Anonymised version

Case C-70/20

Request for a preliminary ruling

Date lodged:

12 February 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

30 January 2020

Appellant on a point of law:

YL

Respondent in the appeal on a point of law:

Altenrhein Luftfahrt GmbH

In the case of the applicant party YL [Austria] […] against the defendant Altenrhein Luftfahrt GmbH, Vienna Airport [Austria] […], seeking EUR 68 858 plus interest and costs and a finding (value in dispute: EUR 5 000) in the proceedings concerning the applicant's appeal on a point of law against the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as an appellate court, of 29 April 2019 […] upholding the judgment of the Handelsgericht Wien (Commercial Court, Vienna) of 23 January 2019 […], the Oberster Gerichtshof (Supreme Court) has […] made the following

Order:

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU: **[Or. 2]**

Does a hard landing, albeit still made within the normal operating range of an aircraft, which results in injury to a flight passenger constitute an accident within the meaning of Article 17(1) *of the Convention for the Unification of Certain*

Rules for International Carriage by Air concluded on 28 May 1999 in Montreal, signed on 9 December 1999 by the European Community and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001?

II. [Suspension of proceedings] […]

Grounds:

1. Facts:

On 20 March 2014, the applicant was a passenger on one of the flights carried out from Vienna to St. Gallen/Altenrhein (Switzerland) by the defendant. During the landing, the flight recorder recorded a vertical load of 1.8 g. Such a landing may be subjectively perceived as hard. However, having regard also to a measuring tolerance viewed from an aeronautical perspective, it was (still) within the aircraft's normal operating range, which, according to the aircraft manufacturer's specifications, extends to 2 g. No failing on the part of the pilot could be established. From an aeronautical point of view, a harder landing is more likely than a soft one at St. Gallen/Altenrhein airport because of its alpine situation.

2. Arguments of the parties and forms of order sought: **[Or. 3]**

The applicant claims that she sustained a spinal disc injury during the landing and seeks compensation pursuant to Article 17 of the Montreal Convention (MC). She claims that the 'hard' landing constitutes an accident within the meaning of Article 17 of the MC.

The defendant contends that the landing was made within the aircraft's normal operating range. It was therefore a typical event during a flight and not an accident within the meaning of Article 17 of the MC.

3. Proceedings to date:

The court of first instance dismissed the applicant's claim, ruling that liability under Article 17 of the MC presupposed an accident which could be assumed only in the case of an 'extraordinarily hard landing'. That was not the case here. Typical air transport events, such as a hard landing or hard braking, did not justify liability because the passenger (by which a typical passenger was clearly meant) would be aware of such events and would expect them.

The appeal court upheld that decision. Although, exceptionally, a hard landing might also constitute an accident within the meaning of Article 17 of the MC, this presupposed that the tolerance limits specified by the manufacturer for the load on the landing gear and load bearing members were clearly exceeded. An operationally normal landing, as occurred in this case, could not be regarded as an accident.

The Oberster Gerichtshof has to rule on the applicant's appeal on a point of law against that judgment. The applicant still considers that an accident occurred which justifies the defendant's liability. If that is correct, the Oberster Gerichtshof would have to set aside the decisions of the lower courts. In that event, the court of first instance **[Or. 4]** would have to establish whether the applicant's spinal disc injury was indeed occasioned by the landing. That question has not been examined so far, as the lower courts immediately ruled out the possibility of the defendant's liability owing to the non-existence of any accident.

4. Legal bases:

4.1. The defendant's liability must be assessed in accordance with the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention, MC). That convention is applicable because the flight's place of departure and place of destination were situated in different Contracting States (Austria, Switzerland), with the result that there was international carriage for the purposes of Article 1 of the MC.

4.2. The Montreal Convention was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001. It (therefore) forms an integral part of the EU legal order, because the European Court of Justice has jurisdiction to give a preliminary ruling concerning its interpretation (CJEU, judgment of 26 February 2015, Case C-6/14, *Wucher Helicopter GmbH*, EU:C:2015:122).

4.3. The dispute concerns the interpretation of Article 17(1) of the MC:

> *The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*

According to that provision, the carrier is liable up to the maximum limit laid down in Article 21(1) of the MC (which is not reached by the applicant's present claim) **[Or. 5]** irrespective of whether it was at fault, against which liability it can claim only contributory negligence under Article 20 of the MC. Article 17 of the MC corresponds, in essence, to Article 17 of the *Warsaw Convention for the Unification of Certain* Rules *Relating to International Carriage by Air*, with the result that the case-law relating to that provision can continue to be relied on.

5. Grounds of the request for a preliminary ruling:

5.1. The incurring of liability under Article 17(1) of the MC requires a personal injury (death or bodily injury) caused by an 'accident'; the occurrence of the accident must be a *conditio sine qua non* for the injury. The existence of an 'accident' is therefore crucial. That concept is not defined in the convention. The

issue which arises is whether it covers a landing which is 'hard' but which is (still) made within the 'normal operating range'. This means that the load on the landing gear and load bearing members remains below the tolerance limits above which, according to the manufacturer, a technical review of the aircraft is necessary. In that context, the present Chamber understands 'hard' as describing a landing which, unlike in the case of a 'soft' landing, is not largely absorbed by the aircraft's landing gear and can be perceptibly felt by the passenger.

5.2. The European Court of Justice held in its decision of 19 December 2019 in Case C-532/18, *GN*, EU:C:2019:1127, paragraph 34, that reference must be made to the 'ordinary meaning' of the concept of 'accident', which, in that context, was an 'unforeseen, harmful and involuntary event' ('*un évènement involontaire dommageable imprévu*'). That wording seems to indicate that it depends on the **[Or. 6]** passenger's expectation of the event ('*imprévu*' (unforeseen'), not '*imprévisible*' ('unforeseeable'). The US Supreme Court uses similar wording to that of the European Court of Justice. It understands an 'accident' to be an 'unexpected or unusual event or happening that is external to the passenger' (*Air France v. Saks* [1986], https://supreme.justia.com/cases/federal/us/470/392/). At least according to that wording ('or'), it is sufficient that the event was unexpected, it did not also have to be unusual. Decisions of the German Bundesgerichtshof which focus (solely) on the 'suddenness' of the event also appear to point in the same direction [...].

Such terminology could be understood to mean that what matters is not the objective unpredictability or unusualness of the event causing the injury but solely that the event came from outside, happened suddenly and the passenger did not expect it (see *Lord Scott in House of Lords, Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, paragraph 14: 'It is important to bear in mind that the "unintended and unexpected" quality of the happening in question must mean "unintended and unexpected" from the viewpoint of the victim of the accident. It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the "accident" and it is from his perspective that the quality of the happening must be considered.').

According to that (broad) interpretation, there would therefore be no accident only where the injury was caused by the **[Or. 7]** normal operation of the aircraft, without there being any occurrence of a sudden and, for the passenger, surprising event. That is particularly the case where normal cabin pressure results in injury (*Air France v. Saks*: Loss of hearing; *Deep Vein Thrombosis and Air Travel Group Litigation*: Thrombosis). On the other hand, even light or moderate turbulence (which, as such, is neither unusual nor unforeseeable) may be classified as an accident in respect of injuries caused by it. […]. The same should probably also apply to a hard landing which (as here), although it (still) comes within the aircraft's normal operating range, occurs suddenly and unexpectedly

and (according to the applicant's assertions, which are still to be examined) results in a corporal injury.

5.3. On the other hand, French case-law focuses, in particular, on the unpredictability of the event (Cour de cassation […]: '*évènement extérieur, soudain et imprévisible*'). It would therefore have to be an event which is not only external ('*extérieur*'), sudden ('*soudain*') and unexpected from the passenger's viewpoint, but also unforeseeable ('*imprévisible*'), and therefore objectively unusual. Consequently, there would be no compensation for injuries which arise from events which occur as part of the aircraft's normal and foreseeable operation (see, to that effect, Advocate General *Saugmandsgaard Øe*, Opinion in Case C-532/18, point 44, who, though, also interprets the US and German case-law to that effect). **[Or. 8]**

A similar interpretation is also advocated in the German legal literature: Liability could not be based on typical, operationally necessary and accepted events […]. A hard landing could therefore be classified as an accident only where the tolerance limits specified by the manufacturer for the load on the landing gear and load bearing members had been clearly exceeded […].

The District Court for the Southern District of New York […] and the Landgericht Düsseldorf […] decided to that effect that the airline was not liable in the case of a 'routine landing' (District Court) or a landing made 'within the bounds of normality' (Landgericht).

5.4. The latter position is clearly based on the assessment that events which (still) form part of an aircraft's normal operation do not generally result in an injury, even if they occur suddenly and unexpectedly. That is particularly the case for 'hard landings' (see *Truitt*, Plain Talk about Plane Claims: An Air Carrier Claims Examinees Handbook, Journal of Air Law and Commerce […]: '… airplanes are not as strong as people — meaning that if a hard landing did not hurt the airplane, it would not have been capable of harming occupants.'). If an injury does, however, occur, this is generally attributable to the passenger's particular disposition, which is a further **[Or. 9]** cause of the injury additional to the event. Such a disposition would not, then, come within the airline's area of risk (see in general, to that effect, Advocate General *Saugmandsgaard Øe*, Opinion in Case C-532/18, point 44).

6. The Oberster Gerichtshof considers that that position is, in principle, to be preferred. Although it has the effect that the tolerance limits specified by the aircraft manufacturer indirectly determine the interpretation of the concept of 'accident', it strikes an appropriate balance between the interests of the passenger and those of the airline, prevents liability from being limitless (see judgment in Case C-532/18, paragraph 37) and also has the advantage of simplicity by virtue of the linkage to specific tolerance limits. However, in the absence, for the above reasons, of an *acte clair*, the Oberster Gerichtshof, as the court of last instance, is required to submit a request for a preliminary ruling.

II. [procedural statement] […]

[signatures] […]