European air passenger rights:

Montreal's damage and Brussels's compensation

Renzo van der Bruggen[*]

Abstract: *In the European context, two legal instruments are used to regulate compensation for damage occasioned by delay in the carriage by air of passengers. The way in which these two instruments interact is unclear, and some of the highest courts interpret them in contradictory ways. As a result, air passengers' rights are ambiguous, and air carriers' liability limits are vague. This paper addresses these issues from a damage/compensation point of view. A proposal is made that could create more legal certainty both for the hundreds of millions of passengers that are carried each year in the European Union (EU) and for the airlines that must bear the cost of these European air passenger rights – which equates to around four billion euros annually.*[1]

Keywords: Damage occasioned by delay in the carriage by air of passengers; European Air Passenger Rights Regulation; Montreal Convention for the Unification of Certain Rules for International Carriage by Air; Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air; exclusivity; uniformity; coexistence; identical damage; individual damage; further compensation; supplementary compensation; double recovery; deduction; air carrier's liability limits; material and non-material damages.

1. Introduction

The departures board reads "FLIGHT DELAYED". What now?

Don't panic – if a flight is delayed there is a cross-border legal instrument that provides you with air passenger rights. In fact, there are two – the worldwide Montreal Convention on international air carrier liability (MC)[2] and the European Air Passenger Rights Regulation (APRR).[3]

As a passenger, some questions immediately spring to mind. Are both legal instruments applicable? Can I combine them? Will I be compensated twice or are both instruments complementary? Can I make a choice about which of the two instruments I would prefer to use, or does one prevail over the other?

[*] Ph.D. Candidate / Graduate Teaching Assistant, Consumer Law Institute (University of Ghent & University of Antwerp), Financial Law Institute (University of Ghent), Mediator in Civil and Commercial Disputes, Renzo.vanderBruggen@UGent.be.
The author wishes to thank Professor Evelyne Terryn, Professor Ignace Claeys, Professor Marc Kruithof and Professor Reinhard Steennot for their valuable comments and suggestions.

[1] International Air Transport Association (IATA), "Passenger Rights", <https://www.iata.org/policy/Documents/pax-rights.pdf> (last visited 12 February 2017), pp. 1–3, at p. 1, para. 4.

[2] Convention for the Unification of Certain Rules for International Carriage by Air (signed at Montreal on 28 May 1999).

[3] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/1991, [2004] OJ L 46/1.

These questions are important, not only for you as a passenger but also for the whole airline industry. The MC is one of the most important multilateral conventions of international carriage by air and counts 122 State Parties (and one "Regional Economic Integration Organisation" – the EU).[4] The APRR is applicable to every flight departing from the EU and every flight flying towards the EU (the latter if the carrier is classed as a Community Carrier).[5] In 2015 more than 900 million passengers were carried by air in the EU.[6] The answers to the above questions will have a huge impact on the sector. Now it's time – panic!

This paper begins with an outline of the different views on the MC's exclusivity provision and introduces the two leading common law cases (section 2). It then discusses the European Court of Justice (ECJ)'s opposite interpretations on exclusivity and damage (3) and tackles the legal consequences concerning the extent of the air passenger's compensation and the limits of the air carrier's liability (4). After pointing out the views on material and non-material damages by United States judges and the ECJ (5), a model is proposed in an attempt to bring both instruments together in a more complementary and legally consistent way (6).

2. Exclusivity and coexistence

Article 29 MC states:

> *In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.*

The key question is whether or not article 29 gives the MC exclusive application, regardless of any other relevant legal instrument.

2.1 Uniformity

Uniform rules – In the early days of international air transport there were no uniform rules of law governing the carriage of passengers. Different legal systems approached particular situations in different ways. A set of uniform rules, with the force of international law, was very desirable. By providing such a set – the MC – many conflict-of-law questions were eliminated and most choice-of-law problems were side stepped.[7]

---

[4] Status of ratification: International Civil Aviation Organisation (ICAO), <http://icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> (last visited 12 February 2017).

[5] Article 2(c) APRR defines "Community Carrier" as "*an air carrier with a valid operating licence granted by [an EU] Member State in accordance with the provisions of [Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (Recast), [2008] OJ L 293/3]*".

[6] The total number of passengers carried by air is 918,209,300 (arrivals plus departures). Source: Eurostat, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=ttr00012> (last visited 12 February 2017).

[7] McClean (ed.), *Shawcross and Beaumont: Air Law* (Butterworths, loose-leaf), vol. 1, VII, paras. 124 and 126 (and references).

Article 29 MC's aim is to ensure that the liability regime of the MC is not undermined by any other provisions. In the event of damage, such as delay, other claims also exist in most cases, often based on national laws. Without article 29 MC, there is the risk that claimants could choose whichever legal basis appears to be the most favourable to them in their specific situation. As a result, the MC's application would largely be left to chance, and its purpose, the creation of legal unity, would be called into question.[8] The aim of the MC is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should only be permitted where the MC itself provides for them.[9]

If an international convention provides that its remedies are exclusive, then any inconsistent domestic law of ratifying states addressing the same subject must not be applied. This is particularly true with respect to international conventions that seek to harmonise private international rules across jurisdictions.[10]

2.2 Certain uniformity

Certain rules – The MC is a "*Convention for the Unification of Certain Rules for International Carriage by Air*". The title alone suggests that it does not tackle all issues (private rights) connected with international carriage by air but merely *certain rules* in particular need of standardisation. Other matters remain subject to the applicable national or supra-national (European) law. In the absence of any express statement to the contrary, national law will always apply where the MC is silent.[11]

To determine whether or not a convention is exclusive, it is important to consider the scope of the convention, its applicability, and the special issues that are dealt with in the convention. If the question at issue is not addressed by the convention, remedies may be found in applicable domestic law.[12]

The ECJ stated in its famous IATA case[13] that a delay in the carriage of passengers by air causes two types of damage. Since the MC only addresses one type of damage, according to the Court, the EU is therefore free to regulate the other type of damage (below, "3. The ECJ's two types of damage").[14]

[8] See Giemulla and Schmid (eds.), *Montreal Convention* (Wolters Kluwer, loose-leaf), Commentary, Chapter III, Article 29, paras. 1–2.

[9] *Sidhu and others v British Airways* [1996] UKHL 5, <http://www.publications.parliament.uk/pa/ld199697/ldjudgmt/jd961214/abnett02.htm> (last visited 12 February 2017), (vii), (a).

[10] Dempsey and Johansson, "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage", [2010] *Air and Space Law*, pp. 207–224, at p. 208 (and references).

[11] See Giemulla and Schmid (eds.), *Montreal Convention*, Commentary, Introduction, paras. 37 and 43.

[12] Dempsey and Johansson, "Montreal v. Brussels: The Conflict of Laws", p. 208 (and references).

[13] *International Air Transport Association (IATA) and European Low Fares Airline Association (ELFAA) v Department for Transport* (C-344/04) EU:C:2006:10.

[14] See also *IATA* (C-344/04), paras. 43–46.

2.3 Strict uniformity

United Kingdom – The Sidhu case[15] is one of the leading decisions on the interpretation of article 29 MC.[16] Although the regulatory framework in that case was the Warsaw Convention (WC),[17] which is the MC's predecessor, the same might well be said today of the MC.[18] The issue was whether the passenger, who suffered personal injury arising out of detention (by invading Iraqi forces) in the terminal at Kuwait but for whom no action lay under the WC, had an action in respect of that injury against the air carrier at common law.[19]

In the Sidhu case, Lord Hope stated that Chapter III of the WC ("*Liability of the Carrier*") is designed to set out all the rules relating to the liability of the carrier that are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies. He explains the structure of the provisions as follows: "*On the one hand the carrier surrenders his freedom to exclude or to limit his liability. On the other hand the passenger or other party to the contract is restricted in the claims which he can bring in an action of damages by the conditions and limits set out in the Convention.*" Exceptions, whereby a passenger could sue outside the Convention for losses sustained in the course of international carriage by air, would distort the whole comprehensive system, even in cases for which the Convention did not create any liability on the part of the carrier. It is very clear to Lord Hope that in all questions relating to the carrier's liability, the provisions of the Convention apply and the passenger does not have access to any other remedies.[20]

In his conclusions, Lord Hope admits that an answer that leaves claimants without a remedy is not at first sight attractive. However, he is convinced that "*in those areas with which [the Convention] deals — and the liability of the carrier is one of them — the [Convention] is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.*" The object and structure of the Convention made it clear to him that the WC was not designed to provide remedies against the carrier to enable all losses to be compensated. Instead, it was designed to define those situations in which compensation was to be available. Lord Hope wanted to respect the balance that was struck, in the interests of certainty and uniformity, and concluded: "*where the Convention has not provided a remedy, no remedy is available*."[21]

United States – In the US it is also clear that whenever a claim is based upon events occurring in the course of international transportation by air (within the meaning of the WC or MC), the liability rules of the Convention are exclusive and pre-empt all local and national laws. If the Convention governs a claim for damages, and liability cannot be established under its rules, passengers cannot bring an action for damages under any national, state or local law. In other words, if the Convention's liability rules do not recognise the claim, there can be no liability of the air carrier based on local or national

---

[15] *Sidhu* [1996] UKHL 5, <http://www.publications.parliament.uk/pa/ld199697/ldjudgmt/jd961214/abnett02.htm> (last visited 12 February 2017).

[16] Prassl and Bobek, "Welcome Aboard" in Prassl and M. Bobek (eds.), *Air Passenger Rights – ten years on* (Hart Publishing, 2015), pp. 1–21, at p. 17.

[17] Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed at Warsaw on 12 October 1929).

[18] Giemulla and Schmid (eds.), *Montreal Convention*, Commentary, Chapter III, Article 29, para. 2.

[19] Clarke, *Contracts of Carriage by Air*, 2nd edition (Lloyd's List, 2010), p. 8.

[20] See also *Sidhu* (1996) UKHL 5, (vii), (a).

[21] See also *Sidhu* (1996) UKHL 5, Conclusions.

law.[22] Even before the United States Supreme Court's decision in the – now leading – Tseng case,[23] most courts held that the Convention cause of action was exclusive and pre-empted all state law based causes of action.[24] Those cases decided before the Tseng case, permitting state law claims to be pursued even though the Convention was applicable (and thus rejecting the pre-emptive effect of its liability rules), have effectively been overruled by the US Supreme Court in Tseng and can no longer be regarded as authoritative.[25]

The arguments used in the Tseng judgment were similar to the Sidhu case – the latter was ruled only a few years earlier. The negotiating and drafting history; the unification goal; the textual emphasis; the comprehensive scheme of liability; and the intention to balance the interests of passengers and air carriers were again the decisive factors.

3. The ECJ's two types of damage

Identical damage and individual damage – As mentioned above, the ECJ stated in its IATA case that delay in the carriage of passengers by air causes two types of damage: (a) "identical damage" (damage that is almost identical for every passenger); and (b) "individual damage" (damage that is inherent in the reason for travelling). It is clear to the ECJ that the MC only addresses (b), individual damage. As a result, the EU is free to regulate (a), identical damage, the type of damage not tackled by the MC.[26]

The first type of damage (a) is damage that is almost identical for every passenger of the (excessively) delayed flight. Therefore, according to the ECJ, redress may take the form of standardised and immediate assistance or care for *everybody* concerned.[27] The APRR translates this assistance and care into an obligation for the operating air carrier[28] to offer, free of charge, meals and refreshments,[29] two telephone calls[30] and, if necessary, hotel accommodation[31] (transport between the airport and place of accommodation included).[32] Since the Sturgeon case,[33] passengers of a delayed flight are also

[22] See Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States* (Wolters Kluwer, 2010), p. 96 (including the many references to case law).
[23] *El Al Israel Airlines v Tsui Yuan Tseng* [1999] 525 U.S. 155.
[24] See Tompkins, *Liability Rules Applicable to International Air Transportation*, p. 97 (including the many references to case law).
[25] See Tompkins, *Liability Rules Applicable to International Air Transportation*, p. 99 (including the many references to case law).
[26] See also *IATA* (C-344-04), paras. 43–46.
[27] See *IATA* (C-344-04), para. 43.
[28] When the operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure for two, three, four hours or more, depending on the distance of the flight ((a) two hours or more in the case of flights of 1,500km or less; (b) three hours or more in the case of all intra-Community flights of more than 1,500km and of all other flights between 1,500km and 3,500km; (c) four hours or more in the case of all flights not falling under (a) or (b)). See article 6(1) APRR.
[29] In a reasonable relation to the waiting time. See articles 6(1)(i) and 9(1)(a) APRR.
[30] Or telex or fax messages, or e-mails. See articles 6(1)(i) and 9(2) APRR.
[31] Where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary. See articles 6(1)(ii) and 9(1)(b) APRR.
[32] See articles 6(1)(ii) and 9(1)(b) APRR.
[33] *Sturgeon and others v Condor* and *Böck and Lepuschitz v Air France* (Joined Cases C-402/07 & C-432/07) EU:C:2009:716.

entitled to financial compensation up to EUR 600 (the amount depends on the distance of the flight)[34] when they suffer a loss of time equal to or in excess of three hours.[35, 36] Lastly, when the delay is at least five hours the APRR requires that passengers must be offered the choice between the excessively delayed flight, or the reimbursement of the full cost of the ticket,[37] together with, when relevant, a return flight to the first point of departure.[38]

The second type of damage (b) is individual damage, inherent in the reason for travelling. This kind of redress, according to the ECJ, requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an *individual* basis.[39] It is this type of damage that the ECJ finds to be covered by the MC.

According to the Court, the MC drafters did not intend to shield carriers from any other form of intervention. An example of such an intervention was given by the Court: an action by the public authorities in order to (1) redress, (2) in a standardised and immediate manner, (3) the damage that is constituted by the inconvenience that delay causes, (4) without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts. Whether it is coincidental or not, the assistance and care of passengers as envisaged by article 6 APRR fits the given example perfectly. Therefore, according to the ECJ, assistance and care are not regulated by the MC.[40]

The ECJ concludes that both legal instruments are set up from different angles. The MC merely governs *the conditions under which the passengers concerned may bring actions for damages by way of redress on an individual basis*, that is to say for compensation, from the carriers liable for damage resulting from the delay. The APRR governs *the conditions under which damage linked to the abovementioned inconvenience should be redressed*. Because of this different set up, the Court is convinced that both instruments are complementary. In fact, the standardised and immediate assistance and care measures from article 6 APRR do not prevent passengers from being able to bring additional actions to redress that damage under the conditions laid down by the MC (should the same delay also cause them damage conferring entitlement to compensation). The system prescribed in article 6 APRR simply operates at an earlier stage than the system that results from the MC.[41]

---

[34] Article 7(1) APRR: (a) EUR 250 for all flights of 1,500km or less; (b) EUR 400 for all intra-Community flights of more than 1,500km, and for all other flights between 1,500km and 3,500km; (c) EUR 600 for all flights not falling under (a) or (b).

[35] "*Articles 5, 6 and 7 [APRR] must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 [APRR] where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. […]*" (*Sturgeon and Böck* (Joined Cases C-402/07 & C-432/07), dictum 2)

[36] Concerning the ECJ's error in calculating the three-hour timeframe, see van der Bruggen, "European air passenger rights: delay and cancellation", [2015] *European Journal of Consumer Law – Revue européenne de droit de la consommation*, pp. 107–146, at pp. 121–126.

[37] Article 8(1)(a), para. 1 APRR: reimbursement within seven days […] of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan.

[38] See articles 6(1)(iii) and 8(1)(a) APRR.

[39] See *IATA* (C-344/04), para. 43.

[40] See *IATA* (C-344/04), paras. 45–46.

[41] See *IATA* (C-344/04), paras. 44, 46 and 47.

Standardised? – For Dempsey and Johansson, the ECJ's reasoning is unacceptable. They find the APRR not to be standardised, but particularised. Passenger rights under the APRR vary, and depend upon the distance flown and the time of delay.[42]

It is indeed true that the APRR attaches different sorts of passenger rights to different sorts of situations (depending on the distance flown and the time of delay). Nonetheless, the question arises as to whether those particularised situations must therefore always result in (only) particularised damage. In other words, is it not possible that particularised situations result (partially) in damage that is almost identical for every passenger concerned – for example loss of time?

Also, the ECJ did not mix passengers from different situations (passengers who had flown different distances and/or had experienced different lengths of delay). The Court referred to "*passengers of an excessive delayed flight*". Therefore, the passengers in the Court's hypothetical flight must be, *per definitionem*, in the same situation. The flight's distance flown and time of delay would be the same for every passenger on board of this flight – for example, a 10-hour delay on a 5,000 kilometres flight. However, it is easy to imagine that even this hypothetical flight could result in damage that is not almost identical for every passenger. To illustrate, passenger A arrives 10 hours late at his home country X, while for passenger B country X was merely a stopover and he missed his connecting flight due to the 10-hour delay. For passenger B this can result in unforeseen hotel stays, transportation, etc. This example illustrates that non-particularised situations can also create particularised damage.

To conclude this point, one could say that particularised and non-particularised situations can both result in particularised and/or non-particularised damage. However, this discussion (particularised or not) only shifts the question from "*can the APRR and MC coexist?*" to "*can particularised and non-particularised situations/damage coexist?*"

(Supra)national law – Article 19 MC reads as follows:

> *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.*

What damage is to be compensated is not specified in the MC. This omission in the provisions must therefore be covered by national law (agreed upon parties, or applicable via private international law).[43] As a result, case law provides us with all kinds of possible damage caused by delay in the carriage of persons. For example: the costs of accommodation and food; the costs of a first class supplement (in order to get to the destination on time, albeit with a different air carrier); lost profit; uselessly wasted or affected holiday; illness contracted due to waiting for the delayed departure; etc.[44] For EU Member States this "national law" is in fact "European law"; they passed their competence on to the European Union. The EU itself, as a "Regional Economic Integration Organisation", also ratified the MC. By doing so, the EU made the MC an integral part of the EU community's legal order. Since the ECJ is

[42] Dempsey and Johansson, "Montreal v. Brussels: The Conflict of Laws", p. 219.
[43] See Giemulla and Schmid (eds.), *Montreal Convention*, Commentary, Chapter III, Article 19, para. 84 (and references).
[44] Examples given in Giemulla and Schmid (eds.), *Montreal Convention*, Commentary, Chapter III, Article 19, paras. 2, 84 and 85 (and references).

competent for interpreting the latter, the ECJ can interpret the MC. Just like any judge from the examples given, the ECJ can decide upon the sort of damage that is covered by the MC. In other words, the ECJ is competent and free to interpret the "*damage occasioned by delay in the carriage by air of passengers*" (cf. article 19 MC) as (only) "individual damage, inherent in the reason for travelling".

4. MC compensation and APRR compensation

Article 22 MC – After discussing the ECJ's two types of *damage* (section 3), this section examines the *compensation* that follows from both types of damage. In contrast to "damage", the extent of the "compensation" is specified and limited by the MC. Article 22, paragraph 1 MC states: *"In the case of damage caused by delay as specified in Article 19 [MC] in the carriage of persons, the liability of the carrier for each passenger is limited to [4,694]*[45] *Special Drawing Rights [or EUR 5,979.64]."*[46] This means that every judge or court can identify different types of damage that are covered by the MC, but eventually each damage must result in the compensation foreseen and specified by the MC. In other words, as regards delay in the carriage of air passengers under the MC, there can be different types of damage, but the compensation that follows from them must fit the MC.

As has been said, it is legally correct for the ECJ to identify two types of damage ((a) damage that is almost identical for every passenger; and (b) individual damage, inherent in the reason for travelling). As long as the total compensation for both these types of damage does not exceed the limits of article 22 MC, there is conformity. What does not conform to the MC is that the two types of damage do not result in the compensation foreseen by the MC. Both types of damage, the "identical" and the "individual", are "*occasioned by the delay in the carriage by air of passengers*" (cf. article 19MC). Both types of damage fall under article 19 MC and therefore the compensation for both types of damage must be limited in amount, according to article 22 MC. But let us come back to this shortly (below, "4.2 Supplementary compensation, *One ceiling for all?*").

4.1 Further compensation

Article 12 APRR – Article 12 APRR states that *"[the APRR] shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under [the APRR] may be deducted from such compensation."*

In the Sousa Rodríguez case[47] the following question was referred to the ECJ:

> *Is the term "further compensation", used in Article 12 [APPR], to be interpreted as meaning that […] 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 [APRR], even if such provisions have not been relied upon or, lastly, are the two*

[45] This is the reviewed limit. The initial number in the MC was 4,150.

[46] For a Special Drawing Rights (SDR) Currency Exchange Rate Conversion Calculator, see for example <http://coinmill.com/SDR_calculator.html#SDR=4694> (last visited 12 February 2017).

[47] *Sousa Rodríguez and others v Air France* (C-83/10) EU:C:2011:652.

aforementioned notions of further compensation compatible one with another? (*Sousa Rodríguez* (C-83/10), paragraph 24(2))

The Court translated this into two questions: (a) whether, in respect of the "further compensation" provided for by article 12 APRR, the national court may order the air carrier to pay for all types of damage arising from breach of contract in accordance with national rules; and (b) whether such "further compensation" may cover expenses incurred by passengers due to the failure of the air carrier to fulfil its obligations to assist and provide care under articles 8 and 9 APRR.[48]

At the outset, the ECJ points out that the APRR establishes minimum rights for air passengers. The "further" compensation granted to air passengers on the basis of article 12 APRR is intended to supplement the application of measures provided for by the APRR. This is in order to compensate air passengers for the entirety of the damage that they suffered due to the failure of the air carrier to fulfil its contractual obligations. The Court reminds us that the APRR's standardised and immediate measures do not prevent passengers from also bringing additional actions to redress damage under the conditions laid down by the MC.[49] It is therefore clear to the Court that article 12 APRR allows the national court to order the air carrier to compensate for damage arising from breach of the contract of carriage by air on a legal basis other than the APRR, in particular under the conditions provided for by the MC and national law.[50]

What the national court cannot do, according to the ECJ, is order an air carrier, on the basis of article 12 APRR, to reimburse passengers whose flight has been delayed or cancelled the expenses the passengers have incurred because of the failure of the carrier to fulfil its obligations to assist[51] and provide care[52] under articles 8 and 9 APRR. Air passengers' claims based on the rights conferred on them by the APRR cannot be considered as falling within "*further* compensation". However, there is nothing in the APRR that precludes the awarding of compensation (in respect of a failure to fulfil the obligations provided for by articles 8 and 9 APRR), if those provisions are not invoked by the air passengers.[53]

With the Sousa Rodríguez case clarifying the relationship between the APRR and the MC, a system becomes clear. Passengers of a delayed flight all suffer a same type of damage, damage that is almost identical for every one of them. The APRR requires that redress must be provided for this damage, in the form of standardised and immediate assistance and care (to be provided by the air carrier). If (some of) the passengers concerned also suffer individual damage, inherent in the reason for travelling, they can claim damages under the MC (or the applicable national law). Article 12 APRR allows this. The ECJ sees compensation for individual damage as supplementary to the compensation required in the APRR. According to the Court, the APRR provides for minimum rights/compensation, while the MC provides for supplementary, further compensation. If a carrier does not provide passengers with the APRR's minimum rights/compensation, passengers can still claim these damages afterwards, but not under

[48] See *Sousa Rodríguez* (C-83/10), para. 36.
[49] The ECJ refers to *IATA* (C-344/04), para. 47.
[50] See *Sousa Rodríguez* (C-83/10), paras. 37–39.
[51] The ECJ describes the obligation to assist as the reimbursement of the ticket or the re-routing to the final destination, while taking into account the cost of transfer between the airport of arrival and the originally scheduled airport.
[52] The ECJ describes the obligation to care as the provision in meals, accommodation and communication.
[53] See *Sousa Rodríguez* (C-83/10), paras. 42, 43 and 45.

the heading of "supplementary compensation". The passengers concerned have been denied their "minimum compensation", not their "further, supplementary compensation".

4.2 Supplementary compensation

Although Dempsey and Johansson state that the ECJ believes the APRR compensation to be supplementary to the damages recoverable under article 19 MC (instead of vice versa), they make two pertinent remarks concerning supplementarity. First, the ECJ's supplementary regime would mean that passengers are free to receive double recovery under both the EU rules and the MC. Second, the overall amounts recovered by a passenger may thus exceed the liability ceiling provided in the MC (4,694 Special Drawing Rights (SDR)), which is clearly antithetical to the liability ceilings set out in the MC.[54]

Double recovery – It is true, as Dempsey and Johansson state, that, as a rule, damage cannot be recovered twice. One cannot receive compensation twice for the same damage.[55] However, this rule only applies for the *same* damage. If someone suffers *two different types* of damage, that person can be compensated twice – once for every type of damage. The latter reasoning is exactly the one applied by the ECJ in the IATA case. The ECJ saw that passengers of a delayed flight suffered two types of damage: (a) damage that is almost identical for every passenger; and (b) individual damage, inherent in the reason for travelling. So, following the IATA reasoning, there is no double recovery. There are two types of damage, and each type is compensated only once (via its own specific regulatory framework).

Exceeding the MC's liability ceiling – In this context, I would like to come back to article 12 APRR and focus on its last sentence: *"[The APRR] shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under [the APRR] <u>may</u> be deducted from such compensation."* As already mentioned (above, "4. MC compensation and APRR compensation, *Article 22 MC*"), there is no problem in identifying two types of damage, as long as the total compensation for both does not exceed the limits of article 22 MC. Both types of damage fall under article 19 MC ("*damage occasioned by the delay in the carriage by air of passengers*") and therefore the compensation for both types of damage must be limited in amount according to article 22 MC. Following this reasoning, the text of article 12 APRR should be interpreted as "*The compensation granted under [the APRR] <u>must</u> be deducted from such compensation."* If not, the overall amounts recovered by a passenger may exceed the MC's liability ceiling.

Also, the APRR itself provides another argument in favour of the "*must* be deducted" theory. For passengers departing with an EU Community Carrier from an airport located in a third country and flying to an airport situated in the EU, the APRR's scope is limited. In accordance with its article 3(1)(b), the APRR is not applicable for passengers who "*received benefits or compensation and were given assistance in that third country"*. It seems that the EU also does not want to over- or double compensate for damage. If compensation has already taken place in a third country, the EU does not compensate the passenger for a second time. The first compensation is taken into account in order to calculate the (possible) second one.

[54] Dempsey and Johansson, "Montreal v. Brussels: The Conflict of Laws", pp. 219–220.
[55] Punitive, exemplary or other non-compensatory damages not taken into account.

The van der Lans case[56] contributes to this context. The ECJ stated that:

> *Although Article 3(1)(b) [APRR] does not require it to be proved that the passenger concerned has actually obtained the benefits or compensation and assistance in a third country, the mere possibility of entitlement cannot of itself justify the conclusion that the regulation is not applicable to that passenger.* (*van der Lans* (C-257/14), paragraph 27)

It is unacceptable for the ECJ that a passenger could be deprived of the APRR's protection solely on the ground that he may benefit from some compensation in the third country. There must be evidence that that compensation corresponds to the purpose of the compensation guaranteed by the APRR or that the conditions to which the beneficiary is subject and the various means of implementing it are equivalent to those provided for by the APRR.[57] Some questions arise: What if the third country compensation corresponds to another *purpose* than the one in the APRR? Does this also mean that both compensations compensate for different types of damage? If not, the same damage is compensated twice. If so, there is a risk that the total compensation for the different types of damage exceeds the limits of article 22 MC. The same can be said concerning the third country compensation's "conditions" and "means of implementing". If, for example, the harder conditions for the third country compensation are met by the passenger concerned (and thus he received the third country compensation), should he also be entitled to the APRR compensation, because the conditions are not equivalent? When the same (type of) damage is compensated twice, double recovery takes place. If it concerns compensation for different types of damage, article 22 MC's limits must be taken into account.

One ceiling for all? – However, is it correct to assume that the limits of article 22 MC must be taken into account when different types of damage are compensated? As has been mentioned, the ECJ is competent for interpreting the MC. In the IATA case, the ECJ interpreted the concept of "damage", as it occurs in articles 19, 22 and 29 MC, and divided it into two types of damage, one type being covered by the APRR, the other by the MC. Although not stated, this division also has an impact on article 22's liability ceiling. Since the MC does not cover "identical" damage, but only "individual" damage, the liability ceiling from the MC's individual damage system cannot be applied to the APRR's identical damage system. Each type of damage has its own compensation system. Rules – and ceilings – cannot be combined because every set of rules regulates a different kind of damage. Therefore, the liability ceiling from article 22 MC cannot apply to "identical" damage. It applies only to "individual" damage. This is the consequence of the IATA case reasoning.

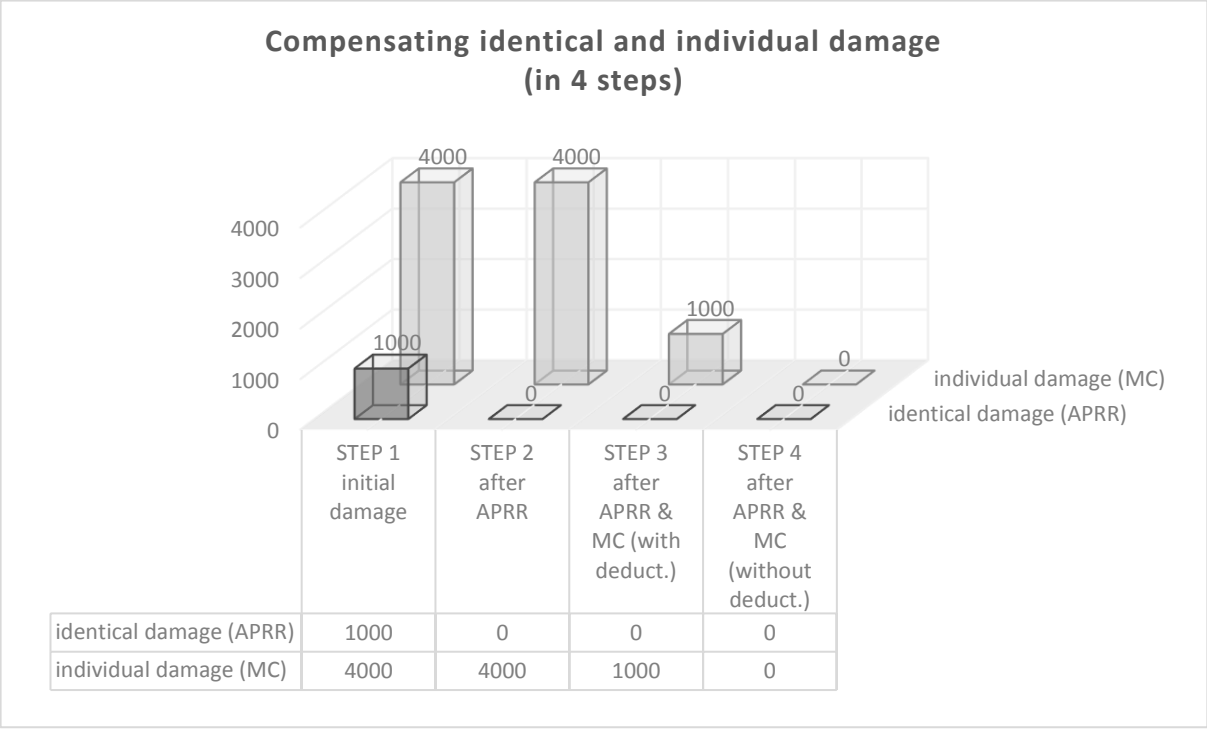
Deducting "APRR compensation" from "further compensation" via the MC? – In the ECJ's logic, whenever a passenger receives "further compensation" *via the MC*, one could say that the compensation granted under the APRR should *not* be deducted from it (cf. article 12 APRR), because both compensations compensate for a different type of damage. If there are two types of damage, each type has to be compensated. After setting up two separate systems in order to compensate for two separate types of damage, why would the ECJ deduct the one compensation from the other? Keep in mind that the ECJ is convinced of the APRR's aim to ensure a high level of protection for passengers[58]

[56] *van der Lans v Koninklijke Luchtvaart Maatschappij* (C-257/14) EU:C:2015:618.
[57] See also *van der Lans* (C-257/14), paras. 19–31.
[58] Preamble APRR, recitals 1 and 2; *van der Lans* (C-257/14), para. 26.

and wants to compensate air passengers *for the entirety* of their damage.[59] With deduction, one type of damage will not (or not fully) be compensated. Therefore, deduction can only take place if it concerns the same type of damage – which is not the case for the APRR vis-à-vis the MC.

Example: John's flight was delayed for 24 hours. Due to this delay he suffered 1,000 units of identical damage and 4,000 units of individual damage. The total amount of damage is 5,000 units (STEP 1). After the APRR compensates John's identical damage (1,000 units), his damage balance is down to 4,000 units of individual damage (STEP 2). With the MC in his hand, John claims the 4,000 units of individual damage in court. The judge deducts the 1,000 units of identical damage (compensated via the APRR) from the remaining 4,000 units of individual damage and grants the result of 3,000 units (4,000 – 1,000 = 3,000) to John. As a result, John gets compensated (via the MC) for the amount of 3,000 units, but remains uncompensated for 1,000 units of individual damage (STEP 3). If the judge had not deducted the APRR compensation from the MC compensation, he would have granted John 4,000 units. As a result, John would have received compensation (via the MC) for 4,000 units, and (with the APRR compensation for 1,000 units) end up with all his 5,000 units of damage being compensated (STEP 4). In this context, a judge should therefore not deduct the APRR compensation from the MC compensation.

The following graph illustrates this example:



Deducting "APRR compensation" from "further compensation" via national law? – How likely is it that the passenger concerned will receive "further compensation" via *national law* and that deduction takes place? Well, let us do the maths. Today there are 193 countries in the world.[60] The MC is ratified

[59] *Sousa Rodríguez* (C-83/10), para. 38.

[60] The number "193" does not reflect a political vision, nor is it a political statement. The number is chosen for its convenience and refers to the number of United Nations (UN) Member States. Source: UN, <http://www.un.org/en/sections/about-un/overview/index.html> (last visited 12 February 2017).

by 122 states.[61] Supposing that all of these 122 countries respect the MC's exclusivity, they will not have national law that supplements the MC (concerning air carriers' liability in the case of delay). Their national law is de facto the MC. Continuing on the ECJ's reasoning, APRR compensation (for "identical damage") will not be deducted from the "further compensation" received under these 122 countries' national law (de facto the MC), because the latter covers a different type of damage (de facto "individual damage"). So, after crossing out these 122 countries, deduction is now potentially possible in 71 countries. Moreover, if we subtract the number of countries that are not an MC State Party, but who are a WC State Party[62] (articles 19, 22 and 29 MC correspond with articles 19, 22 and 24 WC; by analogy, both conventions only cover "individual damage"), the possible number goes down to 34. In order to make deduction possible, the remaining 34 countries must not only compensate for the same type of damage as the APRR does, their awarded compensation/minimum rights must also be higher and supplementary to what is offered by the APRR. If not, it is impossible to deduct the APRR compensation (if X is lower than Y, one cannot deduct Y from X).[63] As a result, there is only a small chance that the APRR compensation could be deducted from the supplementary "further compensation" via national law.

5. Material and non-material damages for delay

US – Another big difference between the US and the EU is the recoverable damages. In the US, as stated by Tompkins, the damages recoverable as a result of delay are seldom of a significant amount and are restricted to economic "out-of-pocket expenses". If there is no economic loss, there is no recovery under the MC. In addition to the limitation of the air carrier's liability, the "all necessary measures" defence of article 19 MC *("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"*) plays a significant role in averting liability or minimising recoverable damages. As a result, recoverable damages in the case of delay are: telephone calls, meals, hotel accommodation, taxi and similar expenses.[64]

Case law showed that damages for emotional distress or injury (without physical or pecuniary loss), inconvenience (without economic damage), loss of a memorable vacation, etc. are not recoverable.[65] Some US courts have expressed uncertainty as to whether damages can be awarded for emotional

[61] Status of ratification (MC): ICAO, <http://icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> (last visited 12 February 2017).

[62] The WC is the ancestor of the MC and counts 152 parties (37 of them are not an MC State Party). Status of ratification (WC): ICAO, <http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf> (last visited 12 February 2017).

[63] For example: Passenger A received EUR 600 compensation for his delayed flight. According to his national law – not the MC – passenger A could only receive EUR 25 compensation for the same type of damage as covered by the APRR. The national law's EUR 25 is not *supplementary* to the APRR's EUR 600. The latter encloses the former. Therefore, the national law compensation (EUR 25) cannot be awarded in order to reduce the APRR compensation (EUR 600); the national law compensation simply cannot be awarded, because the damage is already compensated (by the APRR). Otherwise, there would be a problem of double recovery *for the same damage*.

[64] See Tompkins, *Liability Rules Applicable to International Air Transportation*, p. 237.

[65] For references to case law, see Tompkins, *Liability Rules Applicable to International Air Transportation*, pp. 237–239.

distress, or inconvenience, or whether proof of economic or physical injury caused by the delay is required, although these views are, according to Tompkins, in the minority.[66]

EU – In its Walz case[67] the ECJ had to answer the following question: *"[must] the term 'damage', which underpins Article 22(2) [MC] that sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, […] be interpreted as including both material and non-material damage?*" After repeating that the MC does not contain any definition of the term "damage" and the Court has jurisdiction to give a preliminary ruling concerning its interpretation,[68] the ECJ referred to article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts.[69] Since the latter text is drawn up by the International Law Commission of the United Nations, the ECJ holds that article 31(2) therefore provides the ordinary meaning of the term "damage" that is common to all the international law sub-systems.[70] As a result, the ECJ concludes that "damage" must be interpreted as including both material and non-material damage, and that this corresponds with the MC's spirit.[71]

Although the "damage" in the Walz case concerned "damage resulting from the loss of baggage", the interpretation can be transposed to damage occasioned by delay in the carriage of passengers. The ECJ clearly stated that "*the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage*".[72] Since Chapter III MC also encompasses the carrier's liability for damage occasioned by delay, the damage clarification in Walz also applies to this cause of damage. The latter was *expressis verbis* confirmed in the later Sousa Rodríguez case.[73]

6. Proposal: identical compensation (APRR) as part of individual compensation (MC)

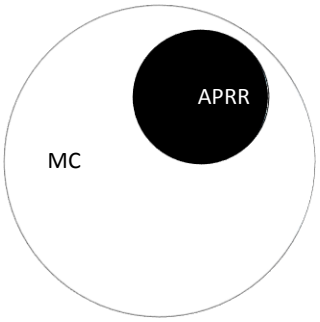
In what follows, a proposal is made that attempts to bring the conflicting views and legal instruments closer together. The problems that we encountered throughout this text are referred to, and the advantages that the proposal offers are explained.

Proposal – Considering "identical damage" as a subdivision of "individual damage" could create more legal consistency. When a flight is delayed, all the passengers individually suffer damage – individual damage. They may have a part of that individual damage in common with other passengers – identical damage. Nevertheless, this sort of common damage remains individual. As shown in the following diagrams, passengers A, B and C each suffered, individually, different forms of damage (the circles with different patterns). An element of their damage is common to all three (the solid black circle), but it remains part of the damage that they each suffered individually.

---

[66] See Tompkins, *Liability Rules Applicable to International Air Transportation*, pp. 238–239 (including references to case law).
[67] *Walz v Clickair* (C-63/09) EU:C:2010:251.
[68] *Walz* (C-63/09), paras. 20–21.
[69] UN, "Responsibility of States for Internationally Wrongful Acts", annex to General Assembly Resolution 56/83 of 12 December 2001, <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> (last visited 12 February 2017).
[70] *Walz* (C-63/09), paras. 27–28.
[71] *Walz* (C-63/09), paras. 30–38.
[72] *Walz* (C-63/09), paras. 25–26 and 29.
[73] *Sousa Rodríguez* (C-83/10), para. 41.

Since both the MC and the APRR are likely to remain in force, it is preferable to make both legal instruments work (in a complementary way). The requirement for more legal certainty leads to a need for one comprehensive framework that covers both instruments. The idea is that the MC and the APRR coexist, not next to each other but in relation to each other. Both instruments are interconnected – after all, they regulate the same issue. As described above, "identical damage" is to be seen as part of/a subdivision of "individual damage". If the APRR covers identical damage and the MC covers individual damage, the analogous conclusion is that the APRR compensation should be seen as a part of/a subdivision of the MC compensation. Where the MC regulates liability and compensation in general, the APRR regulates some specific situations and issues. The APRR's framework therefore falls within the MC's framework. In other words, the MC is the APRR's bigger picture and sets the boundaries. Within those boundaries specific topics can be regulated, which is exactly what the APRR does. The basic idea is visualised in the diagram on the right.



Exclusivity and coexistence – This proposal unites the "exclusivity" and "coexistence" views. In this proposal, the MC still sets the boundaries – exclusively. The APRR cannot go further than the MC. The MC exclusively regulates the framework, and the APRR can (only) manoeuver within that framework. At the same time, this proposal allows both instruments to coexist.

Compensation and ceiling – The liability ceiling provided in the MC is 4,694 SDR. According to this proposal, the APRR cannot go beyond this limit. What the APRR can do is concretise the MC compensation within those limits. In other words, the APRR compensation only works out and elaborates the practicalities of the right to be compensated, as set out generally and theoretically in the MC.

The MC's liability ceiling being applicable to the APRR also addresses some concerns from within the aviation industry. In the APRR, some of the carriers' obligations are unlimited. When Iceland's Eyjafjallajökull volcano erupted on 14 April 2010, many European countries had to close their airspace for several days. On top of the significant impact on airlines' costs and revenues (the Association of European Airlines (AEA) evaluated loss of revenue at EUR 850 million for the period from 15 April to 23 April), airlines also faced the cost of providing unlimited hotel accommodation and other assistance to stranded passengers. The AEA has estimated that it cost just under EUR 200 million for passenger

rights exposure for their member airlines (who provided 40–50% of the seats in the affected airspace).[74]

In the European Commission's proposal for amending the APRR, a limited number of measures are proposed in order to better take into account the financial capacities of the air carriers. One of those measures is that in the case of delays and cancellations due to extraordinary circumstances, the air carrier may limit the right to accommodation to three nights with a maximum of EUR 100 per night and passenger.[75] As stated above, it would be more legally consistent to limit the passenger rights and compensation in the APRR to that agreed in the MC (4,694 SDR).

Further compensation and double recovery – The author's proposal sees the APRR compensation as a part of/a subdivision of the MC compensation. As a consequence, both the APRR and the MC cover "*damage occasioned by delay in the carriage by air of passengers*" (cf. article 19 MC). The APRR simply compensates a specific part of this damage; the rest is covered by the MC. In the words of the ECJ, *"[the] APRR simply operates at an earlier stage than the […] MC*".[76] If a passenger suffers damage, a first part will be compensated by the APRR. Afterwards, if further compensation is needed – if there is another part left – the passenger can turn to the MC, which can compensate for the rest of the damage. In this sense, the proposal also tackles the fear of double compensation. After the APRR has compensated its own specific part of the damage, only the remaining part can be compensated by the MC. The same (part of the) damage will not be compensated twice.

Damage and deduction – Since both the APRR and the MC cover "*damage occasioned by delay in the carriage by air of passengers*" (cf. article 19 MC), consequently a correct deduction should take place. The proposal helps to interpret article 12 APRR's deduction rule: the part of damage that is compensated by the APRR should be deducted from the total amount of "damage occasioned by delay in the carriage by air of passengers", not from the remaining part of damage (which is to be compensated by the MC). In other words, the APRR compensation (part a) must not be deducted from the MC compensation (the remaining part, part b), but from the total amount of compensation for the damage occasioned by delay (part a + part b = total compensation).

Author's objective – In this paper the author has attempted to clarify the interconnection between the MC and the APRR, together with the legal consequences. His objective has been to lead the reader from "certain uniformity" to "certain certainty".

Renzo van der Bruggen

---

[74] See also IATA, "Economic briefing May 2010: The impact of the Eyjafjallajökull's volcanic ash plume" <https://www.iata.org/whatwedo/Documents/economics/Volcanic-Ash-Plume-May2010.pdf> (last visited 12 February 2017), pp. 3–4; Kallas, "The impact of the volcanic ash cloud crisis on the air transport industry", SEC(2010) 533, Information note to the European Commission (27 April 2010), para. 14.

[75] See also Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM(2013) 130 final, Explanatory Memorandum, section 3.3.2, second bullet.

[76] See *IATA* (C-344/04), para. 46.