer protection issues before, during and after travel that States should consider in developing and updating their consumer protection regimes.[6] Similarly to the US DOT oversales and denied boarding regulations, the ICAO Principles' 'preamble' recognises the beneficial effects of a well-balanced system that ensures a certain level of consumer protection, without unduly affecting the overall competitiveness of the industry. The competition in the market is presented as an important factor in guaranteeing better, cheaper, more robust airline services. Having discussed the need for a "global framework to manage consumer protection issues",[7] and after consulting with its Member States, ICAO opted for a development of guiding principles that will serve as a baseline for governments in establishing consumer protection regimes, while providing the necessary flexibility in regulatory approaches. According to ICAO, the Principles are flexible,

[2] ICAO, *Consolidated statement of continuing ICAO policies in the air transport field*, ICAO Assembly Resolution A38-14, 38th Sess, ICAO Doc 10022, III-1, online: ICAO <www.icao.int/publications/Documents/10022_en.pdf> [*Resolution A38-14*].
[3] ICAO, "Air Transport Policy and Regulation", online ICAO <http://www.icao.int/sustainability/pages/eap_ep_consumerinterests.aspx > [ICAO, "Consumer Protection"].
[4] ICAO, Press Release, "ICAO Council Adopts Core Principles on Consumer Protection and New Long-Term Vision for Air Transport Liberalization" (9 July 2015), online: <http://www.icao.int/Newsroom/Pages/ICAO-Council-Adopts-Core-Principles-on-Consumer-Protection-and-New-Long-Term-Vision-for-Air-Transport-Liberalization.aspx>.
[5] *Resolution A38-14*, *supra* note 2, Appendix A, Section 1, para 19.
[6] ICAO, "Consumer Protection", *supra* note 3.
[7] ICAO Secretariat, *Effectiveness of Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2.3, Information Paper No 1, Doc ATConf/6-IP/1 (27 February 2013), online: ICAO < http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6.IP.001.en.pdf>, at 15.

and constitute a "living document, which [will] be refined and improved from time to time in the process of their implementation, based on the experiences gained and feedback received".[8] The ICAO Principles state that national and regional consumer protection regimes must be proportionate, and consistent with the provisions of the Warsaw and Montreal Conventions.[9] Moreover, they emphasize the need to educate and inform passengers about their rights to enable them to make informed choices. With regard to specific provisions in the second part of the document, there are several which are of direct relevance to flight delays, cancellations and denial of boarding. Prior to the travel, passengers should be informed of the terms and conditions applicable to their ticket.[10] Most relevant to flight irregularities and denied boarding, are the principles listed as applicable 'during travel'.[11] The first one provides that passengers should be notified about any circumstances that might affect their flight, or cause a disruption to their travel plans. The second principle, encompasses right to care and assistance, rerouting, refund, or, if available, compensation.[12] The third principle relates to persons with disabilities. The fourth principle, addresses the issue of care and assistance in cases of massive disruptions and mandates participation of all stakeholders, not only air carriers.[13] The fifth provision defines massive disruptions as "situations resulting from circumstances outside the operator's control, of a magnitude such that they result in multiple cancellations and/or delays, leading to a considerable number of passengers stranded at the airport".[14] Two examples expressly included in the principles are: acts of nature (hurricanes, volcanic eruptions, earthquakes,

[8] ICAO, "Consumer Protection", *supra* note 3.
[9] ICAO, "ICAO Core Principles on Consumer Protection", online: <http://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciples.pdf> [ICAO, "Core Principles"] at 1.
[10] *Ibid* at 2.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.

floods), and political instability. Moreover, States should establish effective complaints and grievance redress mechanisms.[15]

There seems to be a general agreement between the States, industry representatives and academic commentators that the ICAO Principles constitute a positive development, which will foster regulatory convergence among different air passenger protection regimes.[16]

Commenting on the general support of the ICAO Member States, various organisations representing the industry, and the World Trade Organisation (WTO) for the development of the Principles, Truxal noted that it may be viewed as an indication that the Montreal Convention should be amended as it "may no longer be fit for purpose given the proliferation of air passenger rights regimes".[17] The following section addresses this issue in the context of the recent proposals to adopt a new convention on air carrier liability for cancellations and denied boarding in international air transportation of passengers.

4.3 Proposals for an International Convention on Cancellation and Denied Boarding

Some authors have suggested that there is a need for a new international convention governing air carrier's liability for cancellation and denied boarding.[18] Those two situations are not expressly regulated in either the Warsaw System conventions, or the Montreal Convention, and, it has been suggested that it leads to legal uncertainty as to the extent of air carrier liability,[19] lack of uniformity,[20] and application of domestic laws, which may not be equipped to assist the passenger in making a claim.[21]

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[15] *Ibid*.
[16] Correia,Vincent & Noura Rouissi. "Global, Regional and National Air Passenger Rights – Does the Patchwork Work?" (2015) 40 Air & Space L 123, at 145.
[17] Truxal, Steven. "Consumer Protections and Limited Liability: Global Order for Air Transport?" (2014) 1:1 Journal of International and Comparative Law 8.
[18] Adediran, Adejoke O. "The Need for an International Legal Regime for Flight Cancellation and Denied Boarding" (2015) 50 Ann Air & Sp L 863.
[19] *Ibid* at 865.
[20] *Ibid*.
[21] *Ibid* at 874.

In light of the conclusions presented in Chapter one of this Thesis, it seems that despite the underlying purpose of the private international air law conventions to establish a uniform system of rules governing air carrier liability in international transportation, due to differences in ratification, interpretation and application of the Conventions, the international framework has achieved only a certain degree of harmonisation. Moreover, there is a risk that a new Convention either amending or supplementing the Montreal Convention of 1999 will lead to even further fragmentation of the existing rules, akin to the Warsaw System of conventions.

Havel and Mulligan observed that, in the near future, it is unlikely that ICAO will regulate air passenger rights, either through a set of binding international standards or a multilateral convention.[22] Similar view was expressed by Dempsey and Milde, who remarked that "the 1999 Montreal Convention will prevail as the "common law" of international carriage by air" in the 21st century.[23] The recent adoption of the ICAO Core Principles on Consumer Protection indicates that States are reluctant to adopt a completely new, legally binding instrument.

A call for a new multilateral convention is misguided, particularly in light of the general reluctance of States to ratify new treaties, and a highly politicised nature of the process. Drafting and adoption of a new convention is a lengthy procedure, and within the United Nations, draft treaties are adopted by consensus, which makes it even more challenging. Moreover, a convention usually requires a specific number of ratifications before it comes into force. In case of the Montreal Convention, for example, it took four years for the treaty to become effective. There are more appropriate solutions to address the issue of air passenger protection in cases of flight cancellations and denied boarding that can provide specific rights and obligations without undue delay.

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[22] Brian Havel & John Q Mulligan "Extraterritorial Application: Exporting Consumer Protection Standards" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016) 239, at 254-255.

[23] Paul Stephen, Dempsey & Michael Milde. International Air Carrier Liability: The Montreal Convention of 1999 (Montréal, QC: McGill University Centre for Research in Air & Space Law, 2005), at 43.

It would be ill-advised to regulate issues related to cancellation and denied boarding through an international framework; both require detailed provisions that are better addressed at the regional or national level, so that they can be adapted to the social, political, economic as well as geographical characteristics of a particular region or State. In fact, the ICAO Principles expressly refer to national and regional regimes, recognizing the current trend in regulatory approaches to air passenger protection.[24] The document provides in relevant part that "government authorities should have the flexibility to develop consumer protection regimes (…) which take into account States' different social, political, and economic characteristics".[25] The AtConf/6 participants believed that allowing States to adopt their own measures, either on the national or regional level, based on the common standards laid down in the ICAO Principles, would ensure consistency, while, at the same time, allowing a certain degree of flexibility and tailoring of regulatory solutions to the State's particular circumstances.[26] Hence, at the present time, there seems to be no need for a new convention on air passenger rights in the event of flight cancellations and denied boarding.

4.4 Duplication, overlap, and inconsistencies

Most of this paper focused on the fragmentation of the legal regime of air carrier liability in international transportation of passengers in cases of delay, cancellation and denied boarding. The analysis highlighted certain areas where the framework established by the international Conventions creates lacunas that the regulators on the regional and national level address through separate air carrier liability rules. Based on the findings of this study, this section presents some proposed improvements that would help alleviate the resulting issues of duplication, overlap and inconsistencies.

[24] ICAO, "Core Principles", *supra* note 9.
[25] *Ibid* at 2.
[26] ICAO, Report on Agenda Item 2.3, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2.3, ATConf/6-WP/104 (20 March 2013), online: <http://www.icao.int/Meetings/atconf6/Documents/FinalReport/ATConf6_wp104-2-3_en.pdf>.

First, States should be encouraged to adopt the Montreal Convention of 1999 to bring the applicable regimes up-to-date, and harmonise areas regulated by the Convention across the globe. This would partially address the problem of which rules are applicable in international air transportation, at least in cases of flight delay.

Second, regional and national air passenger protection regimes developed by States must be compatible with the international law, especially the 1999 Montreal Convention. Article 19 together with Article 29 of MC99 establish an exclusive regime of air carrier liability for 'damage occasioned by delay' and conflicting local law that purports to regulate the same issue should be struck down as invalid. In that regard, the on-going revision of Regulation 261 should be used as an opportunity to bring the delay provisions in line with the international framework. On the other hand, complementary regional and national air passenger regimes can strengthen the existing system of air carrier obligations and corresponding passenger rights, by providing immediate assistance to passengers who are subject to flight irregularities or denied boarding, ensuring a well-balanced oversight without overburdening the airline industry with unreasonable costs. According to Tony Tyler, IATA's Director General and CEO, both airlines and passengers would benefit from "a transparent and level playing field".[27] In his opinion, "passenger rights should be fair, simple, consistently applied and aligned with global standards".[28]

Third, in order to ensure an appropriate level of consumer protection, both cancellation that is within the air carrier's control and denied boarding situations should be regulated in a more centralised way. A certain degree of regulatory oversight of air carriers' overbooking practices is necessary to protect air passengers from being involuntarily denied boarding, while preserving the carriers' ability to offer a profitable and commercially competitive service.

[27] IATA, Press Release, 35, "Industry Welcomes Clarity on EU Passenger Rights" (10 June 2016), online: <http://www.iata.org/pressroom/pr/Pages/2016-06-10-01.aspx>.
[28] Ibid.

Otherwise passengers are bound by the terms and conditions of the contract of carriage, which is a contract of adhesion, offered to the passenger on a "take it or leave it" basis. Moreover, national contract laws potentially expose air carriers to an unlimited liability. Systems of liability based on contracts of carriage alone are insufficient and do not guarantee appropriate enforcement of passenger rights. A combination of voluntary industry commitments and regulatory measures could provide an alternative approach. Another possible solution, particularly based on the US regulations, is introduction of sanctions and fines as a systemic enforcement mechanism. It ensures that there is a systematic, governmental enforcement of the rules, and avoids potential conflicts with the exclusivity of the international conventional law.

Fourth, passengers should be educated and informed about their rights and obligations. Even with the introduction of a comprehensive framework regulating cancellation and denied boarding on a global level, passengers will not be able to fully benefit from it unless they are aware of what their rights are in the first place.

Finally, improving the existing infrastructure is an important step in addressing the source of the problem, i.e. the cause of flight delays. Regulation that takes into account that most of the flight delays are external to the air carriers, and involve other stakeholders, such as air navigation service providers (ANSPs), airports, ground handling personnel, could help alleviate some problems with the congested network.

4.5 Conclusion

The overall regulatory liberalisation of air transportation has had the opposite effect with regard to passenger rights, which gained importance over the past few years. Due to proliferation of regional and national regimes on air passenger rights, ICAO has become more involved in the issues of consumer protection effectiveness and passenger satisfaction. Following a study on

the 'Effectiveness of Consumer Protection Regulations',[29] conducted in 2013, the 38th ICAO Assembly directed the ICAO Council to adopt a set of high-level, non-binding, non-prescriptive principles on consumer protection. While the impact of the Principles on the development of national and regional passenger regimes is yet to be tested, they provide a common baseline for both the regulators and the industry with regard to consumer protection. The issues of air carrier obligations and corresponding air passenger rights in cases of delay, cancellation and denied boarding, especially with regard to appropriate care and assistance should be addressed on national and regional levels, rather than through an international convention. That way States may adapt a regulatory approach that better suits their social, political, economic and geographic circumstances. When promulgating specific rules, however, they should take into consideration systems in other jurisdictions that may also apply, and endeavour to avoid duplication of efforts and prevent potential overlaps that may impose different or conflicting obligations on air carriers.

[29] ICAO Secretariat, *Effectiveness of Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2 & 2.3, Information Paper No 1, Doc ATConf/6-IP/1 (27 February 2013), online: ICAO <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6.IP.001.en.pdf>.

CONCLUSION

Air transportation is inherently international and cross-border in nature. It is vital that it is subject to uniform rules in the areas of safety, security or environment; and the unification and harmonisation of rules governing air carrier liability was the principal objective and driving force behind the adoption of first the Warsaw System instruments, and recently also the Montreal Convention. Havel and Mulligan correctly point out, however, that flight delays, cancellations or denied boarding are not exactly "global problem[s] that require a solution that involves the entire international community".[1] Instead of proposing a new multilateral convention on air passenger rights, and consumer protection in general, the ICAO Council in co-operation with the Member States has recognised the value in addressing those issues on regional and national levels. In this particular area, the fragmentation of applicable rules operates to strengthen the international framework on air carrier liability in transportation of passengers. It allows States to provide an immediate relief for passengers who might be subject to flight irregularities and denial of boarding, while ensuring controlled oversight of the airline industry. Despite certain flexibility afforded to national courts in the interpretation of the provisions of international Conventions, neither the Warsaw System, nor the Montreal Convention were designed to address specific issues related to delays, cancellation or denial of boarding, such as provision of care and assistance, or rerouting. The ICAO Principles on Consumer Protection promote convergent standards that can be easily adopted to the particular circumstances of individual States.

While adopting and developing regional and national passenger rights regimes, the regulators should be mindful of potential duplication, overlaps and inconsistencies with the international

[1] Brian Havel & John Q Mulligan "Extraterritorial Application: Exporting Consumer Protection Standards" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016) 239, at 256.

framework of rules, and systems of air passenger protection in other jurisdictions. Ambiguity as to which set of rules govern a particular situation, and lack of certainty with regard to the extent of air carrier liability may result in higher costs to the industry, and adversely affect passengers who were meant to be protected by the system in the first place. The cost of regulatory compliance and cost of insurance is ultimately passed on to passengers,[2] airlines simply include it in their fares.

Moreover, regional and national systems must observe the exclusivity of the remedies under international conventions for damage occasioned by delay. Perhaps the EU will recognise the error of its ways in interpreting the exclusion provisions of the Montreal Convention and correct it in the upcoming revision of Regulation 261.

States must find ways to regulate air carrier liability and ensure protection of air passenger rights in the international carriage by air, based on an equitable balance of interests, in keeping with the spirit of the Montreal Convention, as expressed in its preamble. Instead of trying to achieve coherence at any cost, including an overall unworkability of a perfect system of uniform norms,[3] the international community of States should build a pluralist legal system focused on "the celebration of difference that remains committed to the existence of universal standards".[4]

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[2] International Air Transport Association (IATA), *A Proposal for a Set of High-level, Non-prescriptive Core Principles on Consumer Protection*, ICAO Assembly, 38th Sess, Agenda Item 40, Working Paper No 73, Doc A38-WP/73, Revision No 2 (3 September 2013), online: ICAO <http://www.icao.int/Meetings/a38/Documents/WP/wp073_rev2_en.pdf>; Hermida, J. "The New Montreal Convention: the International Passenger's Perspective." Air and Space Law. 26 (2001): 150, at 155: 'The increased cost of insurances ultimately passed on to the passengers'.

[3] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UNGA, 2006, UN Doc A/CN.4/L.682.

[4] K. Anthony Appiah, "Citizens of the world" in Matthew J. Gibney, ed. Globalizing Rights: The Oxford Amnesty Lectures 1999 (Oxford, United Kingdom: Oxford University Press, 2003) at 189 at 202; see also William W. Burke-White. "International Legal Pluralism" (2004) 25:4 Mich J Intl L 963 at 977.

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