

Anonymised version

Translation

C-93/20 — 1

Case C-93/20

Request for a preliminary ruling

Date lodged:

25 February 2020

Referring court:

Bezirksgericht Schwechat (District Court, Schwechat, Austria)

Date of the decision to refer:

13 February 2020

Claimant:

JU

Defendant:

Air France Direktion für Österreich

ORDER

CASE:

Claimant

JU

8010 Graz

[...]

[...]

[...]

[...]

Defendant

Air France Direktion für Österreich [...]

1070 Vienna

[...]

[...]

[...]

Concerning:

EUR 639.00 together with costs and interest (compensation/warranty claim)

I.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is Article 31(2) in conjunction with Article 31(4) of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) to be interpreted as meaning that damage to checked baggage which occurred on board the aircraft or during a period within which the checked baggage was in the charge of the carrier must, in the case of a delayed delivery, be notified to the carrier, at the latest, within seven days from the date on which the baggage was placed at the disposal of the person entitled to delivery, and that, otherwise, no action is to lie against the carrier save in the case of fraud on its part?
2. (If the answer to the first question is no:) **[Or. 2]**

Is Article 31(2) in conjunction with Article 31(4) of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) to be interpreted as meaning that damage to checked baggage which occurred on board the aircraft or during a period within which the checked baggage was in the charge of the carrier must, in the case of a delayed delivery, be notified to the carrier within 21 days from the date on which the baggage was placed at the disposal of the person entitled to delivery, and that, otherwise, no action is to lie against the carrier save in the case of fraud on its part?

II.

[...] [Stay of proceedings]

GROUND

The relevant facts and the subject matter of the dispute in the main proceedings

On 24 June 2018, the Claimant took flight AF 1139 from Vienna to Paris, which she had booked with, and which was operated by, the Defendant as carrier. The baggage checked in to this flight by the Claimant in Vienna at the Defendant's check-in counter, a black suitcase, was handed back to her belatedly on 3 July 2018, after her return to Vienna. The suitcase itself, as well as an electric toothbrush contained therein, were irreparably damaged during the period in which it was in the charge of the Defendant. The Claimant first notified the

Defendant of the damage to the suitcase and the electric toothbrush by letter of 20 July 2018.

In bringing the action in the main proceedings, the Claimant sought compensation amounting to EUR 639.00 plus costs and interest due to the damage to the suitcase and the electric toothbrush. In summary, she argued that the suitcase and the electric toothbrush had been delivered to her severely damaged. She said that she had taken photographs of the damage and had made the claims within the 21-day period in accordance with Article 31 of the Montreal Convention ('MC') following the late delivery of the baggage.

The Defendant disputed the claim and contended that the action should be dismissed and the Claimant should bear costs. The Defendant argued, essentially, that the Claimant was not claiming damages due to the delayed [Or. 3] delivery of the baggage, but solely due to the damage to the baggage. In such a case, the Defendant argued, a complaint was required to be made to the carrier, at the latest, within seven days from receipt in accordance with the first sentence of Article 31(2) MC. If that period of notification was not complied with, no action was to lie against the carrier in accordance with Article 31(4) MC. The Claimant should therefore have lodged a substantiated complaint by 10 July 2018 at the latest; however, she had failed to do so.

Applicable EU law and provisions of EU law concerned

Both France and Austria ratified the Montreal Convention on 28 June 2004. As a regional economic organisation, the European Community together with the Member States of the European Union deposited the instrument of ratification on 29 April 2004, which means that the Convention also entered into force for the European Union on 28 June 2004 [...]. That means that the Court of Justice of the European Union is competent to interpret the Montreal Convention. In its case-law the Court, when requested by national courts or tribunals to issue a preliminary ruling, regularly interprets the Montreal Convention (Cases C-344/04 *IATA and ELFAA*; C-63/09 *Walz*; C-6/14 *Wucher Helicopter and Euro-Aviation Versicherung*; C-240/14 *Prüller-Frey*).

The Montreal Convention includes the following provisions:

- Article 17(2): The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

- Article 19: 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.
- Article 31(2): In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case [Or. 4] of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.
- Article 31(4): If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Assessments made by the courts involved up to this point and positions of the parties

The Claimant's position is that it must be inferred from the second sentence of Article 31(2) MC that, in the case of late delivery of baggage, complaints must be made within 21 days, irrespective of the type of damage. The Defendant on the other hand contends that, in the case of damage to baggage, the person entitled to delivery must notify the carrier of the damage, at the latest, within seven days. The Defendant associates the bases for a claim provided for in Articles 17 and 18 MC relating to damage to cargo and baggage, on the one hand, and those in Article 19 MC relating to damage occasioned by delay, on the other, with the two periods of notification laid down in Article 31(2) MC. It infers from this that that provision must be interpreted as meaning that physical damage sustained must be asserted within 7 days in accordance with the first sentence *leg. cit.*, and damage due to delay must be asserted within 21 days in accordance with the second sentence *leg. cit.*

During the proceedings at first instance, the referring court, as the court of first instance, essentially endorsed the Defendant's view and dismissed the application. It stated that the purpose of the notification obligation was to provide certainty for the carrier within a reasonable timeframe as to whether claims would be asserted against it. Moreover, in the case of damage to baggage, once the baggage had been handed over the carrier had scant opportunity to determine whether any damage asserted had in fact arisen before delivery. Given that damage to baggage is generally immediately noticeable by the recipient upon receipt, a short period of notification of seven days was stipulated for any compensation claims based on damage to baggage. If baggage which was delivered late was damaged, recipients would have the same opportunity to check for damage from the time of delivery as they would have had if it had been delivered on time. If, even in such cases, where

the damage specifically did not result from a delay, the longer period of 21 days was applied, this would lead to an unjustified differentiation. The second sentence of Article 31(2) MC should therefore be interpreted as referring only to damage occasioned by delay. According to its purpose, Article 31(2) referred to different causes of damage and provided for different periods of notification for these **[Or. 5]**. On the one hand — for the reasons referred to above — a shorter period of notification for damage to baggage and, on the other, a longer period of notification for damage caused by delay.

The Claimant appealed against that judgment. On appeal, the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) set aside the contested judgment and referred the case back to the court of first instance for a fresh judgment after further proceedings. It pointed out in that regard that Article 31(2) MC did not mention [actual] damage and damage occasioned by delay but provided for different time limits for damage to checked baggage and to cargo. Ultimately, that provision provided that, in the case of delay, the time limit for notification was 21 days. The association with separate bases for a claim, as suggested by the Defendant, was not apparent from the wording. Similarly, an assessment in accordance with the spirit and purpose of the notification did not provide any clarity in favour of a particular interpretation. The spirit and purpose of the notification of damage was to provide clarity for the carrier within a reasonable timeframe as to whether claims would be asserted against it under the Montreal Convention in order to enable the carrier to take timely measures towards the preservation of evidence. The purpose of the obligation to notify was therefore to provide clarification [...]. It was meant to allow the carrier to preserve evidence in that regard in good time [...]. Therefore, if the carrier were aware of the damage or delay, there would be no obligation to notify since the *raison d'être* of the damage notification was to inform the carrier as soon as possible of the damage and to enable it to investigate the damage; if the carrier were aware of the damage, a damage notification would effectively be a mere formality [...]. The carrier's situation was to be construed differently in the case of damage to baggage, on the one hand, and late delivery of baggage, on the other. If baggage was delivered on time but the carrier was unaware of the damage to it, the carrier would proceed on the assumption that it had duly performed the contract of carriage. In the event of damage, the carrier therefore had a legitimate interest in being informed promptly of any improper performance as, only then, would it be in a position to preserve any evidence. If, however, delivery of the baggage was already delayed, the carrier should expect to receive a complaint in respect of any damage occasioned by delay for that reason alone. For that reason alone would the carrier then seek to preserve any evidence. It also appeared reasonably possible that, in the event of late delivery, the probability of damage would be higher. For that reason, too, it was in the interest of the carrier to preserve evidence. The obligations placed on the recipient to make the carrier aware of the fact that it might face damages claims by checking the baggage/cargo particularly quickly and by therefore quickly notifying the carrier of the damage **[Or. 6]** applied to a lesser degree if the contract of carriage by air had been breached by the carrier than if the contract had been performed on time. There was therefore a strong

argument in favour of allowing notification within 21 days in the event of delay for any damage to baggage also. In the view of the appeal court, it was not necessarily readily apparent why, in the case of delay, as here, the carrier would have an interest in being informed of damage occasioned by delay only within 21 days, but within a period of 7 days in the event of damage to baggage. On the other hand, the principle of equal treatment of passengers was an argument in favour of a uniform application of the period of notification to all passengers in the event of damage occasioned by delay, since, from the point of view of passengers, there was no reason to grant a much longer period of notification for damage caused to baggage in the event of a delayed delivery.

Final remarks

The outcome of the proceedings in question depends on the interpretation of Article 31(2) and (4). It is apparent from the facts that the Claimant submitted her notification after expiry of the 7-day period, but within the 21-day period. If, in a situation such as that in the present case, the 7-day period were applicable, Article 31(4) would have the effect that no action would lie against the Defendant and the action would therefore have to be dismissed.

[...] [Eligibility to make a reference for a preliminary ruling]

[...] [Stay of proceedings]

District Court Schwechat, [...]

Schwechat, 13 February 2020

[...]

[...]