Anonymised version

Case C-532/18

Request for a preliminary ruling

Date lodged:

14 August 2018

Referring court:

Oberster Gerichtshof (Supreme Court, Austria)

Date of the decision to refer:

26 June 2018

Applicant:

GN, represented by the father HM

Defendant:

ZU, acting as administrator in the insolvency of Niki Luftfahrt GmbH

REPUBLIC OF AUSTRIA

OBERSTER GERICHTSHOF (SUPREME COURT)

[...]

The Supreme Court, as the court of appeal [...] in the case of the applicant GN, represented by the applicant's father HM, [...] against the defendant ZU, acting as administrator in the insolvency of NIKI Luftfahrt GmbH, Vienna 3, [...] concerning EUR 8 500 (plus interest and costs) and a declaration (amount in dispute: EUR 16 000), on the appeal on a point of law brought by the applicant against the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna), as appellate court, of 30 August 2016, [...] which amended the interim and partial judgment of the Landesgericht Korneuburg (Regional Court, Korneuburg) of 15 December 2015, […]

decided:

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

Where a cup of hot coffee, which is located on the shelf of the seat in front of a person in an aircraft in flight, for unknown reasons slides and tips over, causing a passenger to suffer scalding, does this constitute an 'accident' triggering a carrier's liability within the meaning of Article 17(1) of *the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed on 9 December 1999 by the European Community on the basis of Article 300(2) EC and approved on behalf of the European Community by Council Decision 2001/539/EC of 5 April 2001 (Montreal Convention, MC)*?

II. The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union. [...]

Grounds:

1. Facts:

In August 2015, the then six-year-old applicant and her family flew from Mallorca to Vienna on an aircraft belonging to the now insolvent defendant airline. Approximately one hour after take-off the air hostess served beverages. At that time, the applicant sat in the window seat and was leaning (across the armrest to her father's adjacent seat) into her father's hip and chest area. The applicant's father took a cup of orange juice and a paper cup (without a cover) of freshly brewed, hot coffee, which he deposited on the tray fixed to the seat in front of him. **[Or. 3]** Subsequently, he asked for some milk. At that moment, the air hostess noticed that the cup of coffee began to slide. She drew the father's attention to this, but he could no longer prevent the cup from tipping over and pouring over his right thigh and the applicant's chest. The applicant thereby suffered second-degree scalding across the chest at the front and left of the middle of a total extent of approximately 2 to 4% of body surface. It could not be established that the tray was defective and crooked from the start, or that the coffee cup began to slide due to a vibration of the aircraft.

2. Arguments of the parties and forms of order sought

After continuing proceedings, interrupted by the initiation of insolvency proceedings vis-à-vis the insolvency administrator of the airline, the initial defendant, the applicant claims compensation for pain and suffering and compensation for disfigurement of EUR 8 500 for enforcement of the entitlement to cover in the airline's aviation liability insurance as well as a declaration of liability for any future consequences of the accident. The applicant submits that the defendant is liable under Article 17(1) of the Montreal Convention (MC).

Under that convention, the carrier is liable for damage sustained in case of death or bodily injury of a passenger.

The defendant claims that liability under Article 17 MC cannot succeed, due to the absence of an accident, as no sudden and unexpected event led to the sliding of the coffee cup and the spillage of the coffee. Should an accident have occurred, it was not caused by the defendant or its **[Or. 4]** employees. In any event, no hazard typically associated with aviation had materialised.

The objection initially raised by the defendant alleging contributory negligence on the part of the applicant is no longer the subject matter of the proceedings.

3. Previous proceedings:

The court of first instance found that the request for payment was, in principle, well founded. The fact that the cup had tipped over and the hot liquid had spilled over the applicant, is to be treated as an accident within Article 17 MC, as this is attributable to an unusual, external event. This has also given rise to the realisation of a hazard typically associated with aviation, as an aircraft produces differing, operationally inherent inclinations, which (in general) could result in objects placed on a horizontal surface in the aircraft starting to slide, without any special manoeuvres being necessary for that to occur. According to the court of first instance, there was no fault on the part of the defendant, as serving hot drinks without a cover is common practice and socially appropriate.

The Court of Appeal dismissed the action. Article 17(1) MC only covers such accidents which are triggered by a hazard typically associated with aviation. It is for the applicant to adduce evidence to that effect. As the cause of the cup's tipping over could not be determined, the applicant was unable to adduce such evidence. Pursuant to Article 17(1) MC, the defendant's liability is therefore excluded.

It is against that ruling that the applicant's appeal on a point of law is directed, requesting restoration of the judgment at first instance.

4. Legal basis: **[Or. 5]**

4.1. The defendant's liability is to be judged in accordance with *the Convention for the Unification of Certain Rules Relating to International Carriage by Air* (Montreal Convention, MC). The application of that convention results from the fact that the flight's place of departure and place of destination were located in different States Parties (Spain, Austria), thus establishing international carriage within the meaning of Article 1 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, with the

result that the European Court of Justice is called upon to give a preliminary ruling concerning its interpretation (judgment of the European Court of Justice, *Wucher Helicopter GmbH*, Case C-6/14, paragraph 33 with further references).

4.3. At issue is the interpretation of Article 17(1) 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.*

Pursuant to that provision, the carrier shall be liable up to the limit of liability under Article 21(1) MC, which is not reached in the present action — regardless of its fault, whereby it can only object to its liability by means of one — in this case no longer relevant — plea of contributory negligence under Article 20 MC.

5. Grounds for the order for reference: **[Or. 6]**

5.1. According to Article 17(1), the condition of liability is injury (death or bodily injury) which was caused by 'an accident'; the accident must be a *conditio sine qua non* of the damage [...] . According to the convention's wording, the decisive factor is therefore the existence of an 'accident'.

Neither the Montreal Convention nor the older Warsaw Convention (WA) contains a definition of this term. According to the case-law developed with regard to the Warsaw Convention, it is a sudden event based on an external factor resulting in the passenger's death or injury. The person concerned suffers damage which he did not expect [...] .

5.2. In the present case, the applicant sustained bodily injury, because a cup of hot coffee, which had been placed in front of her during the flight, began to slide for unknown reasons. According to the referring court, that is, in any event, a sudden event based on an external factor, which caused the applicant to suffer unexpected damage. That suggests the applicability of Article 17(1) MC.

5.3. However, it is disputed whether the term 'accident' and therefore liability is to be limited to cases where a hazard typically associated with aviation was realised.

5.3.1. Such an (additional) requirement is supported in particular by the majority of German legal doctrine and jurisprudence [...] . **[Or. 7]** According to that view too, the hazards and dangers do not need to be unique and occur in no other area of life but only during the carriage by air; in any event, it is sufficient if a hazard arises from an aircraft's typical structure or condition or from aeronautical equipment used when embarking on or disembarking from the aircraft. The aircraft's operation (for example, the impact of changes in altitude or speed) is probably also to be equated to its structure and condition. The reasons given are that a shift to the carrier of the general risk in life, which every person has to bear,

cannot be desired and it was also not the intention of the States which participate in the Montreal Convention [...] .

However, this view leads to significant legal uncertainty. Admittedly, the German Bundesgerichtshof (Federal Court of Justice) [...] does not (or no longer) require that a hazard materialises which occurs exclusively in the field of aviation; it is sufficient if a connection of hazards exists. However, this raises the question of the burden of proof: According to general principles, each party must prove any facts favourable to its legal position. The burden of proving the realisation of a hazard typically associated with aviation is therefore on the injured party. In the present **[Or. 8]** case, owing to the fact that the cause of the accident is unexplainable, the claim should be dismissed.

5.3.2. According to another view, by contrast, the realisation of a hazard typically associated with aviation is not important. Supporters of this view refer in particular to the wording of Article 17(1) MC, which does contain such a requirement; such a restriction was also not intended when the convention was drawn up [...] . In addition, if such a requirement were to be accepted, at least on the basis of a strict interpretation — which, however, the German Federal Court of Justice no longer supports to such a stringent extent (see 5.3.1. above) — it would exclude almost every event of damage from the regime of liability under Article 17(1) MC, since (apart from the aircraft's crash) it could occur at least in a similar way in different circumstances of life [...] . The rule of liability would then be at risk of being rendered nugatory. In any event, there should be no concerns as regards limitless liability, because in the event of contributory negligence of the injured party, the carrier would be able to exonerate itself pursuant to Article 20 MC.

On that basis, spillages of hot beverages or food onto the body of a passenger are recognised as accidents in parts of the legal doctrine, the consequences of which the carrier is automatically liable for [...] . Therefore, the defendant's liability in the present case should be answered in the affirmative.

6. The latter considerations are, in principle, convincing. **[Or. 9]**

Apart from the wording of Article 17(1) MC, which cites only an 'accident' as a basis of liability, but not also the realisation of a hazard typically associated with aviation, Article 29 MC, in particular, is to be referred to: Under that provision, 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, [...] .'

The purpose of that rule is the creation of a uniform regime of liability, which makes recourse to national law unnecessary (see paragraph 5 of the preamble to the Montreal Convention: '[...] for further harmonization and codification [...]'). That excludes a strict interpretation of Article 17(1) MC. According to such an

interpretation, damage which is not based on the realisation of a hazard typically associated with aviation would not be compensated in any event, not even where they resulted from the fault of the carrier's servants or agents. Therefore, the legal situation under the Montreal Convention differs from that of the Warsaw Convention (WC). That is because Article 24 (WC), which corresponds to Article 29 (MC), did not exclude the application of national law in general, but (in so far as is relevant to the present case) only 'in cases concerning Article 17'. If the latter provision was interpreted strictly, recourse to national law was possible in other situations — which were then not 'cases concerning Article 17' [...] . That is now excluded by Article 29 MC. **[Or. 10]**

This suggests, based on the wording of Article 17 MC, that one should only require the existence of an accident and dispense with the (additional) requirement of the realisation of a hazard typically associated with aviation. As an intermediate solution, it may, however, be considered that an accident on board or while using embarking and disembarking equipment may justify liability, but the carrier may exempt itself from that liability if it can prove that, in that particular case, there is no connection with the aircraft's operation or condition. This would in particular exclude cases from liability in which an accident was solely attributable to the conduct of a third party, which is not connected to the aircraft's condition or operation. In the present case, that view would also lead to the defendant's liability as the cause of the accident could not be determined.

7. In any event, there is no *acte clair* with regard to the interpretation of Article 17 MC. Therefore, as the court of last instance, the Supreme Court is obliged to make a request a preliminary ruling.

II. Pending the decision of the Court of Justice of the European Union the appeal proceedings shall be interrupted.

[...]