EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2014) 22 ERPL 5

The *European review of Private Law* is published six times per year.
Subscription prices for 2014 [Volume 22, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 718/USD 956/GBP 527
Online subscription prices: EUR 664/USD 886/GBP 488

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
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The *European Review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*
Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

European Review of Private Law 5-2014 [769–786] © Kluwer Law International BV. Printed in Great Britain.

The Disabling of the EC Disability Regulation: *Stott* v. *Thomas Cook Tour Operators Ltd* in the Light of the Exclusivity Doctrine

INGRID KONING*

Abstract: The (contractual) relationship between passengers and airlines is regulated on an international as well as a European level. However, problems arise in the demarcation between these levels. The cause of these demarcation problems lies, on the one hand, in the strict 'exclusivity doctrine' under which only the Montreal Convention can serve as a basis for any claim arising out of international carriage by air and, on the other hand, the refusal of the CJEU to deal with the matter.

In *Stott* v. *Thomas Cook Tour Operators Ltd,* the UK Supreme Court has unequivocally confirmed the Exclusivity Doctrine to the detriment of the EC Disability Regulation. In this article, the decision of the UK Supreme Court will be discussed in the broader context of the problematic relationship between the international convention and European passenger rights regulations.

1. Introduction

Many aspects of our day-to-day life are regulated by European laws. This is also true for private law relationships between EU citizens and businesses. The field of air transport, in particular, is an example in this respect. From the mid-1990s onwards, the European Union created an elaborate regulatory system aimed at legislating the (contractual) relationship between passengers and airlines. That same legal relationship is, however, also the subject of long-established international conventions. The European Union also became a party to the international convention that regulates international carriage by air: the Montreal Convention 1999.[1]

The idea behind regulating the legal relationship between passengers and airlines is, from a European standpoint, understandable and admirable: both transport and consumer protection are policy areas where the EU has actively and successfully exercised its competence and consumers have definitely benefited from this. There is, however, one snag: the European legislation does not always fit well with the international convention, which is widely interpreted as being the

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1 The Convention for the Unification of Certain Rules for International Carriage by Air, *OJ* L 194, 18/07/2001, p. 38.

exclusive basis for a claim arising out of international carriage by air (the exclusivity doctrine). So far, the European legislator as well as the CJEU have failed to properly react, allowing the problem to fester and ultimately destabilize both systems. The decision of the UK Supreme Court in *Stott* v. *Thomas Cook Operators Ltd* is the latest chapter in this story. In this article, the decision of the UK Supreme Court in the *Stott* case will be discussed in the broader context of the problematic relationship between the international convention and the European passenger rights regulations.

2. The Predicament of Mr Stott

Christopher Stott is severely disabled and permanently confined to a wheelchair. He depends on his wife during air travel. In 2008, Mr Stott booked a return flight from the United Kingdom to Greece with Thomas Cook Tour Operators and went to great lengths to ascertain that he and his wife would be seated together. During the outward flight, everything went as planned, but when they checked in for the return flight to the United Kingdom they were told that they would not be seated together. When Mr Stott protested, he was reassured that the problem would be solved at the gate. When they arrived there, however, all the passengers had already boarded and they were told that the seat allocations could not be changed. The flight turned out to be a horrendous experience for Mr and Mrs Stott. During embarkation, Mr Stott's wheelchair overturned and he fell onto the cabin floor. No one present knew how to deal with the situation. Mr Stott felt embarrassed, humiliated and angry. Mrs Stott, who was seated behind her husband during the flight, had the greatest difficulty in taking care of her husband and assisting him with his catheter. The crew did not offer any help or assistance.

With the assistance of the Equality and Human Rights Commission Mr Stott brought a claim under the UK and EC Disability Regulations[2] for discomfort and injury to his feelings caused by the breach of duty under these regulations. The Manchester County Court Recorder[3] decided that the EC Disability Regulation had indeed been violated and that he would have awarded GBP 2500 if the Montreal Convention had not prevented him from doing so. He therefore rejected Mr Stott's claim. On appeal this decision was upheld.[4] According to the Court of Appeal, the injury to Mr and Mrs Stott was sustained during the

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2 Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 Jul. 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, *OJ* L 204, 26/07/2006, pp. 1-9, which is implemented in the UK by the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 (SI 2007/1895).

3 Recorders are judges in the County and Crown courts. See for an overview of the UK judiciary http://www.judiciary.gov.uk/.

4 [2012] EWCA Civ 66. See also http://ukscblog.com/new-judgment-stott-v-thomas-cook-tour-operators-ltd-2014-uksc-15/.

timeframe when the Montreal Convention governed their situation. Its exclusivity both provided and limited their rights and remedies.[5] Mr Stott then appealed to the UK Supreme Court which – seemingly reluctantly – dismissed his appeal.[6]

How is it possible that Mr Stott – who has a European Regulation on his side that is geared to protecting exactly those rights that were violated – was still left empty-handed? Why does the Montreal Convention prevent the compensation of damage for a breach of that fundamental right? What are the justifications for the far-reaching consequences of this approach? The answer can be found in Article 29 of the Montreal Convention and the persistent and widely accepted view that this convention is exclusive and exhaustive, the so-called 'exclusivity doctrine'. Since 2006, the CJEU has delivered a number of preliminary rulings that are at odds with the exclusivity doctrine, and so far it has skilfully circumvented every direct or indirect question thereon. The question is whether the CJEU can still afford this approach after the decision of the UK Supreme Court.

3. The Montreal Convention and the European Union

The Montreal Convention 1999 was established under the auspices of the International Civil Aviation Organization (ICAO), a specialized agency of the UN. Its objectives are to further harmonize and codify the rules governing international carriage by air, to ensure the protection of the interests of consumers and the need for fair compensation based on the principle of restitution, and to achieving a fair balance of interest among those involved in international air transport.[7]

The convention has a worldwide effect: when someone travels by air, there is a great chance that the convention will govern the (contractual) relationship between passenger and airline. There are two reasons for this. First, the convention has rather broad scope rules. It applies to all international flights between two contracting states as well as to return flights from (and to) a contracting state. Second, most of the air-faring countries that have any significance – air transport-wise – are a party to the convention, which has a total

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5 *Supra*, at 54.

6 Lord Toulson considered: 'The embarrassment and humiliation which Mr Stott suffered were exactly what the EC and UK Disability Regulations were intended to prevent. I share the regret of the lower courts that damages are not available as recompense for his ill-treatment and echo their sympathy for him, but I agree with the reasoning of their judgments and would dismiss this appeal', see [2014] UKSC 15, at 65.

7 See the preamble of the Montreal Convention. The website of McGill University's Air and Space Law Institute contains a catalogue of all air law-related international treaties. Under 'Private Air Law Treaties and Conventions', the Montreal Convention and its predecessor the Warsaw Conventions can be found, see http://www.mcgill.ca/iasl/research/air-law/private-air-law-treaties.

of 107 Member States.[8] Because all the European Member States are party to it, the Montreal Convention will govern all flights originating from or within the European Union.

The European Union shares competence with its Member States in matters concerning transport policy.[9] This is why not only the Member States but also the European Union itself became a party to the Montreal Convention.[10] This was made possible by virtue of Article 53 paragraph 2 Montreal Convention, which was included in the convention for precisely that purpose.[11]

The European Union then subsequently incorporated the Montreal Convention in the European legal order by Regulation (EC) No. 889/2002,[12] under which the liability rules of the Montreal Convention apply to all air transport carried out by European airlines.[13] What the European Union did was effectively to widen the scope of the Montreal Convention to all national flights within the borders of one European Member State as well.

4. The Functioning of the Montreal Convention in the National Legal Order

The Montreal Convention is designed to apply directly to the (contractual) relation between the passenger and the air carrier. The convention itself forms the basis of a claim for damages. This seems logical, but it has been extensively discussed for many years.[14] The fact that the convention has – to put it in European law terms – direct horizontal effect is not stipulated expressly. Rather, it should be derived from the system of the convention and the way in which its subjects, their obligations and their relationships are described. The provisions of the convention are designed to directly govern the relationship between the

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8 See for a list of signatories and ratifying countries www.icao.int.

9 Articles 2(2) and 4(2g) TFEU.

10 Council Decision 2001/539/EC of 5 Apr. 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), *OJ* 2001 L 194/38.

11 Article 53 para. 2 Montreal Convention: 'This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a 'Regional Economic Integration Organisation' means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention (…)'.

12 Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, *OJ* 2002, L140/2.

13 A European air carrier or 'Community air carrier' under the regulation is an air carrier with a valid operating license granted by a Member State in accordance with the provisions of Regulation (EEC) No. 2407/92, according to Art. 1 para. 3b Regulation 889/2002.

14 See for an elaborate overview of the case law and doctrine on this point Shawcross and Beaumont, Air law, (London, LexisNexis, loose-leaf) vol. 1, para. VII-[401]ff.

parties involved in the contract of carriage. It covers the (private law) relationship of the contracting parties (the air carrier and the passenger) and others involved in the execution of the contract of carriage (the subcarrier, the successive carriers and servants and agents). The only tangible indication that the convention itself provides the foundation for a claim is the title of Article 29 Montreal Convention, which reads: 'basis of claims'.[15]

If the specific flight falls within the formal, temporal and material scope of the convention, it applies semi-mandatorily, which means that it is only possible to deviate from the convention in specific situations and only to the benefit of the passenger.

All situations that fall within the subject matter of the convention are thus subject to the convention, and the national law is taken out of the equation completely.

Nevertheless, it still falls under the national legal order where the convention is effectively applied, in the sense that parties rely on the (civil) courts of the contracting states to enforce the liability rules. In order to determine the competent court the convention provides for jurisdiction rules as well, under which passengers have the choice of five possible jurisdictions to bring their claim.[16]

5. The Importance of an Autonomous Interpretation

As said, the observation that the international convention is applied and interpreted in the national legal order may seem obvious. However, the success (or failure) of international private law conventions such as the Montreal Convention largely depends on whether national courts are aware of this fact, whether they are able to step outside of their national legal frameworks and partake in the international discourse that takes place between the courts of the contracting states and how much they are in tune with the rules of autonomous interpretation. These rules cannot be derived from the convention itself because no provisions as to its interpretation were included.

The fact that national courts of the contracting states are not bound by each other's decisions (not even by a decision of the highest courts of the other contracting states) could potentially threaten uniformity: 107 different national courts may interpret a provision in just as many different ways. There is no supranational entity that can decide what the proper interpretation is when the

15 Article 29 Montreal Convention will be discussed more extensively hereunder.

16 See Arts 33 and 46 Montreal Convention. The five jurisdictions are (1) the court of domicile of the carrier, (2) the court of the place of business through which the contract was made, (3) the court of the place of destination, (4) the court of the domicile of the sub-carrier, and in case of the death or injury of a passenger (5) the court of the principal permanent residence of the passenger.

national courts are divided. How can the objectives of the convention – to unify international air law – be protected under these circumstances? The answer is autonomous interpretation: an interpretation of the convention on the basis of its wording, context and objectives. In international transport law, it is generally accepted and it is common usage to rely on the drafting history of conventions to determine the purpose of the contracting parties. To an increasing extent reference is made in this context to the rules on treaty interpretation in Articles 31, 32 and 33 of the Vienna Convention on the law of treaties.[17] Another important and broadly accepted tool for the interpretation of transport treaties in general (and air transport treaties are no exception) is the examination of international case law. A comparison of the case law in the different contracting states can be a method to determine what the prevailing interpretation of a provision is. This is why generally there is such a strong focus on international case law in the doctrine concerning (air) transport law.

This seems straightforward enough, in theory. In reality, however, different applications or interpretations of the convention are difficult to prevent, even on key aspects of the convention. However, there seems to be more harmony between Montreal contracting states that belong to the same 'legal family'. For instance, the courts in Commonwealth Montreal states tend to be more aware of each other's decisions, which makes an actual discourse between the courts more likely than between Continental European courts, even if these courts share the same legal roots. Still, in the absence of a supranational highest court that can give guidance and direction to the courts of the contracting states, a true uniform interpretation will remain unachievable. Perhaps this will change one day, as quite recently the Dutch Association for Maritime and Transport Law (NVZV) and the Royal Dutch Society for International Law (KNVIR) have requested the Dutch Minister for Foreign Affairs to examine the possibilities of a preliminary reference procedure concerning the interpretation of international (private law) conventions before the International Court of Justice.[18]

6. The Exclusivity Doctrine

Let us return to Mr Stott and his barred claim under the EC Disability Regulation because of the exclusivity of the Montreal Convention. What does the exclusivity doctrine entail? What are its roots and, most importantly, its justification?

The Montreal Convention does not expressly state that it is exclusive in the sense that, if the convention does not provide a remedy, no remedy is possible at all. In other words, the exclusivity doctrine, as formulated by the UK Supreme

17 https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

18 See http://www.nvzv.nl/knvir-en-nvzv-vragen-onderzoek-naar-adviesprocedure-bij-het-internationaal-gerechtshof-te-den-haag.

Court, cannot be derived literally from the text of the convention. Rather, the doctrine is a product of a teleological systematic interpretation of Article 24 of the Warsaw Convention 1929, the predecessor of the Montreal Convention. Article 24 was taken over in Article 29 of the Montreal Convention. Textual changes were made, but the gist of the provision is similar to its 1929 forerunner. Article 29 reads as follows:

ARTICLE 29 – BASIS OF CLAIMS. 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 be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

The conditions and limits to which Article 29 refers are, for instance, the period of limitation of two years,[19] the possible exemptions the carrier can invoke (or the lack thereof),[20] the limitations of liability[21] and the core liability provisions: Articles 17 and 19 Montreal Convention.[22] Under Article 17 Montreal Convention, the period of liability is restricted to a specific location and timeframe: the air carrier is only liable for damage sustained in case of the death of or bodily injury to a passenger subject only to the condition that the accident that caused the death or injury took place on board the aircraft or in the course of embarking or disembarking. Liability for the loss of or damage to luggage (the second, third and fourth paragraphs of Article 17 Montreal Convention)[23] and delay (Article 19 Montreal Convention)[24] is not restricted to a certain timeframe or location. The fact that the damage falls within the broad conditions as

19 Article 35 Montreal Convention.

20 Articles 17, 19, 20 and 21 Montreal Convention.

21 Only for delay and damage to luggage, see Art. 22 Montreal Convention. Liability for the death of and bodily injury to passengers is unlimited.

22 Under the Warsaw Convention Arts 17 and 19 also governed liability for the death of and injury to passengers as well as a delay and their wording has not been significantly changed.

23 Article 17 para. 2 Montreal Convention: 'The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.'

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

described in Article 17 or 19 of the Montreal Convention is enough to trigger liability.

Article 29 of the Montreal Convention can be read in two ways. First, the words 'can only be brought subject to the conditions and such limits of liability as are set out in this Convention' signify that an action for damages can be brought regardless of its basis (be it in contract, tort or otherwise) albeit that the conditions and limits of liability (in Articles 17, 19, 21 and 22 as described above)[25] will always prevail. Second, one can read Article 29 to mean that an action for damages can be brought *only* on the basis of the liability provisions of the Montreal Convention – the exclusivity doctrine. Under this doctrine, an action for damages can only be brought exclusively on the basis of the Montreal Convention liability provisions.

As long as the Montreal Convention actually offers a basis for a claim (for instance, a passenger breaks his leg (bodily injury) during the flight (on board of an aircraft)), the question seems academic. After all, either Article 17 Montreal Convention or national law serves as a basis. Either way, a remedy is available to the passenger. Whichever basis the passenger chooses, the conditions and limits of liability are protected. The exclusivity doctrine, however, goes further than this. Articles 17 and 19 are considered to be *exhaustive* as well. This means that if an action for damages cannot be brought under Article 17 or 19 (because the passenger did not break his leg but incurred psychological injuries) not only is the carrier not liable under the Montreal Convention but it is not liable at all. To paraphrase the words of the House of Lords (now the UK Supreme Court) in *Abnett and Sidhu* v. *British Airways* – the landmark case in this context – under the exclusivity doctrine the object and purpose of the convention is to describe the circumstances, the *only* circumstances under which the airline can be held liable for any damage that is caused by or related to the international transportation.[26] *Sidhu* dates back to 1996. Two years later, the US Supreme

25 The exclusivity doctrine also applies to the carriage of goods (Art. 18 Montreal Convention). The carriage of goods will not be discussed here, since it falls outside the selected scope of this article.

26 *Abnett and Sidhu* v. *British Airways Plc* [1997] A.C. 430, at 447. The House of Lords considered: 'The intention [of Art. 24, insertion IK] seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not

Court confirmed *Sidhu* in *El Al Israel Airlines, Ltd* v. *Tsui Yuan Tseng.*[27] Scarcely six months later, in May 1999, the Montreal Convention was concluded. In the convention, the provision on which the House of Lords and later the US Supreme Court based the exclusivity doctrine (Article 24 of the Warsaw Convention) was taken over, almost verbatim, in Article 29 cited above. The House of Lords again confirmed the doctrine in *Deep Vein Thrombosis and Air Travel Group Litigation*,[28] and after that, its prevalence seemed to be no longer contested, at least in the lower courts of the United States and the United Kingdom. In light of this, the decision of the UK Supreme Court (formerly the House of Lords) comes as no surprise. The UK Supreme Court simply referred to its 1996 decision – which was based on a teleological interpretation of Articles 17 and 24 of the Warsaw Convention.

The key question is therefore: is the exclusivity doctrine correct? Does an autonomous interpretation on the basis of the wording, context and objectives of the convention justify the conclusion that the system is exhaustive? Here it becomes somewhat murky. As explained above, the wording of Article 29 Montreal Convention and Article 24 Warsaw Convention could be read either way. The scarce references that can be found in the preparatory works of the Montreal Convention concerning (the draft version of) Article 29 are at best brief and ambiguous.[29] The drafting history of the Warsaw Convention is equally unclear. Only two contradicting references relating to exclusivity can be found. The first is from Henri De Vos, who was the Reporter of the 1929 conference. De Vos explained the system of liability (for luggage in Article 17) under the convention and the relation with national (common) law:

(...) as to the personal effects that the traveller keeps with him, these do not fall under the regime of the Convention: The traveller retains the custody as well as the risk. The system of liability of the Convention is based only upon the document of carriage. The baggage check not covering these personal effects, the contemplated system does not apply. It is understood, however, that the convention does not prevent the application of common law: if a traveller has his clothing damaged by the fault of the carrier, he can demonstrate the latter's fault (…).[30]

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need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention'.

27 525 U.S. 155 (S. Ct. 1999).

28 [2006] 1 Lloyd's Rep. 231.

29 International Conference on Air Law, Montreal 10-28 May, vol. I Preparatory Materials, Doc. 9775/DC/2, pp. 13, 189, 190 and 235.

30 C.I.T.E.J.A, II Conférence Internationale de Droit Privé Aérien, 4-12 Oct. 1929, Varsovie (Procès-verbaux), Warsawa: l'OACI 1930, pp. 14-17, as translated in R.C. HORNER & D. LEGREZ,

The second reference is from Sir Alfred Dennis (the delegate for the United Kingdom) concerning the draft version of Article 24:

We have at the beginning of the Article [24, insertion IK): '…any liability action however founded can only be brought under the conditions and limits provided for by the present Convention.' It's a very important stipulation which touches upon the very substance of the Convention, because this excludes recourse to common law (…).[31]

While the first passage speaks of a non-exhaustive system, the second indicates an exhaustive one, which in my view disqualifies the preparatory works of the Warsaw Convention (as well as the Montreal Convention) from guidance in this matter.[32]

Yet it seems as if there are only firm believers who adamantly defend that the wording of Article 29 Montreal Convention (as well as Article 24 Warsaw Convention) and their drafting history shows that the Convention is exhaustive[33] and those who equally wholeheartedly reject[34] or, as will be shown below, fail to see this at all. The source of this Babel-like confusion is, in my view, legal heritage. If one comes from a legal background where the concurrence of claims is widely accepted and permitted,[35] Article 29 Montreal Convention (and Article 24 Warsaw Convention) is likely to be read as an article that is designed to *permit* and *curb* parallel claims to the limits of the system. The concurrence of claims is

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Second International Conference on Private Aeronautical Law Minutes, Warsaw 1929, Fred B. Rothman, South Hackensack 1975, p. 22.

31 II Conférence Internationale de Droit Privé Aérien, p. 140, as translated in Horner and Legrez 1975, p. 213.

32 Different Sonja Radosevic, 'CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention', 38. *ASL* 2013, p. 98.

33 Jorn j. wegter, 'The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention', 34. *ASL* 2006, pp. 135 ff.; Sonja Radosevic, 'CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention', 38. *ASL* 2013, pp. 95 ff.; George N. Tompkins, 'Are the Objectives of the 1999 Montreal Convention in Danger of Failure?', 39. *ASL* 2014, pp. 207 ff.; Folorunsho Majiyagbe & Ajibola Dalle, 'The Exclusivity of the Warsaw Convention Regime vis-a`-vis Actions and Remedies in International Carriage by Air under Nigerian Laws', 31. *ASL* 2006, pp. 196 ff.; Paul Stephen Dempsey, Svante O. Johansson, '*Montreal* v. *Brussels*: The Conflict of Laws on the Issue of Delay in International Air Carriage', 35. *ASL* 2010, pp. 207 ff.

34 This author belongs to this last group; see I. Koning, Aansprakelijkheid in het luchtvervoer. Goederenvervoer onder de Verdragen van Warschau en Montreal, PhD thesis Rotterdam 2007, pp. 312 ff; see also Marc Mc Donald, 'The Montreal Convention and the Preemption of Air Passenger Harm Claims', XLIV. *The Irish Jurist*, 2010, pp. 203 ff.

35 See for an elaborate exposé on the application of the concept of concurrence in (amongst others) international air law R. De Graaff, *Something Old, Something New. Something Borrowed, Something Blue. Applying the General Concept of Concurrence on European Sales Law and International Air Law,* Jongloed, Leiden 2014.

engrained in many international transport treaties[36] as well as in national law systems such as, for instance, the Dutch Civil Code.[37] On the other hand, there are legal systems that entertain the idea that a law or a rule (that serves as a basis for a claim) can fill the entire legal vacuum without leaving room for the concurrence of claims. The clearest example in this context is the United States, where the rule of federal pre-emption dictates that State law remedies are pre-empted by federal statutes or Treaties (such as the Montreal Convention).[38] Those who come from a legal background where the non-concurrence of claims or legal domains is the norm are much more inclined to read a pre-emptive effect into Article 29 Montreal Convention.

However, the exclusivity doctrine cannot be derived directly from the wording of Article 29 or Article 17 or from their drafting history. Article 29, read in its context and in light of the purpose of the convention ('Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'),[39] could just as well be interpreted as a provision that permits and curbs concurrent claims and that Articles 17 and 19 are not meant to be exhaustive in the sense that they completely take national law out of the equation, even in circumstances that fall outside the conditions described therein.[40]

The exclusivity doctrine initially only related to the demarcation between the Montreal Convention and the national laws of the contracting states. Simultaneously with the solidification of the exclusivity doctrine in the courts of (mostly) the United Kingdom and the United States, another important development can be discerned: the European Union began to regulate the private relationship between passengers and airlines by means of the air passenger rights regulations. Does the exclusivity doctrine also apply to this new legal dimension? In other words, does the Montreal Convention also exclude claims based on (secondary) European law?

7. European Passenger Regulations and the Exclusivity Doctrine

The European Union has been involved in the Montreal Convention from the onset. Representatives of the European Union were present at the Diplomatic

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36 Article 28 of the Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956), Art. 52 of the Convention concerning International Carriage by Rail (CIV) 1999.

37 See Art. 8:362 Civil Code that concerns parallel contractual and tortious claims in the Contract of carriage.

38 SHAWCROSS & BEAUMONT, Air law (London: LexisNexis, loose-leaf) vol. 1, para. VII-[406].

39 The third paragraph of the Preamble to the Montreal Convention.

40 The blueprint for such an approach has already been provided: see R. DE GRAAFF, *Something Old, Something New. Something Borrowed, Something Blue. Applying the General Concept of Concurrence on European Sales Law and International Air Law,* Leiden, Jongloed 2014.

Conference in Montreal in 1999 and directly and indirectly (through the European Member States that were present) played a role in the negotiations that took place there. The Union became a signatory to the convention, and it urged the (then) Member States to complete their ratification processes as soon as possible. The European Union itself (as an international organization) also became a fully fledged party to the Montreal Convention as well.[41] It even incorporated the Montreal Convention into the European legal order (and simultaneously expanded the scope of the convention)[42] by means of Regulation (EC) No. 889/2002.[43]

In addition to Regulation (EC) No. 889/2002 the European Union continued with three regulations, which were intended to supplement the Montreal regime. Together, the airline passenger's rights armamentarium was meant to regulate the position of the passenger vis-à-vis the carrier in quite a comprehensive way.

The most well known is Regulation (EC) No. 261/2004.[44] Under this regulation passengers have a right to care and assistance in the form of meals, refreshments and hotel accommodation. In the event of denied boarding, cancellations and long delays (but not a mere delay), passengers are also entitled to a standardized compensation of EUR 250, EUR 400 or EUR 600, depending on the length of the journey. In spite of the text of the regulation, the CJEU expanded the right to claim compensation under the regulation to a delay as well in the Sturgeon judgment.[45]

The third regulation, Regulation (EC) No. 2111/2005[46] obliges the airline that concludes the contract of carriage with the passenger to inform the passenger

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41 Council Decision of 5 Apr. 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), *OJ* L 194, 18/07/2001, p. 38.

42 To purely domestic flights and to international flights executed by European airlines that did not fall within the scope of the Montreal Convention because (for instance) the place of destination or departure would not be situated in a Montreal Contracting state, as Art. 1 of the Montreal Convention demands.

43 Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002, amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, *OJ* 2002 L140/2.

44 Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No. 295/91, *OJ* 2004 L46/1.

45 CJEU 19 Nov. 2009, joined Cases C-402/07 and C-423/07, ECR 2009, p. 923.

46 Regulation (EC) No. 2111/2005 of the European Parliament and of the Council of 14 Dec. 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier and repealing Art. 9 of Directive 2004/36/EC, *OJ* 2005 L 344/15.

about the identity of the carrier that will actually perform the flight (the sub-carriers). It creates transparency in the contractual chain. It also introduces the legal framework under which the European Union adopted a blacklist of airlines subject to an operating ban within the European Union. Regulation (EC) No. 1107/2006[47] is the Regulation that Mr Stott relied upon. It concerns the rights of disabled passengers and passengers with reduced mobility. The regulation forbids airlines[48] from refusing passengers a reservation on grounds of disability or reduced mobility.[49] Carriers are obliged to allow disabled passengers, free of charge, to take assistance dogs into the cabin, as well as additional medical equipment and mobility equipment, and to make all reasonable efforts to meet any special seating needs and when a disabled person is assisted by an accompanying person, the air carrier must make all reasonable efforts to arrange accompanying seats.[50]

8. The Relationship between International Treaties and Secondary European Law

When the European Union became a party to the Montreal Convention, it became an integral part of the European legal order and thus binding on the European Union, its institutions and the Member States.[51] This also means that the CJEU has jurisdiction to give preliminary rulings on the interpretation of (provisions of) the convention.[52] In the legal hierarchy (from a European perspective), the Montreal Convention stands above secondary sources of European law such as regulations. In case of a conflict, the regulations yield to the Montreal Convention. The regulations apply to the same (private law) relationship between the passenger and the air carrier as the Montreal Convention. It is therefore not surprising that – even before Regulation (EC) No. 261/2004 came into force – the

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47 Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 Jul. 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, *OJ* 2006 L 204/1.

48 Obligations rest on airports as well as airlines. Art. 1 para. 2 of Regulation 1107/2006 stipulates that the regulation applies to disabled persons and persons with reduced mobility on (intended) commercial flights that depart from, transit through, or arrive at an airport situated in a European Member State. Paragraph 3 specifies that when a flight commences from a non-European destination to a destination in the European Union, the regulation only applies to Community airlines. For a detailed exposé on the (complicated) scope rules of the Regulation see: José Viegas Maria, Passengers with Reduced Mobility in the European Union: Legal Issues Regulation (EC) No. 1107/2006 of 5 Jul. 2006, *A&SL* 2013/1, p. 56.

49 Article 3 Regulation (EC) No. 1107/2006.

50 Article 2 and Annex 2 Regulation (EC) No. 1107/2006.

51 Article 216 TFEU and CJEU 10 Jan. 2006, Case C-344/04, ECR 2006, p. 403 (IATA and ELFAA), legal grounds 35 and 36.

52 Article 267 TFEU.

first preliminary question concerning a possible conflict between the two regimes was referred to the CJEU: the *IATA and ELFAA* case.[53]

IATA and ELFAA raised the question whether the provisions concerning the right to care and assistance in case of delay (Articles 6 and 9 of Regulation (EC) No. 261/2004) were in conflict with Articles 19 and 29 of the Montreal Convention. The CJEU decided that there was no conflict between the two regimes, because the regulation and the convention relate to different types of damage. According to the CJEU, two types of damage were possible in the case of passenger delay.[54] On the one hand, damage that is the same for all passengers that can be redressed through standardized measures such as the regulation's provision of care and assistance. On the other hand, there is 'individual damage', damage that is inherent to the specific passenger or the reason for the particular journey. In the eyes of the CJEU, the Montreal Convention only refers to individual compensation; it does not follow from Articles 19 and 29, or from any other provision of the Montreal Convention, 'that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities (i.e., the European Union) to redress, in a standardized and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts'.[55]

Although the CJEU referred to Article 31 of the Vienna Convention – the provisions concerning an autonomous interpretation of international treaties – its interpretation lacks any grammatical, contextual or teleological substantiation. This would in fact have been a difficult feat (had the CJEU made a serious attempt in this direction) because there is no support in the Montreal Convention for a distinction between 'individual' and 'collective' damage or that the Montreal Convention would be limited to the first type of damage. In fact, the costs that a passenger could claim in the event of a breach of the obligation to provide care and assistance under the regulation (the cost of a meal, additional transport, overnight accommodation, and telephone or email costs) can undoubtedly also be claimed under Article 19 of the Montreal Convention.

It is also highly unsatisfactory that the exclusivity doctrine has not received any attention from the CJEU. The questions raised in connection with Article 29 Montreal Convention gave the CJEU every reason to do so. Nonetheless, the CJEU has refrained from any reference to the exclusivity doctrine and considers that it does not follow from Article 29 or from any other provision of the Montreal Convention that the drafters intended to shield carriers from any other form of

53 CJEU 10 Jan 2006, Case C-344/04, ECR 2006, p. 403.

54 Legal ground 40.

55 Legal ground 45.

intervention. In the legal (air transport) doctrine, the CJEU's decision in *IATA and ELFAA* was received as a brusque brush-off; it diametrically opposed the exclusivity doctrine, which, at the time of the judgment, had been – at least on the surface of things – the prevailing view for ten years.[56]

In my view, the CJEU could have avoided many problems if it had faced the exclusivity doctrine head on. Admittedly, it would have been a more difficult and complicated conclusion regarding the relationship between the convention and the regulation, but not necessarily to the detriment of the latter.[57] The CJEU could have chosen, after all, to respectfully but expressly disagree with the House of Lords in *Sidhu* and the US Supreme Court in *Tseng*. The exclusivity doctrine is an interpretation (autonomous, albeit, but still an interpretation) of a treaty, and in my view, there are enough grounds for another, less far-reaching interpretation.

Unfortunately, the CJEU did no such thing. Instead, it kept categorically ignoring the exclusivity doctrine and placed itself outside the international discourse between the courts of the Montreal Member States, thereby denying itself the guiding position it could potentially have asserted.[58] But worse still: it seriously threatened its own authority. The *Sturgeon* decision of 2009 is an example of this.

In the *Sturgeon* case, the CJEU extended the right to standardized compensation (under the regulation only available in case of denied boarding and cancellation) to a delay as well. According to the CJEU, the distinction that the regulation made between cancelled passengers (compensation of EUR 250 to EUR 600) and delayed passengers (a voucher for a sandwich and/or a (small) cup of coffee) violated the principle of equality. Although this *contra legem* interpretation seems to be legitimate in light of the principle of equality, it nonetheless led to twelve new preliminary references, five of which were directly related to the relationship between the Sturgeon decision and Articles 19 and 29 of the Montreal Convention. The decision caused so much turmoil that Member States' courts began to defer cases until the CJEU had delivered clarity on the validity of the Sturgeon decision.

The CJEU provided this clarity three years later in the *Nelson and TUI Travel* decision.[59] Unsurprisingly – perhaps – it ruled that the *Sturgeon* decision was not in conflict with the *IATA and ELFAA* decision or the Montreal Convention, without going into the exclusivity doctrine. The CJEU simply

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56 *Supra* fn. 33.

57 Similarly J. Prassl, 'Reforming Air Passenger Rights in the European Union', 39. *ASL* 2014, p. 72.

58 Preliminary Rulings guide the courts of the 28 Member States. That is more than a quarter of the 106 Montreal contracting states.

59 CJEU 23 Oct. 2012, Joined Cases C-581/10 en C-629/10.

concluded that in the *IATA and ELFAA* judgment it had already been decided that the Montreal Convention and the regulation related to different types of damage and that the latter did not encroach into the domain of the Montreal Convention. In other preliminary rulings concerning the delineation between the Montreal Convention and the regulation, the CJEU continues to carefully avoid the exclusivity doctrine. In the *Rodriguez* case,[60] for instance, the CJEU decided that a violation of (among other things) the obligation to provide care and assistance under Regulation (EC) No. 261/2004 entitles the passenger to compensation on the basis of the factors set out in Article 9[61] and continued that these elements cannot be claimed under the Montreal Convention. In *McDonagh,*[62] the CJEU confirmed that the violation of an obligation under the Regulation constitutes a basis for a (private law) compensation claim.

The problems described above all relate to Regulation (EC) No. 261/2004. One could say that Regulation (EC) No. 1107/2006 should be considered as a bird of an entirely different feather. I think that this is not the case, however. Like Regulation (EC) No. 261/2004, it bestows rights onto passengers. Its purpose is similar as well: a high degree of consumer protection. That the consumer under Regulation (EC) No. 1107/2006 is a disabled consumer or a consumer with reduced mobility makes no difference, except that it elevates the protection to the level of fundamental rights, to the principle of non-discrimination as vested in Articles 21 and 26 of the Charter of Fundamental Rights. In my mind, there is no doubt that the CJEU would have followed the line it set out under Regulation (EC) No. 261/2004 in the *Rodriguez* and *McDonagh* cases if a question as to the basis of claims under Regulation (EC) No. 1107/2006 would have been referred to it. Which is exactly what Stott did; he did not reconcile with the Court of Appeal's decision, appealed to the Supreme Court and in fact encouraged a preliminary question regarding the exclusivity doctrine under the Montreal Convention and its relation towards Regulation (EC) Nos 261/2004 and 1107/2006.[63]

It would have been a perfect opportunity to (once more) persuade the CJEU to closely examine the exclusivity doctrine. Unfortunately, however, the UK Supreme Court did not refer the question. According to the Supreme Court, the case was not about the interpretation or application of a European regulation.[64] It was a question about the scope of the Montreal Convention. The fact that the European Union is a party to the Montreal Convention, which gives the CJEU

60 ECJ 13 Oct. 2011, Case C-83/10.
61 *Supra*, legal ground 44.
62 ECJ 31 Jan. 2013, Case C-12/11.
63 [2014] UKSC 15, at 49.
64 *Supra,* at 59.

competence, [65] to give preliminary rulings concerning its interpretation or the fact that the Court of Appeal's conclusion barred a claim for compensation under a European Regulation was of no consequence to the UK Supreme Court. In the eyes of the Supreme Court, this it was an *Acte Clair*. The answer to the question was plain; 'the embarrassment and humiliation which Mr Stott suffered were exactly what the EC and UK disability regulations were intended to prevent', but nonetheless, damages were not available because of the exclusivity of the Montreal Convention.[66]

9. Conclusion

It is difficult to predict the aftermath of this decision. As long as the exclusivity doctrine, in its strict form as formulated by the US and UK Supreme Courts in *Tseng* and *Sidhu* and now in *Stott* prevails, it hardly seems thinkable that the Montreal Convention and the European Regulatory system can peacefully coexist. The *Stott* case is testimony to that. There are solutions to this problem, but none of them are simple.

First, the European Union should refrain from enacting legislation that undermines (or has the potential to undermine the Montreal Convention). The Union is a party to the Montreal Convention; it concluded an international agreement with the other Montreal contracting states to unify certain aspects of the private law relationship between airlines and passengers. With this, international law obligations (most importantly *pacta sunt servanda*)[67] go hand in hand. Ideally, any proposal for new passenger rights regulations or to reform existing regulations should ascertain that the boundaries of the Montreal Convention are respected.

Second, the total disregard for the exclusivity doctrine by the CJEU as well as the unequivocal denial of any criticism towards it by the UK Supreme Court seriously destabilizes both systems. Understandably, a departure from the exclusivity doctrine was a bridge too far for the UK Supreme Court. However, in my view, it could have – and should have – referred a preliminary question to the CJEU because it is not an *acte clair* that Article 29 of the Montreal Convention prescribes that the convention is exhaustive and exclusive.

Third, the CJEU could have prevented all this if it had interpreted Articles 19, 22 and 29 truly autonomously and had taken notice of the rich history of the case law concerning the interpretation of the convention's provision. As explained above, this does not necessarily mean that the CJEU should have unreservedly embraced the exclusivity doctrine. It could have opted for a weaker exclusivity, in which the concurrence of claims is permitted albeit within the boundaries of the

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65 Article 267 TFEU.

66 Nos. 65 and 66.

67 Article 26 of the Vienna Convention on the law of treaties.

Montreal Convention. In all probability, the Regulations (No. 261/2004 as well as the EC Disability Regulations) would not have come out of that exercise completely intact, but they would have survived for a large part.

By categorically ignoring the problem that kept popping up, it seemed as if the CJEU took a stance for air passenger rights regulations and the high level of consumer protection they aimed to achieve. But in the end, it is the consumer (Mr Stott) who is left empty-handed. And not only is Mr Stott left empty-handed, all disabled passengers are: The UK Supreme Court has sabotaged any claim for damages for a breach of an airline's duty under the disability regulation.

European Review of Private Law 5-2014 [811–812] © Kluwer Law International BV. Printed in Great Britain.

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REVUE EUROPÉENNE DE DROIT PRIVÉ
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