

2023

Opening Pandora's Box: Comparing Airline Passenger Protection in Korea and Europe in Light of Global Treaties

Pablo Mendes de Leon
Leiden University, the Netherlands

Author(s) ORCID Identifier:

Pablo Mendes de Leon:  <https://orcid.org/0000-0002-3918-0235>

Jin Choi:  <https://orcid.org/0000-0002-1659-5382>

Jin Choi
Leiden University, the Netherlands

Author(s) ORCID Identifier:

Pablo Mendes de Leon:  <https://orcid.org/0000-0002-3918-0235>

Jin Choi:  <https://orcid.org/0000-0002-1659-5382>

Recommended Citation

Pablo Mendes de Leon et al., *Opening Pandora's Box: Comparing Airline Passenger Protection in Korea and Europe in Light of Global Treaties*, 88 J. AIR L. & COM. 105 (2023)
<https://scholar.smu.edu/jalc/vol88/iss1/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**OPENING PANDORA'S BOX: COMPARING AIRLINE
PASSENGER PROTECTION IN KOREA AND EUROPE IN
LIGHT OF GLOBAL TREATIES**

PABLO MENDES DE LEON*
JINYOUNG CHOI**

ABSTRACT

Passenger protection will continue to ask for attention. The involved bodies and persons include policymakers and legislators, media, courts, compliance departments of airlines, law firms, consumer protection organizations, and airports. All parties must announce the conditions for such protection on their premises. In 2020, around 50% of all cases in the Netherlands, around 4,000 to 5,000 claims submitted to the lower courts, concerned passenger protection in aviation. In the Republic of Korea (Korea), these numbers are more limited but still significant; that is, around 2,500 claims form the aggregate number presented to Korean courts and Korea's Consumer Protection Agency.

The complexity of these cases is caused by the differentiated conditions under which protection measures are expected by and provided to passengers in conjunction with the various legal layers under which remedies must be afforded to them. Such layers concern global treaties; regional and domestic regulations; and conditions of carriage drawn up by the International Air Transport Association (IATA) and implemented by member airlines. Last but not least, all of these legal tools have been explained by courts in all parts of the world with differing interpretations of these rules.

DOI: <https://doi.org/10.25172/jalc.88.1.3>

* Professor of Air Law, The Hague, the Netherlands.

** Lecturer, Adv. L.L.M. Air and Space Law, Leiden University, the Netherlands; Safety and Human Performance R&D Consultant at the Royal Netherlands Aerospace Centre (NLR), the Netherlands.

For these reasons, this Article is entitled “Opening Pandora’s Box.”*** Lifting the ceiling of this box—which contains conditions, rules, remedies, and court decisions—reveals sources of great and unexpected troubles. We have made an attempt to open that box in this Article.

The continued magnitude of claims presented to Korean courts and the Consumer Protection Agency calls for a fresh light to be cast on this subject. This Article will examine the legal situation surrounding these issues by exploring the law in the following aspects. Part I of this Article will discuss the global umbrella regulations governing passenger protection. Parts II and III explore zealous Korean initiatives in passenger protection and the long and winding road in the European Union (EU). Part IV presents concluding remarks.

We conclude that the passenger protection regimes in Korea and the EU are among the most developed in the world. The Korean model is more detailed and specific than its European counterpart; however, passenger rights are more vigorously enforced by courts and other bodies in the EU States. Moreover, we analyze the compatibility between decisions made by the Court of Justice of the EU (CJEU) and global regulations pertaining to airline liability.

TABLE OF CONTENTS

I. GLOBAL UMBRELLA REGULATIONS.....	107
A. AIRLINE LIABILITY IN THE 20TH CENTURY: A BALANCING ACT	107
B. AIRLINE LIABILITY AT THE DOORSTEP OF THE 21ST CENTURY: THE MONTREAL CONVENTION OF 1999	108
C. COMPENSATION FOR DAMAGE CAUSED BY DELAY .	109
D. CONCLUDING REMARKS.....	110
II. THE KOREAN REGIME FOR PASSENGER PROTECTION	111
A. THE HISTORY OF THE LEGISLATIVE FRAMEWORK .	111
B. CURRENT LEGISLATIVE FRAMEWORK	114
C. THE REGIME FOR DOMESTIC FLIGHTS IN KOREA .	116
D. THE REGIME FOR INTERNATIONAL FLIGHTS	117

*** Cf. *Works and Days*, BRITANNICA, <https://www.britannica.com/topic/Works-and-Days> [<https://perma.cc/3DCM-XWPZ>] (“Pandora had a jar containing all manner of misery and evil . . . She afterward opened the jar, from which the evils flew out over the earth.”).

2023]	<i>AIRLINE PASSENGER PROTECTION</i>	107
	E. CASE LAW	118
	F. CONCLUDING REMARKS.....	119
III.	THE LONG AND WINDING ROAD IN THE EU .	120
	A. THE FIRST STEPS TOWARD PASSENGER PROTECTION: REMEDIES FOR DENIED BOARDING .	120
	B. MOVING ON WITH PASSENGER PROTECTION: THE ESTABLISHMENT OF EU REGULATION 261/2004 .	121
	1. <i>Proposals for a New Regulation</i>	121
	2. <i>Relationship Between the Montreal Convention and Contract Law</i>	122
	3. <i>The Scope of EU Regulation 261/2004</i>	123
	4. <i>Principal Terms</i>	125
	5. <i>Provisions of the Montreal Convention Have Become EU Law</i>	127
	C. AN AVALANCHE OF COURT CASES	129
	1. <i>Incompatibility with the Montreal Convention</i> ..	129
	2. <i>A Variety of Legal and Factual Questions Arising in Court Decisions</i>	130
	3. <i>The EU Court of Justice Acting as a Legislator</i> ..	132
	4. <i>The Airline's Defense: Reliance on Extraordinary Circumstances</i>	133
	5. <i>EU Passenger Protection Measures in the Conditions of Carriage of Non-EU Airlines</i>	135
	6. <i>Concluding Remarks</i>	137
IV.	CONCLUDING REMARKS	138

I. GLOBAL UMBRELLA REGULATIONS

A. AIRLINE LIABILITY IN THE 20TH CENTURY: A BALANCING ACT

FOR NEARLY SEVEN DECADES, passengers were deemed to be sufficiently protected by the global regime governing airline liability.¹ In 1929, the Warsaw Convention concluded with the Convention for the Unification of Certain Rules Relating to International Carriage by Air, which now has 152 contracting parties.² This document has been amended in various ways, but

¹ *See generally* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. No. 13,083, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

² *See generally* Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

principally by the Hague Protocol of 1955, which 139 states have ratified to date.³

These conventions aimed to avoid conflicts of overlapping national rules covering the same subject, such as the compensation of injuries in international carriage by air, by formulating global treaties.⁴ The drafters of such conventions designed them in such a fashion to ensure that the interests of their airlines and passengers were balanced harmoniously.⁵ Thus, unless airlines could rely on specified exemptions, their liability for physical injuries and death was limited to \$10,000 under the Warsaw Convention and \$20,000 under the Hague Protocol.⁶

B. AIRLINE LIABILITY AT THE DOORSTEP OF THE 21ST CENTURY: THE MONTREAL CONVENTION OF 1999

The negotiations at Montreal in 1999 concluded with a new convention on airline liability, which bears a similar title to that of its predecessors: Convention for the Unification of Certain Rules for International Carriage by Air, henceforth also referred to as the Montreal Convention, or the Convention.⁷ A number of terms are relevant for our discussion, including: *unification*, *certain rules*, and *for international carriage by air*.

Unification implies that jurisdictions across the world are expected to apply the terms as consistently as possible—that is, as close as possible to the meaning of these terms as they were envisioned by their drafters.⁸ The goal of unification is supported by the concept of exclusivity as alluded to below.⁹ The term *certain rules* refers to the limitation that not all regulations pertaining to international carriage by air are governed by the Convention.¹⁰ Lastly, *for international carriage by air* restricts the scope of the

³ See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 373 [hereinafter Hague Protocol]; Int'l Civ. Aviation Org. [ICAO], *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at the Hague on 28 September 1955*, https://www.icao.int/secretariat/legal/list%20of%20parties/wc-hp_en.pdf [<https://perma.cc/4T46-JDJN>].

⁴ See Warsaw Convention, *supra* note 2, art. 1.

⁵ See *id.* art. 1(2).

⁶ See *id.* art. 21; Hague Protocol, *supra* note 3, art. 22.

⁷ See Montreal Convention, *supra* note 1, pmbl.

⁸ See *id.* pmbl., art. 1(1).

⁹ See *infra* Section III.B.5.

¹⁰ See Montreal Convention, *supra* note 1, art. 1(1).

Convention to the period in which “carriage by air” takes place.¹¹

Equally essential for the current discussion is the premise of the “exclusive” application of its provisions on which the Montreal Convention has been built. This implies that all other sources of law, such as Korean public regulations, European arrangements, or contractual conditions, must comply with the provisions of this Convention.¹² Judges must interpret the applicable law in accordance with the terms of this Convention.¹³

C. COMPENSATION FOR DAMAGE CAUSED BY DELAY

The question of delay is particularly important to the present analysis. The Montreal Convention includes provisions addressing damages caused by delay which occur, again, “in the carriage by air.”¹⁴ Domestic regulations, including those in Korea and the European Union (EU), may also govern protections afforded to passengers in situations of delay.¹⁵ It follows from the application of the exclusivity concept, upon which the Convention is built, that domestic regulations must align and may not infringe upon the global rules regarding compensation of damages caused by delay.¹⁶

For the Montreal Convention to apply, the carriage must be international.¹⁷ To illustrate, a roundtrip flight between Seoul, Korea and Tokyo, Japan falls under the Convention’s provisions,

¹¹ See *id.* art. 1(2).

¹² See Kevin Bartlett, *The Exclusivity Principle and the Montreal Convention*, COOPER GRACE WARD LAWS. (Mar. 14, 2014), <https://cgw.com.au/publication/the-exclusivity-principle-and-the-montreal-convention> [<https://perma.cc/X4GH-ATB4>] (“[T]he remedies available to the passenger are those exclusively under that convention.”).

¹³ See *id.*

¹⁴ See Montreal Convention, *supra* note 1, art. 19 (“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.”).

¹⁵ See *infra* Parts II–III (discussing Korean and EU regulations regarding air passenger protections).

¹⁶ See Bartlett, *supra* note 12.

¹⁷ See Montreal Convention, *supra* note 1, art. 1(2) (defining international carriage as any carriage in which “the place of departure and the place of destination . . . are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party.”).

and so does a one-way trip from Seoul to Beijing, China.¹⁸ Further, while a one-way flight between Seoul and Naypyidaw, Myanmar is not subject to the Montreal Convention; instead, it is governed by the Warsaw Convention as amended by the Hague Protocol.¹⁹

The expression *international carriage by air*, as previously discussed, means that events that are not part of the contract for international carriage by air do not fall under the provisions of the international conventions identified above.²⁰ This statement has important consequences for the subject covered by this Article because events such as overbooking²¹ and cancelation of a flight precede the carriage by air; thus, they are not covered by the provisions of the international conventions, but are instead covered by the contractual conditions governing the relationship between the airline and the passenger, which must comply with domestic regulations on passenger protection.²² The examination below will analyze such relationships in greater detail.

D. CONCLUDING REMARKS

The Montreal Convention and its predecessors from the 19th century are limitedly concerned with events that occur in the carriage by air, excluding any events that happen before or after the carriage by air, such as cancelation and overbooking of flights.²³ Hence, other regulations on these matters do not have to comply with the provisions of the Montreal Convention or

¹⁸ *See id.*

¹⁹ Compare ICAO, *supra* note 3, with ICAO, *Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, https://www.icao.int/secretariat/legal/list%20of%20parties/mtl99_en.pdf [<https://perma.cc/HWW7-BHUR>] (listing Korea as a party to both the Warsaw Convention and the Hague Protocol while Myanmar is only a party to the Hague Protocol).

²⁰ *See* Hague Protocol, *supra* note 3, art. 1; *see also* Montreal Convention, *supra* note 1, art. 1(2).

²¹ Overbooking occurs when airlines accept more reservations than there are seats on a flight. *See* John P. Rafferty, *Why Do Airlines Overbook Seats on Flights?*, BRITANNICA, <https://www.britannica.com/story/why-do-airlines-overbook-seats-on-flights> [<https://perma.cc/KPH4-6JTF>]. If there are not enough volunteers who are prepared to surrender their seats on terms to be agreed upon with the airline, the airline may have to deny boarding to some passengers. *Id.*

²² *See* Montreal Convention, *supra* note 1, art. 1(2).

²³ *See id.*

any other global agreement governing airline liability.²⁴ This is different for regulations concerning flight delays.²⁵

Compared to its predecessors, the Montreal Convention affords greater protection to passengers because they may be entitled to unlimited compensation for loss of life or bodily injury caused by an accident in the carriage by air.²⁶ Prior to 1999, unless passengers could invoke rather exceptional circumstances, such as willful misconduct of the air carrier, passengers were entitled to claim only limited amounts of compensation for loss of life and bodily injury under the Warsaw Convention.²⁷

Concerned with an increasing attention for consumer protection, including passenger protection, jurisdictions around the world implemented domestic regulations designed to better protect passengers from harms caused by airlines.²⁸ The following sections will explore such domestic regulations within Korea and the EU.

II. THE KOREAN REGIME FOR PASSENGER PROTECTION

A. THE HISTORY OF THE LEGISLATIVE FRAMEWORK

In the past, passenger protection has not received enough attention in Korea.²⁹ Unlike other states that became parties to the Montreal Convention, Korea's legal regime focused only on the wealth of air carriers rather than passengers.³⁰ This was mainly to preserve the potential of a growing air transport industry. Nevertheless, attention has grown as the bigger players in

²⁴ See *infra* Parts II–III (discussing Korean and EU regulations regarding air passenger protections).

²⁵ See *id.*

²⁶ See Montreal Convention, *supra* note 1, art. 21(1).

²⁷ See Warsaw Convention, *supra* note 2, art. 22(1).

²⁸ See *infra* Parts II–III (discussing Korean and EU regulations regarding air passenger protections).

²⁹ *But see, e.g.*, Press Release, S. Kor. Ministry of Foreign Affs., Entry into Force of the Convention on the Unification of Certain Rules in International Air Transport (Montreal Convention) (Dec. 28, 2007) [hereinafter Korean Ministry of Foreign Affairs Statement], https://www.mofa.go.kr/www/brd/m_4080/view.do?seq=307956&srchFr=%3bsrchTo=%3bsrchWord&%3bsrchTp=& amp%3bmulti_itm_seq=0& amp%3bitm_seq_1=0& amp%3bitm_seq_2=0& amp%3bcompany_cd=& amp%3bcompany_nm=&page=1049 [https://perma.cc/52J6-MJ4U].

³⁰ See Aviation Business Act, art. 12 (S. Kor.), amended by Act No. 12817, Jan. 16, 2015 (S. Kor.). Only in 2012 did the relevant law start regulating passenger protection only as part of the Aviation Act, but the law was amended in 2021. See *id.*

aviation, like the EU and in Latin American states, have prioritized passenger protection.³¹ As a result of this trend, Korea became a party to the Montreal Convention.³²

On December 29, 2007, the Montreal Convention became effective in Korea.³³ Since that date, the Convention has maintained the same authority as domestic laws governing international carriage by air.³⁴ The most important aviation regions, including Japan, China, Singapore, Australia, Thailand, the United States, the Russian Federation, the EU, the United Kingdom (UK), Canada, and Brazil, are all significant trading partners of Korea³⁵ and are parties to this Convention.³⁶ However, the passenger protection afforded by the Montreal Convention was evidently not sufficiently comprehensive for Korean policymakers.³⁷ Until 2016, there was no specific passenger protection regime; however, general regimes covered this area of law.³⁸ For instance, the 2002 Regulation on Aviation Safety and Security contained the only initial aviation-specific protection remedy by establishing the central damage remedy center.³⁹ Only since 2012 has the Korean Aviation Act recognized that

³¹ Jecheol Kim, *Introduction and Implementation of the Air Transportation User Protection System*, Airzin Plus, at 1 (“The global air transport industry has been regulated by the government in terms of fostering and development, and accordingly, supplier-oriented policies to promote industrial growth have been prioritized. However, after deregulation, air transport demand surged along with active market participation by air transport operators. As a result, from the early 1980s, advanced aviation countries such as the United States and the United Kingdom began to develop protection policies for various air transport users as one of the important policy decisions.”) (translated by the authors) (on file with the authors).

³² See ICAO, *supra* note 19 (listing the date of accession of the Montreal Convention in South Korea as October 30, 2007, whereas the date of entry into force is towards the end of 2007).

³³ Press Release, S. Kor. Ministry of Foreign Affs., *supra* note 29.

³⁴ See DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], *amended by* Constitution no. 10, Oct. 29, 1987, art. 6 (S. Kor.).

³⁵ See Korea, Rep. *Trade Balance, Exports and Imports by Country 2020*, WORLD INTEGRATED TRADE SOL., <https://wits.worldbank.org/CountryProfile/en/Country/KOR/Year/2020/TradeFlow/EXPIMP/Partner/by-country> [<https://perma.cc/DRN5-99LM>].

³⁶ See ICAO, *supra* note 32.

³⁷ See Aviation Business Act art. 3(1)–(2) (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=39499&lang=ENG [<https://perma.cc/Z4HD-HHFT>].

³⁸ See *id.*

³⁹ See Hangong Anjeong Mit Boaneo Gwanhan Boekgrul [Regulation on Aviation Safety and Security Act] art. 36, amended by Act No. 6734, Aug. 26, 2002 (S. Kor.).

passengers carried by air are *users* of the air transport services and are in turn deserving of legal protection.⁴⁰ Consequently, airline passengers, like other consumers, are protected from any threat to their person or property.⁴¹

After the enactment of the Montreal Convention, the Aviation Act did not encompass specific protection clauses; rather, it established that air carriers should be equipped to inform passengers of available compensation for damages caused by delay, cancelation, and loss of baggage, as well as a refund for air fare.⁴² Passengers were entitled to claim compensation under the Framework Act on Consumers,⁴³ but passengers usually did not claim compensation because the procedure to claim compensation was too complicated.⁴⁴ Due to the lack of a specific framework relevant to aviation, passengers had to seek a remedy through the Korea Consumer Agency, which provided remedies to all types of consumers.⁴⁵ Additionally, aviation-related claims were directly addressed to the Ministry of Land and Maritime of Korea, which did not have any relevant divisions for passenger protection.⁴⁶ Both organizations—the Korea Consumer Agency and the Ministry of Land and Maritime—had to communicate for the claims, but the lack of a legal framework or specific division caused both complexity and redundancy, which led to no claims.⁴⁷ In mid-2016, this system changed entirely.⁴⁸

⁴⁰ See Aviation Business Act, art. 12 (S. Kor.), amended by Act No. 12817, Jan. 16, 2015 (S. Kor.).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Framework Act on Consumers, art. 4(5) (S. Kor.), translated in Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45955&lang=ENG [perma.cc/22EY-KQGW].

⁴⁴ See *supra* note 31, § 2.

⁴⁵ See Framework Act on Consumers, art. 16(2) (S. Kor.), translated in Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45955&lang=ENG [perma.cc/22EY-KQGW]; *Function & Role*, S. KOR. CONSUMER AGENCY, <https://www.kca.go.kr/eng/sub.do?menukey=6023> [<https://perma.cc/5VEH-7CX5>].

⁴⁶ *History*, MINISTRY OF LAND, INFRASTRUCTURE & TRANSP., https://www.molit.go.kr/english/USR/WPGE0201/m_35387/DTL.jsp [<https://perma.cc/T29G-Y8EG>]. The Ministry was reorganized as the Ministry of Land, Infrastructure and Transport in 2013. *Id.*

⁴⁷ See Framework Act on Consumers, art. 38 (S. Kor.), translated in Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45955&lang=ENG [perma.cc/22EY-KQGW].

⁴⁸ See Hannggon Gyotongyiyongja Boho Gijun [Air Transport User Protection Standards], amended by Administrative Regulation, Notice of the Ministry of Land, Infrastructure and Transport No. 2016-471, July, 13, 2016 (S. Kor.).

On July 13, 2016, the Ministry of Transport in Korea announced the establishment and enforcement of the Air Transport User Protection Standards.⁴⁹ The increasing number of passengers encouraged the Korean government to draft and enact this framework.⁵⁰ Between 2011 and 2015, according to the Ministry of Transport, the number of annual passengers increased from about 60 million to 90 million, whereas the number of registered claims increased from about 250 to 900 during the same period.⁵¹ This became the basis of the current protection mechanism analyzed below.

B. CURRENT LEGISLATIVE FRAMEWORK

The Commercial Act contains the primary Korean passenger protection regime governing compensation for harm caused by delay and loss of (or damage caused to) baggage.⁵² The provisions of the Commercial Act are applicable to domestic carriage by air and carriage between Korea and a state that is not party to the Montreal Convention.⁵³

In addition to the Commercial Act, the Aviation Business Act requires air carriers to formulate procedures and standards for the compensation of various types of damage.⁵⁴ The Aviation Business Act applies to domestic and international carriage by air, as defined by the Montreal Convention.⁵⁵

Pursuant to the establishment of the Aviation Business Act in Korea, air carriers must set up a damage compensation plan, which is designed to protect passengers from damages caused by any of the following: (1) cancellation, overbooking, or delay of the flight; (2) loss of or damage to baggage; (3) delayed payment of reimbursement of the ticket price in case of cancellation of the flight; (4) missing of flights due to inaccurate provision of information on the departure gate, schedule of the flight, and other pieces of information; (5) omission of registration of mile-

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See* Hang-Gong Gyotong Service Bogoseo [The Ministry of Land, Infrastructure and Transport's 2015 Air Transport Service Report] at 7 (S. Kor.); *see also* Hang-Gong Gyotong Service Bogoseo [The Ministry of Land, Infrastructure and Transport's 2016 Air Transport Service Report] at 57 (S. Kor.).

⁵² *See* Sangbeob [Commercial Act of the Republic of Korea], *amended by* Law No. 17764 (S. Kor.).

⁵³ *See id.*

⁵⁴ *See* Aviation Business Act, art. 12, amended by Act No. 18565, Dec. 7, 2021 (S. Kor.).

⁵⁵ *See supra* Section I.B.

age points due to a mistake of the airline; and (6) expiration of mileage points without prior notice.⁵⁶ Air carriers are not liable for harm caused by *force majeure* events.⁵⁷ Such cases include, but are not limited to, weather conditions, natural disasters, aircraft rotation, and unscheduled maintenance for ensuring the safe operation of the aircraft.⁵⁸

In addition, pursuant to the Air Traffic User Protection Standards,⁵⁹ air carriers must administer a plan for the compensation of damages pursuant to these standards and publish the plan online.⁶⁰ The plan must include (1) the matters relating to the establishment and operation of a damage compensation information office; (2) the functions and duties of the department and personnel in charge of affairs relating to damage compensation; (3) the damage compensation processing procedures; and (4) the methods for informing claimants of damage compensation and the results of processing their claims.⁶¹

Finally, the Consumer Dispute Resolution Standards,⁶² implemented because of the Framework Act for Consumer Protection⁶³ and the Enforcement Decree,⁶⁴ provide a detailed framework establishing the amounts of compensation owed to passengers by air carriers in a given situation.⁶⁵ The following two Sections will discuss passenger protection regimes that apply to domestic and international flights departing from a Korean airport. Regarding international flights, this Article will also ex-

⁵⁶ See Aviation Business Act, art. 61(1) (S. Kor.).

⁵⁷ See *id.* art. 61-1.

⁵⁸ See *id.* art. 12-1

⁵⁹ See Hanggong Gyotongyiyongja Bohogijun [Air Transport User Protection Standards], amended by Notice of the Ministry of Land, Infrastructure and Transport No. 2020-383, May 27, 2020 (S. Kor.).

⁶⁰ See *id.* art. 10.

⁶¹ *Id.* arts. 4-9; see, e.g., *Consumer Protection Safety Policy Notice*, KLM ROYAL DUTCH AIRLINES, <https://www.klm.co.kr/information/legal/customer-rights> [<https://perma.cc/HK3W-T3M2>].

⁶² See Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards], amended by Enforcement Decree, Notice of the Fair Trade Commission No. 2022-25, Dec. 28, 2022 (S. Kor.).

⁶³ See Framework Act on Consumers, art. 61(2) (S. Kor.), translated in Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45955&lang=ENG [perma.cc/22EY-KQGJ].

⁶⁴ See Sobijagibonbeob Sihaenglyeong [Enforcement Decree of the Framework Act on Consumers] art. 3, amended by Presidential Decree No. 33141, Dec. 27, 2022 (S. Kor.).

⁶⁵ See Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards] art. 3, app. 2, amended by Enforcement Decree, the Notice of the Fair Trade Comm'n No. 2022-25, Dec. 28, 2022 (S. Kor.).

amine the passenger protection regime's alignment with the relevant provisions of the Montreal Convention.

C. THE REGIME FOR DOMESTIC FLIGHTS IN KOREA

Upon a flight delay, the air carrier must appropriately compensate the passenger for damages pursuant to the following criteria: 10% of the air fare for one to two hour delays; 20% of the air fare for two to three hour delays; and 30% of the air fare for three hours or more.⁶⁶ When a passenger cannot reach their destination because the airline canceled the flight, or if the air carrier denies boarding to a passenger due to flight overbooking, the air carrier must provide compensation.⁶⁷ In these events, the air carrier must offer the following remedies. For alternative flights provided within one to three hours of the overbooked or canceled flight, the passenger is entitled to compensation in the amount of 20% of airfare of the canceled or overbooked flight.⁶⁸ For alternative flights provided after three hours of the overbooked or canceled flight, the passenger is entitled to compensation in the amount of 30% of airfare of the canceled or overbooked flight.⁶⁹

The above measures only apply if the carrier offers an alternative flight.⁷⁰ Also, the alternative flight must be operated within twelve hours of the cancellation or denied boarding.⁷¹ If the air carrier does not offer a timely alternative flight, it is obligated to refund the air fare for the flight that it has not operated *and* award flight tickets for the same route.⁷² Alternatively, the carrier may present vouchers to the passenger.⁷³ Air carriers may avoid liability and are not required to pay compensation if the cancellation or delay of the flight occurs due to weather conditions, unexpected maintenance for safety reasons, or delays of

⁶⁶ See *id.* art. 36(1)–(3); see also Press Release, S. Kor. Ministry of Foreign Affs., *supra* note 29.

⁶⁷ See Hanggonggyotongyiyongja Bohogijun [Air Transport User Protection Standards] art. 4(1), app. 2, *amended by* Notice of the Ministry of Land, Infrastructure and Transport No. 2020–383, May 27, 2020 (S. Kor.).

⁶⁸ See Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards] app. 2, *amended by* Enforcement Decree, Notice of the Fair Trade Commission No. 2022-25, Dec. 28, 2022 (S. Kor.).

⁶⁹ *Id.*

⁷⁰ *Id.* art. 36(1)–(3).

⁷¹ *Id.* art. 34(6).

⁷² *Id.* art. 36(1)–(3).

⁷³ See *id.*

earlier flights.⁷⁴ If the carrier cannot prove the occurrence of these circumstances, it must provide overnight accommodations and meals as necessary.⁷⁵ If the air carrier loses, or causes damage to, a passenger's baggage, it must reimburse the value of the baggage as reported by the passenger upon check-in, pursuant to the conditions of carriage of that air carrier.⁷⁶ Such conditions must comply with the relevant provisions of the Montreal Convention.⁷⁷

D. THE REGIME FOR INTERNATIONAL FLIGHTS

For international flights departing from Korea, the following measures apply when a passenger is denied boarding due to overbooking or no record.⁷⁸ When the air carrier offers an alternative flight, the passenger's compensation depends on the flying time and the promptness of the alternative flight.⁷⁹ For flights shorter than four hours, the passenger is entitled to compensation as follows: \$200 if an offered alternative flight departs within two to four hours after the original expected departure *or* \$400 if an offered alternative flight departs later than four hours after the original expected departure. For flights longer than four hours, the passenger is entitled to compensation as follows: \$300 if an offered alternative flight departs within two to four hours after the original expected departure *or* \$600 and a refund of air fare if more than four hours pass after the original departure time of the overbooked or canceled flight and the

⁷⁴ See Aviation Business Act, art. 12 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=39499&lang=ENG [<https://perma.cc/Z4HD-HHFT>].

⁷⁵ See Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards] art. 36(1)–(3), ann. 2, *amended by* Notice of the Fair Trade Commission No. 2022-25, Dec. 28, 2022 (S. Kor.).

⁷⁶ See *id.*

⁷⁷ See *supra* Sections I.B.–C; see also Montreal Convention, *supra* note 1, arts. 13, 27.

⁷⁸ *No record* refers to a situation where an airline has no record of a reservation or seat confirmation in their system, even though the passenger provides the ticket and reservation confirmation upon check-in. See *Aviation Abbreviations*, SOFEMA AVIATION SERVS., <https://sassofia.com/wp-content/uploads/2022/05/Aviation-Abbreviations.pdf> [<https://perma.cc/E6DN-A4NP>].

⁷⁹ These provisions always use the U.S. dollar (USD) as the currency for compensation. A single USD is equivalent to approximately 1136 South Korean won, as per the currency exchange rate on March 12, 2021. See *US Dollar to South Korean Won Spot Exchange Rates for 2021*, EXCH. RATES UK, <https://www.exchangerates.org.uk/USD-KRW-spot-exchange-rates-history-2021.html> [<https://perma.cc/643G-U54S>].

airline has not provided an alternative flight.⁸⁰ In cases of denied boarding, only those passengers who arrive within the agreed-upon check-in hours are entitled to the above measures.⁸¹

When international flights from Korea are delayed, the air carrier must arrange for accommodations and meals for affected passengers when needed.⁸² Moreover, the passenger is entitled to the following compensation: 10% of the airfare for delays of two to four hours, 20% of the airfare for delays of four to twelve hours, and 30% of the airfare for delays longer than twelve hours.⁸³ If air carriers lose, damage, or delay the delivery of baggage, they must compensate the passenger according to their conditions of carriage.⁸⁴ Such conditions apply to domestic and international carriage by air and are subject to the applicable provisions of the Montreal Convention or the Commercial Act.⁸⁵ However, air carriers may avoid reimbursements if they can establish circumstances involving unexpected aircraft maintenance, weather conditions, delay, cancelation, or safety.⁸⁶

E. CASE LAW

The Supreme Court of Korea recognized that the Montreal Convention is applicable to international carriage by air only if places of departure and arrival are located in the state that is a party to the Montreal Convention.⁸⁷ Thus, if the place of departure is located outside such a contracting state, the Court will not apply the Montreal Convention even though the flight is an international carriage by air.⁸⁸

In granting compensation to passengers, the Seoul East District Court ruled that the Korean Commercial Act and Civil Law governed passenger protection for international flights only if

⁸⁰ See Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards] § 36(2)–(3), ann., amended by Notice of the Fair Trade Comm'n No. 2022-25, Dec. 28, 2022 (S. Kor.).

⁸¹ *Id.* app. 36(2)–(4).

⁸² *See id.*

⁸³ *See id.* app. 36(3)–(4).

⁸⁴ *See id.* app. 36(1)–(4).

⁸⁵ *See* Commercial Act, arts. 908–10; *see also* Montreal Convention, *supra* note 1, art. 22.

⁸⁶ *See* Sobijabunjaeonghaegyolgijun [Consumer Dispute Resolution Standards] art. 3, app. 2, amended by Notice of the Fair Trade Comm'n No. 2022-25, Dec. 28, 2022 (S. Kor.).

⁸⁷ *See* Daebeobwon [S. Ct.], Mar. 24, 2016, 2013Da81514 (S. Kor.).

⁸⁸ *See id.*

the Montreal Convention did not regulate the matter at hand.⁸⁹ Regarding psychological damage to passengers that is not addressed by the Montreal Convention, this court decided that the defendant airline must compensate such damages when the Korean Civil Act, which confirms the right for compensation of such psychological damage, applies to the carriage in question.⁹⁰

Although the previously cited cases reflect a favorable attitude towards passenger protection, it does not mean that *any* compensation claim would be accepted.⁹¹ A court case filed in Korea regarding a passenger who bought tickets for a roundtrip flight from Seoul to Paris, France highlights this limitation.⁹² The passenger was denied boarding due to overbooking upon which the airline offered an alternative flight.⁹³ However, the passenger refused this offer and purchased a new ticket from a different air carrier for their return flight to Korea.⁹⁴ The original carrier later provided a refund for the portion of the unused ticket, along with additional compensation as required by the European passenger protection regime.⁹⁵ Even so, the passenger claimed that they were eligible for extra compensation to cover the price for the additional ticket and to atone for the psychological damages that occurred during the denied-boarding process.⁹⁶ The court did not accept this claim because the air carrier had already provided the refund for the unused ticket as well as additional compensation.⁹⁷ Because overbooking is a “well-established industry practice,”⁹⁸ the court rejected the passenger’s claims of unreasonableness.⁹⁹

F. CONCLUDING REMARKS

Korea protects its passenger via various domestic regulations, each of which must be assessed in the context of its geographi-

⁸⁹ Seouldongbujibangbeobwon [Seoul E. Dist. Ct.], July 3, 2019, 2018Na29933 (S. Kor.).

⁹⁰ See Minbeob [Civ. Act], amended by Act No. 17503, Oct. 20, 2020, art. 751 (S. Kor.).

⁹¹ See, e.g., Seouljungangjibangbeobwon [Seoul Cent. Dist. Ct.], Dec. 5, 2012, 2012Na24544 (S. Kor.).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

cal scope—domestic or international. These domestic regulations appear to function harmoniously, as there is no case law that presents questions regarding conflicting rules.

The Korean court decisions reflect compliance with the Montreal Convention.¹⁰⁰ Korean district courts acknowledge that the Montreal Convention preempts domestic commercial and civil law for international carriage by air.¹⁰¹ Due to the homogenous nature of laws of Korea, this consistent approach reduces passenger confusion.¹⁰² Lastly, although most judgments favor passengers, courts in Korea recognize the importance of protecting the air transport industry.¹⁰³

III. THE LONG AND WINDING ROAD IN THE EU

A. THE FIRST STEPS TOWARD PASSENGER PROTECTION: REMEDIES FOR DENIED BOARDING

The EU was one of the first jurisdictions to enact legislation regarding passenger protection.¹⁰⁴ The EU regulations on this subject have served as a model and benchmark for similar regulations in many jurisdictions across the world,¹⁰⁵ which is why this Section will explain such regulations.

EU Regulation 295/91 came into force in 1991, back when the organization was called the European Economic Community (EEC).¹⁰⁶ It applied to all flights departing from an EU airport, irrespective of the nationality of the air carrier or the passenger.¹⁰⁷ Its scope was limited to provide protections to passengers who were denied boarding, which is defined as: “a refusal to accommodate passengers on a flight” although they have a valid ticket; confirmed a reservation on the flight; and presented themselves for check-in within the required time limit and as stipulated.¹⁰⁸ The remedies, which the air carrier must

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See, e.g.*, Seouldongbujibangbeobwon [Seoul E. Dist. Ct.], Jul. 3, 2019, 2018Na29933 (S. Kor.).

¹⁰⁴ *See generally* Vincent Correia & Noura Rouissi, *Global, Regional and National Air Passenger Rights – Does the Patchwork Work?*, 40 AIR & SPACE L. 123, 125–30 (2015).

¹⁰⁵ *See id.* at 134–43.

¹⁰⁶ Council Regulation 295/91 of Feb. 4, 1991, Establishing Common rules for a Denied-Boarding Compensation System in Scheduled Air Transport, 1991 O.J. (L 36) 5, 5 pmb. (EC).

¹⁰⁷ *Id.* art. 1.

¹⁰⁸ *Id.* art. 2(a).

provide as stipulated in this Regulation, concern reimbursement of the ticket price or rerouting flights.¹⁰⁹ Moreover, the air carrier must pay €150 for flights up to 3,500 kilometers and €300 for all other flights.¹¹⁰

Regulation 295/91 was a rather-straightforward regulation with clear and concise provisions.¹¹¹ Perhaps even more importantly, as argued in Section I.C above,¹¹² denial of boarding is a matter of domestic civil law because it constitutes a breach of contract, and such breaches are not governed by supranational law.¹¹³ The Montreal Convention does not address damages caused by denied boarding.¹¹⁴ Regulation 295/91 has not prompted significant litigation either in terms of the number of court cases or in terms of questions of law.

More than a decade later, the EU enacted Regulation 261/2004—a Regulation that has a much broader scope than its predecessor.¹¹⁵ This Regulation has given rise to a myriad of court cases,¹¹⁶ and the Regulation is known as the most-litigated EU regulation ever.¹¹⁷ The following Sections will analyze court cases interpreting the Regulation's terms, scope, and compatibility with the Montreal Convention.

B. MOVING ON WITH PASSENGER PROTECTION: THE ESTABLISHMENT OF EU REGULATION 261/2004

1. *Proposals for a New Regulation*

When drafting proposals for a new regulation, legislators intended to reduce the number of flight cancelations caused by commercial mishaps.¹¹⁸ The EU Commissioner for Transport at

¹⁰⁹ *Id.* art. 4(1).

¹¹⁰ *Id.* art. 4(2).

¹¹¹ *See id.* art. 4.

¹¹² *See supra* Section I.C.

¹¹³ *See supra* Section I.C.

¹¹⁴ *See supra* Section I.C.

¹¹⁵ *See infra* Section III.B.

¹¹⁶ *See generally* ICELANDIC TRANSPORT AUTHORITY, AIR PASSENGER RIGHTS – EUROPEAN CASE LAW (2022), <https://www.samgongustofa.is/media/domar-og-ur-skurdir/2022-summary-of-the-most-relevant-cjeu-judgements.pdf> [<https://perma.cc/H954-F8K2>] (compiling a list of cases that deal with issues surrounding Regulation 261/2004).

¹¹⁷ *See* PABLO MENDES DE LEON, INTRODUCTION TO AIR LAW 308 (11th ed. 2022).

¹¹⁸ *See* Commission Regulation 261/2004 of Feb. 11, 2004, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No 295/91, 2004 O.J. (L 046) 1, pmb. (2)–(3) (EC).

the time, who was a frequent flyer between Brussels and Spain, was concerned about flight delays, denied boarding, and flight cancellations.¹¹⁹ The former Commissioner intended to streamline air traffic management in Europe by promoting the “single European sky”—a system designed to enhance traffic flow and cross-border cooperation between air traffic control centers in the EU.¹²⁰ Delays had to be reduced by enhancing efficiency in the combined airspaces of the EU.¹²¹

These events inspired the executive body of the EU, the EU Commission, to extend the scope of EU Regulation 295/291 so as to include mandatory compensation and remedies for overbooking and cancellation.¹²² Moreover, the EU Commission introduced measures to compensate passengers harmed by flight delays.¹²³ EU Regulation 261/2004 repealed EU Regulation 295/91¹²⁴ and entered into force on February 17, 2005.¹²⁵

2. *Relationship Between the Montreal Convention and Contract Law*

After the adoption of the Montreal Convention, EU Member States became a party member both individually and collectively as the EU, in so far as such accession was permitted under the provisions of the Convention and EU law.¹²⁶ Moreover, the EU implemented the provisions of the Convention in an EU Regulation to assure the Convention’s uniform application to flights within the EU Regulation.¹²⁷ In other words, the Montreal Convention governs carriage between cities located in different EU States (for example, Rome, Italy to Paris, France or Amsterdam, Netherlands to Lisbon, Portugal), which would be international carriage under the terms of this Convention, and also flights within EU States (for example, Munich, Germany, to Hamburg,

¹¹⁹ See MENDES DE LEON, *supra* note 117, at 308; Renée Cordes, *De Palacio Bids to Reduce Delays by Creating a ‘Single European Sky,’* POLITICO (Sept. 20, 2020, 5:00 PM), <https://www.politico.eu/article/de-palacio-bids-to-reduce-delays-by-creating-a-single-european-sky/> [<https://perma.cc/5W3U-BYV7>].

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See* Commission Regulation 261/2004, *supra* note 118, pmb. (1)–(3).

¹²³ *See id.* pmb. (3).

¹²⁴ *Id.* art. 18.

¹²⁵ *Id.* art. 19.

¹²⁶ *See* Montreal Convention, *supra* note 1, art. 53(2).

¹²⁷ Commission Regulation 889/2002 of May 13, 2002, Amending Council Regulation (EC) No 2027/97 on Air Carrier Liability in the Event of Accidents, 2002 O.J. (L 140), pmb. (6) (EC).

Germany, or Barcelona, Spain, to Madrid, Spain), which would be domestic, non-international flights under the terms of the Convention.¹²⁸

Compensation to passengers for damages caused by delay is governed by EU Regulation 261/2004 and the Montreal Convention.¹²⁹ As mentioned in Section I.B, this Convention is built on the premise of the exclusive application of its provisions, including those on delay.¹³⁰ Under the Montreal Convention's provisions regarding delay, passengers are entitled to restitution only for compensable (i.e., economic) losses.¹³¹ The relationship between the provisions governing delay within EU Regulation 261/2004 and those of the Montreal Convention has appeared to be a sensitive one.¹³²

As noted in Section I.B,¹³³ denied boarding and cancelation of flights are not regulated by the Montreal Convention because they precede carriage by air; therefore, they do not fall under the terms of this Convention.¹³⁴ In the past, if passengers whose flights fell under the scope of EU Regulation 261/2004 sought compensation of damages caused by denied boarding or cancelation of flights, they had to rely on domestic civil law and procedures.¹³⁵ However, this reliance changed when EU Regulation 295/91 and EU Regulation 261/2004 for denied boarding and cancelation of flights came into force.¹³⁶

3. *The Scope of EU Regulation 261/2004*

While EU Regulation 261/2004 dramatically expanded the scope of EU 295/91, including its remedies,¹³⁷ the geographical application remained unchanged—it continues to govern all

¹²⁸ See *id.* art. 1(2).

¹²⁹ See Commission Regulation 261/2004, *supra* note 118, pmb. (2); Montreal Convention, *supra* note 1, art. 19 (“The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.”) (emphasis added).

¹³⁰ See *supra* Section I.B.

¹³¹ See Montreal Convention, *supra* note 1, art. 29 (“In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”) (emphasis added).

¹³² See *supra* Section I.C.

¹³³ See *supra* Section I.B.

¹³⁴ See generally Montreal Convention, *supra* note 1 (lacking any provisions regulating denied boarding or cancellation of flights).

¹³⁵ See Commission Regulation 261/2004, *supra* note 118, pmb. (8), arts. 4–5.

¹³⁶ See generally *id.*; see also Council Regulation 295/91 of Feb. 4, 1991, Establishing Common Rules for a Denied-Boarding Compensation System in Scheduled Air Transport, 1991 OJ (L 36) 5, art. 1 (EC).

¹³⁷ See Commission Regulation 261/2004, *supra* note 118, art. 7.

flights departing from one of the European Economic Area (EEA) States and Switzerland.¹³⁸ Moreover, passengers departing from an airport located outside of the EEA on a flight to an airport within the EU or EEA (a flight to which the Montreal Convention applies) could also enjoy the benefits of this new Regulation.¹³⁹ This benefit is not available to passengers who have already received compensation and assistance from an EU air carrier.¹⁴⁰ The meaning of the substantive provisions and the geographical scope of EU Regulation 261/2004 required an explanation by the courts.¹⁴¹

In some cases, not only has the substantive scope of the Regulation's provisions been stretched,¹⁴² but also the geographical applicability—producing an extraterritorial effect of EU Regulation 261/2004.¹⁴³ For instance, the Court of Justice for the European Union (CJEU) opined that the right of compensation for excessive delays under EU Regulation 261/2004 applies to connecting flights to states with layovers outside the EU when the carriage is made on a single booking, even if the flights are performed by a non-EU carrier.¹⁴⁴

Passengers denied boarding are entitled to the benefits described below if they can produce a reservation confirmation and they checked-in to their flight on time.¹⁴⁵ The obligations set out in this Regulation apply equally to EU and non-EU operating carriers.¹⁴⁶

¹³⁸ The EEA States include the twenty-seven EU Member States as well as Iceland, Lichtenstein, and Norway. *EU, EEA, EFTA and Schengen Area Countries*, GOV'T NETH., <https://www.government.nl/topics/european-union/eu-eea-efta-and-schengen-area-countries> [<https://perma.cc/J8KL-UEW2>].

¹³⁹ See Commission Regulation 261/2004, *supra* note 118, art. 3(1)(a).

¹⁴⁰ See *id.* art. 3(1)(b).

¹⁴¹ See MENDES DE LEON, *supra* note 117, at 317.

¹⁴² See *infra* Section II.C.

¹⁴³ See generally Charlotte Thijssen & Dries Deschuttere, *CJEU Extraterritorial Airways: A Critical Analysis of the Judgment of the Court of Justice of the European Union in the Wegener Case*, 43 AIR & SPACE L. 609, 612–16 (2018) (explaining the extraterritorial application of the regulation through case law).

¹⁴⁴ See Case C-537/17, *Wegener v. Royal Air Maroc SA*, ECLI:EU:C:2018:361, ¶ 27 (May 31, 2018); see also Case C-11/11, *Air France v. Folkerts*, ECLI:EU:C:2013:106, ¶ 49 (Feb. 26, 2013); *Gahan v. Emirates* [2017] EWCA Civ. 1530 [76]–[80] (appeal taken from Eng.).

¹⁴⁵ See Commission Regulation 261/2004, *supra* note 118, art. 3(2)(a).

¹⁴⁶ See *id.* art. 3(5).

4. *Principal Terms*

EU Regulation 261/2004 includes a complex framework for compensation and other remedies.¹⁴⁷ Summaries of the Regulation's remedies for overbooking, cancelation, and delays of flights are detailed below.

In regards to overbooking, airlines must first call for volunteers to surrender their reservations,¹⁴⁸ in which case such volunteers would be entitled to a reimbursement of the ticket within seven days; rerouting to the final destination at the earliest opportunity; *or* rerouting to the final destination at a later date as agreed upon between the parties.¹⁴⁹

If an insufficient number of passengers volunteer to relinquish their seat, the airline may deny boarding to passengers against their will.¹⁵⁰ In such cases the air carrier must offer the passenger meals and refreshments (care); hotel accommodation, if circumstances so require; transport between the airport and the hotel, if circumstances so require; means of communication; reimbursement of the ticket or rerouting to the final destination; *and* compensation in accordance with figures presented in the table below.¹⁵¹

Moving on to flight cancelations, when a flight is canceled, the passenger is entitled to assistance consisting of reimbursement of the ticket within seven days *or* rerouting to the final destination at the earliest opportunity under comparable transport conditions or at a later date at the passenger's convenience.¹⁵² Further, the customer is entitled to care, including meals and refreshments as well as means of communication.¹⁵³ In case of rerouting on at least the day after the planned departure time of the canceled flight,¹⁵⁴ the passenger is entitled to hotel accommodations when circumstances so require; transport between the airport and the hotel when circumstances so require; and compensation according to the scheme detailed in the following paragraph.¹⁵⁵

¹⁴⁷ *See id.* arts. 3–9.

¹⁴⁸ *Id.* art. 4(1).

¹⁴⁹ *Id.* arts. 4(1), 8.

¹⁵⁰ *Id.* art. 4(2).

¹⁵¹ *Id.* arts. 4(3), 7–9.

¹⁵² *Id.* art. 5.

¹⁵³ *Id.* art. 9.

¹⁵⁴ *Id.* art. 5(1)(b).

¹⁵⁵ *Id.* art. 9.

Unless the carrier has informed the passenger, the passenger is entitled to at least two weeks before departure of the canceled flight; between two weeks and seven days before departure and offers rerouting allowing passengers to depart within two hours before the scheduled departure time and to reach the final destination within four hours after the scheduled arrival time; or less than seven days before the scheduled departure time and offers rerouting allowing passengers to depart no more than one hour before the scheduled departure time and to reach their final destination less than two hours after the scheduled arrival time.¹⁵⁶

If an airline cancels a flight, it may avoid liability to passengers when it can prove the cause of the cancellation was “extraordinary circumstances” that could not have been avoided even if all reasonable measures had been taken.¹⁵⁷ Section 3.C below shall discuss case law explaining this term.

In the case of delay, the passenger may be entitled to compensation if a passenger’s flight has been delayed for two hours or more in the case of flights of 1,500 kilometers or less; for three hours or more in the case of all intra-EU flights of more than 1,500 kilometers and of all other flights between 1,500 and 3,500 kilometers; *or* for four hours or more in the case of all flights not falling under the categories mentioned above.¹⁵⁸ Compensation includes the following: care such as meals and refreshments *and* means of communication; hotel accommodation transport between the airport and the hotel when the expected departure time is at least twenty-four hours after the original departure time of the flight; *and* reimbursement of the ticket within seven days when the delay is at least five hours.¹⁵⁹ A passenger whose flight has been delayed (but not canceled) is *not* entitled to the compensation mentioned in the table below.¹⁶⁰ However, the CJEU ruled differently—as it has done concerning other provisions of this Regulation.¹⁶¹

¹⁵⁶ *Id.* art. 5(1)(c)(i)–(iii).

¹⁵⁷ *Id.* art. 5(3).

¹⁵⁸ *Id.* art. 6(1).

¹⁵⁹ *Id.* arts. 6(1)(c)(i)–(iii), 8(1)(a), 9(1)–(2).

¹⁶⁰ *See id.* art. 6 (not mentioning a right to compensation under Article 7).

¹⁶¹ *See* Jorn J. Wegter, *The ECJ decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention*, 31 AIR & SPACE L. 133, 142–43 (2006).

Regulation 261/2004 provides for the following amounts of compensation¹⁶²:

Compensation	Applicable to Flights	Distance Between Port of Embarkation and Destination
250 €	All	< 1500 km
400 €	Intra-EU flights	> 1500 km
400 €	Non-intra EU flights	> 1500 km < 3500 km
600 €	All other flights	> 3500 km

Various court rulings illustrate how airlines, passengers, judges, and authors are troubled by EU Regulation 261/2004.¹⁶³

5. Provisions of the Montreal Convention Have Become EU Law

So far, the EU is the only Regional Economic Integration Organization (REIO) that has ratified the Montreal Convention.¹⁶⁴ In doing so, the EU accepted the Convention as the sole source of substantively applicable law because “[i]n the internal aviation market, the distinction between national and international transport has been eliminated.”¹⁶⁵ Further, “[i]t would be impractical for Community air carriers and confusing for their passengers if they were to apply *different liability regimes* on different routes across their networks.”¹⁶⁶

Unfortunately, those noble considerations laid down in the Preamble of Regulation 889/2002 have been severely violated by EU legislators who adopted a regulation—*delay* in Regulation 261/

¹⁶² Commission Regulation 261/2004, *supra* note 118, art. 7.

¹⁶³ See Wegter, *supra* note 161, at 147–48; see also Kieran St. Clair Bradley, *Case C-344/04, The Queen Ex Parte International Air Transport Association*, European Low Fares Airline Association v. Department for Transport, 43 COMMON MKT. L. REV. 1101, 1101–24 (2006); John Balfour, *Correspondence*, 44 COMMON MKT. L. REV. 555, 555–60 (2007); C.I. GRIGORIEFF, THE REGIME FOR INTERNATIONAL AIR CARRIER LIABILITY: TO WHAT EXTENT HAS THE ENVISAGED UNIFORMITY OF THE 1999 MONTREAL CONVENTION BEEN ACHIEVED? 143–51 (2021).

¹⁶⁴ ICAO, *supra* note 19.

¹⁶⁵ Commission Regulation 889/2002, *supra* note 127, pmb. (8).

¹⁶⁶ *Id.* pmb. (13) (emphasis added).

2004.¹⁶⁷ This Convention relies on the principle of exclusivity, meaning that matters laid down in the Convention are exclusively regulated by its provisions and not by local laws.¹⁶⁸ One of those matters concerns liability for damages caused by delay.¹⁶⁹

The CJEU, also referred to as the European Court, has not—at least not correctly—evaluated the exclusivity of this Convention. Among others, the CJEU made a rather artificial distinction between damages under the Montreal Convention and damages under EU Regulation 261/2004.¹⁷⁰ This is all the more striking because the Montreal Convention *exclusively* allows for compensable damages and forbids the provision of noncompensatory and other damages.¹⁷¹ Moreover, by ratifying it, the EU has accepted the Montreal Convention as a single source of substantive law because “[i]n the internal aviation market, the distinction between national and international transport has been eliminated.”¹⁷² Whereas, “[i]t would be impractical for Community air carriers and confusing for their passengers if they were to apply *different liability regimes* on different routes across their networks.”¹⁷³ Various literary authors have criticized the decisions of the CJEU¹⁷⁴ along with subsequent decisions affecting the exclusivity and other provisions of the Montreal Convention.¹⁷⁵

¹⁶⁷ See Montreal Convention, *supra* note 1, art. 19; Commission Regulation 261/2004, *supra* note 118, art. 6.

¹⁶⁸ Montreal Convention, *supra* note 1, art. 29 (“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 . . .*”) (emphasis added).

¹⁶⁹ *Id.* art. 19 (“The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.”).

¹⁷⁰ See, e.g., Case C-344/04, Int’l Air Transp. Ass’n v. Dep’t for Transp., 2006 E.C.R. I-4403, ¶¶ 34–77.

¹⁷¹ See Montreal Convention, *supra* note 1, art. 29 (“In any such action, *punitive, exemplary or any other non-compensatory damages shall not be recoverable.*”) (emphasis added).

¹⁷² Commission Regulation 889/2002, *supra* note 127, pmb. (8).

¹⁷³ *Id.* pmb. (13) (emphasis added).

¹⁷⁴ See, e.g., GRIGORIEFF, *supra* note 163, at 143–51.

¹⁷⁵ Case C-344/04, *The Queen v. Dep’t of Transp.*, ECLI:EU:C:2005:530, ¶¶ 32–53 (Sept. 8, 2005); see also *Joined Cases C-581 & 629/10, Nelson v. Deutsche Lufthansa AG & The Queen v. Civ. Aviation Auth.*, ECLI:EU:C:2012:295, ¶¶ 48–49 (May 15, 2012).

C. AN AVALANCHE OF COURT CASES

1. *Incompatibility with the Montreal Convention*

IATA and the European Low Fares Airline Association (ELFAA) challenged the validity of Articles 5–7 of EU Regulation 261/2004 on a number of grounds.¹⁷⁶ For instance, in proceedings brought before the High Court of Justice of England and Wales, the applicants alleged an inconsistency between Article 6 and various provisions of the Montreal Convention, along with a failure to respect the principles of legal certainty, proportionality, and discrimination in the implementation of Regulation 261/2004.¹⁷⁷ In its decision, the UK High Court of Justice referred to the CJEU's questions about the compatibility of the EU Regulation and the relevant provisions of the Montreal Convention.¹⁷⁸

The CJEU found that there was no inconsistency between the two pieces of legislation.¹⁷⁹ The case focused on damages—a term used in both the Regulation and the Convention.¹⁸⁰ The CJEU held that the term damages must be interpreted differently.¹⁸¹ In other words, the term *damages* under the Montreal Convention is distinguishable from *damages* in the European Regulation.¹⁸² Thus, the CJEU circumvented a principle pillar of the Convention, exclusivity,¹⁸³ in conjunction with the provision

¹⁷⁶ Case C-344/04, *Int'l Air Transp. Ass'n v. Dep't for Transp.*, 2006 E.C.R. I-4403, ¶ 2.

¹⁷⁷ *Id.* ¶¶ 33–34.

¹⁷⁸ *Id.* ¶¶ 35–36.

¹⁷⁹ *Id.* ¶ 46.

¹⁸⁰ *Id.* ¶ 45.

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 45 (“It does not follow from [Articles 19, 22, or 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 to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.”).

¹⁸³ This means, in short, that all claims pertaining to international carriage to which the Convention applies, including those on delay, must be handled pursuant to the provisions of this Convention with the exclusion of all other sources of law, including but not limited to EU Regulation 261/2004. *See* Montreal Convention, *supra* note 1, art. 29 (“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 . . .*”) (emphasis added).

laid down in Article 29 of the Montreal Convention, which states that noncompensatory damages, including the types of standardized damages envisaged by the European Court, are not permitted by this Convention.¹⁸⁴

Consequently, the CJEU has not addressed the prohibition of the compensation of all noncompensatory damages under the Convention.¹⁸⁵ The amounts identified in the table of Section III.B.4 represent noncompensatory damages because they are not designed to balance economic losses, which are meant to be damages under Article 29 of the Convention.¹⁸⁶ Indeed, these amounts aim to meet the needs of all passengers in a standardized manner, irrespective of whether the damages have been suffered on an individual basis or have led to economic losses for each passenger.¹⁸⁷ Compensation for economic losses on an individual basis is what the Montreal Convention attempts to achieve on an exclusive basis.¹⁸⁸

2. *A Variety of Legal and Factual Questions Arising in Court Decisions*

Courts in EU States were also puzzled by the approach chosen by the CJEU in Luxembourg.¹⁸⁹ In these cases, the courts considered the scope of Regulation 261/2004;¹⁹⁰ status of the “operating carrier”;¹⁹¹ calculation of distance;¹⁹² definition of a “passenger”;¹⁹³ conditions for making claims under the denied-boarding provisions;¹⁹⁴ definition of delay;¹⁹⁵ interpretation of

¹⁸⁴ *Id.*

¹⁸⁵ Case C-344/04, *Int'l Air Transp. Ass'n v. Dep't for Transp.*, 2006 E.C.R. I-4403, ¶ 45.

¹⁸⁶ Montreal Convention, *supra* note 1, art. 29.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ Various courts refused to follow the CJEU's reasoning in the IATA and ELFAA case. *See MENDES DE LEON, supra* note 117, at 327.

¹⁹⁰ *See* Case C-173/07, *Emirates Airlines v. Schenkel*, ECLI:EU:C:2008:400, ¶ 1 (July 10, 2008).

¹⁹¹ *See* MENDES DE LEON, *supra* note 117, at 321–23.

¹⁹² *See id.* at 319–20.

¹⁹³ *See* Kathrin Vaupel, *Burden of Proof Regarding Airline Booking Acceptance Lies with Passenger*, LEXOLOGY (June 29, 2016), <https://www.lexology.com/commentary/aviation/germany/arnecke-sibeth/burden-of-proof-regarding-airline-booking-acceptance-lies-with-passenger> [<https://perma.cc/37AB-HC5R>].

¹⁹⁴ *See* Case C-321/11, *Rodríguez Cachafeiro v. Iberia*, ECLI:EU:C:2012:609, ¶ 1 (Oct. 4, 2012); *see also* Case C-22/11, *Oyj v. Lassoooy*, ECLI:EU:C:2012:604, ¶ 1 (Oct. 4, 2012).

the right to compensation;¹⁹⁶ distinction between cancellation and delay;¹⁹⁷ entitlements of passengers, including right to care;¹⁹⁸ jurisdiction and procedural matters;¹⁹⁹ and the right of regress, which is an airline's right to recover the damages it pays to passengers from a third party, such as damages resulting from a strike performed by air traffic controllers.²⁰⁰

In 2018, the CJEU applied the right of compensation for long delays under EU Regulation 261/2004 to flights connecting to states with layovers outside of the EU in cases where the carriage is made on a single booking, even if the flights are performed by a non-EU carrier.²⁰¹ This is one of those decisions where, yet again, the extraterritoriality with respect to the interpretation of EU Regulation 261/2004 could be criticized because it expands

¹⁹⁵ See Case C-452/13, *Germanwings v. Henning*, ECLI:EU:C:2014:2141, ¶ 1 (Sept. 4, 2014); see also Case C-11/11, *Air France SA v. Folkerts*, ECLI:EU:C:2013:106, ¶ 49 (Feb. 26, 2013).

¹⁹⁶ See Case C-601/17, *Harms v. Vueling Airlines SA*, ECLI:EU:C:2018:702, ¶ 21 (Sept. 12, 2018); Joachim Dejonckheere, *Reimbursement of Commissions Charged by Intermediaries After Flight Cancellation. A Legal Analysis of the Harms Case (C-601/17) and Its Impact on the Objectives of Regulation (EC) No 261/2004*, 44 AIR & SPACE L. 111, 113–14 (2019).

¹⁹⁷ See Ronald Schmid, *Case Law Digest: Germany*, 32 AIR & SPACE L. 233, 233–34 (2007); see also Miles Brignall, *New Hope for Air Passengers as the Grounded Fly High in Court*, GUARDIAN (Feb. 3, 2006, 8:00 PM), <https://www.theguardian.com/money/2006/feb/04/moneysupplement.travel> [<https://perma.cc/C43P-PTE2>] (discussing two successful legal claims brought against airlines).

¹⁹⁸ See *Graham v. Thomas Cook* [2012] EWCA Civ. 1355, [22], [25] (appeal taken from Eng.); see also Katja H. Brecke, *Steef Mennens v. Emirates Direktion für Deutschland*, 42 AIR & SPACE L. 71, 71–72 (2017).

¹⁹⁹ See, e.g., Case C-204/08, *Rehder v. Air Baltic Corp.*, 2009 E.C.R. I-6078, ¶ 1 (dealing with jurisdiction); Case C-139/11, *Moré v. Koninklijke Luchtvaart Maatschappij NV*, ECLI:EU:C:2012:741, ¶ 18 (Nov. 22, 2012) (dealing with procedural matters such as the statute of limitations); see also Marco Marchegiani, *Latest Case Law on Regulation (EC) No. 261/2004: Passengers Do Not Need to Provide Evidence of the Delay*, AVIATION J., Feb. 2018, at 1 (discussing an Italian Supreme Court case affirming CJEU decisions).

²⁰⁰ See Stefanie Gilcher & Hans Georg Helwig, *No damages to Third Party After Unlawful Strike?*, LEXOLOGY (Oct. 14, 2015), <https://www.lexology.com/commentary/aviation/germany/arnecke-sibeth/no-damages-to-third-party-after-unlawful-strike> [<https://perma.cc/W6F3-BCE6>] (explaining a decision of the German Federal Labour Court).

²⁰¹ See Press Release, Ct. of Just. of the EU, No. 77/18, *The Right to Compensation for Long Delays of Flights Applies to Connecting Flights to Third States with Stopovers Outside the EU* (May 31, 2018), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/cp180077en.pdf> [<https://perma.cc/XKX4-QBYS>].

the scope of EU law to flights taking place outside of the EU.²⁰² There is no apparent justification for the lack of a connection between the applicable law and the flight.²⁰³

3. *The EU Court of Justice Acting as a Legislator*

On November 19, 2009, the CJEU made yet another controversial ruling.²⁰⁴ As referenced by courts in Austria and Germany, the case is nowadays known as the *Sturgeon* case.²⁰⁵ After explaining the distinction between delay and cancellation, the CJEU found that passengers on flights whose arrival at their final destination was delayed by three or more hours were entitled to noncompensatory damages as calculated for passengers whose flights have been canceled—even though the terms of Regulation 261/2004 did not entitle passengers of delayed flights to such noncompensatory amounts.²⁰⁶ In other words, the CJEU amended Regulation 261/2004, which resulted in myriad critical comments.²⁰⁷

On October 23, 2012, the CJEU affirmed its earlier decision when it again held that passengers who suffered long delays should be treated the same as passengers whose flights were canceled—despite a lack of explicit language for such equal treatment in EU Regulation 261/2004.²⁰⁸ Further, the EU Commission, the body tasked with drafting proposals for EU leg-

²⁰² See *id.* (“[T]he Court rules that the regulation applies to passenger transport effected under a single booking and comprising, between its departure from an airport situated in a Member State (Berlin) and its arrival at an airport situated in a third country (Agadir), a scheduled stopover outside the EU (Casablanca) with a change of aircraft.”).

²⁰³ See *id.* (providing no explanation).

²⁰⁴ See Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst GmbH*, 2009 E.C.R. I-10954, ¶ 24.

²⁰⁵ See *id.*

²⁰⁶ See *id.* ¶ 69 (“In the light of the foregoing . . . Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning 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 and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.”).

²⁰⁷ See John Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, 35 AIR & SPACE L. 71, 71 (2010); Kinga Arnold & Pablo Mendes de Leon, *Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!*, 35 AIR & SPACE L. 91, 91 (2010).

²⁰⁸ See Joined Cases C-581/10 and C-629/10, *Nelson v. Deutsche Lufthansa AG*, ECLI:EU:C:2012:657, ¶ 92 (Oct. 23, 2012).

isolation, deliberately declined to grant equal remedies to passengers whose flights were delayed and those whose flights were canceled.²⁰⁹ Since 2012, the CJEU has not reconsidered its controversial decision in *Sturgeon*.

The CJEU's decisions have again been severely criticized.²¹⁰ We agree with the criticism because compensation of passengers who suffer delays of more than three hours was never written into Regulation 261/2004, and such compensation does not align with the exclusivity governing the Montreal Convention. In other words, the CJEU acted as a legislator, trespassing the principle of separation of powers between the legislature, judiciary, and executive bodies of EU governance.²¹¹ Nevertheless, the CJEU's decisions reflect the state of European law regarding the compensation of passengers whose flights have been delayed for more than three hours.²¹²

4. *The Airline's Defense: Reliance on Extraordinary Circumstances*

An airline may resist claims for compensation,²¹³ if extraordinary circumstances caused the harm.²¹⁴ The Preamble of EU Regulation 261/2004 describes *extraordinary circumstances* as circumstances

where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.²¹⁵

²⁰⁹ See *Protection of Air Passengers in the European Union*, at 17, COM (2000) 365 final (June 21, 2000).

²¹⁰ See Sonja Radošević, *CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention*, 38 AIR & SPACE L. 95, 102 (2013).

²¹¹ See CHARLES LOUIS SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, THE SPIRIT OF LAWS 151–52 (1748) (historical piece emphasizing the importance of the separation of powers).

²¹² See Radošević, *supra* note 210, at 95.

²¹³ See table *supra* Section III.B.4.

²¹⁴ See Commission Regulation 261/2004, *supra* note 118, art. 5(3) (“An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”).

²¹⁵ See *id.* pmb. (15).

Courts in EU States have explained this term in different fashions.²¹⁶

The CJEU clarified this term when it held that technical problems that come to light during maintenance of an aircraft, or on account of a failure to carry out such maintenance, do not constitute, in and of themselves, extraordinary circumstances.²¹⁷ The CJEU later revisited the scope of extraordinary circumstances.²¹⁸ In its decision on September 17, 2015, the CJEU found that the extraordinary circumstances defense was not valid when a technical problem affecting the operation of the aircraft appeared during the maintenance of the aircraft, including a failure to perform such maintenance.²¹⁹

Weather conditions such as typhoons, storms, and volcanic eruptions generally qualify as extraordinary circumstances.²²⁰ Strikes must be differentiated into bird strikes, lightning strikes, and labor strikes.²²¹ While courts have not regarded bird strikes as an extraordinary circumstance,²²² lightning strikes have been,²²³ and the same is true for labor strikes subject to the con-

²¹⁶ See *Jet2.com Ltd. v. Huzar*, [2014] EWCA Civ. 791, [21]–[28], [50] (appeal taken from Eng.); *Dawson v. Thomson Airways Ltd.*, [2014] EWCA Civ. 845, [23]–[25] (appeal taken from Eng.); *Case C-394/14, Siewert v. Condor Flugdienst GmbH*, ECLI:EU:C:2014:2377, ¶ 24 (Nov. 14, 2014).

²¹⁷ See *Case C-549/07, Wallentin-Hermann v. Alitalia*, 2008 E.C.R. I-11085; see also John Balfour, *The “Extraordinary Circumstances” Defence in EC Regulation 261/2004 After Wallentin-Hermann v. Alitalia*, 58 ZLW 224, 228 (2009).

²¹⁸ See *Case C-257/14, van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, ECLI:EU:C:2015:618, ¶¶ 48–49 (Sept. 17, 2015).

²¹⁹ *Id.*

²²⁰ See *Case C-12/11, McDonagh v. Ryanair Ltd.*, ECLI:EU:C:2013:43, ¶ 34 (Jan. 31, 2013) (holding that a volcanic eruption is an extraordinary circumstance); see also Pierre Frühling, *Delayed Flights: Typhoon Constitutes Extraordinary Circumstance*, LEXOLOGY (July 24, 2013), <https://www.lexology.com/commentary/aviation/belgium/holman-fenwick-willan-llp/delayed-flights-typhoon-constitutes-extraordinary-circumstance> [<https://perma.cc/32ED-7KPG>].

²²¹ See *Case C-315/15, Pešková v. Travel Service a.s.*, ECLI:EU:C:2017:342, ¶ 21 (May 4, 2017) (stating that extraordinary circumstances typically arise during “strikes that affect the operation of an air carrier.”).

²²² See *id.* ¶¶ 11, 43–48 (finding that reasonable preventative measures could be taken to prevent bird strikes); see also *Case C-394/14, Siewert v. Condor Flugdienst GmbH*, ECLI:EU:C:2014:2377, ¶ 24 (Nov. 14, 2014) (finding that a collision of mobile boarding stairs with an aircraft is not an extraordinary circumstance).

²²³ *Compensation If Your Flight Is Struck by Lightning*, BUS. TRAVELER (Jan. 14, 2016), <https://www.businesstraveller.com/news/2016/01/14/compensation-if-your-flight-is-struck-by-lightning> [<https://perma.cc/ZGW7-KPD3>] (referencing a decision by the Reading County Court); see also *Cour de cassation* [Cass.] [supreme

ditions under which the labor strike takes place.²²⁴ Capacity reductions imposed by air traffic control because of weather conditions that cause cancellations and long delays of flights have²²⁵ and have not²²⁶ qualified as extraordinary circumstances. Behavior of unruly passengers necessitating a flight delay constitutes an extraordinary circumstance.²²⁷

5. *EU Passenger Protection Measures in the Conditions of Carriage of Non-EU Airlines*

In the context of this Article, which also focuses on Korean law regarding passenger protection, it is interesting to evaluate the enforceability of the EU rules on passenger protection. The geographical scope of the EU rules on passenger protection has been explained above.²²⁸

U.S. courts have considered whether passengers may rely on said European rules to avoid the exclusive application of the Montreal Convention.²²⁹ If yes, those passengers could benefit from the more generous remedies and measures of the European Regulation instead of being restricted to, for instance, the compensation of only economic or material damages under the Montreal Convention.²³⁰ In this respect, U.S. courts look at the conditions of carriage of the defendant airline.²³¹ The courts'

court for judicial matters] 1e civ., Feb. 5, 2020, Bull. civ. I, No. 113 (Fr.) (holding that a pilot's sudden illness is not an extraordinary circumstance).

²²⁴ See Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, *Krüsemann v. TUIfly GmbH*, ECLI:EU:C:2018:258, ¶¶ 42–50 (Apr. 17, 2018) (differentiating between an official and unofficial labor strike); see also Magdalena Kucko, *The Decision in TUIfly: Are the Ryanair Strikes to Be Seen as Extraordinary Circumstances?*, 44 AIR & SPACE L. 321, 321 (2019).

²²⁵ See RB Noord-Holland, 3 oktober 2018, ECLI:NL:RBNHO:2018:8187 (*Passengers/British Airways PLC*) (Neth.).

²²⁶ See RB Amsterdam, 27 maart 2018, ECLI:NL:RBAMS:2018:1962 (*Claimingo BV/Koninklijke Luchtvaart Maatschappij NV*) (Neth.); see also RB Noord-Holland, 30 mei 2018, ECLI:NL:RBNHO:2018:5056 (*Passengers/British Airways PLC*) (Neth.).

²²⁷ Case C-74/19, *LE v. Transport Aéreos Portugueses SA*, ECLI:EU:C:2020:460, ¶ 62 (June 11, 2020).

²²⁸ See *supra* Section III.B.3.

²²⁹ See, e.g., *Polinovsky v. British Airways, PLC*, No. 11-C-779, 2012 WL 1506052, at *1 (N.D. Ill. Mar. 30, 2012).

²³⁰ See *supra* Section I.C.

²³¹ See *British Airways*, 2012 WL 1506052, at *3; *Dochak v. Polskie Linie Lotnicze Lot S.A.*, 189 F. Supp. 3d 798, 802 (N.D. Ill. 2016).

answers depend on whether the carriers did²³² or did not²³³ provide express reference to “261” compensation in their conditions of carriage as published on their websites, because these actions are typically “limited to courts in the EU member states.”²³⁴

U.S. courts decided that if one of the plaintiff’s state law claims for breach of contract involves compensation under EU Regulation 261/2004, then the suit does not fall under the exclusivity of the Montreal Convention, because the Convention does not preempt a breach of contract claim.²³⁵ In another case, a court dismissed a claim on the basis of EU Regulation 261/2004.²³⁶ The court found that the Regulation “is not judicially enforceable outside the courts of EU Member States” because it is not incorporated into the air carrier’s contract of carriage; therefore, no breach of contract occurred.²³⁷

The U.S. legal framework governing passenger protection is unlike that of the EU.²³⁸ In the United States, passenger claims are subject to the provisions of the Montreal Convention and the contractual provisions agreed upon by the air carrier and the passenger.²³⁹ U.S. courts generally adhere to the exclusivity principle embodied in the Convention.²⁴⁰

²³² For cases where the court found that the conditions of carriage incorporated the European Regulation, see *Polinovsky v. Deutsche Lufthansa, AG*, No. 11 CV 780, 2012 WL 1080415, at *3 (N.D. Ill. Mar. 30, 2012); *Giannopoulos v. Iberia Líneas Aéreas de España, S.A.*, No. 11 C 775, 2011 WL 3166159, at *1 (N.D. Ill. July 27, 2011).

²³³ For cases where the court found that the conditions of carriage did not incorporate the European Regulation, see *Dochak*, 189 F. Supp. 3d at 803; *British Airways*, 2012 WL 1506052, at *3; *Bytska v. Swiss Int’l Air Lines, Ltd.*, No. 15-cv-483, 2016 WL 792314, at *3 (N.D. Ill. Mar. 1, 2016); *Lozano v. United Cont’l Holdings, Inc.*, No. 11 C 8258, 2012 WL 4094648, at *4 (N.D. Ill. Sept. 17, 2012).

²³⁴ *Bystka*, 2016 WL 792314, at *2.

²³⁵ *British Airways*, 2012 WL 1506052, at *1–3; *Deutsche Lufthansa*, 2012 WL 1080415, at *4; *Giannopoulos*, 2011 WL 3166159, at *4–5; *Volodarskiy v. Delta Airlines, Inc.*, 784 F.3d 349, 350 (7th Cir. 2015).

²³⁶ *Volodarskiy*, 784 F.3d at 357; see also *Bergman v. United Airlines Inc.*, No. 12 C 07040, 2014 WL 12775668, at *2 (N.D. Ill. June 18, 2014).

²³⁷ See *Bergman*, 2014 WL 12775668, at *4.

²³⁸ See *supra* Section III.B.

²³⁹ See George N. Tompkins, Jr., *EU Passenger Rights Regulation 261/2004 and United States Courts*, 40 AIR & SPACE L. 451, 451 (2015).

²⁴⁰ See *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 168 (1999); see also *Miller v. Cont’l Airlines, Inc.*, 260 F. Supp. 2d 931, 934 (N.D. Cal. 2003) (stating that the Warsaw Convention “provides the exclusive remedy for conduct falling within its provisions.”).

The combination of these factors may account for understanding the decisions made by U.S. courts regarding EU Regulation 261/2004. U.S. courts are hesitant to enforce the provisions of EU Regulation 261/2004 unless the conditions of carriage of the air carrier, which has been held liable for the combination of one of the events mentioned in the EU Regulation (delay, overbooking, or cancelation), refer to the EU Regulation.²⁴¹

6. Concluding Remarks

EU Regulation 261/2004 created a complex regime for passenger protection—passenger entitlements vary in accordance with other factors and circumstances detailed by the Regulation.²⁴² Meanwhile, the scope of the Regulation has been expanded by subsequent decisions of the CJEU for the benefit of consumer protection and equal treatment of passengers.²⁴³ Various questions have been asked about the Regulation's relationship with the provisions of the Montreal Convention, including the term *extraordinary circumstances*, the distinction between cancelation and delay, the geographical scope, and the scope of entitlements.²⁴⁴ While the Convention does not specifically deal with cancelation and denied boarding, it does address flight delays.²⁴⁵ Cancelation and denied boarding are often regarded as a nonperformance of the contract of carriage by the air carrier, and are consequently governed by national civil law rather than the exclusive provisions of the Convention.²⁴⁶ Therefore, delay is regulated by the Convention *and* by EU Regulation 261/2004.²⁴⁷

The decisions made by the CJEU have been frequently criticized.²⁴⁸ The criticisms pertain to the relationship between EU

²⁴¹ See *Polinovsky v. Deutsche Lufthansa, AG*, No.11 CV 780, 2012 WL 1080415, at *3 (N.D. Ill. Mar. 30, 2012); *Giannopoulos v. Iberia Líneas Aéreas de España, S.A.*, No. 11 C 775, 2011 WL 3166159, at *1 (N.D. Ill. July 27, 2011).

²⁴² See table *supra* Section III.B.4.

²⁴³ See *supra* Section III.C.

²⁴⁴ See *supra* Section III.C.2.

²⁴⁵ Montreal Convention, *supra* note 1, art. 19.

²⁴⁶ See, e.g., Hanggong Gytongyiyongja Bohogijun [Air Transport User Protection Standards] art. 4, *amended by* Notice of the Ministry of Land, Infrastructure and Transport No. 2020–383, May 27, 2020 (S. Kor.) (dealing with denied boarding).

²⁴⁷ Montreal Convention, *supra* note 1, art. 19; see Commission Regulation 261/2004, *supra* note 118, art. 6.

²⁴⁸ See, e.g., Arnold & Mendes de Leon, *supra* note 207, at 91.

Regulation 261/2004 and the Montreal Convention, the distinction between cancellation and delay (pursuant to the ‘equal treatment’ principle), and the notion of extraordinary circumstances.²⁴⁹ At times, it appears that the CJEU has relied upon an artificial line of reasoning to justify its decisions, prioritizing European law and policy, including consumer protection, while ignoring the provisions of the Montreal Convention.²⁵⁰ Further, the CJEU has effectively legislated from the bench, thus exceeding its mandate to apply and interpret the law—not create the law.

Considering the above observations, the anticipated revision of Regulation 261/2004 will hopefully clarify questions provoked by the current edition of the Regulation. To ensure common understanding and proper enforcement, the EU Commission published interpretation guidelines for Regulation 261/2004.²⁵¹

IV. CONCLUDING REMARKS

In addition to Korea and the EU, numerous other jurisdictions across the globe have established passenger protection regimes.²⁵² Among them are India, Brazil, Mexico, China, Argentina, Bahrain, Bolivia, Ecuador, Colombia, Egypt, Indonesia, Israel, Nigeria, Oman, the Russian Federation, Saudi Arabia, Turkey, Uruguay, and Vietnam.²⁵³ Each country’s legal scheme encompasses varying measures, including different compensation amounts and accompanying conditions for delay, cancellation, denied boarding, or a combination of these events.²⁵⁴

Most of the States listed above are parties to the Montreal Convention, which at the time of publishing boasts 139 con-

²⁴⁹ *Id.* at 98.

²⁵⁰ *Id.* at 97.

²⁵¹ See Commission Notice on Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and on Council Regulation (EC) No 2027/97 on Air Carrier Liability in the Event of Accidents as Amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, 2016 O.J. (C 214) 5, 6 (EC).

²⁵² ICAO, *Assistance to Passengers in Case of Airport/Airline Disruptions*, at 1, ICAO Doc. C-WP/14804 (2018), <https://www.icao.int/sustainability/Documents/C.215.WP.14804.REV1.EN.PDF> [<https://perma.cc/7GQ4-RSMZ>].

²⁵³ See *id.*

²⁵⁴ See *id.* at 3–4.

tracting States.²⁵⁵ In the majority of cases, the highest courts in these States, including Korea, have paid tribute to the exclusivity of the Montreal Convention regarding matters governed by it, such as compensation of damage occasioned by delay.²⁵⁶ The CJEU has not honored its accession to the Convention by holding that the European law principles, based on consumer protection and equal treatment, prevail over the Convention's exclusivity.²⁵⁷ Thus, the CJEU also ignored the primacy of international law.²⁵⁸

In conclusion, while the Montreal Convention still serves useful purposes by avoiding conflicts of law and determining the applicable law for airlines and passengers in international carriage by air, it is increasingly supplemented, and at times undermined, by a patchwork of domestic regulations and court interpretations thereof. As is the case with competition law, which does not know a global regime, these isolated local regulations may yield extraterritorial effects because of the cross-border nature of air transport. In other words, airlines may have to answer claims from passengers based on different regulations that are enacted by the State in which the flight departed or landed—leading to potential conflicts of law. So far, such conflicts have been modest, but they may well grow in scope and intensity in the future.

Hence, it is recommended that the States that have established passenger regulations and adhere to the Montreal Convention, the International Civil Aviation Organization (ICAO), IATA, and other interested organizations put their minds together to enhance synchronization of rules for the benefit of passengers, airlines, and other parties who are working in the aviation sector. That said, this should be weighed against IATA's argument that passenger protection should be left to market forces because it is up to carriers to determine the service level they wish to afford their passengers.²⁵⁹ In other words, passenger protection should be seen as a marketing tool and an instrument in competition between airlines. However, policymakers have ventured beyond that vision to cater to the interests of the

²⁵⁵ See ICAO, *supra* note 19.

²⁵⁶ See *supra* Section II.E.

²⁵⁷ See *supra* Sections III.C.1–3.

²⁵⁸ See *supra* Section III.C.1.

²⁵⁹ *Consumer Issues*, IATA, <https://www.iata.org/en/programs/passenger/consumer-issues/> [<https://perma.cc/V8RQ-Z57U>].

consumers, who, at the end of the day, are the citizens whom policymakers represent.