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THE MONTREAL CONVENTION OF 1999 AND REGULATION NO 261/2004 IN THE EUCJ AND NATIONAL CASE LAW

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ABSTRACT

The article first analyses the relationship between the Montreal Convention and Regulation 261/2004. Although the Regulation and the Convention both relate to the protection of air passenger's rights it remains ambiguous when and in which disputes these acts should be applicable. Thus, this article reveals the problematical issue of how these acts differ and in which situations they are applicable. Second, it reviews the development of the EUCJ case law regarding the application of these acts. Third, it examines the relevant case law of the Supreme Court of the Republic of Lithuania in this area.

KEYWORDS

Denied boarding, flight cancellation, delay of flight, compensation

INTRODUCTION

The goal of the Montreal Convention of 1999 and Regulation No 261/2004 is to protect air passenger's rights addressing air carrier liability. Nevertheless, legal status, the scope and application of these acts differ. Moreover, the spectrum of protected air passenger rights, remedies, and compensation differ. Thus, it may remain ambiguous in which situation they shall be applicable, what the differences between the *scope materia* of these acts are, and whether they shall be applicable in each case separately or (and) together.

In order to answer to these questions the article analyses the provisions of Regulation 261/2004 which cover three situations – denied boarding, flight cancellation and delay of flight. The Montreal Convention in relation to Regulation No 261/2004 is analysed only to the extent that it governs the delay of the carriage by air of passengers. The article crystalizes the main differences between these two acts.

Also the article takes into account the most relevant scientific literature that focuses mainly on the criticism over Regulation 261/2004 and defends the exclusivity of the Montreal Convention. The articles rejects the argument that the provisions of the Regulation conflicts with the norms of the Montreal Convention.

The EUCJ case law related to the application of both acts is investigated. This is done in order to overview and highlight the main trends in the jurisprudence of the EUCJ in air passenger's rights. Concepts of flight, itinerary, extraordinary circumstances, flight delay, cancellation, denied boarding, material and non-material damage, arrival time are examined in the article.

The Lithuanian experience will be considered in order to observe how the Regulation No 261/2004 and the Montreal Convention are applied in national legal system and case law.

1. THE RELATIONSHIP BETWEEN THE CONVENTION AND THE REGULATION IN CASE LAW OF THE EUCJ

In order to reveal the relationship between the Montreal Convention of 1999 (hereinafter – Convention) and Regulation No 261/2004 (hereinafter – Regulation) this part of the article focuses on the goals, purposes, scope of application of both acts.[1]

[1] It should be noted that the very first opinion on the relationship between the Convention and the Regulation was delivered by Advocate General M. L.A. Geelhoed. The advocate in a very detailed way analyzed the differences between these two documents and supported the idea that the provisions of the

1.1. THE GOAL OF THE CONVENTION AND THE REGULATION

The preamble of the Convention emphasises the importance of ensuring protection of the interests of consumers in international carriage by air.[2] Recital 1 of the Regulation provides a high level protection for air passengers.[3] Despite different wording of the goals in both acts, their primary purpose is the same: to protect air passenger's rights and address air carrier's liability to passengers.

1.2. THE CONVENTIONS' PRIMACY OVER THE REGULATION

The State Parties (hereinafter – SP) of the Convention are not only EU Member States (hereinafter – MS) but also more than 100 countries. Moreover, the EUCJ on the basis of Article 300 (7) (TFEU Article 218), stated that "the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation"[4]. Thus, the Convention is an international treaty and an integral part of the Community legal order and the Regulation is a secondary legal act.[5]

It follows that the Convention has primacy over the Regulation: "<...> Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions <…>"[6].

1.3. THE SCOPE OF APPLICATION

The Regulation defines the scope of the application which is found in paragraphs 1 and 2 of Article 3.

Analysing the territorial application of the Regulation four different situations can be identified, including recital 6 in the preamble:

1. it is applicable in any case regardless of the carrier's licence when the flight is within the EU.

Regulation does not conflict with the norms of the Montreal Convention. See: *Opinion of Advocate General M. L.A. Geelhoed*, Delivered on 8 September 2005.

[2] *Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)*, Official Journal L 194, 18/07/2001 P. 0039 – 0049.

[3] *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 (Text with EEA relevance) - Commission Statement*, Official Journal L 046, 17/02/2004 P. 0001 – 0008.

[4] See: *Emirates Airlines – Direktion für Deutschland v. Diether Schenkel*, (C-173/07) EU:C:2008:400 [2008], para 43; *Friederike Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA*, (C-549/07) EU:C:2008:771 [2008], para 28; *International Air Transport Association, European Low Fares Airline Association v. Department for Transport*, (C-344/04) EU:C:2006:10 [2006], para 35.

[5] *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba*, (C-429/14) EU:C:2016:88 [2016], para 23; *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 36; *Axel Walz v Clickair SA*, (C-63/09) EU:C:2010:251 [2010], para 20, etc.

[6] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 39.

2. it is applicable in any case regardless of carrier's licence when the flight is from the EU to the third country.[7]
3. it is applicable when the carrier is a Community carrier when the flight is from the third country to the EU. The Regulation is not applicable when the flight is form the third country to the EU and the carrier is not Community carrier.
4. it is not applicable regardless of a carrier when the flight is from the third country to the third country.

Thus, the application of the Regulation depends on the place of departure and arrival of the flight and/or carrier's licence.[8]

Article 3(2) of the Regulation defines the conditions under which Article 3(1) is applicable. Two basic conditions are laid down: passengers shall have a confirmed reservation and have been transferred from the flight for which they held reservation to another flight.

Therefore, the Regulation is applicable when passengers have confirmed reservation or have been transferred to another flight when the flight is within the EU or is from the EU to the third country regardless of carrier's licence or the flight is from the third country to the EU when the carrier is a Community carrier.

The application of the Convention depends only on the territory of the SPs (territorial jurisdiction).

Analysing Article 1 of Convention, three different situations can be identified:

1. The Convention is applicable when the flight is from one SP to another SP.
2. The Convention is applicable when the flight is within a single SP and there is a stop in another SP or third state. Some authors pointed out that such regulation may result absurd situation when two person sitting in the same aircraft may be subject to two different legal regimes[9]. Also the US case law has established two cumulative conditions: "(1) the country where the departure and destination cities are located is a party to the Convention; and (2) there was an 'agreed stopping place' within the territory of a second country, even if it is not a party to the Convention"[10].
3. The Convention is not applicable when the flight is within a single SP (no stop in another state).[11]

[7] The latest case law of the EUCJ has shown that Article 3(1) of the Regulation applies in the event of denied boarding, cancellation or long delay of flights in the case when the carriage by air is from the EU to the third country with the scheduled stopover in the third country with the change of aircraft and the carriage by air was booked as a single unit. See: *Claudia Wegener v Royal Air Maroc SA*, (C-537/17) EU:C:2018:361 [2018], para 5, 24, 26.
[8] See: *Emirates Airlines*, *supra* note 4, para 29, 30.
[9] Michael Milde, *Essential Air and Space Law* (Eleven: International Publishing, 2008), 283–284.
[10] See: Paul Larsen, Paul B. Sweeney, and Joseph John Gillick, *Aviation Law: Cases, Laws and Related Sources*, 2nd edition (Leiden, Boston: Martinus Nijhoff Publishers, 2012), 344; *Jones v. USA 3000 Airlines*, 2009 U.S. District LEXIS 9049 (E.D.Mo. 2009).
[11] Paul Dempsey, Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Canada: McGill University, 2005), 69.

Thus, in contrast to the Regulation the carrier's licence in neither case may make impact on the application of the Convention. The Convention is applicable only if the flight has a link with the territory of at least one MS. Additionally, in contrast to the Regulation the Convention is not applicable to a flight within the same country.

1.4. PROTECTED AIR PASSENGERS RIGHTS AND REMEDIES UNDER THE CONVENTION AND THE REGULATION

Article 1(1) of the Regulation grants only the minimum rights to air passengers. The EUCJ in *Folkerts* case emphasized that article 1(1) must be interpreted together with articles 4, 5, 6 of the Regulation that encompass three different situations when air passengers enjoy minimum rights:

1. When they are denied boarding against their will (Article 4),
2. When their flights are cancelled (Article 5),
3. When their flights are delayed (Article 6). [12]

Thus, the Regulation establishes certain package (exhaustive list) of air passenger rights. The damage caused by other actions by the air carrier (for instance, lost baggage) do not fall under the scope of the Regulation and the remedies can be found in national law.

In contrast, the Convention is relevant only to the extent that it governs a delay of the carriage by air of passengers (Article 19), limits of liability in relation to delay (Article 22), basis of claims (Article 29). In other words, the Convention also covers such cases when the damage made to baggage, cargo, death or bodily injury of passengers. The Regulation does not govern such situations. Thus, the application *ratione materiae* of the Convention differs since it is applicable to the different air passenger rights (except delay of the flight).

Also, the Regulation provides different remedies for different situations:

1. In the case of denied boarding air carriers should compensate (Article 7), reroute/reimburse (Article 8) and care (Article 9),
2. In the case of cancellation of a flight air carriers should assist in the form of rerouting or reimbursement (Article 8) and care, in the form of meals, etc. (Article 9), but they should not provide compensation (Article 7), if the passengers were informed in good time or if the carrier can prove that cancellation is caused by extraordinary circumstances,
3. In the case of delay air carriers should only care under Article 9, except for delays of five hours or more. In that situation a passenger is also entitled to reimbursement in accordance with Article 8.[13]

[12] *Air France SA v. Heinz-Gerke Folkerts, Luz-Tereza Folkerts*, (C-11/11) EU:C:2013:106 [2013], para 26.

The legal remedies under the Convention are different. It covers the liability of an air carrier for damage caused in case of death or bodily injury of a passenger and damage sustained in case of destruction or loss of checked baggage (Article 17), damage to cargo (Article 18), damage occasioned by delay in the carriage by air of passengers, baggage or cargo (Article 19).

Also both acts establish different statutory limits to bring an action before the court. Article 35 of the Convention governs the limitation of actions – an action should be brought within a period of two years. In contrast in the Regulation No 262/2004 time limits for bringing actions are not established. The EUCJ has specified that actions for compensation under Articles 5 and 7 of the Regulation should be brought on the basis of limitations of actions' rules of each MS.[14]

Overall, the Regulation and the Convention differ from the material and procedural point of view. Thus, it may be debatable whether the protection of both acts overlap.

1.5. COMPENSATION

According to the EUCJ case law, Articles 19, 22 and 29 of the Convention govern the conditions under which, after a flight has been delayed, the air passengers concerned may bring actions for damages against the carriers liable for damage resulting from that delay.[15] In contrast, the Regulation contains additional instruments for the air carrier liability in cases of denied boarding, cancellation or delay.[16] Therefore, the Regulation and the Convention "established two separate compensation systems pursuing different objects"[17].

Thus, the Convention governs an individual passenger's right to bring an action before the court in order to claim damages caused by the delay of the flight.[18] Furthermore, Article 19 of the Convention implies that the damage should arise as a result of a delay, that there should be a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them.[19] However, the EUCJ case law has extended the term "individual passenger's right" to the claims for damages. Here we can find one more difference: in contrast to the Regulation under the Convention the employer

[13] *Opinion of Advocate General M. L.A. Geelhoed*, *supra* note 1, para 18.
[14] *Joan Cuadrench Moré v. Koninklijke Luchtvaart Maatschappij NV*, (C-139/11) EU:C:2012:741 [2012], para 33.
[15] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 44.
[16] *Opinion of Advocate General M. L.A. Geelhoed*, *supra* note 1, para 40.
[17] Jiří Malenovský, "Regulation 261: Three Major Issues in the Case Law of the Court of Justice of the EU": 26; in: Michal Bobek and Jeremias Prassl, *Air Passenger Rights. Ten Years On* (Oxford and Portland, Oregon: Hart Publishing, 2016).
[18] *Opinion of Advocate General M. L.A. Geelhoed*, *supra* note 1, para 50.
[19] *Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v. Deutsche Lufthansa AG*, (C-581/10) EU:C:2012:657 [2012], para 50.

has the right to claim damages.[20] The regulation does not provide such possibility and only the person who suffers damage can bring a claim under this act.

In sum, the provisions of the Regulation do not relate to damage that arose as a result of delay. It governs standardized and immediate assistance, care and compensatory measures related to the inconveniences caused in the cases of denied boarding, flight cancellation and long delay. [21] However, the above mentioned measures do not preclude the air passengers concerned from bringing actions to redress damage under the conditions laid down by the Convention, because the same delay can cause individual damage.[22]

1.6. CARRYING OF PASSENGERS

Regarding the separation of the Convention and the Regulation, it is also important to note that the Convention does not regulate the carrying of air passengers when the flight is delayed. Meanwhile the Regulation estimates minimal services and assistance governed by Articles 7-9.[23] P. S. Dempsey and M. Milde described this as follows: "it [Regulation] contains specific rules dealing with the strict duty of the carrier to assist delayed passengers by offering meal and refreshments, hotel accommodation, and free phone, telex or fax messages, or e-mails and even reimbursement of the cost of the ticket or rerouting"[24].

The granting of such services cannot be denied even when "exceptional circumstances" arise and they result the denied boarding, cancellation of the flight or delay. However, when "exceptional circumstances" arise Article 5 (3) preserves the air carrier from the obligation to pay compensation under Article 7 of the Regulation.[25]

1.7. CRITISISM OVER REGULATION NO 261/ 2004

Some scholars argue that "EU law conflicts with the international conventions and the exclusivity of their application"[26]. Their arguments are based on several observations.

[20] See: *Air Baltic Corporation*, *supra* note 5.
[21] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 45; *Emeka Nelson*, *supra* note 19, para 49.
[22] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 47.
[23] See also: Paul Dempsey and Svante O. Johansson, "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage," *Air and Space Law* 35 (2010): 207.
[24] Paul Dempsey and Michael Milde, *supra* note 11, 177.
[25] See: *Denise McDonagh v. Ryanair Ltd*, (C-12/11) EU:C:2013:43 [2013], para 31.
[26] Paul Dempsey and Svante O. Johansson, *supra* note 23: 207. See also: Jorn J. Wegter, "The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention," *Air and Space Law* 31 2 (2006): 133.

First, some criticism relates to the exclusivity of the Montreal Convention. From the findings of the EUCJ case law the scholars conclude that compensations provided in Regulation No 261/2004 are supplementary to the damages recoverable by passengers under Article 19 of the Montreal Convention.[27] In such case these compensations violate the requirement of Article 29 of Montreal Convention.[28] J. J. Wegter states that "what the Regulation defines as 'assistance' and 'care' falls within the meaning of 'damage' as contained in Article 19 of the Montreal Convention" and thus Regulation No 261/2004 ignores the exclusivity of Montreal Convention.[29]

Second, if these compensations under Regulation No 261/2004 are supplementary then passengers are able "to receive double recovery under both the EU rules and the Montreal Convention"[30] and it "may well exceed the 4,150 SDR ceiling provided in the Convention"[31]. Other scholars point out that some passengers are able to receive double recovery while others may not be covered under the Regulation No 261/ 2004.[32]

Third, there is no clear definition of "delay". According to Anglo-American and Scandinavian law "delay" means not only late "fulfilment of the obligation but also non-performance altogether"; whereas in continental law the term "non-performance" is not "included in the definition of delay"[33]. Thus, scholars offer to the EUCJ to maintain in its' case-law "that the Flight Cancellation and Denied Boarding do not address 'delay' "[34]. An example of such a proposal is *Sturgeon v. Condor Flugdienst* case where the EUCJ declared "that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled <...> where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours <...>"[35].

Fourth, the EUCJ has repeatedly held that the air carrier paying damages has the right to seek compensation from any person, including third parties and that such compensation may reduce or remove the financial burden borne by the carriers in consequence of those obligations.[36] Thus, scholars presume that "air

[27] Paul Dempsey and Svante O. Johansson, *supra* note 23: 220.
[28] *Ibid.*
[29] Jorn J. Wegter, *supra* note 26: 146-147.
[30] Paul Dempsey and Svante O. Johansson, *supra* note 23: 219.
[31] *Ibid.*: 220.
[32] Arnold Kinga, "Application of Regulation (EC) No 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights," *Air and Space Law* 32 (2007): 94.
[33] [33] Paul Dempsey and Svante O. Johansson, *supra* note 23: 210.
[34] *Ibid.*: 220.
[35] *Christopher Sturgeon, Gabriel Sturgeon, Alana Sturgeon v. Condor Flugdienst GmbH*, (C-402/07) EU:C:2009:716 [2009], para 69.
[36] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 4, para 90*; Finnair Oyj v.Timy Lassooy*, (C-22/11) EU:C:2012:604 [2012], para 39.

navigation service providers may find themselves potentially subject to liability for costs incurred by air carriers"[37].

2. THE DEVELOPMENT OF CASE LAW OF THE EUCJ IN PROTECTION OF AIR PASSENGER RIGHTS

In order to reveal the development of the EUCJ case law in protection of air passengers' rights, it is appropriate to analyse different remedies from this perspective.

2.1. THE CONCEPT OF FLIGHT, OPERATED FLIGHTS AND ITINERARY

In the case of *Emirates Airlines* a dispute arose because an applicant booked a round trip from the EU MS to the third country and back.[38] However, he returned back to the EU two days later because the return flight was cancelled. The air carrier was not a Community carrier. The applicant brought an action claiming compensation and relying on 5(1)(c) and 7(1)(c) of the Regulation. He argued the outward and return flights are both parts of one flight and since the flight started in a MS, the applicant falls within the scope of the Regulation as laid down in Article 3(1). The air carrier argued the outward and return flights cannot be regarded as two separate flights and the air carrier, as a non-Community carrier, is not liable to pay compensation.

The EUCJ defined the notion of a flight when a passenger flies from the EU MS to the third country and returns back. It found that the concept of a "flight" under the Regulation means an air transport operation, "a "unit" of such transport", performed by an air carrier which fixes its itinerary"[39]. In the *Sturgeo*n case the EUCJ specified that itinerary is an "essential element of the flight"[40]. Furthermore, in the *Sousa Rodríguez* case[41] the EUCJ explained the meaning of the operated flight which focuses on itinerary as an essential element. It found that the concept of itinerary means the journey from the airport of departure to the airport of arrival by aeroplane according to a fixed schedule. Thus, the flight is operated when the aircraft reaches its destination according to the itinerary.

The EUCJ in *Emirates Airlines* case stated that if a flight within the meaning of Article 3(1)(a) of the Regulation would be understood as an outward and return

[37] Paul Dempsey and Svante O. Johansson, *supra* note 23: 222.
[38] Emirates Airlines, *supra* note 4.
[39] *Ibid.*, para 40.
[40] *Christopher Sturgeon*, *supra* note 35, para 30; *Aurora Sousa Rodríguez, Yago López Sousa, Rodrigo Manuel Puga Lueiro Luis Ángel Rodríguez González, María del Mar Pato Barreiro, Manuel López Alonso, Yaiza Pato Rodríguez v. Air France SA*, (C-83/10) EU:C:2011:652 [2011], para 26.
[41] *Ibid*.

journey, the final destination of journey would coincide with the first point of departure. In this case Article 3(1)(a) of the Regulation would be senseless.[42] Besides, if a flight would mean an outward and return journey then it would worsen the high level of passenger's protection since compensation could be requested only once.[43] Moreover, it would further deprive air passenger rights in case of flight from the EU when the air carrier is a non-Community carrier.[44] The EUCJ concluded that an outward and return journey cannot be regarded as a single flight. It follows that Article 3(1)(a) of the Regulation cannot be applied to a journey out and back, when passengers depart from an airport located in the EU MS travel back to that airport from an airport located in a third country.[45]

The protection provided by the Regulation is not applied when a non-Community carrier operates air services for a flight from the third country to the EU, even if it operates a flight from the EU to the non-member country and the passenger bought the round trip. Such interpretation confirms that the application of the Regulation is coupled with the type of air carrier.

2.2. THE CONCEPT OF EXTRAORDINARY CIRCUMSTANCES

An air carrier can be excluded from civil liability (Article 5(3) of the Regulation) if it proves that the flight is cancelled due to extraordinary circumstances. Often disputes arise about how the concept of "extraordinary circumstances" shall be applicable.

Recital 14 in the preamble of the Regulation provides that extraordinary circumstances are those "which could not have been avoided even if all reasonable measures had been taken". The list named in the recital (political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes) was established as indicative because these events may result in the emergence of extraordinary circumstances.[46]

The EUCJ[47] acknowledged that a collision between an aircraft and a bird "must be classified as "extraordinary circumstance" within the meaning of Article 5(3) of the Regulation.[48] However, in Article 5(3) of the Regulation besides the concept of "extraordinary circumstances" the concept of „all reasonable measures" is used. It follows that it is not enough to establish "extraordinary circumstances"

[42] Emirates Airlines, *supra* note 4, para 34.
[43] *Ibid.*, para 36.
[44] *Ibid.*, para 37.
[45] *Ibid.*, para 53.
[46] *Friederike Wallentin-Hermann*, *supra* note 4, para 22.
[47] *Marcela Pešková, Jiří Peška v. Travel Service a.s.*, (C-315/15) EU:C:2017:342 [2017].
[48] *Ibid.*, para 24, 33.

because the air carrier still has to prove that extraordinary circumstances could not have been avoided even by taking all reasonable measures. Thus, the Court emphasized that there are technical devices by which anti-bird control can be executed and there is a big spectrum of transport operators who could be responsible for anti-bird control measures.[49] Also some technical devices are typically fitted on board of aircraft.[50] Thus, a mere collision between aircraft and birds is not an issue that removes the air carrier's liability *per se*.

In that regard a two-step test for national courts in such cases was established. First, the court has to assess whether the air carrier was in a position to take directly or indirectly preventive measures to reduce possible collisions with birds. Second, to ensure that the measures did not require to make intolerable sacrifices in the light of the capacities of its undertaking.[51]

In *Wallentin-Hermann*[52], *van der Lans*[53], *Kramme v SAS Scandinavian*[54] cases the EUCJ pointed out that there could be various occasions that may result in the emergence of extraordinary circumstances, for instance, a hidden manufacturing defect made by aircraft manufacturer, acts of sabotage or terrorism.[55]

In *Wallentin-Hermann* [56] the EUCJ established another two-step test. According to it, the national judicial institutions must check whether the technical problems derive from the events which are not typical "in the normal exercise of the activity of the air carrier concerned and were beyond its actual control"[57]. A technical problem, even if it causes a flight cancellation, does not fall into the scope of the concept of "extraordinary circumstances" within the meaning of Article 5(3) of the Regulation, unless this problem stemmed from events which are not typical to the normal exercise of the activity and are beyond the actual control.[58]

This same rationale was repeated in the *Sturgeon* and *Böck* joined cases[59], *Sandy Siewert v Condor Flugdienst GmbH* case[60]. In the latter case the flight delay occurred because an airport's set of mobile boarding stairs had collided with the aircraft. The air carrier claimed that these are "extraordinary circumstances" within the meaning of Article5(3) of the Regulation and it is not obliged to pay compensation. The EUCJ found that the usage of an airport's set of mobile boarding

[49] *Ibid.*, para 40.
[50] *Ibid.*, para 39; *Opinion of Advocate General Bot*, Delivered on 28 July 2016, para 32.
[51] *Ibid.*, para 44, 46.
[52] *Friederike Wallentin-Hermann*, *supra* note 4, para 26.
[53] *Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, (C-257/14) EU:C:2015:618 [2015], para 38.
[54] *Opinion of Advocate General Sharpston*, Delivered on 27 September, 2007.
[55] *Friederike Wallentin-Hermann*, *supra* note 4, para 26.
[56] *Friederike Wallentin-Hermann*, *supra* note 4.
[57] *Ibid.*, para 27.
[58] *Ibid.*, para 34.
[59] *Christopher Sturgeon*, *supra* note 35, para 72.
[60] *Sandy Siewert, Emma Siewert, Nele Siewert v. Condor Flugdienst GmbH*, (C-394/14) EU:C:2014:2377 [2014], para 18.

stairs is a typical everyday activity as it enables air passengers to enter or leave an aircraft and this activity is repeated many times a day. Accordingly, it cannot be covered by the concept of "extraordinary circumstances"[61]. A similar conclusion was reached by the EUCJ in the *van der Lans* case.[62]

The development of the EUCJ case law reveals that, if the question arises whether certain technical problems fall or do not fall within the definition of "extraordinary circumstance" two aspects should be considered: first, whether these events are inherent in the normal exercise of an air carrier's activity; second, whether these events are within the actual control of air carrier. Accordingly in the same way the questions should be answered when dealing with other circumstances. For example, in the *Peškova* case the EUCJ acknowledged that a collision between an air carrier and a bird should be considered as "extraordinary circumstances" under Article 5(3) of the Regulation because first, a collision between the air carrier and a bird is not inherent in the normal exercise of the activity of the air carrier and, second, are outside its actual control.[63]

2.2.1. TECHNICAL AND ECONOMIC VIABILITY IN LIGHT OF EXTRAORDINARY CIRCUMSTANCES

In some cases the dilemma has arisen whether certain events fall within the definition of extraordinary circumstances, but not all of them lead to the exemption from obligations of air carriers. According to the case law of the EUCJ when the dispute concerns "extraordinary circumstances", it is necessary to assess whether an air carrier technically and economically could avoid negative consequences at the time of extraordinary circumstances.

In the *Wallentin-Hermann* case the EUCJ formulated technical and economic viability criterion of an air carrier to operate flights at the time of extraordinary circumstances. These criteria are as follows: first, an air carrier deploys all its resources in terms of staff, or equipment and the financial means at its disposal, second, air carrier does not make intolerable sacrifices. Accordingly, the EUCJ states that a national court in the circumstances of cancellation of the flight resulted from possible extraordinary circumstances should ascertain whether the air carrier took measures appropriate to the situation.[64]

[61] *Ibid.*, para 19.
[62] *Corina van der Lans*, *supra* note 53, para 49.
[63] *Marcela Pešková*, *supra* note 47, para 24.
[64] *Friederike Wallentin-Hermann*, *supra* note 4, para 42.

The EUCJ has further developed the doctrine of technical and economic criteria in the *Eglītis ir Ratnieks* case.[65] In this case the dispute arose because Swedish air space was closed due to failures in the power supply which led to a breakdown in radars and air navigation systems. However, the applicants claimed that the flight was cancelled because the working hours of the crew of that flight was expired.[66]

The EUCJ relied on its above-mentioned preliminary ruling in the *Wallentin-Herman* case. In the latter the Court emphasised that in order to prevent the cancellation of the flight resulted from the extraordinary circumstances an air carrier must prove that it deployed all its resources and did not make intolerable sacrifices.[67]

The EUCJ in *Eglītis ir Ratnieks* found that in case of "extraordinary circumstances" an air carrier must take all reasonable steps to take care of air passengers "<…> the reasonable air carrier must organise its resources in good time to provide for some reserve time, so as to be able, if possible, to operate that flight once the extraordinary circumstances have come to an end. If <…> an air carrier does not, however, have any reserve time, it cannot be concluded that it has taken all reasonable measures as provided for in Article 5(3) of Regulation No 261/2004"[68]. However, the EUCJ emphasised that the required reserve time should not lead an air carrier "to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time"[69].

The question of technical and economic criteria was also examined in the *Peškova* case, when it turned out that the owner of the aircraft after the collision between aircraft and bird asked for the second inspection of technician as it refused to authorise the first one.[70] The EUCJ clarified that an air carrier in extraordinary circumstances should use all resources of staff or equipment and the financial means "in order to avoid, as far as possible, the cancellation or delay of its flights"[71]. However, the EUCJ highlighted that the second inspection is not an appropriate measure and does not meet technical and economic criteria formulated in the *Eglītis ir Ratnieks* preliminary ruling (*Eglītis ir Ratnieks*, para 25). [72] Thus, a flight cancellation and a long delay cannot be considered extraordinary circumstances.

[65] *Andrejs Eglītis, Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija*, (C-294/10) EU:C:2011:303 [2011], para 25.
[66] *Ibid.*, para 15.
[67] *Friederike Wallentin-Hermann*, *supra* note 4, para 41.
[68] *Andrejs Eglītis*, *supra* note 65, para 28.
[69] *Ibid.*, final ruling.
[70] *Marcela Pešková*, *supra* note 47.
[71] *Ibid.*, para 34.
[72] *Ibid.*, para 35, 28,

2.2.2. DO EXTRAORDINARY CIRCUMSTANCES EXEMPT THE AIR CARRIER FROM THE DUTY TO PROVIDE CARE OF PASSENGERS?

In the event of extraordinary circumstances resulting in a disruption in air travel the Regulation imposes an obligation on the air carrier with the goal to mitigate the negative impact of those circumstances on air passengers by providing care.

In the *McDonagh* case the national court asked whether the closures of European airspace due to the eruption of the volcano which caused disruption to air travel, go beyond "extraordinary circumstances" within the meaning of the Regulation and if yes, whether these circumstances do not exempt an air carrier from the duty to provide care within the meaning of Article 5(1)(b) and Article 9.[73]

The EUCJ pointed out that the air carrier should provide care in the case of flight cancellation whatever happened[74]. Moreover, the duty to provide care to passengers under Article 5 and 9 of the Regulation should not "be subject to a temporal or monetary limitation"[75]. Otherwise it would deny the aims of the Regulation.[76]

The EUCJ also concluded that if a passenger claims compensation, in a situation in which the air carrier did not provide care to him or her, the amount of compensation should be assessed by the national court.[77]

Consequently, two aspects shall be highlighted. First, extraordinary circumstances do not exempt an air carrier from the duty to provide care of passengers within the provisions and goals of the Regulation. Second, even in the absence of extraordinary circumstances a carrier must always provide care to the passengers regardless the reasons of its failure to provide care to air passengers.

2.3. FLIGHT DELAY OR CANCELLATION?

Article 7 of the Regulation governs compensations in cases of denied boarding (Article 4(3)), cancellation of flights (Article 5(1)(c)). However, in practice disputes also arise because passengers claim compensation in the event of delay.

Consequently, the EUCJ has repeatedly answered if a flight delay can be considered as flight cancellation and repeatedly interpreted distinctive features between flight delay and cancellation.

[73] *Denise McDonagh*, *supra* note 25.
[74] *Ibid.*, para 31.
[75] *Ibid.*, para 43.
[76] *Ibid.*, para 42.
[77] *Ibid.*, para 51, 66.

The EUCJ tried to separate the notions of 'cancelled' and 'delayed'. According to the EUCJ, a flight is delayed when "it is operated in accordance with the original planning and its actual departure time is later than the scheduled departure time"[78]. Thus, the notion of 'flight delay' is associated with the scheduled departure time, but other elements, for example, such as itinerary, must remain unchanged.[79]

Cancellation means non-operation of a flight which was previously planned. Thus, the EUCJ concluded that the flight which is delayed, even if the duration is long, cannot be regarded as cancelled.[80] The EUCJ emphasised that a flight the departure time of which is later than the departure time scheduled in the timetable, can be considered as cancelled. However, it can be only if the air carrier arranges (for the passengers) another flight planning time of which is different from the previously planned flight.[81]

The impression is that the notion of 'flight delay' is associated merely with the scheduled departure time. However, in the *Folkerts* case[82] the EUCJ highlighted that in other contexts the Regulation governs another situation when the flight is delayed.[83] This situation is determined not by the scheduled departure time, but by arrival to the final destination time (Article 5(c)(iii)).[84] It follows that legal consequences are related with the "reaching of final destination a certain amount of time after the cancelled flight's scheduled time of arrival"[85], because inconveniences resulted from the cancelled flights are experienced on arrival at the final destination.[86] EUCJ, explaining the second situation, relies on the Convention, which does not differ the notions 'flight delay' or 'cancellation'. Therefore, the Convention does not specify "at which stage of such carriage the delay in question must occur"[87].

The EUCJ compared the situations of passengers when the flight is delayed and cancelled in both the *Sturgeon* and *Nelson* cases.[88] The EUCJ acknowledged that passengers in both situations suffer similar damage because of a loss of time. Besides, under Article 5(1)(c) of the Regulation in the case of flight cancellation passengers have the right to compensation when they lose three hours or more. In contrast, passengers in the case of a flight delay do not have the same right. Thus, according to the EUCJ, passengers of a delayed flight "would be treated less

[78] *Christopher Sturgeon*, *supra* note 35, para 32.
[79] *Ibid.*, para 31.
[80] *Ibid.*, para 34.
[81] *Ibid.*, para 35.
[82] *Air France SA*, *supra* note 12.
[83] *Ibid.*, para 28.
[84] *Ibid.*, para 30.
[85] *Ibid.*, para 30.
[86] *Ibid.*, para 33.
[87] *Ibid.*, para 31.
[88] *Emeka Nelson*, *supra* note 19.

favourably" even if they suffer similar damage.[89] Thus, the EUCJ concluded that passengers whose flights are delayed have right to compensation under Article 7 of the Regulation when they reach the final destination three hours or more after the arrival time originally scheduled.[90]

Three-hour critics could not understand why three hours were chosen, not, for example, two or four hours. J. Malenovský reminds that "it is the legislator and not the Court who made the choice of three hours" [91] because the choice of three hours comes from Article 5 (1) (c) (iii) and not from Article 6 of the Regulation.

2.4. ARTICLE 22 OF THE CONVENTION AND ARTICLE 12 OF THE REGULATION: MATERIAL AND NON-MATERIAL DAMAGE

Rather often the disputes are related to the air carrier's obligation to compensate material and non-material damage arising from breach of a contract of carriage by air.

In the *Alex Walz* case the dispute arose because the applicant claimed damages for the value of the lost baggage and for non-material damage.[92] The air carrier did not agree with the amount because it exceeded the limit for liability in relation to baggage. Consequently, the national court asked the EUCJ whether Article 22(2) of the Convention include both types of damage – non-material and material damage.

Since the Convention is an international treaty, the EUCJ relied on Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts and explained that the injury includes material or moral damage within the meaning of Chapter III of the Convention.[93]

In the *Sousa Rodríguez* case[94] the EUCJ clarified whether the national court on the basis of national legal order may oblige the air carrier to pay for damage, including non-material, because of the breach of a contract of carriage by air.[95] The EUCJ relying on Article 12 of the Regulation found that a national court may oblige the air carrier to compensate damage for passengers because of the breach of the contract of carriage by air on other legal basis than the Regulation, i.e. the Convention and national law.[96]

[89] *Ibid.*, para 58.
[90] *Ibid.*, para 61, para 38.
[91] Jiří Malenovský, *supra* note 17: 41.
[92] *Axel Walz v Clickair SA*, *supra* note 5.
[93] *Ibid.*, para, 27, 29.
[94] *Aurora Sousa Rodríguez*, *supra* note 40.
[95] *Ibid.*, para 36.
[96] *Ibid.*, para 38.

Moreover, the EUCJ relied on the *Alex Walz* case[97] findings that the term "damage" must include material and non-material damage. In light of the foregoing the EUCJ decided that under Article 12 of the Regulation damage for which compensation is payable may be material or non-material.[98]

Thus, a passenger may claim for material and non-material damage under both the Convention and the Regulation. The difference between these acts is that under the Convention the maximum amount of the claimed damage is established in the Convention and it cannot be exceed (included both types of damage). In contrast, the Regulation established a minimum amount of compensation for material and non-material damage. However, it does not deprive a passenger relying on the Convention or national law to claim for additional compensation.

2.5. DENIED BOARDING

The term 'denied boarding' is given in Article 2(j) and Article 4 of the Regulation. Article 2(j) gives a list of the situations (reasons of health, safety or security, or inadequate travel documentation) as reasonable grounds to deny boarding. In the *Finnair* case the EUCJ noted that this list is non-exhaustive.[99]

The EUCJ relying on recitals 3, 4, 9, 10 of the Preamble of the Regulation and *travaux préparatoires* for this regulation found that "the EU legislator expanded the scope of the definition of 'denied boarding' beyond merely situations where boarding is denied on account of overbooking <…> and construed 'denied boarding' broadly as covering all circumstances in which an air carrier might refuse to carry a passenger"[100]. Otherwise, it would limit protection of air passenger's rights and would be contrary to the aim of the Regulation.[101] According to the EUCJ, this is the reason for a broad interpretation of the rights granted to passengers.

Accordingly, the notion of 'denied boarding' within the meaning of Articles 2(j) and 4 of the Regulation relates not only to the case when boarding is denied due to overbooking but also when boarding is denied due to other grounds (for instance, operational reasons).[102]

The EUCJ in the *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor* case came to a similar conclusion.[103]

[97] *Axel Walz v Clickair SA*, *supra* note 5, para 29.
[98] *Ibid.*, para 41.
[99] *Finnair Oyj v.Timy Lassooy*, *supra* note 36, para 30.
[100] *Ibid.*, para 22.
[101] *Ibid.*, para 23.
[102] *Ibid.*, para 26.
[103] *Germán Rodríguez Cachafeiro, María de los Reyes Martínez-Reboredo Varel Villamor v.Iberia, Líneas Aéreas de España SA*, (C-321/11) EU:C:2012:609 [2012], para 21, 26, 33.

In sum, the concept of 'denied boarding' is not fully disclosed in the Regulation and it may include other situations where boarding is denied in order to maintain the aim of the Regulation.

2.6. ARRIVAL TIME

Articles 2, 5, 7 of the Regulation establish the term 'arrival time', which is not defined. Thus, the EUCJ in the *Germanwings* case establishes the actual arrival time of aircraft.[104]

In this case the dispute arose because the applicant reached his final destination more than three hours after the scheduled arrival time. The applicant required compensation on the basis of Articles 5 to 7 of the Regulation. However, the air carrier claimed that the actual arrival time means the moment when the plane touches down on the tarmac at an airport, consequently, the delay was two hours and 58 minutes. Thus, according to air carrier, compensation should not be paid.[105]

The EUCJ examined what moment should be considered as the time of arrival. It analysed situation of air passengers and concluded that passengers may continue their ordinary activities when they are permitted to leave the aircraft and the order to open the doors of aircraft is given. Before this moment air passengers are in the enclosed space of aircraft and they are limited to resume their normal activities.[106]

2.7. THE EMPLOYER'S RIGHT TO CLAIM DAMAGES UNDER THE CONVENTION

As we have mentioned in first part of this research, in contrast to the Regulation under the Convention an employer has the right to claim damages.

In one of the cases the EUCJ had to define the concept of passenger. In the *STT* case a dispute arose because two employees of certain agency, which purchased flight tickets from EU MS to third country, reached the final destination of their business travel one day after the scheduled arrival time.[107] The agency required to be compensated by the air carrier. The latter stated that an employer does not have the right to be compensated because under Article 19 of the Convention this right belongs to passengers but not to legal person.

[104] *Germanwings GmbH v.Ronny Henning*, (C-542/13) EU:C:2014:2141.
[105] *Ibid.*, para 9.
[106] *Ibid.*, para 23, 24
[107] *Air Baltic Corporation*, *supra* note 5.

The EUCJ explained that Article 19 of the Convention "does not specify in any manner whatsoever who may have suffered that damage"[108]. Moreover, in the third recital in the preamble to the Convention the term 'consumer' is used. According to the EUCJ this may include not only passengers.[109] Thus, Article 19 of the Convention may be applied not "only to damage caused to passengers themselves but also to damage suffered by an employer"[110]. Besides, Article 1(1) of the Convention uses the term "person", but not "passenger".

3. PROTECTION OF AIR PASSENGER RIGHTS IN THE CASE LAW OF THE SUPREME COURT OF THE REPUBLIC OF LITHUANIA (hereinafter – SCRL)

Over the last ten years Lithuanian case-law has been enriched by the cases in the air passenger's rights.

3.1. DOMESTIC LEGAL REGULATION AND NATIONAL ENFORCEMENT BODY

The main national acts which govern air passenger rights are the Civil Code, the Aviation Law, the Law on Tourism, other codes of separate transport branches, and statutes.

Claims related to air passenger rights are brought before the civil courts under the Code of Civil Procedure. However, the national regulation establishes not mandatory pre-trial settlement procedure: a passenger's complaint shall be first filed with the air carrier. If an unsatisfactory response is given a passenger may file the claim to the court. Also the passenger can turn to the national enforcement body – Civil Aviation Administration. But the decision of national enforcement body is not binding.

3.2. CONCERNING THE CONVENTION COMPATIBILITY WITH THE REGUALTION

The SCRL analysed the relationship between the Convention and the Regulation only in one case.[111] It was necessary because a respondent in his response to the complaint relied on the Article 33 of the Convention in order to define which national court (Lithuanian or Latvian) has jurisdiction to settle the

[108] *Ibid.*, para 28.
[109] *Ibid.*, para 38.
[110] *Ibid.*, para 29.
[111] *M. L. v. Air Baltic Corporation AS*, Supreme Court of the Republic of Lithuania (2009, No 3K-3-541).

dispute. The court basically followed the EUCJ findings in the *IATA ir ELFAA* case[112], and the *Rehder* case[113].

3.3. WHO BEARS LIABILITY WHEN THE AIR CARRIER AND THE FLIGHT TICKET VENDOR ARE DIFFERENT?

National courts had the opportunity to draw a line between the liability of an air carrier and a flight ticket vendor.

In the civil case two defendants were identified - one bought two tickets for the applicants and had to arrange and pay a fixed price for the services provided to the air carrier in the manner prescribed by the agreement, the other one had to provide a technically sound aircraft with a qualified crew for passengers, luggage and cargo.[114]

The SCRL noted that the obligations imposed by the Regulation are on the air carrier operating or intending to operate. Thus, it had to determine which entity operated as the air carrier in the case. It concluded that under the Regulation, the operating air carrier must respond to the passengers under the conditions set out in the Regulation when the flight is cancelled and that the Regulation does not provide for the fulfilment of the obligations imposed on it by the person who sold flight tickets, unless the air carrier itself carries out the sale of tickets.

An interesting fact is that the flight ticket seller and the air carrier concluded the air carriage contract, under which the ticker seller was liable if scheduled flights were unpaid and therefore cancelled.

The SCRL decided that this condition is incompatible with Article 15 of the Regulation and provisions of Civil Code. According to the national law conditions of carriage contract abolishing or restraining the carrier‘s civil liability shall not be valid with the exceptions provided by law. The court also found that parties of the agreement cannot alter, limit, abolish the validity and application of mandatory rules, no matter whether national or international law sets these standards.

3.4. THE OBLIGATION OF THE TOUR OPERATOR TO COMPENSATE FOR THE DELAYED FLIGHT

Lithuanian courts have dealt with the disputes related to the liability of the tour operator for the damage caused to air passengers due to the delay of flights.

[112] *International Air Transport Association, European Low Fares Airline Association*, *supra* note 3.
[113] *Peter Rehder v. Air Baltic Corporation*, (C-204/08) EU:C:2009:439 [2009].
[114] *R. G., A. G., A. J., v. "Palangos Avia", "Aurela"*, Supreme Court of the Republic of Lithuania (2008, No 3K-7-43).

The SCRL concluded that air passengers could seek compensation not from the operating air carrier but from the tour operator.

In one case a question of legal interpretation was raised, whether a tourist can claim for damages caused by the delayed flight directly from the tour operator within the meaning of Article 7 of the Regulation.[115]

The court of appeal stated that the services of carriage was provided by the third person. It follows that the compensation should be provided not by the air carrier but by the tour operator. The SCRL disagreed with the findings of the court of appeal. It relied on the provisions of the Law on Tourism and the case law. According to the latter, a tour operator as the business entity must ensure the quality of the services provided and the correctness of their information, assume the risk of the negative consequences of its activity, also carefully choose third parties in order to fulfil its obligations and enjoy the possibility to control activity of the third parties. Thus, the SCRL concluded that civil liability for the improper tour services, although certain part of the services was provided by the third person chosen by the tour operator, is applicable to the tour operator.

Also the SCRL relied on the provisions of the Regulation. The Court found that the Regulation imposes obligations on the air carrier. The Regulation does not directly govern obligations on the tour operator. However, it does not forbid it. The Court relied on 5 recital in the preamble of the Regulation, governing that "protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours". The right to compensation laid down in Article 7 of the Regulation also is applicable to the air passenger whose flight forms a part of package tour. Consequently, the Court concluded that the interpretation of the provisions of the Regulation confirms that it does not prevent a passenger from claiming compensation from the tour operator. It also emphasized that having provided a compensation equal to the amount specified in the Regulation to the air passenger, the tour operator is entitled to request repayment from the operating air carrier.

3.5. DUE TO EXTRAORDINARY CIRCUMSTACNES

Lithuanian courts have already dealt with issues related to flight cancellation or delay of flights resulting from extraordinary circumstances. However, several such cases were resolved and it should be confirmed that Lithuanian courts follow the EUCJ case law.

[115] *G. D., A. D., S. B. D. v. Tez Tour*, Supreme Court of the Republic of Lithuania (2013, No 3K-3-601).

In one case it was estimated that a technical problem was detected before the flight.[116] The problem was fixed and the flight was carried out. The defendant in the main proceedings had not provided evidence that this malfunction was due to the events which are not inherent in the normal exercise of an air carrier's activity and are not within the actual control of air carrier. Thus, national courts, following the case law of the EUCJ, decided that there is no reason to assert that the technical problem of an aircraft dresulted from the events which by their nature or cause of their occurrence are not inherent in the normal exercise of an air carrier's activity and are not within the actual control of air carrier. Therefore, according to the SCRL, there is no reason for the defendant to be exempted from the obligation to pay compensation under Article 7 of the Regulation.

In another case the delay of the flight was an hour and twenty minutes. It happened after a Eurocontrol order was released to delay the flight due to German airspace restrictions.[117] Following the operation of the flight to Brussels-Riga the aircraft flying from Riga to Vilnius did not wait for the passengers coming from Brussels. Thus, the applicant went from Riga to Vilnius via bus and reached her final destination four hours after the arrival time originally scheduled. The defendant claimed that the flight from Brussels to Riga was delayed due to the extraordinary circumstances as the Eurocontrol order is not inherent in the normal exercise of an air carrier's activity. Consequently, according to the defendant, compensation within the meaning of the Article 5(1)(c) of the Regulation should not be provided to the applicant. In this case the national court relied on the findings of the EUCJ in the *Eglītis and Ratnieks* case that air carrier while planning its flight must organise its resources appropriately taking into account the risks associated with the occurrence of extraordinary circumstances. [118] The SCRL noted that Eurocontrol orders are binding. However, such order which resulted the delay of flight could be identified as an extraordinary circumstance only if that delay was long and an air carrier would have demonstrated that during the planning of the flight Brussels-Riga the risk of such a delay was assessed and all reasonable measures were taken in order to avoid delays or cancellations, for example, sufficient time between the flights. Finally, according to the Court, the delayed arrival to the final destination was also determined by the fact that the aircraft from Riga to Vilnius did not wait for the passengers from the flight Brussels-Riga. Thus, the Court concluded that in this case Article 5(3) of the Regulation is not applicable. Moreover, a national court also relied on 15 recital in the preamble of the

[116] *Ibid*.
[117] *R. O. D. v. Air Baltic Corporation AS*, Supreme Court of the Republic of Lithuania (2014, No 3K-3-403).
[118] *Andrejs Eglītis*, *supra* note 65, para 28.

Regulation which defines several conditions when air traffic management decision should be deemed as extraordinary circumstances: long delay, overnight delay, cancellation of one or more flights. It means that in this case the air carrier must pay compensation. It also means that in some situations Eurocontrol orders should be considered extraordinary circumstances.

3.6. NON-MATERIAL DAMAGE UNDER ARTICLE 12 OF THE REGULATION AND ARTICLE 22 OF THE CONVENTION

The applicant sought compensation under Article 7 of the Regulation. She claimed damages, because the flight was delayed for one hour and twenty minutes. This was the reason why she went by bus (about 300 km) and reached the final destination four hours later than planned.[119] The applicant had to go to her workplace without taking a rest. A national court relied on the *Sousa Rodríguez* case and provisions of the Civil Code (namely Article 6.250) which establishes the notion of non-material damage.[120]

According to Article 25 of the Civil Code, damage caused by the violation of non-material assets, as well as in the case of material damages, requires all conditions of civil liability (unlawful acts, causation, guilt and injury). The applicant should prove the occurrence of non-material damage and provide appropriate arguments and evidence. According to the applicant, the damage resulted inconveniences caused by the delay of flight. The Court pointed out that the applicant should state the reasons that compensation within the meaning of the Regulation does not cover all non-material damage resulted from a delay of flight. According to the SCRL, the fact that the applicant reached the final destination by bus and not by plane is irrelevant for the determination of non-material damage within the meaning of Article 6.250 of Civil Code. Besides, the Regulation does not govern that the passengers of cancelled or delayed flights should reach the final destination by air transport. Moreover, the SCRL emphasised the short distance of traveling by bus. Thus, the inconveniences lasted for a short time and the applicant did not mention other arguments, besides the fact that she had to go to workplace without taking a rest. As a consequence, the SCRL concluded that the whole set of circumstances and criteria did not constitute sufficient grounds for admitting that the applicant had suffered greater moral damage than the compensation under the Regulation could provide.

[119] *R. O. D. v. Air Baltic Corporation AS*, *supra* note 117.
[120] *Aurora Sousa Rodríguez*, *supra* note 40.

Thus, in this case the SCRL decided on the conditions under which the air passenger may claim compensation for the damage higher than it is governed by the Regulation.

There are also cases related to moral compensation under the Convention. Applicants claimed non-material damage from the tour operator because of the loss of baggage.[121] In the baggage they had medications and other items necessary for traveling. The SCRL indicated that Article 22(2) of the Convention sets out limits of liability but it cannot be perceived as completely restricting the liability of tour operator. The Court, relying on the EUCJ ruling in the *Axel Walz* case and provisions of Civil Code, found that if the latter improperly performs other obligations arising from contract for tourism services which can be reasonably expected by the passenger limits set out in Article 22(2) of the Convention are not applicable. Consequently, in such cases the lower courts should assess whether the tour operator has to pay non-material damage (which was resulted by improper execution of contract for tourism services) under Article 6.754(5) of the Civil Code even if it exceeds the limits laid down in Article 22(2) of the Convention. The SCRL emphasised that the amount of non-material damage is determined by assessing specific personal inconveniences, other violations of non-material values.

Consequently, the SCRL found that it is possible to claim more non-material damage than it is provided in the Convention.

CONCLUDING REMARKS

1. The *ratione materia* of the Regulation and the Convention differs. The application of the Regulation depends on the territory of departure and landing of the aircraft and the type of the carrier whereas the application of the Convention depends only on the territory of the State Parties. Moreover, the application of both acts differs since they protect different air passenger rights and provide different remedies.
2. The EUCJ in its case law developed the protection of air passenger rights:

2.1. If the question arises whether certain technical problems fall within the definition of "extraordinary circumstances" two aspects should be considered whether the events are normal in practice and the air carrier could have controlled them.

2.2. Also the EUCJ formulated technical and economic viability criterion of an air carrier to operate flights at the time of extraordinary circumstances. First, an air carrier deploys all its resources in terms of staff, or equipment and the

[121] *D. S., V. S. v. Tez Tour*, Supreme Court of the Republic of Lithuania (2013, No 3K-3-454).

financial means at its disposal. Second, an air carrier does not make intolerable sacrifices.

2.3. In relation with the compensations when the flight is delayed, the EUCJ concluded that passengers whose flights are delayed have the right to compensation under Article 7 of the Regulation when they reach the final destination three hours or more after the arrival time originally scheduled. However, if an air carrier proves that delay occurred due to extraordinary circumstances passengers are not entitled to compensation.

2.4. Passengers may claim for material and non-material damage under both the Convention and the Regulation. The difference is that under the Convention the maximum amount of the claimed damage is established in the Convention and it cannot be exceed (included both types of damage). In contrast, the Regulation establishes a minimum amount of compensation for material and non-material damage. However, it does not deprive a passenger to claim for additional compensation relying of the Convention or/and national laws.

2.5. Under the Convention an employer has the right to claim damages when the employees are the passengers on a business trip. Whereas, the Regulation does not provide such a possibility and only passengers can claim for damages.

3. The Supreme Court of the Republic of Lithuania only in one case has considered the compatibility of the Regulation and the Convention. The court basically follows the EUCJ findings and rely on them in cases related to the concept of extraordinary circumstances. However, the national courts of Lithuania in the air passenger rights protection area separated the liability of an air carrier and a flight ticket vendor, as well as an air carrier and a tour operator.

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