Anonymised version

Case C-606/20

Request for a preliminary ruling

Date lodged:

17 November 2020

Referring court or tribunal:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

9 November 2020

Applicant and appellant:

EZ

Defendant and respondent:

IBERIA Lineas Aereas de Espana, Sociedad Unipersonal

I.

[…]

Landgericht Düsseldorf (Düsseldorf Regional Court, Germany)

Order

In the case

of Mr EZ, […],

applicant and appellant

[…]

IBERIA Lineas Aereas de Espana, Sociedad Unipersonal, […] Madrid, Spain,

defendant and respondent

[…]

the 22nd Civil Chamber of Düsseldorf Regional Court

further to the hearing of 23 October 2020

[…]

made the following order: [Or. 2]

The proceedings are stayed.

The following question on the interpretation of EU law is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU:

> Is the first sentence of Article 20 of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999, approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 and entering into force on 28 June 2004, to be interpreted as meaning that the carrier is wholly or partly exonerated from its liability for loss of baggage pursuant to Article 17(2) of the Montreal Convention if a passenger transports new or as-new electronic items such as a compact camera, tablet (iPad) and wireless headphones in his checked baggage instead of his hand baggage without informing the carrier of this, even though it would have been possible and reasonable for the passenger to carry those electronic items with him in his hand baggage?

Grounds:

I.

The […] applicant, EZ, seeks compensation from the defendant airline IBERIA Lineas Aeras de Espana, S.A., Operadora, Sociedad Unipersonal for loss of baggage under the Montreal Convention (MC).

The applicant reserved with the defendant a flight operated by the latter from Düsseldorf to Panama City via Madrid on 29 December 2018 […]. At the beginning of his journey, the applicant checked in a travelling bag at Düsseldorf Airport. He did not carry any hand baggage with him. In addition to clothing, the checked baggage contained the following items, amongst others things: **[Or. 3]**

– 1 x Cybershot compact camera, brand: Sony, model: DSX-RX 100 II, market value: EUR 674.10, purchased: summer 2018

– 1 x tablet, brand: Apple, model: iPad, Cellular 128 GB memory capacity, colour: grey, market value: EUR 512.10, purchased: June 2018

– 1 x wireless headphones, brand: Beats by Dr. Dre, colour: matt black, market value: EUR 314.91, purchased: October 2018

The applicant could have easily carried the aforementioned items in his hand baggage. However, he did not do so because he had always transported such items in his checked baggage and had never lost any baggage up to that point.

The contents of the travelling bag (clothes, camera, tablet and headphones) had a total value of EUR 2 268.10. The applicant seeks compensation for this damage up to the liability limit under Article 22(2) of the MC, in the amount of 1 288 Special Drawing Rights, which corresponds to an amount of EUR 1 383.00.

By judgment […] delivered on 24 January 2020, the Amtsgericht (Local Court) allowed the action for compensation for loss of baggage only in the amount of EUR 720.47 and dismissed it with regard to the compact camera, iPad and wireless headphones.

As its grounds, the Local Court stated that the applicant was 100% contributorily negligent pursuant to the first sentence of Article 20 of the MC, with the result that claims for compensation for loss of baggage are excluded. The aforementioned items (camera, tablet, headphones), which were practically new and not insignificant in value, constitute 'valuables'. In modern-day mass air travel, passengers always have to accept the possibility of their baggage being lost and should therefore always transport such valuables in their hand luggage.

The applicant […] brought an appeal against the judgment at first instance of 24 January 2020 – which was served on him on 5 February 2020 – in due form and within the prescribed period and **[Or. 4]** provided grounds of appeal […] [procedural details] in due form and within the prescribed period.

On appeal, the applicant asserts that the Local Court misinterpreted the first sentence of Article 20 of the MC. He submits that that sentence should be interpreted in the light of the purpose of the MC – to ensure protection of the interests of consumers and to strike an equitable balance of interests. Nowadays, submits the applicant, electronic items such as compact cameras, tablets and headphones are no longer 'valuable items' but mere 'everyday items' that are used on a daily basis, do not have an extraordinary value and often have only a short to medium lifespan. He takes the view that such electronic items should therefore be treated in the same way as clothing, sunglasses and the like, which could also be transported in checked baggage.

The applicant therefore requests, on appeal, that the judgment at first instance of 24 January 2020 be altered and that he be awarded additional compensation of EUR 662.53 in respect of the aforementioned items.

II.

Before the appellate court, the defendant contends that the appeal be dismissed. It defends the judgment at first instance.

The success of the applicant's appeal depends crucially on the question set out at the beginning of this order.

More precisely:

1.

Regulation (EC) No 2027/97 implements the relevant provisions of the MC as regards the liability of air carriers for the carriage of passengers and their baggage by **[Or. 5]** air in the territory of the European Union. It is apparent from Article 3(1) of that regulation that the liability of EU air carriers in respect of passengers and their baggage is to be governed by all provisions of the MC relevant to such liability. The MC was signed by the European Community on 9 December 1999 and approved on its behalf by the Council of the European Union on 5 April 2001. It entered into force, so far as the European Union is concerned, on 28 June 2004. Since the MC has, as from that date, been an integral part of the EU legal order, the Court of Justice of the European Union has jurisdiction to give a preliminary ruling concerning its interpretation (see CJEU, judgment of 19 December 2019 – C-532/18, *GN* v *ZU*, NJW 2020, pp. 381, 382, paragraphs 29 et seq.).

2.

It is common ground that the applicant is entitled, pursuant to Article 17(2) of the MC, to claim compensation from the defendant, as the carrier, for the loss of baggage that occurred after baggage check-in at Düsseldorf Airport on 29 December 2018. The only point of contention between the parties is whether the applicant is 100% contributorily negligent pursuant to the first sentence of Article 20 of the MC because he transported a compact camera, an iPad and headphones – which were in the lost suitcase – not in his hand baggage but in his checked baggage.

Pursuant to the first sentence of Article 20 of the MC, the carrier is to be wholly or partly exonerated from its liability for loss of baggage if and to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.

The decisive question in the present case is therefore what the MC means when it requires, for the purposes of exoneration owing to the contributory negligence of a passenger, that 'the damage was caused or contributed to by the negligence or other wrongful act or omission' of that passenger. **[Or. 6]**

The concepts contained in the MC must be interpreted uniformly and autonomously, so that, when interpreting these concepts, it is necessary to take into account not the various meanings that may have been given to them in the internal laws of the Member States of the European Union, but rules of interpretation of general international law, which are binding on it. In that regard, Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, which codifies general international law binding on the European Union, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see CJEU, judgment of 19 December 2019 – C-532/18, *GN* v *ZU*, NJW 2020, pp. 381, 382, paragraphs 31 et seq.).

In accordance with the third paragraph of the preamble to the MC, the States Parties, recognising 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution', decided to lay down a system of strict liability for air carriers. A system of that kind implies, however, as is apparent from the fifth paragraph of the preamble to the MC, that an 'equitable balance of interests' be maintained, in particular the interests of air carriers and of passengers (see judgment of 19 December 2019 – C-532/18, *GN* v *ZU*, NJW 2020, pp. 381, 382, paragraph 36).

In order to maintain such balance, the MC provides that, in certain circumstances, the carrier may be exonerated from its liability. The first sentence of Article 20 of the MC provides that, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger, the carrier is to be wholly or partly exonerated from its liability to that passenger. Those limits enable passengers to be compensated easily and swiftly, yet without imposing a very heavy compensation burden on air carriers, which would be difficult to determine and to calculate, and would be liable to undermine, and even paralyse, the economic activity of those carriers (see CJEU, loc. cit., paragraphs 39 et seq.). **[Or. 7]**

The condition for the carrier's exoneration from liability in the first sentence of Article 20 of the MC, that 'the damage was caused or contributed to by the negligence or other wrongful act or omission' of the passenger, must therefore be interpreted in accordance with the ordinary meaning given to those words and with the scheme of the MC and in the light of its object and purpose, namely to ensure a high level of protection of consumer protection interests while establishing an 'equitable balance of interests' between the interests of passengers and those of airlines.

The ordinary meaning given to the contribution to the cause of damage at least negligently in cases where baggage is lost is likely to be that it presupposes a disregard for the level of care objectively required.

In the German domestic case-law and German literature, the view is taken that, in today's mass transport, passengers must always accept the possibility of their checked baggage getting lost, meaning that it constitutes in principle a gross breach of passengers' duty of care in their own affairs under the first sentence of Article 20 of the MC if they transport their valuable items in their checked baggage and not in their hand baggage […]. Accordingly, German case-law has assumed contributory negligence where, for instance, a passenger has transported valuable camera equipment […] in his checked baggage even though it was possible and reasonable for him to transport it in his hand baggage and the checked baggage was subsequently lost.

Situations in which passengers transport conventional valuables such as cash, securities, gold jewellery and the like in their **[Or. 8]** checked baggage instead of their hand baggage would not pose a problem for the present Chamber. They will generally be considered to involve a significant degree of contributory negligence on the part of the passenger, as a result of which the carrier is wholly or partly exonerated from its liability […]. However, in situations where electronic items are transported, as in the present case, the question of contributory negligence requires a more differentiated approach.

Many electronic items such as smartphones, tablets, laptops, compact cameras and so forth have become 'everyday objects' in many sections of the population in recent years and have become widely used. The prices of electronic items have fallen continuously in recent decades despite constant technological improvements. Many people use such electronic items on an almost daily basis. Even if the prices of such devices when new sometimes reach values of up to EUR 1 000.00 – as also shown by the present case – they often have only a limited lifespan and service life and quickly lose their value on the second-hand market. Such electronic items are therefore not regarded as conventional valuable items in large sections of the population. This could also militate in favour of a finding that the applicant's conduct (depositing the camera, tablet and headphones in checked baggage) does not constitute contributory negligence and of full compensation of the applicant for those lost items.

On the other hand, the value of as-new electronic items in particular is not insignificant – as shown by the present case. Electronic items such as smartphones, compact cameras, tablets and headphones are often small and portable and can generally be transported by passengers in their hand baggage easily. It is also true that baggage is lost on a regular basis in modern-day mass air travel, so passengers should in principle always expect that it could happen. In order to establish an equitable balance of interests between the interests of passengers – who enjoy the benefits of modern-day mass air travel, too – and those of airlines, passengers could be reasonably expected always to carry such items in their hand baggage, so as to prevent **[Or. 9]** airlines from being exposed to large claims for financial compensation in cases involving the loss of baggage.

This question has not been clarified to date by the EU courts – as far as can be seen – and the correct interpretation cannot be clearly determined either, with the result that this question had to be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.

III.

Owing to the reference to the Court of Justice of the European Union, the case had to be suspended in accordance with Paragraph 148 of the Zivilprozessordnung (Code of Civil Procedure).

[…]