

2012

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Jae Woon Lee et al., *Air Carrier Liability for Delay: A Plea to Return to International Uniformity*, 77 J. AIR L. & COM. 43 (2012)
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AIR CARRIER LIABILITY FOR DELAY: A PLEA TO RETURN TO INTERNATIONAL UNIFORMITY

JAE WOON LEE*
JOSEPH CHARLES WHEELER**

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I. OVERVIEW—THE CONCEPT OF DELAY

“When a man sits with a pretty girl for an hour, it seems like a minute. But let him sit on a hot stove for a minute—and it’s longer than any hour. That’s relativity.”¹

—Albert Einstein

IN PRIVATE international air law, delay is a compensable damage, but the method of defining this term has been controver-

¹ E.g., *Albert Einstein Quotes*, NOTABLE-QUOTES.COM, http://www.notable-quotes.com/e/einstein_albert.html (last visited Feb. 26, 2012).

sial from the beginning of commercial air transportation. This is largely because delay is a highly relative and subjective concept depending on many factors, including culture and circumstance. Early aviation scholars emphasized that time is a factor that should always be taken into account when dealing with commercial aviation.²

For example, if a passenger is comfortably watching an exciting football match in an airport lounge and is informed that his flight is delayed for an hour, it will probably not matter much to him. On the contrary, if a passenger finds that his flight will be delayed for an hour while traveling home after an exhausting business trip, it might be much more stressful. The objective temporal delay is identical in both cases, but the extent of the inconvenience—or *damage*—each passenger faces is significantly different. Einstein’s theory of relativity might explain how passengers perceive delays at airports and why there is wisdom in paying disparate compensation to passengers based on their *particular* damages.

In 2011, approximately 2.8 billion people flew on 38 million flights (30 million by jet and 8 million by turboprop), and the “2011 global accident rate (measured in hull losses per million flights of Western-built jets) was 0.37,” which is equivalent to “one accident every 2.7 million flights.”³ Despite the fact that the definition of “delay” and the period of time that constitutes delay varies by air carrier or airport, such that it is practically impossible to assess global on-time rates, there is no doubt that air carriers’ on-time performance has greatly improved since commercial air transportation began. For example, the passenger aircraft on-time performance rate departing from Seoul Incheon International Airport was 92.2% in 2009, where a flight is considered delayed when it departs fifteen or more minutes later than the scheduled departure time.⁴ Major airline on-time arrival performance in U.S. airports was 79.49% in 2009, where

² See Enrique Mapelli Y Lopez, *Air Carriers Liability in Cases of Delay*, 1 AIR & SPACE L. 109, 109 (1976); SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW 54–55 (Robert C. Horner & Didier Legrez trans.) (1975) [hereinafter SECOND INTERNATIONAL CONFERENCE].

³ Press Release, Int’l Air Transp. Ass’n, Global Accident Rate Reaches New Low – Regional Challenges Remain (Mar. 6, 2012), available at <http://www.iata.org/pressroom/pr/pages/2012-03-06-01.aspx>.

⁴ U.S. Research & Innovative Tech. Admin., *Airline On-Time Statistics and Delay Causes*, BUREAU OF TRANSP. STATISTICS, http://www.transtats.bts.gov/OT_delay/OT_delaycause1.asp?pn=1.

a flight is considered delayed when it arrives fifteen or more minutes later than the scheduled arrival.⁵

Generally, causes of delays are related to one or more of the following factors: weather, aircraft maintenance, aircraft connections, air traffic congestion, or security. Air carriers must deal with these tangible and intangible obstacles every day. Nevertheless, air carrier on-time performance has improved for three main reasons. First, the development of aviation technology has improved on-time performance. Aircraft technology and air traffic control technology have enabled air carriers to operate in the kinds of weather conditions that routinely made some flights impossible in the past. Second, air carriers' desire to earn profits has also helped decrease the number of flight delays. Flight scheduling "involves providing aircraft departures to cities at times (supply) to which and when consumers want to fly (demand), in order to convince passengers to exchange economic resources (revenue) for those benefits."⁶ Since flight scheduling can be impeded by unexpected circumstances causing flight delay, air carriers do their best to reduce dwell time—the period of time between aircraft arrival and departure—to maximize their revenues. Third, since the advent of modern, conventional air carrier liability law, air carriers on international flights have become presumptively liable in cases of delay. Therefore, air carriers take positive steps in operations not to attract liability for the damage occasioned by delays. Despite these observations, the vicissitudes and contingencies of life ensure it is highly probable that delays will remain unavoidable in air transportation. Accordingly, defining and treating an air carrier's liability for passenger delay are important tasks.

This article will examine two influential international and regional legal regimes which seek to create certainty around passengers' expectations of compensation when they have suffered a delay. While this term has been the subject of much passenger and consumer rights legislation, it is a term that was more eloquently captured in the words of Einstein, above, than in the air law instruments which have arisen to shield air passengers from the negative impacts of delay. We hope to present a plea that a comprehensive review or, indeed, repeal, of certain regional regulations must be accomplished to ensure that passenger

⁵ *Id.*

⁶ PAUL STEPHEN DEMPSEY & LAURENCE E. GESELL, AIRLINE MANAGEMENT: STRATEGIES FOR THE 21ST CENTURY 249 (1997).

compensation for delays returns to the pathway originally set by the international community in the noble pursuit of uniformity.

II. DELAY FROM THE WARSAW CONVENTION TO THE MONTREAL CONVENTION

A. DELAY IN THE WARSAW CONVENTION (1929)

Prior to the Second International Conference on Private Aeronautical Law in 1929 (Conference), which adopted the Convention for the Unification of Certain Rules Relating to International Carriage by Air⁷ (Warsaw Convention), the Comité International Technique d'Experts Juridiques Aériens (CITEJA) produced a draft convention concerning air transport documents and the liability of the carrier in international carriage by aircraft.⁸ During the third session of the Conference held on October 6, 1929, Mr. Henri De Vos, the reporter to the Conference, acknowledged that the liability of the carrier in the case of delay had been made the object of numerous objections on the part of air carriers in general.⁹ However, it was CITEJA's belief that a principle of liability due to delay should be established.¹⁰ Accordingly, CITEJA introduced the following principle in Article 21(c) of the draft convention: "the carrier shall be liable for damage sustained during carriage in the case of delay suffered by a traveler, goods, or baggage."¹¹

There were interesting proposals from some states, namely Poland, Great Britain, and Germany, whose delegates suggested amendments to the original wording of Article 21(c). Poland's delegate expressed concerns about liability for delay of travelers because it would open the door to innumerable trials and difficulties of proof.¹² Accordingly, he suggested eliminating the words "by a traveller."¹³ Great Britain's delegate proposed that air carriers should be allowed to include a delay provision in the conditions of contract, stipulating that air carriers do not guar-

⁷ Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention].

⁸ SECOND INTERNATIONAL CONFERENCE, *supra* note 2, at 13.

⁹ *Id.* at 54–55.

¹⁰ *See id.* at 253 ("The principle of liability in the case of delay was retained in order that the carrier not be free to hand over the goods or to have the traveler arrive according to the carrier's own pleasure.")

¹¹ CITEJA, Draft Convention, Article 21(c).

¹² SECOND INTERNATIONAL CONFERENCE, *supra* note 2, at 56–57.

¹³ *Id.*

antee on-time operation.¹⁴ Sir Alfred Dennis proposed adding words to the effect of “except as otherwise agreed” to Article 21(c).¹⁵ The majority of delegates shared the view that speed is a basic and specific characteristic of air transportation, and delay is a source of damage to the interests of passengers.¹⁶ Ultimately, the Conference adopted a principle of liability due to delay in Article 19 of the Warsaw Convention, which simply stipulates that “[t]he carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.”¹⁷

Article 19 of the Warsaw Convention was criticized for lack of clarity.¹⁸ Not every delay can be the responsibility of air carriers, so more explanation—i.e., definition—would have further refined it. Consequently, two fundamental questions about Article 19 remain unanswered: which factors constitute delay, and what length must that period of delay be? As to the first question, Professor Diederiks-Verschoor suggested the following considerations when determining liability for delay:

- (1) the existence of the material fact of the delay;
- (2) the fact or circumstance that the delay is produced in the course of the air transportation; and
- (3) that the damage is a direct effect of the delay.¹⁹

As to the second question, Mr. Henri De Vos, on behalf of CITEJA, stated that the carrier must fulfill its obligations within a reasonable period and that defining “reasonable period” is a question of appreciation of the facts to be resolved by a judge, as no formula can determine such a period.²⁰

The question of how to define compensable delay is assisted by Article 20 of the Warsaw Convention.²¹ In fact, Article 19 should be read together with Article 20, which states that a car-

¹⁴ *Id.* at 55.

¹⁵ *Id.*

¹⁶ *Id.* at 56–57.

¹⁷ Warsaw Convention, *supra* note 7, art. 19.

¹⁸ See I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 82 (7th rev. ed. 2001).

¹⁹ *Id.*

²⁰ SECOND INTERNATIONAL CONFERENCE, *supra* note 2, at 253.

²¹ Warsaw Convention, *supra* note 7, art. 20 (“The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agent have taken all necessary measures to avoid the damage.”).

rier can relieve itself from liability if it proves it took “all necessary measures” to avoid the loss or it was impossible for it to do so.²² The losses referred to are passenger death or bodily injury, damage to or loss of any registered luggage or goods, and “damage occasioned by delay,” which Articles 17, 18, and 19 of the Warsaw Convention stipulate, respectively.²³ Courts have interpreted the phrase “all necessary measures” in Article 20 to mean “all reasonable measures.”²⁴ Determining whether “all reasonable measures” were taken to avoid the delay is closely intertwined with an assessment of whether the *causes* of delay and the *period* of delay were reasonable.²⁵

Confusingly, the Warsaw Convention did not discuss a monetary limit on liability for damage caused by passenger delay. Article 22 provides limits of liabilities for other types of damage: 125,000 francs for the death or bodily injury by a passenger; 250 francs per kilogram for damage to or loss of any registered luggage or goods; and 5,000 francs for damage to any carry-on item.²⁶ A Swiss delegate in the Conference suggested that the limit of liability for passenger delay should be 2,500 francs.²⁷ While there were different views on how to interpret the limit of liability, it was common knowledge that the lack of reference to monetary limits did not mean that air carriers must face *unlimited* liability in the case of delay.²⁸

B. DELAY IN THE MONTREAL CONVENTION (1999)

Neither the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol) nor its own subsequent protocol (Guatemala City Protocol) amended Article 19 of the Warsaw Convention,²⁹

²² *Id.*

²³ *Id.* arts. 17–19.

²⁴ *E.g.*, *Lee v. American Airlines, Inc.*, No. CIVA3: 01-CV-1179-P, 2004 WL 2624647, at * 1 (N.D. Tex. Nov. 17, 2004).

²⁵ See cases discussed *infra* Part III.

²⁶ Warsaw Convention, *supra* note 7, art. 22.

²⁷ SECOND INTERNATIONAL CONFERENCE, *supra* note 2, at 320.

²⁸ *Id.* at 88–89.

²⁹ See generally Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended By The Protocol Done At The Hague on 28 September 1955, *opened for signature* Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932 [hereinafter Guatemala City Protocol].

but the Guatemala City Protocol amended Article 20 by specifying a defense mechanism in cases of delays.³⁰ Although Article 20 of the Warsaw Convention provided the “all necessary measures” defense, it was *not* confined to delay.³¹

Ultimately, Article 19 of the new Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), provided:

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.³²

The first sentence of Article 19 of the Montreal Convention is the same as Article 19 of the Warsaw Convention, except it changes the words “luggage or goods” to “baggage or cargo.”³³ The more substantial change is that the Montreal Convention amended the second sentence of Article 19 from “taken all necessary measures to avoid the damage” to “took all measures that could reasonably be required to avoid the damage,” while leaving the words “it was impossible for it or them to take such measures” unchanged.³⁴ On its face, “all necessary measures” appeared “to be a more exacting standard than ‘all measures that [could] reasonably be required.’”³⁵

There was an attempt to specify the meaning of “delay” in preparation for the Montreal Convention. The 30th Legal Committee proposed defining delay as “the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to ex-

³⁰ Guatemala City Protocol, *supra* note 29, art. 10.

³¹ *Id.* art. 20 (“In the carriage of passenger and baggage the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. In the carriage of cargo the carrier shall not be liable for damage resulting from destruction, loss, damage or delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.”).

³² Convention for the Unification of Certain Rules for International Carriage by Air art. 19, *opened for signature* May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

³³ *Compare id.*, with Warsaw Convention, *supra* note 7, art. 19.

³⁴ *Compare* Montreal Convention, *supra* note 32, art. 19, with Warsaw Convention, *supra* note 7, art. 20.

³⁵ PAUL STEPHEN DEMPSEY & MICHAEL MILDE, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999 177 (2005).

pect from a diligent carrier to do so, having regard to all the relevant circumstances.”³⁶

However, the Special Group on the Modernization and Consolidation of the “Warsaw System,” which was established by the 152nd Session of the International Civil Aviation Organization (ICAO) Council, subsequently deleted the above paragraph.³⁷ The reasons for the deletion were discussed in the International Conference on Air Law in Montreal. The President of the conference indicated that the “Special Group” took a pragmatic approach in deciding to leave the term “delay” *without* a definition due to the difficulty of finding precise language that would cover all circumstances which could be characterized as “delay.”³⁸ The Chairman of the Drafting Committee added that a considerable amount of work had been undertaken in order to determine whether the term “delay” could be given a definitive definition; however, delays varied from case to case and circumstance to circumstance, so he maintained that it would be an impossible task to develop a short, precise definition.³⁹ He also commented that the general wording of draft Article 18—which became Article 19 in the final version—was intended to provide sufficient signposts.⁴⁰ Thus, despite both the Warsaw Convention’s and the Montreal Convention’s textual explication that air carriers are *liable* for damage occasioned by delay, a definition of “delay” did not appear in the conventions. As a result, the interpretation of delay is determined by judges in both civil and common law jurisdictions.

Unlike the Warsaw Convention, Article 22 of the Montreal Convention specifically provides a monetary limit for compensation.⁴¹ As of December 30, 2009, the original liability limit for delay—4,150 Special Drawing Rights (SDR)—had been increased to 4,694 SDR.⁴²

³⁶ Int’l Civil Aviation Org. [ICAO], at 83, ICAO Doc. 9775-DC/2 [hereinafter ICAO Doc.].

³⁷ The Special Group meeting convened from April 14–18, 1998.

³⁸ ICAO Doc., *supra* note 36, at 83.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Montreal Convention, *supra* note 32, art. 22 (“In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.”).

⁴² Press Release, Gov’t of Hong Kong, Revision of Limits of Liability in Montreal Convention to Be Gazetted (Dec. 9, 2009), *available at* <http://www.info.gov.hk/gia/general/200912/09/P200912090258.htm>. This reflected a 13.1% in-

C. UNIFORMITY IN THE CONVENTIONAL CONSTRUCTION
OF DELAY

Uniformity was, and remains, a major objective in public and private international air law.⁴³ The Warsaw Convention recognized the trans-jurisdictional potential for aviation and, accordingly, sought to create a uniform and equivalent cross-boundary legal regime.⁴⁴ In an inherently international industry like commercial aviation, both suppliers and consumers benefit from the harmonization of legal relations. Continuing in this vein, the Montreal Convention aims to achieve uniformity and certainty for the passenger and carrier alike: it combines a core set of liability rules for passenger death or injury with other events, such as loss or damage to baggage and delay, to regulate this major aspect of contracts for air carriage in a standardized way.⁴⁵

Preserving uniformity in the application of liability requires exclusivity of operation for any remedies provided. Thus, Article 29 of the Montreal Convention provides that claims for compensation by passengers cannot be brought other than in accordance with the terms of the Montreal Convention:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or 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.⁴⁶

Accordingly, Article 29 seeks to ensure that the Montreal Convention remains the exclusive source for a cause of action for compensatory damages arising under contracts for international air carriage. A significant body of case law indicates that other remedies, such as those which arise under domestic laws, are excluded or “pre-empted.”⁴⁷ Thus, a claimant cannot make

crease for inflation, pursuant to authority under the Montreal Convention. *Id.*; Montreal Convention, *supra* note 32, art. 24, para. 2.

⁴³ See PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 2 (2008).

⁴⁴ DEMPSEY & MILDE, *supra* note 35, at 11.

⁴⁵ See Montreal Convention, *supra* note 32, arts. 17–37.

⁴⁶ *Id.* art. 29.

⁴⁷ See, e.g., *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1360–61 (S.D. Fla. 2008); *Walton v. Mytravel Can. Holdings, Inc.*, 280 Sask. R.1, paras. 31–32 (2006).

analogous or concurrent claims under domestic contract or tort law to bypass the rules and limits of the Montreal Convention.⁴⁸

The British House of Lords in *Sidhu v. British Airways* held that the Montreal Convention's predecessor, the Warsaw Convention, which contained a relevantly similar article, excluded other contractual or tortious claims for damages.⁴⁹ The court noted "in all questions . . . , it is the provisions of the Convention which apply and . . . 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."⁵⁰

Lord Hope summed up the pragmatic effect of the exclusivity of the Montreal Convention when he held that air carriers "[do] not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention."⁵¹ The Supreme Court of the United States took a similar approach in *El Al Israel Airlines v. Tseng*.⁵² Justice Ginsburg approved *Sidhu* and held that the Montreal Convention "precludes a passenger from maintaining an action for . . . damages under local law when her claim does not satisfy the conditions for liability under the Convention."⁵³ These propositions are now considered settled.⁵⁴

Unfortunately, this well-reasoned and intuitively satisfying construction has not been followed in other continental jurisdictions and has, in fact, battled with conflicting regional legislation that seeks to give effect to consumer protection policies. This misalignment of public policy and legislation, which arguably runs contrary to the existing conventional framework, is examined below. It will be argued that this ardor for consumer protection has consequently sidelined the prime objective of international uniformity, even in the context of factual and jurisprudential evidence of its failing.

⁴⁸ *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 176 (1999); *Sidhu v. British Airways, Plc.*, [1997] A.C. 430 (H.L.) 453–54 (appeal taken from Scot.).

⁴⁹ *Sidhu*, [1997] A.C. at 453–54.

⁵⁰ *Id.* at 447 (Lord Hope).

⁵¹ *Id.*

⁵² *El Al Israel Airlines*, 525 U.S. at 156.

⁵³ *Id.* at 175–76.

⁵⁴ See *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385 (2d Cir. 2004); *King v. Am. Airlines, Inc.*, 284 F.3d 352, 356–57 (2d Cir. 2002); *In re Deep Vein Thrombosis & Air Travel Group Litig.* [2005] UKHL 72, [2006] 1 A.C. 495 (H.L.) 500 (appeal taken from Eng.); DEMPSEY & MILDE, *supra* note 35, at 14.

III. SIGNIFICANT JURISPRUDENCE INTERPRETING THE CONVENTIONAL DELAY PROVISIONS

The following case law provides an overview of the kinds of reasoning courts have used in disputes interpreting or applying Article 19. A notable theme is the acceptance of the Montreal Convention as an exclusive remedy for passengers—to the extent of their proven damages—as long as those damages are not too remote—in particular, not the kinds of damages which are implicitly excluded under the Montreal Convention, such as mental anguish.

A. SELECTED CASE LAW ON DELAY

In *Lee v. American Airlines, Inc.*, the plaintiff and twenty others brought suit under Article 19 of the Warsaw Convention seeking “to recover damages for delay, inconvenience, assorted expenses, loss of reasonably foreseeable business, loss of prepaid and/or non-refundable vacation expenses, and loss of a ‘refreshing, memorable vacation.’”⁵⁵ On May 18, 2001, American Airlines Flight 100 from New York to London was scheduled to depart at 6:35 p.m.⁵⁶ However, “due to maintenance problems on two different aircraft,” one on the on-time scheduled flight (aircraft no. 7BB) and the other on a substitute (aircraft no. 7BC), “Flight 100 was delayed and ultimately [canceled] at 1:10 a.m. on May 19, 2001.”⁵⁷

In its ruling, the district court examined whether American Airlines “took all necessary measures” in response to the plaintiff’s allegations that it “(1) failed to begin repairs on the first aircraft in a timely manner; (2) failed to secure alternate transportation for Plaintiffs for that evening; (3) failed to have a reasonable number of spare aircraft available; and (4) failed to disclose to passengers that the delay was caused by an out-of-service aircraft.”⁵⁸ The court held that American Airlines *did* fail to disclose the delay, despite admitting that the airline took the necessary measures in the remaining allegations.⁵⁹ The court held that “[c]ommunicating accurate information [was] a reasonable measure [that] American [Airlines] should have taken

⁵⁵ *Lee v. Am. Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004).

⁵⁶ *Lee v. Am. Airlines, Inc.*, No. CIV3:01-CV-1179-P, 2004 WL 2624647, at *1 (N.D. Tex. Nov. 17, 2004).

⁵⁷ *Id.*

⁵⁸ *Id.* at *2.

⁵⁹ *Id.* at *4.

to enable passengers to avoid the damage caused by the delay.”⁶⁰ However, the court granted American Airlines partial summary judgment as to damages for “inconvenience and loss of a refreshing, memorable vacation,” reasoning that these allegations amounted to damages for mental injuries, which are unrecoverable under the Warsaw Convention.⁶¹ The appellate court affirmed the district court’s findings and stated that the damages the plaintiffs contended were purely economic in nature were “merely an attempted re-characterization of mental anguish damages” and, thus, were “not recoverable under the Warsaw Convention.”⁶²

Similarly, in *Chau v. Delta*, the plaintiffs filed a lawsuit against Delta Airlines claiming damages for “false imprisonment, embarrassment, and emotional distress” arising from an incident in which they were ordered off an aircraft before takeoff following a dispute between them and another passenger.⁶³ As a consequence, they were forced to travel on a flight the following day.⁶⁴ The passengers claimed general damages of \$10,000, special damages of \$500, and punitive damages of \$10,000.⁶⁵

In its ruling, the Ontario Superior Court of Justice recognized that neither Article 17 nor Article 19 of the Warsaw Convention permits recovery for purely mental or psychological injuries.⁶⁶ In its reasoning, the court cited two U.S. cases holding that Article 19 did not support a claim for psychological or emotional injury.⁶⁷ Delta did not dispute special damages representing ac-

⁶⁰ *Id.*

⁶¹ *See* *Lee v. Am. Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004).

⁶² *Id.*

⁶³ *Chau v. Delta*, [2003] 67 O.R. 3d 108, paras. 2–3 (Can. Ont. Sup. Ct. J.).

⁶⁴ *Id.* at para. 2.

⁶⁵ *Id.* at para. 3.

⁶⁶ *Id.* at paras. 14–20.

⁶⁷ *Id.* at paras. 18–19. In *Barrett v. United Airlines, Inc.*, No. 92C 5578, 1994 WL 419637, at *3 (N.D. Ill. Aug. 5, 1994), the court concluded that Article 19 could not be relied upon by these passengers for their mental distress claims. The judge found that the Supreme Court’s decision in *Eastern Airlines, Inc. v. Floyd* concluded that the Warsaw Convention did not intend to create a cause of action for mental injuries. *Id.* at *3. The judge reasoned that, given that the Supreme Court had decided that Article 17 does not permit such recovery in the case of an accident, it would “def[y] common sense” to interpret Article 19 to permit such recovery in the less serious situation of mere delay. *Id.* In *Fields v. BWIA International Airways Ltd.*, No. 99-CV-2493(JG), 2000 WL 1091129, at *3, *6 (E.D.N.Y. July 7, 2000), the court, while accepting that the plaintiff’s claim arose out of delay and was therefore within the parameters of Article 19, concluded that damages claimed solely for emotional stress were not available under Article 19 of the Warsaw Convention.

commodation, meals, and other expenses associated with the overnight stay.⁶⁸

In *Roh v. Korean Air*, the plaintiffs brought suit against Korean Air seeking to recover mental injuries for anxiety and delay.⁶⁹ On January 22, 2007, flight KE 8674 took off on schedule from Kota Kinabalu Airport in Malaysia, bound for Seoul, South Korea.⁷⁰ Soon after take-off, the cockpit crew found an abnormality with the left engine and diverted the plane back to Kota Kinabalu.⁷¹ After staying overnight at hotels provided by Korean Air, all of the passengers were able to take the substitute flight that Korean Air sent from Incheon Airport the following day.⁷² As a result, the passengers arrived at Incheon Airport fifteen hours later than the scheduled arrival time.⁷³

When determining applicable law, the Korea Daejeon District Court rejected the plaintiff's argument that Korean domestic law should apply.⁷⁴ The court noted that the Hague Protocol of 1955 should be applied because the Republic of Korea was not a party to the Montreal Convention when the case was brought.⁷⁵ In its ruling, the court made three points acknowledging that Articles 17, 19, and 20 of the Warsaw Convention were relevant to the case. First, the anxiety that the plaintiffs allegedly experienced did not fall within Korean Air's liability because Article 17 excludes liability for damage caused by purely mental injury. Second, the fifteen hour delay that passengers experienced came within the purview of Article 19.⁷⁶ Third, Korean Air took all necessary measures to avoid the damage, or it was impossible for them to take such measures, and, thus, Korean Air should be exempted from liability.⁷⁷

When examining the "taken all necessary measures" test, the court considered and acknowledged that: (1) the abnormality of the engine—the cause of delay—was not foreseen, and the engine manufacturer admitted that there was a design-related defect on the engine type in question and started to produce a

⁶⁸ *Chau*, 67 O.R. 3d at paras. 2–3.

⁶⁹ Daejeon District Court [Dist. Ct.] 2007 Ga-Hap 3098, June 20, 2009 (S. Korea) (on file with authors).

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² *Id.* at 11.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 12.

⁷⁷ *Id.*

newly-designed product after the incident; (2) the cockpit crew acted properly in the state of emergency according to the manual; (3) Korean Air's staff at Kota Kinabalu Airport took necessary measures to minimize the passengers' inconvenience; and (4) Korean Air provided the substitute flight as soon as practically possible.⁷⁸

The plaintiff in *Lukacs v. United Airlines, Inc.* was booked on a United Airlines flight from Winnipeg to Ohio, which required a stop in Chicago.⁷⁹ The trip was to attend a conference at Ohio University, and the opening day of the conference was the event of most interest to the plaintiff.⁸⁰

The first leg of the flight was canceled due to a mechanical problem.⁸¹ The next United Airlines flight to Chicago departed at a time that would have caused the plaintiff to miss the first day of the conference.⁸² He declined a ticket on that flight, and no other options were offered to him.⁸³ Also, no timely flights existed with competitor airlines, so the plaintiff elected to go home.⁸⁴ United provided the plaintiff with a full refund of his ticket price and also conceded responsibility for the ground transportation charges—\$80.00—he incurred.⁸⁵ Unsatisfied, the plaintiff sought damages for “inconvenience and mental anguish” and “missed academic, research and learning opportunities.”⁸⁶ The case presented four questions for the court, the most significant of which were:

- (1) were the damages claimed “occasioned by delay?”; and
- (2) “[d]id the [carrier] take all measures that could reasonably be required to avoid the damages?”⁸⁷

The court rejected United's defense that there was no delay as a matter of fact.⁸⁸ United argued that there was no delay because the plaintiff was offered a substitute flight the next morning and had refused this option, i.e., the cause of any damages

⁷⁸ *Id.*

⁷⁹ *Lukacs v. United Airlines, Inc.*, [2009] 237 Man. R. 2d 75, para. 6 (Can. Man. Q.B.).

⁸⁰ *Id.* at para. 5.

⁸¹ *Id.* at para. 7.

⁸² *Id.*

⁸³ *Id.* at paras. 7, 12.

⁸⁴ *Id.* at para. 12.

⁸⁵ *Id.* at para. 13.

⁸⁶ *Id.* at para. 2.

⁸⁷ *Id.* at paras. 46–47.

⁸⁸ *Id.* at paras. 35, 46.

was because the plaintiff did not exercise the *offered alternative*.⁸⁹ The court held that there *was* a delay in fact, despite the offer of a ticket for the next day's flight, as the plaintiff's stated purpose of travel was to attend the first day of the conference.⁹⁰ This reasoning demonstrates the flexibility of the Montreal Convention to adapt to claimants' particular circumstances.

Next, the court found that the carrier did not take all reasonable steps required to avoid the damages.⁹¹ The court criticized United and found that the plaintiff's original problems were caused by the carrier not having an appropriate aircraft on hand for the purpose.⁹² To its detriment, United did not raise evidence of what had gone wrong, nor did it provide evidence as to why a replacement aircraft could not be sourced from a nearby hub.⁹³

It appears from this selection of case law that, under the conventional regime, Article 19 allows courts to determine whether damage occurred—and, thus, whether it should be compensable—based on the facts surrounding the alleged incidence of delay. Thus, going back to the fictional passengers at the start of this article, it would not be enough for the unhappy passenger to claim his delay caused loss—the court would undoubtedly make an inquiry as to the causes of the delay and the passenger's resultant behavior. Did he choose to give up and go home? Did he choose to take another flight with another airline? Was the airline's staff or plane unprepared and, thus, somehow culpable for the delay? By leaving these questions to the tribunal of fact, Article 19 exhibits a fluidity in application that protects both the rights of passengers and air carriers.

B. CASE LAW ON NONPERFORMANCE

Except for the recovery of pure mental injury and punitive damages—which are not recoverable under either the Montreal Convention or the Warsaw Convention—the conventions simply provide a pass-through to applicable domestic law to determine the limits of recoverable compensatory damages.⁹⁴ However, the issue of whether the limits of compensatory damages—which are not expressly addressed by the Montreal or Warsaw

⁸⁹ *Id.* at para. 35.

⁹⁰ *Id.* at para. 46.

⁹¹ *Id.* at para. 47.

⁹² *Id.* at para. 48.

⁹³ *Id.*

⁹⁴ See DEMPSEY & MILDE, *supra* note 35, at 204.

Conventions—are applicable to the conventions is also subject to domestic law and to the court's interpretation.⁹⁵ In other words, while damages expressly addressed in the Montreal Convention must be recovered within its scope, other types of damages may or may not be recovered within its scope, as determined by the courts on a case-by-case basis.

A classic example is denied boarding—also known as “bumping”—which is not expressly addressed under the Montreal Convention.⁹⁶ In *Paradis v. Ghana Airways, Ltd.*, it was determined that denied boarding constituted a delay if an airline offered substitute transportation and was therefore covered by the Montreal Convention.⁹⁷ In contrast, in *Weiss v. El Al Israel Airlines, Ltd.*, the court found that the Montreal Convention preempted all passenger claims brought under federal or state law where applicable and, thus, held that denied boarding did not constitute a delay under Article 19 of the Montreal Convention.⁹⁸ However, the plaintiffs' breach of contract action was allowed to proceed against the airline because the airline had made no offer to the plaintiffs to provide them with alternative flights or other compensation.⁹⁹

In *Malek v. Societe Air France*, the plaintiff brought an action based on the exception in *Weiss*.¹⁰⁰ On November 15, 2005, the plaintiff missed a flight from Paris to Newark “when his connecting flight from Venice was delayed arriving in Paris.”¹⁰¹ Rather than lodging a complaint based on the delay when leaving Venice, the complaint focused on the response of Air France once the plaintiff arrived in Paris.¹⁰² The plaintiff claimed damages for having to wait eight hours for another flight, having to pay for refreshments, and the inconvenience of arriving at John F. Kennedy Airport rather than Newark, the original destination.¹⁰³ The court held that the plaintiff's attempt to bring this case under the exception set forth in *Weiss* failed, adding that while “*Weiss* dealt with the denial of service” where the plaintiff was “not provided with an acceptable alternative,” this case dealt

⁹⁵ See *id.*

⁹⁶ See, e.g., *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 365–69 (S.D.N.Y. 2006).

⁹⁷ *Paradis v. Ghana Airways, Ltd.*, 348 F. Supp. 2d 106, 112 (S.D.N.Y. 2004).

⁹⁸ *Weiss*, 433 F. Supp. 2d at 366.

⁹⁹ *Id.* at 370.

¹⁰⁰ *Malek v. Societe Air France*, 827 N.Y.S.2d 485, 487 (N.Y. Civ. Ct. 2006).

¹⁰¹ *Id.* at 486.

¹⁰² *Id.*

¹⁰³ *Id.* at 486–87.

with “a delay in providing a forwarding flight *after [the] plaintiff missed the flight.*”¹⁰⁴ Thus, after considering Article 19 of the Montreal Convention, the court held that it preempted the state law claims because delay was explicitly dealt with in the Montreal Convention.¹⁰⁵

Cancellation is another example of an issue regarding whether *types* of damages not expressly addressed by the Montreal or Warsaw Conventions are recoverable under them. The issue of whether cancellation constitutes delay has been discussed in *Mullaney v. Delta Airlines, Inc.*¹⁰⁶ On October 28, 2007, the plaintiff was scheduled to fly to New York from Paris on a flight operated by Air France, which had a partnership with Delta.¹⁰⁷ Delta canceled the scheduled flight due to a strike by employees of Air France.¹⁰⁸ Although Delta promised to reimburse passengers who booked on another carrier, the plaintiff could not get a seat for three days due to the large number of stranded passengers.¹⁰⁹ In response to the plaintiff’s complaint relying on, *inter alia*, a violation of New York’s consumer protection statute, promissory estoppel, and unjust enrichment, Delta moved to dismiss on the grounds that the Montreal Convention preempted the state law causes of action.¹¹⁰

The court drew a distinction between delay and non-performance, holding that non-performance was not preempted by Article 19 of the Montreal Convention.¹¹¹ The court also noted that, in recent years, “a number of courts concluded that where the facts pleaded in the complaint [added] up to non-performance, rather than simply delay, the Convention does not preempt other claims.”¹¹² The court specifically referred to *In re Nigeria Charter Flights Contract Litigation*, which identified the circumstances that would favor a finding of delay as opposed to non-performance: (1) “the defendant airlines ultimately provided plaintiff[] with transportation;” (2) the plaintiff “secured alternate transportation without waiting to find out whether the

¹⁰⁴ *Id.* at 487 (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ *Mullaney v. Delta Airlines, Inc.*, No. 08 Civ. 7324, 2009 WL 1584899, at *1–2 (S.D.N.Y. June 3, 2009).

¹⁰⁷ *Id.* at *1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at *2.

¹¹² *Id.*

defendant airlines would transport” him; or (3) the plaintiff “refused [the airline’s] offer of a later flight.”¹¹³

It appears that, depending on the facts of the case, a domestic law claim made against a carrier for non-performance will be permissible if the facts demonstrate that the contract of carriage was simply *not performed as anticipated*, as opposed to causing a long delay before performing the relevant carriage. Accordingly, there seems to be no need to enact further domestic or regional legislative regimes to deal with damages occasioned by delay or non-performance, as local law already provides a contractual remedy in all jurisdictions, albeit under different names.¹¹⁴ However, this understanding has not stopped further legislation from occurring in various jurisdictions as a response to contemporary passenger rights protection policies.¹¹⁵

IV. EC REGULATION 261/2004

On February 17, 2004, the European Parliament and the Council of the European Union adopted European Community Regulation 261 (EC Regulation) establishing legal rights for passengers when they have been denied boarding against their wills, when their flights are canceled, or when their flights are delayed.¹¹⁶ As remedies for passengers (and perhaps as punishment for the relevant air carriers), the EC Regulation provides compensation, reimbursement or rerouting, or care and assistance, depending on the situation.¹¹⁷ As such, this legislation implements European Union (EU) regional consumer rights or welfare policy.¹¹⁸ The EC Regulation applies to passengers departing from an airport located in an EU member state and to passengers departing from any other airport to an airport in an

¹¹³ *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 453 (E.D.N.Y. 2007).

¹¹⁴ See generally Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, available at <http://www.julianhermida.com/dossier/dossierpubhk.pdf> (last visited Feb. 28, 2012) (arguing that as time has passed, the contract law of civil and common law jurisdictions has taken on more similarities with each other than differences).

¹¹⁵ Regulation 261/2004, of the European Parliament and of the Council of 11 February 2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation 295/91/EEC, 2004 O.J. (L 46) arts. 4–6 (EC) [hereinafter EC Regulation].

¹¹⁶ *Id.* at paras. 10, 12–13, 17.

¹¹⁷ *Id.* at paras. 10, 12.

¹¹⁸ See *id.* at para. 1.

EU member state when the carrier operating the flight is a "Community carrier."¹¹⁹ In this respect, its application to foreign air carriers is less controversial than the unilateral imposition of the EU's Trading Scheme (ETS or EU ETS) on foreign air carriers from January 1, 2012.¹²⁰ Specifically, the EC Regulation does not apply to incoming air carriers' flights to EU member states, and is instead limited solely to European Community (EC or Community) air carriers.¹²¹

The EC Regulation aims to provide immediate and uniform assistance to remedy inconvenience suffered by passengers who experience long flight-related delays.¹²² A secondary objective appears to be to actually reduce the inconvenience of delay, as air transport is now seen as a necessity rather than a luxury.¹²³ The EC Regulation distinguishes between "denied boarding," "cancellation," and "delay" and, in doing so, is triggered when a prescribed event occurs, imposing upon air carriers certain obligations to provide assistance.¹²⁴ Assistance may take the form of "compensation" (Article 7), "reimbursement or re-routing" (Article 8), or passenger "care" (Article 9).¹²⁵ Under the EC Regulation, compensation is available in scenarios involving denied boarding and cancellation, but not delay.¹²⁶ Article 6 of the EC Regulation sets forth the criteria of delay that result in an enti-

¹¹⁹ *Id.* art. 3(1).

¹²⁰ The original scheme was established by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC. *See generally* 2003 O.J. (L 275) 32. The application to foreign carriers was made by Directive 2008/101/EC of the European Parliament and of the Council of November 19, 2008, amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. *See generally* 2009 O.J. (L 8) 3. The validity of the latter regulation's purported attempt to apply the ETS to foreign air carriers was recently upheld by the Grand Chamber of the European Court of Justice in *Air Transport Ass'n of America v. Secretary of State for Energy & Climate Change*, ECJ (Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, Administrative Court (United Kingdom)), Case C-366/10, 2010 E.C.R. 0. *See also* Part VII(B)(2), below.

¹²¹ EC Regulation, *supra* note 115, art. 3(1)(b).

¹²² *Id.* at Intro.

¹²³ *See Communication from the Commission to the European Parliament and the Council*, at 2, COM (2011) 174 final (Apr. 11, 2011), available at http://ec.europa.eu/transport/passengers/doc/com_2011_174_communication_en.pdf (last visited Feb. 28, 2012).

¹²⁴ EC Regulation, *supra* note 115, arts. 4–6.

¹²⁵ *Id.* arts. 7–9.

¹²⁶ *Id.* arts. 4–6; *see id.* arts. 7–9.

tlement to care (Article 8) or reimbursement within seven days (Article 9).¹²⁷

However, even for a flight cancellation, the air carrier is not obliged to pay compensation if it can prove that the cancellation was “caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”¹²⁸ It is worth noting that this wording is quite similar to Article 20 of the Warsaw Convention and the second sentence of Article 19 of the Montreal Convention.¹²⁹

Where payable, compensation is based on prescribed categories of scheduled flight distance. For flights:

- 1,500 km or less, €250 is payable to the passenger;
- wholly within the EC of more than 1,500 km, or non intra-Community between 1,500 and 3,500 km, €400 is payable; and
- other than these, compensation of €600 is payable.¹³⁰

Delays typically attract, relative to duration and circumstances, an entitlement to meals and refreshments, hotel accommodation, transport, and access to communications.¹³¹ Delays for more than five hours entitle passengers to reimbursement or rerouting.¹³²

V. SIGNIFICANT EUROPEAN JUDICIAL ATTENTION ON THE VALIDITY OF EC REGULATION 261/2004

A. LEGAL CHALLENGES TO THE EC REGULATION—2006 EUROPEAN COURT OF JUSTICE JUDGMENT

The EC Regulation was met with fierce criticism from air carriers and their trade associations.¹³³ Particularly, airlines argued that Articles 5 and 6 of the EC Regulation are legally incompatible with the Montreal Convention.¹³⁴ More specifically, the International Air Transport Association (IATA) claimed that, in

¹²⁷ *Id.* arts. 6, 8–9.

¹²⁸ *Id.* art. 5(3).

¹²⁹ Compare *id.*, with Montreal Convention, *supra* note 32, art. 19, and Warsaw Convention, *supra* note 7, art. 20.

¹³⁰ EC Regulation, *supra* note 115, art. 7(1).

¹³¹ *Id.* art. 9.

¹³² *Id.* arts. 6(1)(c)(3), 8(1)(a).

¹³³ See Press Release, Int'l Air Transp. Ass'n, IATA Challenges EU on Flawed Regulation Airlines Can't Make the Sunshine (Apr. 21, 2009), available at <http://www.iata.org/pressroom/pr/Pages/2004-04-21-01.aspx>.

¹³⁴ See, e.g., Case C-344/04, Int'l Air Transp. Ass'n v. Dep't for Transp., 2006 E.C.R. I-00403, para. 38.

the case of delay-related damages, the absence of any defense or limitation in liability was contrary to the obligations of the EC and its member states under the Montreal Convention.¹³⁵ The IATA also pointed out that the EC Regulation is in contravention of Article 29 of the Montreal Convention, which ensures the convention's exclusivity.¹³⁶ In July 2004, the UK High Court referred the case to the European Court of Justice (ECJ).¹³⁷

The judgment of the ECJ in *International Air Transportation Ass'n v. Department of Transportation (IATA Case)* rejected the airlines' claim with regard to the EC Regulation.¹³⁸ The judgment has been criticized on the grounds that the ECJ disregarded the plain wording of the Montreal Convention and purports to approve an additional level of liability above and beyond the common expectation of the parties to the Montreal Convention.¹³⁹ In a short judgment, the court upheld the validity of the EC Regulation and controversially ruled there was no conflict with EU member states' treaty obligations under the Montreal Convention.¹⁴⁰ The court's consideration of the EC Regulation's compatibility with the Montreal Convention can be reduced to four major conclusions:

- (1) Articles 19, 22, and 29 of the Montreal Convention only govern the basis upon which an individual person might bring a court action for compensation with respect to delay under a contract of air carriage;¹⁴¹
- (2) There was no indication that the Montreal Convention was "intended to shield those carriers from any other form of intervention" or, in particular, regulatory action designed to facilitate standardized, immediate assistance to passengers experiencing flight delays;¹⁴²

¹³⁵ Press Release, Int'l Air Transp. Ass'n, *supra* note 133.

¹³⁶ *Int'l Air Transp. Ass'n*, 2006 E.C.R. at paras. 38–39.

¹³⁷ *Id.* at Issue 1 & para. 36.

¹³⁸ *Id.* at Summary para. 5.

¹³⁹ See Kinga Arnold & Pablo Mendes de Leon, *Regulation EC 261/2004 in Light of the Recent Decisions of the European Court of Justice: Time for a Change?!*, 35 AIR & SPACE L. 91, 93–94, 110 (2010); Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35 AIR & SPACE L. 207, 208, 219–20 (2010).

¹⁴⁰ *Int'l Air Transp. Ass'n*, 2006 E.C.R. at Summary para. 2.

¹⁴¹ *Id.* at para. 44.

¹⁴² *Id.* at para. 45. However, it is settled in the history of the conventional regime that a quid pro quo (strict liability for the benefit of passengers, in exchange for limitations on maximum compensation payable by air carriers) did and does exist to "shield carriers from potentially devastating aviation . . . damage

- (3) There are two types of damage that passengers may suffer as a result of delay:
 - a. “damage that is almost identical for every passenger, redress for which may take the form of standardized and immediate assistance or care . . . through the provision, for example, of refreshments, meals and accommodation;” and
 - b. individual damage suffered by passengers, “redress for which requires a case-by-case assessment . . . of the damage caused” and which can thus only be granted “on an individual basis; and”¹⁴³
- (4) The court asserted that the Montreal Convention only captured the latter, and the EC Regulation, as a result, filled a legal void to allow the former type of damage to be addressed.¹⁴⁴ Accordingly, the EC Regulation operates at “an earlier stage than the [Convention]” and, thus, “cannot be considered inconsistent with the Montreal Convention.”¹⁴⁵

The court likewise dispensed with the other grounds of the plaintiffs’ challenge.¹⁴⁶ The many criticisms of this decision are not the focus of this article, as they have been canvassed exhaustively elsewhere;¹⁴⁷ however, they have been set out below for completeness. The article will then turn to listing the pending judicial questions as to the validity of the EC Regulation to demonstrate that the EC Regulation suffers more in its application than Article 19 of the Montreal Convention. Finally, the article will add to the corpus of reasons for amendment or repeal of the EC Regulation by noting deficiencies in past regulatory reviews and listing the recent events which have cast doubt on the law’s utility. All of these provide pragmatic, *as well as* legal, reasons for reform or repeal.

1. Criticism 1: Interpretive Deficiencies

The ECJ has preferred a narrow, beneficially exclusionary interpretation of the provisions of the Montreal Convention. For example, the court held that Articles 19, 22(1), and 29 only deal with individual actions for delay.¹⁴⁸ This ignores the broader po-

awards” (at least in the industry’s infancy). DEMPSEY & MILDE, *supra* note 35, at 11.

¹⁴³ *Int’l Air Transp. Ass’n*, 2006 E.C.R. at para. 43.

¹⁴⁴ *Id.* at paras. 43–48.

¹⁴⁵ *Id.* at paras. 46, 48.

¹⁴⁶ *Id.* at paras. 49–100.

¹⁴⁷ *See, e.g.*, Dempsey & Johansson, *supra* note 139, at 207.

¹⁴⁸ *Int’l Air Transp. Ass’n*, 2006 E.C.R. at paras. 41–44.

litical context of the treaty and amounts to a selective reading of its text. The Preamble to the Montreal Convention demonstrates that it is intended to be exclusive as to how, and the extent to which, an air carrier bears liability.¹⁴⁹ UK courts have previously held, when construing such provisions, that the Montreal and Warsaw Conventions must be considered as a whole to apply a purposive interpretation.¹⁵⁰ As Lord Hope held in *Sidhu*, citing the unification purpose of the treaty, “exceptions to these rules should not be permitted, except where the Convention itself provides for them.”¹⁵¹ In taking such a restrictive interpretation, the ECJ has ignored the mandatory approach under international legal interpretation rules by failing to interpret the Montreal Convention’s provisions in light of their object and purpose.¹⁵²

2. Criticism 2: The False Dichotomy of Damages Caused by Delay

The ECJ distinguishes between two kinds of damages occasioned by delay.¹⁵³ This distinction has been criticized and appears to have no basis in precedent or doctrine.¹⁵⁴ It presents what may be termed a “false dichotomy.” Damage which is considered to be the “same for every passenger” is still a species of damage, but it is difficult to categorize such damage as identical amongst passengers. Note again the example at the start of this article.¹⁵⁵ Surely, those two passengers suffer different levels of damage. Only food and drink requirements could perceivably be similar. Regarding financial compensation, however, passengers clearly do not suffer identical losses. An instrument such as the EC Regulation may under- or over-compensate. At any rate, Professors Dempsey and Johansson observe that payments

¹⁴⁹ Montreal Convention, *supra* note 32, pmbl.

¹⁵⁰ See, e.g., *Grein v. Imperial Airways, Ltd.*, [1937] 1 K.B. 50, 74–76 (Greene L.J.); *Fothergill v. Monarch Airlines, Ltd.* [1980] UKHL 6, 7–8, [1981] A.C. 251, 252 (Lord Diplock).

¹⁵¹ *Sidhu v. British Airways, Plc.*, [1997] A.C. 430, 444 (H.L.).

¹⁵² See Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (providing that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹⁵³ *Int’l Air Transp. Ass’n*, 2006 E.C.R. at para. 43.

¹⁵⁴ Memorandum from John Balfour on EC Law v. Int’l Law – The Judgment of the European Court of Justice on the Challenge to Regulation 261/2004 on Denied Boarding, Cancellation, & Long Delay of Flights (Feb. 2006) (on file with author).

¹⁵⁵ See *supra* p. 45.

under the EC Regulation are *not*, in reality, standardized because they vary with “the distance flown and time of delay.”¹⁵⁶

Furthermore, the ECJ’s contention that the EC Regulation does not capture the first type of damage is incorrect. Article 19 of the Montreal Convention provides for recovery of “damages occasioned by delay.”¹⁵⁷ Claims in several jurisdictions establish that recovery under Article 19 includes a full range of reasonable consequential losses experienced by passengers, as well as those identified by the ECJ, though notably this does not include mental distress.¹⁵⁸

3. *Criticism 3: Earlier in Time Application than Article 19*

By characterizing the two delay-related laws as differing in their periods of applicability—the EC Regulation is purported to apply at an “earlier stage” than the Montreal Convention—the ECJ may have avoided legitimate engagement with the question of whether the EC Regulation and Article 19 of the Montreal Convention conflict. It is useful to observe that while the Montreal Convention makes an explicit provision for advance payments that can be made in the case of aircraft accidents resulting in death or injury, subject to the relevant state’s national law, *no such provision* is made in the case of delay.¹⁵⁹ The legal maxim *expressio unius est exclusio alterius*¹⁶⁰ controls situations

¹⁵⁶ Dempsey & Johansson, *supra* note 139, at 219.

¹⁵⁷ Montreal Convention, *supra* note 32, art. 19.

¹⁵⁸ See, e.g., Lopez v. Eastern Airlines, 677 F. Supp. 181, 183 (S.D.N.Y. 1988) (compensatory damages for out-of-pocket expenses, loss of time, anxiety and frustration); Harpalani v. Air India, 634 F. Supp. 797, 798 (N.D. Ill. 1986) (cost of accommodation and transportation where passenger missed connecting flight); Johnson v. Nw. Orient Airlines, 642 P.2d 1067, 1067–68 (Mont. 1982) (loss of earnings occasioned by delay recoverable); Lukacs v. United Airlines, Inc., [2009] 237 Man. R. 2d 75, paras. 13, 65 (Can. Man. Q.B.) (reimbursement of ticket and cost of ground transportation—but, note, not mental anguish).

¹⁵⁹ Montreal Convention, *supra* note 32, art. 28.

¹⁶⁰ Literally, “to express one thing is to exclude another.” Richard C. Edwards, *Researching Legislative History*, LEGISLATIVE REFERENCE BUREAU, <http://www.ilga.gov/commission/lrb/lrbres.htm> (last updated Oct. 2008). The Law Council of Australia expressed the maxim in 2001 as follows: “The Expressio Unius principle means that an express reference to one matter indicates that other matters are to be excluded. This principle is based on the notion that where legislation includes provisions relating to similar matters in different terms, there is an implication that there is a deliberate intention to deal with them differently.” Law Council of Austl., *Submission to the Copyright Law Review Committee—“Copyright and Contract”*, AUSTRALASIAN LEGAL INFORMATION INSTITUTE, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/clrc/2/submissions/28.html?stem=0&synonyms=0&query=expressio%20uniussection4> (last visited Feb. 28, 2012).

such as these. It is reasonable to conclude that, in a convention intended to exclusively and uniformly provide liability rules and fix limits on remedies for certain types of damage, the drafters of the Montreal Convention and the ratifying states have purposefully excluded the mention of payment of compensation at an “earlier stage” for delay. Whether such an intention was to be expressed, or will be expressed in the future, is properly a question for future amendment of the Montreal Convention, not parallel regional legislation that purports to usurp true international agreement.

B. SIGNIFICANT JURISPRUDENCE ON EC REGULATION 261/2004
SINCE THE 2006 CHALLENGE

In recent times, two particular ECJ judgments interpreting the EC Regulation have brought ambiguities within the EC Regulation into sharp relief. The decisions indicate that attempts to introduce passenger protection policies into air transport are fraught with the kind of danger that threatens the uniformity and quid pro quo which was struck between the rights and interests of air carriers and passengers within the Montreal Convention regime.¹⁶¹

The first of these came from a reference for a preliminary ruling from the Handelsgericht Wien (Austria) on the application of *Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA*.¹⁶² In the proceedings, Alitalia refused to pay compensation to the applicant passenger, whose flight had been canceled.¹⁶³ Alitalia claimed that there was no obligation to pay compensation under Article 7 of the EC Regulation because the cancellation was “caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”¹⁶⁴ In fact, the cause of the relevant flight cancellation had been a “complex engine defect in the turbine.”¹⁶⁵ The District Commercial Court for Vienna upheld the applicant’s claim for compensation pursuant to Articles 5(1)(c) and 7(1) of the

¹⁶¹ The quid pro quo can be thought of as the balance struck between dispensation of the onerous need by claimants to prove negligence or similar types of claims—e.g., passenger death or injury—in exchange for limited liability on the part of the air carrier. See DEMPSEY & MILDE, *supra* note 35, at 14–15.

¹⁶² Case C-549/07, *Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA*, 2008 E.C.R. I-11061.

¹⁶³ *Id.* at para. 12.

¹⁶⁴ *Id.* at paras. 6, 13.

¹⁶⁵ *Id.* at para. 11.

EC Regulation “on the ground that the technical defects which affected the aircraft . . . were not covered by the ‘extraordinary circumstances’ provided for in Article 5(3).”¹⁶⁶

The Viennese court stayed proceedings and sought a ruling from the ECJ on four questions, primarily whether a technical defect in an aircraft constitutes an “extraordinary circumstances” exemption from the EC Regulation.¹⁶⁷ Because there is no *definition* of “extraordinary circumstances” apart from a reference in the Recitals of the EC Regulation, the court held that the usual meaning in everyday language must be applied to determine the meaning of the term, and “when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly.”¹⁶⁸ In this case, the ECJ held that the Recitals of the EC Regulation explain its content—that consumer protection for passengers was a prime objective.¹⁶⁹ The court held that, because Article 5(3)—the exemption for “extraordinary circumstances”—derogates from the right to compensation, it must be interpreted strictly.¹⁷⁰ Thus, the indicative events in Recital 14 did not fully control the exemption; there needed to be something additional that would characterize the cancellation as “extraordinary.”¹⁷¹ It was concluded that technical problems “caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier’s activity.”¹⁷² To compound matters, the court also concluded that compliance with “minimum rules on maintenance of aircraft [could not] in itself suffice to establish that [the] carrier ha[d] taken ‘all reasonable measures’ within the

¹⁶⁶ *Id.* at para. 13.

¹⁶⁷ *Id.* at para. 14.

¹⁶⁸ *Id.* at para. 17.

¹⁶⁹ *Id.* at para. 18.

¹⁷⁰ *Id.* at para. 20.

¹⁷¹ *Id.* at para. 25. The text of Recital 14 provides: “As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.” EC Regulation, *supra* note 115, recital 14.

¹⁷² *Wallentin-Hermann*, 2008 E.C.R. at para. 24.

meaning of Article 5(3),” which would have relieved the carrier from liability to pay compensation.¹⁷³

The result of the case, as Professors Mendes de Leon and Arnold suggest, is to severely limit the scope of the basis by which air carriers may exonerate themselves from the payment of compensation to passengers following flight cancellations.¹⁷⁴ It is clear that air carriers can do nothing more than comply with required technical maintenance works. To assume otherwise assumes perfect knowledge, the financial wherewithal to keep a spare aircraft handy, or both.¹⁷⁵ Thus, this decision has doubtful value as a clarification of the term “extraordinary circumstances,” and no legal certainty is created, notwithstanding that it is unreasonable for passengers to bear the burden for delays caused by the repair of a technical defect during *regular* maintenance.¹⁷⁶

On November 19, 2009, the ECJ delivered an astonishing judgment. The Bundesgerichtshof (Germany) and the Handelsgesicht Wien (Austria) courts referred to the ECJ cases regarding flight delays of twenty-five and twenty-two hours in *Sturgeon v. Condor Flugdienst GmbH*, and *Böck v. Air France SA* (collectively *Sturgeon*), respectively.¹⁷⁷ The court made three main points in *Sturgeon* that dealt with the concept of “extraordinary circumstances.”¹⁷⁸ The first point was that a flight cannot be considered canceled simply because there has been a long delay, if all other aspects of the flight remain unchanged.¹⁷⁹ Given the facts that the EC Regulation provides a right to monetary compensation (Article 7) in cases of denied boarding and cancellation and such unreasonably long delays had occurred in this case, the plaintiffs claimed that their sustained damages were the result of a *cancellation* rather than a flight delay.¹⁸⁰ However, the ECJ made it clear that, for the purposes of categorization, “a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as [canceled] where the

¹⁷³ *Id.* at para. 44.

¹⁷⁴ Arnold & Mendes de Leon, *supra* note 139, at 92.

¹⁷⁵ *Id.* at 106.

¹⁷⁶ *Id.* at 107.

¹⁷⁷ Joined Cases C-402/07 & C-432/07, *Sturgeon v. Condor Flugdienst GmbH, Böck v. Air France SA*, 2009 E.C.R. I-10923, paras. 12, 23.

¹⁷⁸ *Id.* at para. 73.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at paras. 8, 14.

flight is operated in accordance with the air carrier's original planning."¹⁸¹

This point was extended in relation to *compensation* in the event of a delay in excess of three hours.¹⁸² The ECJ, after reasoning that passengers whose flights have been canceled and passengers affected by a flight delay suffer similar damage—consisting of a loss of time—held that passengers whose flights are delayed in excess of three hours may rely on the right to compensation for flight *cancellation* provided in Article 7 of the EC Regulation.¹⁸³ Finally, reinforcing the judgment in *Wallentin-Hermann*, the court held that the consequent ability of the air carrier to escape liability when there were “extraordinary circumstances” was not triggered by technical problems in an aircraft unless such problems are “not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.”¹⁸⁴

This judgment must be strongly criticized, primarily because it brings the already questionable EC Regulation into further conflict with the Montreal Convention. Article 29 of the Montreal Convention, which deals with the fundamental principle of the Montreal Convention—that it provides an exclusive remedy—is blatantly disregarded by the ECJ in *Sturgeon*.¹⁸⁵ Balfour argues that this means there is now effectively an “entitlement to compensation . . . [for] passengers who suffer delay so that they reach their final destination three hours or more after the originally scheduled arrival time.”¹⁸⁶ It is clear that delay is a form of compensable damage under the Montreal Convention. And yet, the EU, of which all member states are parties to the Montreal Convention, implemented the EC Regulation involving denied boarding, cancellation, and delay. Moreover, its principal court, the ECJ, has here *explicitly* adjudicated on a means by which the EC Regulation can be stretched to accommodate compensation to passengers for delay.

The decision is difficult to reconcile with not only the Montreal Convention, as it traverses issues of delay, but also with the way the court interpreted the Recitals and Articles of the EC

¹⁸¹ *Id.* at para. 73.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Compare *id.*, with Montreal Convention, *supra* note 32, art. 29.

¹⁸⁶ John Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, 35 AIR & SPACE L. 71, 72 (2010).

Regulation.¹⁸⁷ According to Community case law, the interpretation of provisions of Community law must be made by consideration, not only of its wording, but also “the context in which it occurs and the objectives pursued by the rules of which it is part.”¹⁸⁸ Accordingly, the reasons for the adoption of a Community law must be considered when interpreting such a provision—in this case, the fact that the EC Regulation explicitly only purports to deal with certain types of compensation, i.e., denied boarding and cancellation.¹⁸⁹ The same is true for the express statements from the *travaux préparatoires* of the European Commission, which note that “the Commission considers that in present circumstances operators should not be obliged to compensate *delayed* passengers.”¹⁹⁰

Notwithstanding the Community principle of “equal treatment” (which is reminiscent of the common law principle of *stare decisis*),¹⁹¹ it is the ECJ’s role under the EC Treaty to “observe,” rather than create or amend, the law, unlike the role of appellate judges in common law jurisdictions who may extend the application of existing law to novel situations in certain circumstances.¹⁹² The *Sturgeon* judgment effectively creates new law and does not take the wise counsel of the Advocate General, who recommended that the court should reopen oral submissions on the question of whether the EC Regulation is invalid insofar as it “draw[s] a distinction between cancellation and delay . . . in light of the principle of equal treatment.”¹⁹³ By not taking the Advocate General’s advice, the court has arguably ex-

¹⁸⁷ Arnold & Mendes de Leon, *supra* note 139, at 100.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (emphasis added) (citing *Proposal for a Regulation of the European Parliament and of the Council Establishing Common Rules on Compensation and Assistance to Air Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, at para. 23, COM (2001) 784 final (Dec. 21, 2001)).

¹⁹¹ *Stare decisis* is the doctrine that common law courts abide by, under which they adhere to or follow decisions of higher courts that have been decided previously, whereas the EU legal principle of “equal treatment” requires “that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.” Case C-127/07, *Société Arcelor Atlantique et Lorraine v. Premier Ministre*, 2008 E.C.R. I-09895, para. 43.

¹⁹² Arnold & Mendes de Leon, *supra* note 139, at 104.

¹⁹³ *Id.*

exercised a legislative prerogative by treating delay as “de facto cancellation.”¹⁹⁴

Since *Sturgeon*, there have been a number of decisions from the ECJ in relation to the EC Regulation. On May 12, 2011, in *Ratnieks v. Latvijas Republikas Ekonomikas Ministrija*, the ECJ held that the “all reasonable measures” portion of Article 5(3) of the EC Regulation¹⁹⁵ must be interpreted as meaning that when organizing a flight, an air carrier must “take account of the risk of delay” and, therefore, build in a “reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end.”¹⁹⁶ This is an extraordinary decision because the flight in *Ratnieks* was first canceled due to an airspace closure resulting from problems with radar and other aviation systems and then again later due to the expiry of the crew’s maximum permitted duty time.¹⁹⁷ However, the court justified its decision by referring to paragraph 42 of *Walentin-Hermann*, where the court held that “it was necessary to ascertain whether the air carrier . . . had taken measures appropriate to the particular situation.”¹⁹⁸ As such, the court contended it had hit upon a “flexible concept of reasonable measures.”¹⁹⁹

The result is that no minimum reserve time is imposed on air carriers, and national courts are to assess whether, in the circumstances of particular cases, the air carrier should have been regarded as having taken an appropriate measure in the situation.²⁰⁰ The assessment of the carrier’s ability to undertake the planned flight in its entirety following the new conditions, i.e., after the extraordinary circumstances have passed, “must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to

¹⁹⁴ Joined Cases C-402/07 & C-432/07, *Sturgeon v. Condor Flugdienst GmbH, Böck v. Air France SA*, 2009 E.C.R. I-10923, paras. 91–95.

¹⁹⁵ EC 261/2004, Article 5(3) provides: “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 [that] could not have been avoided even if all reasonable measures had been taken.” EC Regulation, *supra* note 115, art. 5(3).

¹⁹⁶ Case C-294/10, *Ratnieks v. Latvijas Republikas Ekonomikas Ministrija*, 2011 E.C.R. 0, paras. 27–28, available at <http://eur-lex.europa.eu/Notice.do?val=572186:cs&lang=en&list=572186:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte>.

¹⁹⁷ *Id.* at paras. 9, 15.

¹⁹⁸ *Id.* at para. 29.

¹⁹⁹ *Id.* at para. 30.

²⁰⁰ *Id.* at paras. 31, 32.

make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.”²⁰¹

Ratnieks demonstrates that the controversial underpinning of “extraordinary circumstances” from *Wallentin-Hermann* endures. The result is that even more uncertainty is evoked in the application by national courts of this important method by which air carriers rely on being able to limit their liability to passengers in the event of cancellation or long delay, which, post-*Sturgeon*, is effectively treated as de facto cancellation.

A further recent interpretation (or perhaps more correctly *extrapolation*) of what the term “cancellation” means was provided by the Third Chamber of the ECJ on October 13, 2011, in *Rodriguez v. Air France SA* by way of a reference for a preliminary ruling from the Juzgado de lo Mercantil no. 1 de Pontevedra (Spain).²⁰² In this case, the passengers departed as planned on a flight from Paris to Vigo; however, due to a technical problem, the flight was forced to return to the departure airport.²⁰³ At Air France’s invitation, three of the passengers took a replacement flight the next day from Paris to Porto in Portugal, where they then traveled by taxi to Vigo.²⁰⁴ The passengers sought various damages for breach of contract of carriage by air, including the fixed sum of €250 each, as prescribed by Article 7 of the EC Regulation, and non-material damages, such as meals and even dog kennel charges due to one of the passengers being away from home longer than expected.²⁰⁵ The ECJ was asked to rule on whether the term “cancellation,” as defined in Article 2(1) of the EC Regulation, was to be interpreted as meaning:

only the failure of the flight to depart as planned or . . . also . . . any circumstance as a result of which the flight on which places are reserved takes off but fails to reach its destination, including the case in which the flight is forced to return to the airport of departure for technical reasons[.]²⁰⁶

It also was asked to rule on whether the term “further compensation,” as used in Article 12, was to be interpreted as meaning that:

²⁰¹ *Id.* at para. 37.

²⁰² Case C-83/10, *Rodriguez v. Air France SA* 2011 E.C.R. 0; [2011] W.L.R. 348 (D).

²⁰³ *Id.* at paras. 19, 20.

²⁰⁴ *Id.* at para. 21.

²⁰⁵ *Id.* at para. 23.

²⁰⁶ *Id.* at para. 24.

in the event of a cancellation, the national court may award compensation for damage, including non-material damage, for breach of a contract of carriage by air in accordance with rules established in national legislation and case-law on breach of contract or, on the contrary, must such compensation relate solely to appropriately substantiated expenses incurred by passengers and not adequately indemnified by the carrier in accordance with the requirements of Articles 8 and 9 of [the EC Regulation], even if such provisions have not been relied upon or, lastly, are the two aforementioned notions of further compensation compatible one with another?²⁰⁷

With respect to the former question, the court noted that it held in previous cases that the itinerary is an essential element of the flight.²⁰⁸ Accordingly, it now held that, because the term “itinerary” means a journey to be made . . . from the airport of departure to the airport of arrival according to a fixed schedule, . . . for a flight to have been considered to have been operated,” it needed to have reached its arrival airport.²⁰⁹ Furthermore, the court held that no express decision by the air carrier canceling the flight was necessary for such a cancellation to have taken place.²¹⁰ Extending the reasoning in *Sturgeon*, the court held that there is cancellation in cases where the original flight is abandoned and a new flight takes on those passengers, such that the present situation—the flight taking off and returning to the departure airport—*also constitutes cancellation*.²¹¹ The court also held that the reason for the return of the flight to the departure airport was only relevant to determine whether the cancellation was caused by “extraordinary circumstances,” not as to the actual classification of “cancellation” itself.²¹²

The classification of a flight as canceled when it has taken off as scheduled but been forced to unexpectedly land is unsatisfactory. The peculiarities of air transport are such that, as a technical operation, each flight is subject to some uncertainty not within the control of the air carrier. It seems inequitable that air carriers would be obligated to pay the compensation ordered under the EC Regulation when a flight must be terminated unexpectedly and, at the same time, would not be able to remove

²⁰⁷ *Id.*

²⁰⁸ *Id.* at para. 27.

²⁰⁹ *Id.* at para. 28.

²¹⁰ *Id.* at para. 29.

²¹¹ *Id.* at para. 30.

²¹² *Id.* at para. 34.

such liability when the cause of the flight termination was a technical problem that the air carrier had taken all reasonable measures to avoid.

Turning to the second question, the court held that the provision for "further compensation" in Article 12 of the EC Regulation allows national courts to order the air carrier to compensate passengers for damage arising from breaches of the contract of carriage on legal bases other than the EC Regulation, namely "the conditions provided for by the Montreal Convention and national law."²¹³ This does not mean that national courts can reimburse passengers whose flights have been delayed or canceled for expenses the passengers have suffered due to the failure of the air carrier to fulfill its obligations to assist and provide care under Articles 8 and 9 of the EC Regulation.²¹⁴

C. CURRENTLY PENDING PRELIMINARY QUESTIONS IN THE EUROPEAN COURT OF JUSTICE

The sheer volume of preliminary questions awaiting consideration in the ECJ is an indicator that the EC Regulation is not operating as intended. The language of the EC Regulation is intended to be widely understandable so that twenty-seven national courts and national enforcement bodies (NEBs) can easily apply the substantive provisions.²¹⁵ However, this is not the case. As will be seen below, the reasoning of the decision in *Sturgeon* is coming under increasing pressure to be invalidated on the basis that extending compensation for delay trespasses on the subject area of Articles 19 and 29 of the Montreal Convention.

1. Pending Preliminary Questions Relating to EC Regulation 261/2004

There are at least seven pending references for preliminary questions before the ECJ at the moment that do not specifically deal with issues of compatibility with the court's decision in *Sturgeon*, compatibility of the EC Regulation with the Montreal Convention, or both;²¹⁶ however, only one will be reviewed here:

²¹³ *Id.* at paras. 36, 38.

²¹⁴ *Id.* at para. 27.

²¹⁵ EC Regulation, *supra* note 115, recitals 21–22.

²¹⁶ Case C-365/11, *Esteves Coelho dos Santos v. TAP Portugal*, 2011 O.J. (C 282) 10 (July 8, 2011); Case C-321/11, *Rodríguez Cachafeiro v. Iberia*, 2011 O.J.

*McDonagh v. Ryanair Ltd.*²¹⁷ This reference raises questions that we contend should also be the major subject of the impending review of the EC Regulation, as it indicates how having two parallel passenger protection laws—the EC Regulation and the Montreal Convention—for international air travel produces legal uncertainty which does not assist passengers who have suffered delays.

The claimant in this case sought payment for costs incurred of about €1,130 during a period of seven days in which her Ryanair flight could not take off from Faro (bound for Dublin) as a result of airspace closures brought about by volcanic ash in European skies. The questions asked of the ECJ in *McDonagh* may, given the timeliness of the subject matter, inform the next review of the EC Regulation, as discussed below. The questions are worth reproducing in full:

- (1) Do circumstances such as the closures of European airspace as a result of the eruption of the Eyjafjallajökull volcano in Iceland, which caused widespread and prolonged disruption to air travel, go beyond “extraordinary circumstances” within the meaning of Regulation 261/2004 [1]?
- (2) If the answer to question 1 is yes, is liability for the duty to provide care excluded under Articles 5 and 9 in such circumstances?
- (3) If the answer to question 2 is no, are Articles 5 and 9 invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an “equitable balance of interests” enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union?
- (4) Is the obligation in Articles 5 and 9 to be interpreted as containing an implied limitation, such as a temporal limit and/or a monetary limit, to provide care in cases where cancellation is caused by “extraordinary circumstances”?
- (5) If the answer to question 4 is no, are Articles 5 and 9 invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an “equitable balance of interests” enshrined in the Montreal Convention, and Arti-

(C 282) 3 (June 28, 2011); Case C-151/11, Condor Flugdienst GmbH v. Dörschel, 2011 O.J. (C 151) 12 (Mar. 28, 2011); Case C-22/11, Finnair Oyj v. Lassooy, 2011 O.J. (C 80) 15 (Jan. 17, 2011); Case C-11/11, Societe Air France SA v. Folkerts, 2011 O.J. (C 95) 5 (Jan. 11, 2011). List current as of November 24, 2011.

²¹⁷ Case C-12/11, *McDonagh v. Ryanair Ltd.*, 2011 O.J. (C 80) 14 (Mar. 12, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:080:0014:02:EN:HTML>.

cles 16 and 17 of the Charter of Fundamental Rights of the European Union?²¹⁸

Clearly, the nature of the questions is not only intended to invite the ECJ to further explicate its reasoning under *Sturgeon* with respect to “extraordinary circumstances,” but also to prompt judicial comment—at least by way of opinion, if not judgment—on the European Commission’s insistence that air carriers’ obligations of care continued throughout the volcanic ash events of 2010.²¹⁹ On March 22, 2012, Advocate General Bot delivered the opinion in *McDonagh*.²²⁰ The reasoning set out therein indicates that while the EC Regulation excludes an air carrier’s liability for compensation in cases which embrace the extraordinary circumstances exception, the liability for care imposed by Article 5(1)(b) is not likewise relieved. Accordingly, the Advocate General opined that:

[T]he EU legislature wanted to bracket together under a single notion—“extraordinary circumstances”—all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity. I therefore consider that there is no room for a category of events which go beyond extraordinary circumstances, as proposed by Ryanair. An event such as the eruption of the Eyjafjallajökull volcano thus certainly constitutes, to my mind, an example of extraordinary circumstances for the purposes of Regulation No 261/2004, triggering for the air carrier the attendant obligation of providing care for passengers whose flights have been [canceled] owing to that eruption.²²¹

The Advocate General further pointed out that it was not possible to imply that the responsibility for care was excluded in cases such as the Eyjafjallajökull volcanic ash on the wording of the EC Regulation, as to do so would be “to create a separate category of ‘particularly extraordinary’ events which would fully release the air carrier from its obligation.”²²² This comment cannot be read without irony considering that one effect of the *Sturgeon* decision was in fact the creation of an implied category that allowed for the payment of compensation in circumstances

²¹⁸ *Id.*

²¹⁹ Information Note to the Commission: The Impact of the Volcanic Ash Cloud Crisis on the Air Transport Industry, 2010 O.J. (1915) 1, 24.

²²⁰ Case C-12/11, *McDonagh v. Ryanair Ltd.*, 2011 EUR-Lex CELEX LEXIS 0012 (Mar. 22, 2012).

²²¹ *Id.* para. 34.

²²² *Id.* para. 35.

not anticipated by the EC Regulation. Thus, it appears that the ECJ, if it concurs with the Advocate General's reasoning, will again be in effect, if not in word, contradicting itself.

The Advocate General did not consider that the third question needed answering in light of the conclusions in relation to the first two referred questions. As for the last two questions, the Advocate General determined that Articles 5 and 9 of the EC Regulation do not "imply any such limitation of the provision of care for passengers whose flights have been [canceled] owing to extraordinary circumstances,"²²³ citing the text of Article 9 which states that meals and refreshments are to be offered free of charge "in a reasonable relation to the waiting time."²²⁴ Controversially, the Advocate General cited the fact that Ryanair introduced an "EU 261" levy on tickets, which is explicitly to cover the costs incurred as a result of the Icelandic volcano airspace closures, as a reason for concluding that the burden on air carriers for complying with its care obligation was not disproportionate (as carriers may pass the cost on to passengers). It is worth pointing out that no attention was given in the opinion as to how this explicit recognition of the lack of a limitation on damages in the EC Regulation conflicts with Article 29 of the Montreal Convention (which, *inter alia*, limits air carrier liability to the limits set out in the Convention).

The tone of the opinion is perhaps unsurprising but it is hoped that (should the ECJ follow the opinion) air carriers and their insurers will become more aware that the implications of not financially preparing to deal with the costs of Article 5-style care obligations could be unsettling, if not disastrous, should other unexpected events like volcanic ash airspace closures cause large-scale losses in the future. Put simply, the ECJ is not sympathetic to the fact that air carriage is peculiarly sensitive to events like volcanic ash and notes "the Court has ruled that given in particular to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, different modes of transport are not interchangeable as regards the conditions of their use."²²⁵

What is left for air carriers to do to defend themselves from the kinds of claims that the EC Regulation allows, in disregard

²²³ *Id.* para. 50.

²²⁴ *Id.* para. 52.

²²⁵ Case C-344/04, *Int'l Air Transp. Assoc. v. Dep't for Transp.*, 2006 E.C.R. I-403, paras. 86, 96-97.

of the principles agreed to internationally in the Montreal Convention? It appears that air carriers may only protect their interests by defending the EC Regulation claims and prompting such questions as those referred to above. If volcanic ash events or other similarly destructive events happen again, forced compliance with the EC Regulation could spell the end for many air carriers, especially those with “low cost” financial models.²²⁶ It appears that, barring an exceedingly negative review of the EC Regulation in 2012—e.g., one that calls for it to be repealed—air carriers have little choice but to press their interests through the courts when they receive voluminous claims that push at the boundaries of fact situations anticipated by the EC Regulation.

2. *Pending Preliminary Questions Challenging the Compatibility of Sturgeon with the Montreal Convention (1999), the IATA Case, or Both*

On December 13, 2010, in the case of *Nelson v. Deutsche Lufthansa AG*, a reference for a preliminary ruling on certain issues was sent to the ECJ by the Amtsgericht Köln (Germany) Court.²²⁷ The issues seek clarification of whether the kind of compensation that may be claimed under Article 7 of the EC Regulation falls within the meaning of “non-compensatory damages” as that term is used in the prohibition within Article 29 of the Montreal Convention.²²⁸ This question represents an attempt to avoid the application of Article 7 of the EC Regulation by characterizing it as a prohibited type of damages under the Montreal Convention. The remaining questions follow in the same vein.

Certainly, in the *IATA Case*, the Regulation has been characterized as “particular action . . . 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.”²²⁹

²²⁶ Bird & Bird has opined that, of the \$1.7–\$1.8 billion lost by airlines as a result of volcanic ash that precipitated airspace closures in Europe in 2010, a “substantial portion . . . will be attributable to the refunds and compensation payable pursuant to EC regulation 261/04.” Richard Venables & Chris Healy, *The Case for Reforming EC Regulation 261/2004*, BIRD & BIRD (June 29, 2010), http://www.twobirds.com/English/News/Articles/Pages/EC_Regulation_2612004.aspx (on file with authors).

²²⁷ Case C581/10, *Nelson v. Deutsche Lufthansa AG*, 2011 O.J. (C 72) 8, 8–9.

²²⁸ *Id.*

²²⁹ Int’l Air Transp. Ass’n v. Dep’t for Transp., 2006 E.C.R. I-00403, para. 45.

This indicates that the ECJ considered the EC Regulation akin to a “fine.” However, this “fine” is paid to passengers rather than appropriated by a governmental authority, so it has the character of compensation, an affront to Article 19 of the Montreal Convention.²³⁰ If the EC Regulation is not compensatory, then it may be considered a *penalty* and would, thus, contradict the second sentence of Article 29 of the Montreal Convention.²³¹ Even if the ECJ is right and the EC Regulation is intended to provide supplementary means of redress to compensation under Article 19, it violates the exclusivity principle contained in Article 29. It will be interesting to read the ECJ’s opinion on this confounding question.

The remaining two questions in *Nelson* further demonstrate this predicament. The first of these asks “[w]hat is the relationship” between the right to *Sturgeon*-based compensation and the right to compensation set out in Article 19 of the Montreal Convention, while the other asks how the ECJ reconciles its interpretation underlying *Sturgeon* with the interpretative criterion it applied in the *IATA Case*.²³² This is clear evidence of the parties’ dissatisfaction with the reasoning in *Sturgeon*, which, as set out above, seems to make new law rather than authoritatively interpret the existing law.

On December 24, 2010, in the case of *TUI Travel PLC v. Civil Aviation Authority (TUI)*, a Reference for a preliminary ruling on certain issues was sent to the ECJ by the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court).²³³ The issues, which the Advocate General Sharpston clearly considered to be of sufficient importance to reopen oral submissions, were squarely within the ambit of the ECJ’s decision in *Sturgeon* and caught upon certain statements made in the Advocate General’s opinion in that case.²³⁴

In particular, this reference presents a challenge and request for clarification on whether *Sturgeon* can be used as authority for the treatment of certain delays as de facto cancellations, so as to

²³⁰ See Montreal Convention, *supra* note 32, art. 19.

²³¹ See *id.*, art. 29.

²³² *Nelson*, 2011 O.J. (C72) at 8–9.

²³³ Case C-629/10, *TUI Travel PLC v. Civil Aviation Auth.*, 2011 O.J. (C 89) 10, 10.

²³⁴ *Id.*; see Joined Cases C-402/07 & C-432/07, *Sturgeon v. Condor Flugdienst GmbH, Böck v. Air France SA*, 2009 E.C.R. I-10923, para. 26.

permit compensation under Article 7 of the EC Regulation.²³⁵ Accordingly, the reference seeks to invalidate Articles 5–7 for breach of the principle of equal treatment in Community law.²³⁶ It further seeks to invalidate Articles 5–7 for inconsistency with the Montreal Convention and other breaches of Community law principles—i.e., proportionality and legal certainty.²³⁷ Finally, the reference seeks the ECJ’s understanding of what effect, if any, is to be given to the *Sturgeon* decision between its delivery in 2009 and the date of the court’s ruling in *TUI*.²³⁸ In an unusual move, an oral hearing was permitted, and the ECJ heard oral submissions from eight interested parties²³⁹ on March 20, 2012.²⁴⁰ All but the EU Commission and Poland opposed the kind of compensation anticipated by the *Sturgeon* case.²⁴¹ A good summary of the arguments advanced is provided in Kathryn Ward’s memorandum of the submissions.²⁴² An opinion is expected by the Attorney General on May 15, 2012, with judgment to follow shortly thereafter.²⁴³

Büsch v. Ryanair Ltd., lodged on May 24, 2011, is another case from Germany that is the subject of a reference for a preliminary ruling from the Amtsgericht Geldern Court.²⁴⁴ This particular reference, like *Nelson*, intimates the parties’ concerns over how the right to compensation under Article 7 of the EC Regulation interacts with the operation of the Montreal Convention.²⁴⁵ Specifically, the concern is whether *Sturgeon*-based compensation—i.e., long delay or de facto cancellation—will be subject to the limits of liability for delays as set out in the Mon-

²³⁵ Sched. of Order at para. 3(a), *TUI Travel PLC v. Civil Aviation Auth.*, [2010] EWHC (Admin) 863729 (Eng.), available at http://www.csm1909.ro/csm/linkuri/22_07_2011__42543_ro.pdf.

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *Id.*

²³⁹ (1) TUI Travel, British Airways, easyJet and IATA; (2) Lufthansa; (3) Germany; (4) Poland; (5) United Kingdom; (6) EU Parliament; (7) EU Council; and (8) EU Commission.

²⁴⁰ KATHRYN WARD, (1) TUI TRAVEL PLC, (2) BRITISH AIRWAYS PLC, (3) EASYJET AIRLINES COMPANY PLC AND (4) IATA –v – CIVIL AVIATION AUTHORITY 1 (2012), available at http://www.dlapiper.com/files/Publication/c0ee48fb-39ef-42be-a3ee-a5d63b463cab/Presentation/PublicationAttachment/437f9df7-51f0-49bd-8243-aad9906ead57/Aviation_Alert_March_2012.pdf.

²⁴¹ *Id.* at 4–5.

²⁴² *Id.*

²⁴³ *Id.* at 5.

²⁴⁴ Case C-255/11, *Büsch v. Ryanair, Ltd.*, 2011 O.J. (C 226) 15, 15.

²⁴⁵ *Id.*

treational Convention.²⁴⁶ Second, the reference asks whether the ECJ will consider any damages paid in excess of that required to compensate the passenger for the long delay as non-compensatory and, thus, prohibited by Article 29 of the Montreal Convention.²⁴⁷ This could perhaps be true, as damage amounts in excess of that required for full compensation may be characterized as punitive or exemplary—categories of damages that also fall outside the Montreal Convention proscription. The German court also seeks to know whether such a situation precludes a right to compensation altogether or if such a right only arises for amounts of damages actually incurred in the event of delays.²⁴⁸

A Dutch reference for a preliminary ruling comes from the Rechtbank Breda Court and was lodged on June 27, 2011, in *Van de Ven v. Koninklijke Luchtvaart Maatschappij N.V.*²⁴⁹ Again, the court has been asked to decide whether Article 7 compensation is consistent with the exclusivity of both the remedies set out in Article 29 of the Montreal Convention and the other limitations of liability set out in the Montreal Convention.²⁵⁰ If this question is answered in the negative, then the court has been asked to decide whether there would be any limitations imposed by an affirmative ECJ ruling that Article 7 compensation is valid.²⁵¹

From the tone of the questions being asked of the ECJ by the various national courts and as argued strongly by airlines and certain countries (e.g., Germany and the United Kingdom), it would seem that, instead of seeking to advance the jurisprudence of the European courts regarding the EC Regulation, the more pragmatic solution would be to invalidate the EC Regulation and allow the situation of delay to default to the operation of Articles 19 and 29 of the Montreal Convention, which have adequately addressed all the questions now before the ECJ. Under Article 19, all provable damages for delay may be recovered up to a limit of 4,694 SDR.²⁵² The judiciary should not

²⁴⁶ *Id.*; see Montreal Convention, *supra* note 32, arts. 22(1), 29.

²⁴⁷ *Büsch*, 2011 O.J. at 15.

²⁴⁸ *Id.*

²⁴⁹ Case C-315/11, *Van de Ven v. Koninklijke Luchtvaart Maatschappij N.V.*, 2011 O.J. (C 269) 27, 27–28.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 28.

²⁵² Montreal Convention, *supra* note 32, art. 19; Press Release, Gov't of Hong Kong, *supra* note 42.

artificially construe delay by using legislation that only deals with, ostensibly, cancellation.²⁵³ Furthermore, there need not be any artificiality in compensating delay by reference to fixed, quasi-punitive payments that bear no resemblance to passengers' actual losses.²⁵⁴ In short, the several questions before the ECJ indicate the redundancy of regional legislation for compensation for delay.

VI. RECONCILING EC REGULATION 261/2004 WITH DELAY UNDER THE MONTREAL CONVENTION (1999)—A BREACH OF INTERNATIONAL LAW?

As noted above, the principal criticism of the EC Regulation is that it conflicts with the mechanism set up to deal with compensation for delay in the Montreal Convention. But does the *existence* of the EC Regulation represent a breach of international law?

The Vienna Convention on the Law of Treaties 1969 (Vienna Convention) came about, *inter alia*, to maintain the achievement of cooperation among nations and stated that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized."²⁵⁵ As such, the rules codify several aspects of customary international law that govern the interpretation, application, and observance of treaties.²⁵⁶ In relation to the EC Regulation, Articles 26 and 31 of the Vienna Convention are invoked due to the conflicting nature of the subject matter of the EC Regulation and Articles 19 and 29 of the Montreal Convention.²⁵⁷

Article 29 of the Montreal Convention provides that compensation shall only be recoverable under the terms of the Montreal Convention.²⁵⁸ However, both the Montreal Convention *and* the EC Regulation regulate delay.²⁵⁹ By providing a legislative basis—other than that established by the Montreal Convention—for the recovery of damages occasioned by delay, the EC Regulation can be considered a breach of Article 26 of the Vienna Convention. The EC Regulation conflicts with Article 29

²⁵³ See *supra* notes 192–99 and accompanying text.

²⁵⁴ See EC Regulation, *supra* note 115, art. 7; *supra* notes 187–90 and accompanying text.

²⁵⁵ Vienna Convention, *supra* note 152, pmbl.

²⁵⁶ See *id.*

²⁵⁷ See *id.* arts. 26, 31; Montreal Convention, *supra* note 32, arts. 19, 29.

²⁵⁸ Montreal Convention, *supra* note 32, art. 29.

²⁵⁹ *Id.*, art. 19; EC Regulation, *supra* note 115, arts. 1, 6.

of the Montreal Convention in at least three ways because it provides for compensation outside the Montreal Convention that:

- (1) is effectively unlimited—at least for instances of “care” where no specific limit is provided—as opposed to the current Montreal Convention Article 22(1) limit of 4,694 SDR²⁶⁰ and which, in relation to care, was recently explicitly recognized by Advocate General Bot in *McDonagh*,²⁶¹
- (2) does not offer air carriers the defenses regarding the care obligation that are available to them in cases under the Montreal Convention;²⁶² and
- (3) is inconsistent with the Montreal Convention in that the passenger losses need not be proven to recover compensation, as is implicit in Article 19 of the Montreal Convention.²⁶³

The “good faith” requirement of the Vienna Convention is uncontroversial in international law. It is not a major logical leap to propose that enactment of a conflicting and contrary regulation similar in subject to a ratified uniform treaty provision is a sign that the performance of Article 29 of the Montreal Convention has not been duly regarded.

Treaty law is binding on the institutions of the European Community and on member states of the EU. In fact, under the Treaty of Lisbon, the EU has international legal personality.²⁶⁴ As the court in *Air Transport Ass’n of America v. Secretary of State for Energy & Climate Change (ETS Judgment)* held:

Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.²⁶⁵

²⁶⁰ Compare EC Regulation, *supra* note 115, art. 9, with Montreal Convention, *supra* note 32, art. 22(1), and Press Release, Gov’t of Hong Kong, *supra* note 42.

²⁶¹ Case C-12/11, *McDonagh v. Ryanair Ltd.*, 2011 EUR-Lex CELEX LEXIS 0012, para. 50 (Mar. 22, 2012).

²⁶² Compare EC Regulation, *supra* note 115, art. 6, with Montreal Convention, *supra* note 32, art. 51.

²⁶³ Compare EC Regulation, *supra* note 115 (lacking any requirement of proof of passenger losses), with Montreal Convention, *supra* note 32, art. 19.

²⁶⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1, 38.

²⁶⁵ Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change*, 2011 E.C.R. 0, para. 101.

In international law, internal law is no justification for a breach of treaty obligations,²⁶⁶ and, thus, the enactment of the EC Regulation is inconsistent with, if not a breach of, obligations that the ECJ itself recognizes.

VII. REVIEW AND POTENTIAL REFORM OF EC REGULATION 261/2004

Having contended that the EC Regulation represents an aberrant breach of several conventional international obligations, the article now turns to the question of past and future review and reform. As discussed below, the EC has reviewed the EC Regulation. But, the regime itself must nevertheless be substantially revised or repealed because, among other pragmatic reasons, it is inconsistent with international law.

A. PRIOR REGULATORY REVIEW: 2007

A regulatory review was completed in February 2007, coincidentally not long after the judgment was delivered in the *IATA Case*.²⁶⁷ The review was mandated by the EC Regulation itself.²⁶⁸ The Commission asked Steer Davies Gleave (SDG) to conduct an independent review of the EC Regulation (2007 Review).²⁶⁹ Other reviews have since complemented the 2007 Review and the judicial examinations by the European courts in the *IATA Case* and others.²⁷⁰ SDG makes it clear that the 2007 Review has been neither adopted nor approved by the EC, but, importantly, it was a significant effort that included results obtained from “in-depth discussions and consultation with stakeholders, including air carriers, . . . data analysis, a survey of passengers’ experiences, and . . . an *independent legal review*.”²⁷¹

The examination of the 2007 Review in this article is confined to the legal review commissioned by SDG that appears as Sec-

²⁶⁶ Vienna Convention, *supra* note 152, art. 27.

²⁶⁷ See Case C-344/04, *Int’l Air Transp. Ass’n v. Dept. for Transp.*, 2006 E.C.R. I-00403.

²⁶⁸ EC Regulation, *supra* note 115, art. 17.

²⁶⁹ STEER DAVIES GLEAVE, REVIEW OF REGULATION 261/2004: FINAL REPORT (2007) [hereinafter 2007 Review].

²⁷⁰ See *Communication from the Commission to the European Parliament and the Council on the Application of Regulation 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, at 5, COM (2011) 174 final (Apr. 11, 2011); see also *infra* Part VIII.

²⁷¹ 2007 Review, *supra* note 269, at 1 (emphasis added).

tion 6 of the document.²⁷² Perhaps due to the recency of the *IATA Case* decision, the summary of the legal review occupies only seven of the 157 pages in the document.²⁷³ One of the recommendations of the 2007 Review was that another review be conducted in two to three years.²⁷⁴ However, the principal criticisms of the EC Regulation identified in the 2007 Review were that elements of the EC Regulation required clarification.²⁷⁵ Many of the clarifications point to ambiguity in the language of the EC Regulation that foreshadows difficulties inherent in applying the EC Regulation to compensating passengers for delays caused by events that *factually* cannot have come about by any act or omission of the air carrier.²⁷⁶ Events like airspace closures due to volcanic ash immediately come to mind with respect to the determination of what exactly constitutes an “extraordinary circumstance.”

Furthermore, the determination of what “delay” means under the EC Regulation was identified as an issue requiring clarification.²⁷⁷ The lack of explanation following the 2007 Review has spawned much case law that has recently determined that a “delay” occurs *even when* an aircraft takes off at its scheduled time and must return to the departure airport due to a problem.²⁷⁸

Many recommendations related to definitional problems include:

- the overly inclusive definitions of “delay,” “denied boarding,” and “cancellation.” For example, “denied boarding” includes cases not only where there is “insufficient capacity due to overbooking,” but also where “the aircraft due to operate a flight becomes unserviceable and the only alternative aircraft is smaller so that not all passengers can be accommodated”;²⁷⁹
- ambiguity as to how the exception applies to a situation in which Community carriers are absolved from providing assis-

²⁷² See *id.* at 87–94.

²⁷³ *Id.*

²⁷⁴ *Id.* at 116.

²⁷⁵ *Id.* at 87.

²⁷⁶ For example, *Sturgeon* and *Wallentin Hermann* both identified the stunning array of interpretations open to courts due to the ambiguity of certain provisions in the EC Regulation. See *Joined Cases C-402/07 & C-432/07, Sturgeon v. Condor Flugdienst GmbH, Böck v. Air France SA*, 2009 E.C.R. I-10923, paras. 1–3; *Case C-549/07, Wallentin-Herman v. Alitalia-Linee Italiane SpA*, 2008 E.C.R. I-11061, para. 1.

²⁷⁷ 2007 Review, *supra* note 269, at 87.

²⁷⁸ *Case C-83/10, Rodriguez v. Air France, SA*, 2011 E.C.R. 0, para. 47.

²⁷⁹ 2007 Review, *supra* note 269, at 87.

tance when such assistance has already been given to passengers departing from an airport in a non-EU state on a flight into the EU;²⁸⁰ and

- the scope of the term “extraordinary circumstances,” especially as used in the examples provided in the Recitals of the EC Regulation.²⁸¹

Given the recent delivery of the Opinion and *ETS Judgment* on the extraterritorial validity of the EU ETS,²⁸² one particular aspect of SDG’s analysis warrants attention: the fact that the Commission asked for an assessment of “whether the [EC] Regulation should be applied to flights into the EU operated by non-EU carriers.”²⁸³ The authors are not aware of any amendments to the EC Regulation that purport to do this, but, given the fact that the unilateral imposition of EU ETS legislation on foreign air carriers was upheld by the ECJ,²⁸⁴ the Commission’s interest in this scenario is cause for concern. The 2007 Review identifies that an extension of the EC Regulation to flights into the EU operated by non-EU carriers would present an example of extraterritorial application of domestic law, which is a breach of both the customary rule of sovereignty and Article 1 of the Convention on International Civil Aviation of 1944 (Chicago Convention)²⁸⁵ and is, thus, unenforceable.²⁸⁶ An analogous argument would hold true if the EC Regulation were likewise extended to include non-Community carriers’ flights from non-EU countries to points within the EU. But, in light of the *ETS Judgment*, if such a law were ever promulgated, the decision would likely provide ample support for application of yet another financially and practically onerous law to foreign air carriers.

SDG noted that the allegation of extraterritorial application might not be a foregone conclusion in *all* situations—e.g., where a ticket has been purchased in the EU.²⁸⁷ In such a case, it has been held that the place the ticket was purchased permit-

²⁸⁰ *Id.* at 88.

²⁸¹ *Id.* at 89.

²⁸² Case C-366/10, *Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change*, 2011 E.C.R. 0.

²⁸³ 2007 Review, *supra* note 269, at 93.

²⁸⁴ *Air Transp. Ass’n of Am.*, 2011 E.C.R. at paras. 71, 158 (holding that the ETS was not an extraterritorial application of EU law and that the EU was not bound by the Convention on International Civil Aviation).

²⁸⁵ Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

²⁸⁶ 2007 Review, *supra* note 269, at 93–94.

²⁸⁷ *Id.* at 94 (citing *CAB v. Lufthansa, AG*, 591 F.2d 951 (D.C. Cir. 1979)).

ted extraterritorial application of U.S. laws regulating overbooking and denied boarding.²⁸⁸

Finally, the 2007 Review noted that, despite the decision of the ECJ in the *IATA Case*, the question of whether the EC Regulation was consistent with the Montreal Convention had not been settled, except internally within the EU.²⁸⁹ It was possible for one or more non-EU states to bring an action in the International Court of Justice with respect to potential breaches of the Montreal Convention.²⁹⁰

The review concluded that the two principal problems with the EC Regulation were that there was “ineffective enforcement in some Member States” and that “the text of the Regulation is unclear in many areas.”²⁹¹ Interestingly, the 2007 Review made several recommendations that have not been implemented, potentially due to a prevailing view at the time of the 2007 Review that it would not be appropriate to change the EC Regulation when it had only been operational for approximately eighteen months.²⁹² However, it was suggested by many of the interviewed stakeholders that “the only way to resolve the issues that have arisen with the Regulation was an amended Regulation.”²⁹³

B. NON REGULATORY AND PARALLEL EVENTS THAT SHOULD INFORM THE NEXT REVIEW

1. *Volcanic Ash in Europe and Forced Airline Compliance with EC Regulation 261/2004*

The volcanic ash events of April 2010 caused a heavy operational and financial burden for air carriers all over the world. The IATA has estimated that air carriers suffered some \$1.7 billion in lost revenue worldwide during the first six days after the

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* It should also be noted that further dispute resolution mechanisms exist. For example, binding arbitration may be initiated through ICAO pursuant to Chapter XVIII of the Chicago Convention. Furthermore, while less likely to be of utility in such a politically charged regionally based dispute, it must not be forgotten that states may negotiate or otherwise further their arguments and resolutions of such disputes bilaterally or multilaterally. Similarly, other avenues may be explored. For example, it would not be out of the question for the United States to claim that the EC Regulation breaches clauses in the U.S.-EU Open Skies Agreement and to resolve the dispute through the machinery of the Agreement (Article 19 – Arbitration) against one of the EU Member State parties.

²⁹¹ *Id.* at 95.

²⁹² *Id.* at 97.

²⁹³ *Id.*

initial eruption alone.²⁹⁴ The costs to tour operators and other areas of the tourism industry likewise suffered.²⁹⁵ To this day, the reasons for the airspace “closures” remain controversial.²⁹⁶ However, with the assistance of ICAO guidance and contingency plans that promoted a risk-averse approach to aircraft operation in areas of known or forecasted volcanic ash contamination, safety—the primary goal of all aviation stakeholders around the world—was maintained.²⁹⁷

In an Information Note from the European Commission dated April 27, 2010, during the early days of recovery of normal air traffic patterns in Europe, Siim Kallas, Joaquin Almunia, and Olli Rehn recognized that the flight restrictions on travel within the EU created a “very difficult situation for passengers who had suddenly to [sic] face cancellations of flights due to extraordinary circumstances.”²⁹⁸ Despite the difficult times and these well-placed intentions, such compassion for passengers more than completely displaced any compassion for air carriers who remained liable for payments and other remedies under the EC Regulation.²⁹⁹ As stated in the Information Note, “The Commission considers that these regulations remain fully applicable during these testing times for passengers and the industry alike. The benefits of EU rules for passengers can be precisely appreciated in such exceptional circumstances.”³⁰⁰

The EC did note that, in the case of flight cancellations, compensation would not be due because “the circumstances were clearly extraordinary.”³⁰¹ Notwithstanding that concession, the impact of the EC Regulation was a financial impost that should

²⁹⁴ IATA Economic Briefing: The Impact of Eyjafjallajökull’s Volcanic Ash Plume, INT’L AIR TRANSP. ASS’N (May 2010), <http://www.iata.org/whatwedo/Documents/economics/Volcanic-Ash-Plume-May2010.pdf>.

²⁹⁵ *EU Says Volcanic Ash Costs Tourism Industry 1 Billion Euros*, CHINA DAILY (Apr. 29, 2010), http://www.chinadaily.com.cn/world/2010-04/29/content_9788370.htm.

²⁹⁶ Mike Swain, *Closure of Airspace Because of Volcanic Ash Cloud ‘Was Justified,’* DAILY MIRROR (Apr. 26, 2011), <http://www.mirror.co.uk/news/uk-news/closure-of-airspace-because-of-volcanic-ash-124822>.

²⁹⁷ For a summary of the ICAO guidance in place at the time of the ash crisis and an examination of the initial attitudes toward amending state and operator reactions to airborne volcanic ash, see Joseph C. Wheeler, *ICAO Guidance on Volcanic Ash: From Risk Aversion to Risk Management*, 36 ANNALS AIR & SPACE L. 219 (2011).

²⁹⁸ Information Note to the Commission, *supra* note 219, at para. 23.

²⁹⁹ *Id.* at para. 24.

³⁰⁰ *Id.*

³⁰¹ *Id.*

not have fallen on the shoulders of the airline industry. The care and assistance required and provided by airlines was of a scale never seen since the implementation of the EC Regulation. The EC stressed that “uniform application throughout the EU”³⁰² was required and recommended that:

[m]ember states adopt administrative acts listing all [canceled] and long-delayed flights resulting from the airspace closure, and fixing a timeline for passengers on those flights to provide proof to the operating air carrier of their expenses according to the regulation, which would be duly reimbursed by the carrier within the fixed timeline.³⁰³

The EC did recognize that the situation was out of airlines’ control, but its insistence on the application of the EC Regulation to provide care, even during such a unique time, was both unexpected and unnecessary.

As previously discussed, the Montreal Convention provides a uniform and assessable means by which individual passenger losses can be compensated. The availability of an instant “quick fix” for delayed passengers during the ash crisis via the EC Regulation may have had its practical usefulness (and, indeed, necessity), but that being the case, providing this kind of assistance should have been within the mandate of national authorities, a regional or other supra-national insurance fund, or private travel insurance. The fact that air carriers were forced to be the “deep pockets” in a situation over which they had negligible control indicates that the air passenger protection policy underlying the EC Regulation, while based on an admirable desire to advance passenger rights, was foundationally deficient. It arbitrarily placed this risk with air carriers instead of considering where the economic risk of paying compensation should most reasonably lie. As Professor Schubert notes, “The European episode of volcanic ash has proved the legitimacy of the airlines’ position.”³⁰⁴

An example of the confusion that the volcanic ash crisis caused the NEBs was demonstrated by the EC’s release of informal guidelines—a “non paper”—that aimed to assist NEBs in fixing the common application of the EC Regulation under the “exceptional circumstances directly linked to the eruption of

³⁰² *Id.*

³⁰³ *Id.* at para. 25.

³⁰⁴ Francis P. Schubert, *Air Navigation and Volcanic Ash Contamination: A Legal Analysis*, 36 *ANNALS AIR & SPACE L.* 169, 217 (2011).

the volcano in Iceland.”³⁰⁵ This document, variously expressed to be non-binding and not to set any precedent, illustrates that the EC Regulation is not fit for its task, especially after the decision of the ECJ in *Sturgeon*.

The discussion above demonstrates that, even if one concedes that passenger rights policies demand a “quick fix” for delayed passengers outside of the Montreal Convention (assuming such a scheme would be lawful under international law, which is not here conceded), a more thorough examination should nevertheless be made of potential sources of the funds for compensation and care in instances of *force majeure*. It has been widely suggested that the EC Regulation requires reform.³⁰⁶ Indeed, some commentators have gone so far as to say that the EC Regulation should “be amended to include exemptions in the event of exceptional circumstances such as volcanic eruptions that prevent the airlines from operating.”³⁰⁷

Extending this thinking one step further, it would be beneficial if an approach was followed similar to that which was recently taken by ICAO states in the 2009 Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (Unlawful Interference Convention)—specifically, the establishment of an International Civil Aviation Compensation Fund.³⁰⁸ This could be accomplished either in a protocol to the Montreal Convention or, at least in the interim, inclusion in the EC Regulation following the impending comprehensive review. The creation of such a fund under the auspices of the ICAO would mark a real return to the foundational motivations for unifying civil aviation regulation internationally.³⁰⁹

³⁰⁵ *Proposed Informal Guidelines on the Application of Some Articles of (EC) Regulation 261/2004* EUROPEAN COMMISSION (Aug. 2010), http://ec.europa.eu/transport/passengers/air/doc/2011_ash-cloud-crisis-guidelines-for-interpretation.pdf.

³⁰⁶ *E.g.*, Schubert, *supra* note 304, at 213–17.

³⁰⁷ *Id.*

³⁰⁸ Int’l Civil Aviation Org. [ICAO], *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*, at 5–11, DCCD Doc. 43 (May 2, 2009) [hereinafter Unlawful Interference Convention].

³⁰⁹ The Preamble to the Chicago Convention provides:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and
WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

The volcanic ash events have shown that a comprehensive overhaul of the EC Regulation and the policies associated with consumer protection, in the context of the existing conventional framework, is necessary. Doing nothing would lead to further absurdities during extraordinary circumstances, whether natural or unnatural, and would be as debilitating to passengers and the airline industry as terrorist attacks on aviation infrastructure.

Air carriers, who must comply with an international private law regime that “covers the field” of compensation to passengers who suffer loss as a result of air carrier delays, simply and pragmatically should not be subjected to a parallel regional legislative mechanism that places upon them the burden of paying for the costs of delays and cancellations brought about by every act of nature, including acts, such as volcanic ash, that are not only out of their own control, but out of the control of every aviation-related entity in the world.³¹⁰ This arbitrary imposition on air carriers takes passenger protection too far.

2. *Lessons that May Be Learned from the EU Emissions Trading Scheme (EU Directive 2008/101/EC) Challenge Litigation*

We note at the outset that the legislation creating the EU ETS is unlike the EC Regulation in that the latter is much more pointedly intended to capture air carriers—including, from January 1, 2012, foreign air carriers—that specifically operate particular flights in and out of the EU.³¹¹ The EC Regulation applies to outbound cases of “long delays” for foreign air carriers, but only Community carriers for inbound legs.³¹² However, the international aviation community’s forceful reaction to the

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.

Chicago Convention, *supra* note 285, pmb1.

³¹⁰ As Professor Schubert points out, “[t]he main flaw of the European legislation is that it burdens airlines with the obligation to compensate passengers for damages arising from events on which they have absolutely no control, such as weather conditions or even social disputes affecting the ATC system.” Schubert, *supra* note 304, at 217.

³¹¹ Compare Council Directive 2008/101/EC, 2009 O.J. (L 008) 3, 3 (EC) (“amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community”), with EC Regulation, *supra* note 115, art. 3(1).

³¹² EC Regulation, *supra* note 115, art. 3(1).

unilateral imposition of the EU ETS on foreign carriers is indicative of a widely held belief that the EU lacks the motivation to remain in harmony with the uniform air carriage conventional framework—the motivation that caused all twenty-seven member states to ratify the Montreal Convention.

Criticisms similar to those in this article and in its predecessors of the reasoning of the ECJ in the *IATA Case* were prompted by the delivery of the Opinion of Advocate General Kokott on October 6, 2011, in relation to the IATA (and other organizations') challenge to the validity of the EU ETS (*ETS Case*).³¹³ Principally, the unsurprising refrain was that the reasoning in the Opinion did not reflect the commonly held and cogent view on the compatibility of certain aspects of regional or domestic legislation within the prevailing civil air law context.³¹⁴ The *ETS Judgment* does not significantly depart from the *ETS Case*.

The Opinion in the *ETS Case* is controversial in its application of international legal principles with respect to standing, extra-territorial application of domestic law, the generally understood reservation to the ICAO of competence to facilitate laws with respect to carbon emissions by the Kyoto Protocol of the United Nations Framework Convention on Climate Change,³¹⁵ and principles of proportionality in the construction of the "fair and equal opportunity" clause in the European Union-United States Open Skies Agreement (Open Skies Agreement).³¹⁶ The Opinion presented the narrow view that, because the EU ETS is a market-based measure with an ostensible purpose of environmental and climate protections, it does not fall within the prohibition against "fees, dues or other charges" as that term is used in the Chicago Convention and Open Skies Agreement.³¹⁷ Such a view is surprising given the existence of substantive European case law that analogously connects domestic financial imposts on civil aviation emissions with impermissible imposts on fuel under supra-national EU regulations analogous to the prohibitions within the Open Skies Agreement and Chicago Conven-

³¹³ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. 0 (Opinion of Advocate Gen. Kokott) [hereinafter *ETS case*].

³¹⁴ Robert Wall & Jens Flottau, *EU Emissions Trading Battle Intensifies*, AVIATION WK. (Oct. 10, 2011), http://www.aviationweek.com/aw/jsp_includes/articlePrint.jsp?headline=EU%20Emissions%20Trading%20Battle%20Intensifies&storyID=news/awst/2011/10/10/AW_10_10_2011_p28-378681.xml.

³¹⁵ Council Decision 2002/358/CE, ann. III, 2002 O.J. (L 130) 4, 20.

³¹⁶ Air Transport Agreement, 2007 O.J. (L 134) 4, 6 (EU).

³¹⁷ *ETS case*, 2011 E.C.R. at paras. 215–221.

tion.³¹⁸ However, the court distinguished *Braathens* by holding that it involved “a direct and inseverable link between fuel consumption and the polluting substances” emitted by aircraft.³¹⁹ It did not likewise see the same link in the EU ETS, which, according to the Advocate General, does not allow a direct inference to be drawn between fuel consumption, per se, and greenhouse gases emitted in the course of a particular flight, citing the calculation methodology used in the directive.³²⁰ If anything, this is a creative construction that relies heavily on the definition within the directive; however, the refusal to link aviation fuel with greenhouse gas emissions in this way amounts to an appeal to a shaky technicality.

While there is merit to some of the conclusions reached by the court, the construction of the international legal instruments advanced therein is untenable. As with the *IATA Case*, the court has preferred a narrow, preferential construction of the instruments that seems out of line with the objective purpose of those instruments—the promotion of uniformity and multilateralism rather than singularity and unilateralism.³²¹ Thus, the reasoning does not support a purposive approach and more likely provides another example of what has been variously described as the ECJ’s “reputation for generously upholding aviation regulations promulgated by the ever-growing and power-thirsty Brus-

³¹⁸ See generally Case C-346/97, *Braathens Sverige AB v. Riksskatteverket*, 1999 E.C.R. I-3419 (holding that the supra-national exemption of mineral oils and fuel from taxes was breached by a Swedish national law taxing domestic aviation emissions). This situation is analogous to the relationship between Article 24 of the Chicago Convention, which prohibits “customs duty, inspection fees or similar national or local duties and charges” on, *inter alia*, fuel and lubricating oils, Chicago Convention, *supra* note 285, art. 24, and ICAO Doc. 8632, which states: “the expression ‘customs and other duties’ shall include import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies.” Int’l Civil Aviation Org. [ICAO], *ICAO’s Policies on Taxation in the Field of International Air Transport*, para. 1(d), ICAO Doc. 8632-C/968 (3d ed. 2000) (emphasis added), available at http://www.icao.int/publications/Documents/8632_cons_en.pdf. Legislating for the payment of charges calculated by distance of flight flown is akin to charging for the consumption of the fuel used for that journey.

³¹⁹ *ETS case*, 2011 E.C.R. at para. 233.

³²⁰ “Actual fuel consumption is calculated by subtracting from the amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete the amount of fuel contained in aircraft tanks once fuel uplift for the subsequent flight is complete, and adding the fuel uplift for that subsequent flight.” *ETS case*, 2011, E.C.R. at para. 230, n. 179.

³²¹ This can be considered a violation of the rule in Article 26 of the Vienna Convention. Vienna Convention, *supra* note 152, art. 26.

sels bureaucracy,”³²² and “[r]ather than testing EU air law against international air law, it seems that the Court applies that test—if at all—the other way around.”³²³

The distancing of the EU from international uniformity in public international and private international air law was recently the stimulus for a provocative political move by the United States. The United States proposed legislation in July 2011 that, if passed, will make it unlawful for U.S. air carriers to participate in the EU ETS once it is applied to foreign air carriers.³²⁴ The aptly titled European Union Emissions Trading Scheme Prohibition Act of 2011³²⁵ has had strong bipartisan support thus far and passed through the House of Representatives on October 24, 2011.³²⁶

One interpretation of the import of the bill is that the U.S. government will, in the short term, negotiate for an exemption or other such concession from the EU and, perhaps, indemnify U.S. air carriers from any losses or penalties they sustain as a result of being the physical agents of the U.S. government. However, it also does not seem out of the question that the United States might express its annoyance by revoking certain air access rights from EU carriers if the EU should enforce its ban on foreign carriers for failing to comply with its ETS. This has been the course of several previous international aviation disputes.³²⁷

In a separate, public criticism on September 30, 2011, the United States signed a non-binding joint declaration with several nations that secured public support for its opposition to the unilateral imposition of the EU ETS.³²⁸ Twenty-six ICAO states

³²² Dempsey & Johansson, *supra* note 139, at 219.

³²³ Arnold & Mendes de Leon, *supra* note 139, at 93.

³²⁴ H.R. Doc. No. 112-2594, pt. 3, at 3 (2011), available at <http://www.govtrack.us/congress/billtext.xpd?bill=H112-2594>.

³²⁵ *Id.*, pt. 1, at 1.

³²⁶ See *Bill Summary & Status – 112th Congress (2011–2012) – H.R.2594 – All Information*, THOMAS (LIBRARY OF CONGRESS), <http://www.thomas.gov/cgi-bin/bdquery/z?d112:HR02594:@@L&summ2=m&> (last visited Mar. 1, 2012).

³²⁷ See Paul B. Larsen, *Arbitration of the United States-France Air Traffic Rights Dispute*, 30 J. AIR L. & COM. 231, 232 (1964). In fact international relations can sour for decades following aviation disputes. Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J. AIR L. & COM. 979, 1031–32 (2001).

³²⁸ See Int’l Civil Aviation Org. [ICAO], *Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and Its Impact*, para. 1.6, ICAO Doc. C-WP/13790 (Oct. 17, 2011), available at <http://www.ainalerts.com/ainalerts/alertimages/ICAO.pdf>.

adopted the declaration on November 2, 2011, in Montreal.³²⁹ These moves indicate that if measures like the EC Regulation and the EU ETS are not quelled by public opinion or alternatively, do not form the subject of new international conventions that amend the Montreal Convention and the Chicago Convention, the object of uniformity will be all but a distant memory for international air law.

VIII. IMPENDING REGULATORY REVIEW PLUS PENDING CASES—THE PERFECT STORM FOR CHANGE?

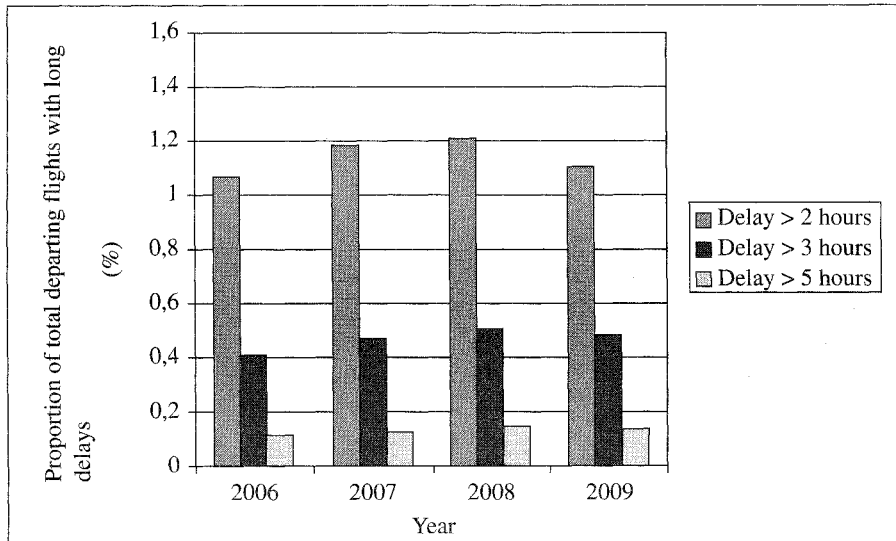
The plethora of cases questioning and extending the interpretation of the ambiguous terms within the EC Regulation show that the decision not to amend the EC Regulation following the 2007 Review was perhaps, in hindsight, short-sighted. Certainly the inability to point to any statistical reduction in air carrier delays as a result of the imposition of the EC Regulation would suggest that the legislation is not working.³³⁰ A table found in the EC's own working papers is worth reproducing here to substantiate this point.³³¹

³²⁹ Bill Carey, *ICAO Joins Airlines, Nations in Opposing Emissions Trading Scheme*, AINONLINE (Nov. 7, 2011), <http://www.ainonline.com/?q=aviation-news/ain-air-transport-perspective/2011-11-07/icao-joins-airlines-nations-opposing-emissions-trading-scheme>.

³³⁰ See *Communication from the Commission to the European Parliament and the Council on the Operation and the Results of Regulation (EC) 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, at 4, SEC (2011) 428 final (Nov. 4, 2011), available at http://ec.europa.eu/transport/passengers/doc/sec_2011_428_staff-working-paper.pdf.

³³¹ *Id.*

Proportion of total flights departing from EU airports that experienced long delays at departure, 2006-2009



Other facts and events outlined above would suggest that the EC Regulation is not just failing, it is also imposing an economic burden on air carriers incongruous with the industry's natural and reasonable area of responsibility: air carriage. It intrudes in other areas as well, such as economic risk-shifting for passengers and social control that are within the realms of insurance and government respectively, *not* air carriers.

Importantly, the EC has again resolved to assess the implementation of the EC Regulation. In a communication dated April 11, 2011, the EC Vice President Siim Kallas provided an assessment of the first six years of the application of the EC Regulation and announced that there would be "an impact assessment and public consultation with a view to the Commission adopting proposals for a revision of Regulation 261 on Air Passenger Rights in 2012."³³² Although this assessment is a short document, it instills hope in air law purists because it accepts

³³² Press Release, European Comm'n, Passenger Rights – Main Findings and Next Steps (Apr. 11, 2011), available at <http://ec.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/232&format=HTML&aged=0&language>. Public consultation for this review opened on December 19, 2011, and will close on March 11, 2012. The review is being conducted by SDG, and details can be viewed at http://ec.europa.eu/transport/passengers/consultations/2012-03-11-apr_en.htm.

that some of the difficulties identified in this and preceding academic commentary will be addressed or neutralized.³³³

One principal area identified for revision or reform is the “structural limits of the [EC] Regulation, which have been tested under the magnified scale of the [volcanic ash] crisis.”³³⁴ As a result, there is likely to be a shift on the effectively unlimited liability of air carriers with respect to the right to care under circumstances of natural disaster. The EC wisely announced there would likely be a clarification of the way in which such risks are properly shared and financed so that “no excessive burden is placed on the aviation industry whilst also ensuring that citizens do not bear the financial cost and inconvenience of natural catastrophes alone.”³³⁵ Also, while carefully sidestepping the actual form and substance of legislative amendment to the EC Regulation, the EC acknowledged that several aspects of the EC Regulation had been criticized: (1) its complexity; (2) lack of limit on liability on provision of care in extraordinary circumstances beyond the carriers’ control; (3) inadequate mechanisms to ensure recovery of costs by air carriers against responsible third parties; (4) the definition of “extraordinary circumstances” within and outside of the carriers’ control; and (5) “lack of uniform interpretation and enforcement.”³³⁶

This aspect of uniform interpretation is the most relevant from a legal analysis perspective. The EC implicitly endorsed the decisions in *Wallentin-Hermann* and *Sturgeon* and noted that the approach therein—to interpret provisions conferring rights on air passengers broadly—was in line with the political objectives of the EC Regulation—i.e., to reduce inconvenience for passengers and to offer reasonable re-routing.³³⁷ Accordingly, given that the EC agrees that “the ECJ has played a key role in clarifying some of the most controversial points,” there is likely to be little, if any, change to Article 13 of the EC Regulation—the right of redress permitting recovery of costs of compliance with the EC Regulation from other at fault parties.³³⁸ Such an

³³³ See *id.*

³³⁴ *Communication from the Commission to the European Parliament and the Council on the Application of Regulation 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, at 4, COM (2011) 174 final (Apr. 11, 2011), available at http://ec.europa.eu/transport/passengers/doc/com_2011_174_communication_en.pdf.

³³⁵ *Id.*

³³⁶ *Id.* at 5.

³³⁷ *Id.* at 7.

³³⁸ *Id.* at 8.

approach remains an inept method of handling passenger rights because the simple fact that air carriers are involved in and sometimes cause delays is no reason to impose on air carriers the burden of exercising a regional governmental policy that has restorative social control features.

Recently, it has been suggested by Harold Caplan that a new regulation should be founded on the basis of explicating the rights and obligations of passengers and air carriers alike in the contract of carriage.³³⁹ It was proposed that this would ensure practical cooperation between the various actors and service providers that together determine whether flights would operate with delays.³⁴⁰ This approach has an advantage in that, as Caplan contends, it would provide a “basic Code of Conduct to guide national courts when deciding whether the carrier may be properly exonerated as permitted by article 19 of the Montréal Convention.”³⁴¹ Accordingly, the proposed outline of a potential new regulation would include elements that set out conditions for passengers, requirements of cooperation for other “actors and services,” a requirement that carriers keep passengers informed at all stages of a delay, and an outline of the duties of states to supervise the regulation.³⁴² It was also suggested that a procedural manual be adopted for major airports to effect the necessary cooperation.³⁴³

There is some merit in seeking the closer cooperation discussed in Caplan’s proposed method of regulation, but such a manual could create even more fertile ground for ambiguity, judicial creativity, and inconsistency than the EC Regulation has already spawned. If a regional European regulation is to remain at all, it should be simplified, minimized, and made the subject of supra-national control or repealed altogether to allow the mechanisms of the Montreal Convention to do what they were designed to do.

Assuming that the Montreal Convention and the EC Regulation can both stand together, the passenger protection policies of the EU would be best addressed by regulation of the air carrier by the state or a supra-national body that would require the

³³⁹ Harold Caplan, *Fulfilling the Contract of Carriage: How a New European Regulation Could Help Airlines and Their Passengers*, 36 ANNALS AIR & SPACE L. 515, 523 (2011).

³⁴⁰ *Id.* at 524.

³⁴¹ *Id.*

³⁴² *Id.* at 524–25.

³⁴³ *Id.* at 525.

air carriers to comply with the Montreal Convention or pay penalties to the state, or to a fund from which passengers can access assistance in times of need, rather than imposing the administrative burden of payments on air carriers that they must later recover from other “at fault” parties.³⁴⁴ One would think that the coordination of twenty-seven diverse nations’ compliance with such a regulation would immediately call for such simplification, but this has not been the case to date with the EC Regulation.³⁴⁵

As the comments in the April 11, 2011 Communication are limited regarding the higher level concerns expressed in this article regarding the compatibility of the EC Regulation and the Montreal Convention—it merely approves the *IATA Case*—the pessimistic outlook is that the EC is unlikely to use the review for anything more than refinement of the existing regime rather than using the opportunity to review the EC Regulation *ab initio*. This is so despite the mounting case law of questions referred to the ECJ inquiring as to the compatibility of the EC Regulation with other international agreements and the sharp increase in academic criticism of the EC Regulation, whether by way of citing the volcanic ash crisis as a strong impetus for reform, as discussed herein and echoed by Professor Schubert,³⁴⁶ or suggesting how a particular new approach to such regulations could help airlines and their passengers navigate their contract of carriage, as recommended by Caplan.³⁴⁷ Accordingly, the EC Regulation will likely continue to flout the otherwise agreed uniformity and exclusivity standard that has prevailed rather successfully, in one way or another, since 1929.

IX. CONCLUSION

The Montreal Diplomatic Conference in 1999 was a success because it literally adopted a new “Convention for the Unification of Certain Rules for International Carriage by Air.”³⁴⁸ The key theme of the Montreal Convention was “uniformity.” The Montreal Convention modernized the Warsaw Convention and its instruments and became a new single convention. As the number of states that ratified the Montreal Convention has in-

³⁴⁴ See Schubert, *supra* note 304, at 217.

³⁴⁵ See *id.*

³⁴⁶ *Id.*

³⁴⁷ Caplan, *supra* note 339, at 523.

³⁴⁸ See generally Montreal Convention, *supra* note 32.

creased, it has come to significantly minimize complexity caused by the patchwork of several parallel regulations from both inside and outside of ICAO states.

Article 19 of the Montreal Convention properly regulates delay. The wording of Article 19 followed that of Articles 19 and 20 of the Warsaw Convention without significant changes. Since neither the Warsaw Convention nor the Montreal Convention provides a definition of delay or states what constitutes compensable delay, these determinations must be made by national courts. The generally accepted rule when national courts determine compensable damage is to assess whether the air carrier took necessary measures that could reasonably be required to avoid the damage in each step subsequent to finding the cause of delay. If, at any point, the court believes the air carrier failed to take the necessary measures to avoid the damage, the court will hold the air carrier liable for the damage. However, if an air carrier proves that it took the necessary measures to avoid the damage, it will not be liable.

There are surely certain types of damage that the Montreal Convention does not cover. Examples of those are denied boarding and cancellation. They can be considered to amount to non-performance of the contract of carriage—a matter not regulated by the Warsaw System and open to the application of any specific national legislation. In contrast, delay is clearly regulated by the Montreal Convention, and, therefore, any legislation regulating international carrier delay that aims to supersede or contradict the conventional regime should be reconsidered pursuant to the exclusive remedies in the Montreal Convention.

To back away from the path down which the ECJ is leading international air law—a path where uniformity is giving way to ambiguity, complexity, and redundancy in regional legislation and jurisprudence—the ECJ *must* ensure its passenger-protection legislation *complements*, rather than *conflicts* with, the Montreal Convention system. Passenger protections can be advanced without doing so at the cost of international uniformity and comity.³⁴⁹ Reviews of the EC Regulation have identified that one of the consequential aims of the EC Regulation—reducing delays for passengers—has not been achieved, and it

³⁴⁹ See Dempsey & Johansson, *supra* note 139, at 224.

may not be possible through regulation alone.³⁵⁰ Thus, surely it is time to consider how decisive changes to the existing non-punitive, though quasi-compensatory, system of the EC Regulation may be effected to ensure air carriers are incentivized to fly regularly and on time.

At the same time, any changes to the EC Regulation should ensure that passengers do not experience windfalls for the mere fortuity of holding a ticket at the time an inevitable delay occurs, particularly if such delays do not financially impact them. Alternatively, if the EC Regulation must survive, detailed consideration should be given to the creation of an International Civil Aviation Compensation Fund to ensure that *force majeure* events, such as the volcanic ash airspace closures of 2010, do not bring with them the ability to financially incapacitate air carriers.

³⁵⁰ For example, the European Consumer Centre Network (ECC-Net) reported that “in 2010, the ECC-Net handled 71,292 cases, of which 44,000 were complaints. Approximately 33% of all recorded complaints were in the area of transport and of those 57% concerned air passenger rights. Of those only 31% could be resolved in an amicable manner, but where they were resolved consumers received on average approximately € 509. In comparison to 2009, 2010 witnessed an increase of 27% in the total number of complaints received by the ECC-Net. Importantly, air passenger rights (APR) complaints increased by 59% on the previous year. This indicates the impact the volcanic ash crisis had on the number of complaints received in 2010.” Clearly, EC 261/2004 is not built for task. See European Consumer Centre Network [ECC-Net], *ECC-Net Air Passenger Rights Report 2011—In the Aftermath of the Volcanic Ash Crisis*, at 4 (Oct. 2011), available at <http://www.euroconsumatori.org/download/16953v16953d69725.pdf>.

