TATLA

TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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'Where a cup of hot coffee, which is placed on the tray table 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 Montreal Convention?'

1. This was the question referred to, and answered by the Court of Justice of the European Union in its recent decision in **GN v ZU (C-532/18)**

2. Before considering the case in greater detail, it is worth pausing to remember why the CJEU was being asked to give a ruling on the substantive operation of the Montreal Convention 1999 at all. On 28th May 1999 the EC became a signatory to the Convention. Council Regulation (EC) 2027/97 (as amended by EC Regulation 892/2002), incorporated the Convention into EU Law. The purpose of the Regulation is to ensure full alignment between the Convention and EU Law. By virtue of section 2 of the European Communities Act 1972, the Montreal Regulation has direct effect in all EU Member states including (for the time being) the United

Kingdom. The CJEU is therefore competent to give any ruling on the meaning and interpretation of the Montreal Convention in cases referred to it by Member States (Finnair, C-258/16).

3. A curious by-product of the incorporation of the Convention into EU law is that the CJEU is entirely free to reach its own interpretation on the meaning of its provisions and is not bound to follow the approach taken by domestic courts. In fact, whilst the CJEU notionally recognises the need for a consistent interpretation between signatories to the convention, it has held, in terms, that the concepts contained in the Montreal Convention must be interpreted "*uniformly and autonomously*" and that the CJEU "*must 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*" (Guaitoli & others C-213/18). This has led to the peculiar situation in which the CJEU, when asked to interpret the meaning of the word '*accident*' in Article 17 (as in the present case) does not even refer to the decision of the United States Supreme Court in *Saks v Air France* (470 US 392 (1985)), despite it being recognised by the Courts of virtually all signatory states *worldwide* as the leading authority on the correct definition to be given to the wording of Article 17.

4. Returning to the facts of GN, the Claimant, a young girl, had been scalded when a cup of coffee was placed on the tray table in front of her father but tipped over and spilled its contents onto her chest. The issue which had arisen in the domestic courts (in this case in Austria) stemmed from the fact that it could not be established why the cup of coffee had slipped off the tray table. It may have been because of a defect in the table or simply due to the ordinary vibration of the aircraft. The Defendant carrier argued that "*no sudden and unexpected incident led to the sliding of the cup of coffee and the spillage of its contents"* and that in these circumstances, there could be no liability because an Article 17 'accident' required "*the materialization of a hazard typically associated with aviation".*

5. Giving its ruling, the CJEU noted that "*Since the concept of 'accident' is not defined anywhere in the Montreal Convention, reference must be made to the ordinary meaning of that concept in its context, in the light of the object and purpose of that convention*". The Court considered that the ordinary meaning given to the concept of 'accident' is that of an "*unforeseen, harmful and involuntary event*". It recognised that the word accident had been chosen by the contracting parties instead of the broader word 'event', but also that since the Convention contained a general '*exoneration clause'* in Article 20 (effectively a contributory negligence provision, but with the possibility of the passenger being 100% to blame) there was no need to impose any additional criteria, including the need for the accident to relate to a hazard typically associated with air travel or even to relate to the operation or movement of the aircraft. The Court thought that Article 17 and 20, read together "*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"

6. The CJEU's judgment is not a model of clarity. As is often the case, it was driven more by the underlying purpose of the Convention and its incorporation into the EU legal order (in particular the protection of consumers/passengers) than it was by the close textual analysis of the Convention itself.

7. Would the outcome be the same in the domestic Courts in England & Wales? I am confident that it would. The definition in *Saks* requires an "*unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft*". The English Courts have also rejected the requirement that the accident should relate to a risk inherent in air travel (*Morris v KLM* (2001) 3 WLR 351) and have instead focused on the need for externality (as distinct from the passenger's own conduct or reaction to the normal operation of the aircraft) and on the usual or unexpected characteristics of the relevant event (which must be judged from the passenger's perspective: *Re: DVT Air Travel Litigation* (2006) 1 AC 495).

8. However, the key aspect of the Saks definition which provides the solution to the facts of the present case is the observation of Connor J in the United States Supreme Court that "*Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger".* This explains the different outcome in two cases (one English, one American) decided on very similar facts.

9. In *Buckley v Monarch Airlines* (2013) 2 Lloyds Rep 235 a cup of hot chocolate had slid off a tray table and spilled onto the Claimant's lap, scalding her. The judge found as a fact that the tray table had not been defective and rejected the Claimant's evidence that she had not touched the cup before it fell. Accordingly, the triggering event was the Claimant's own conduct in knocking the cup and was not therefore external to her.

10. By contrast, in *Lugo v American Airlines* (686 F Supp 373) a decision of the US District Court of Puerto Rico, a cup was placed on a seat-back table and slid off, spilling over the claimant's lap and causing injury. There was no suggestion that the Claimant herself had knocked the cup. The Court held that:

    "When a person boards a place, he does not expect that a cup of coffee will spill over his lap. The usual operation of an airplane does not require passengers to be spilled with hot coffee.

    …

    [The Claimant's] injuries did not result from her internal reaction to normal airplane operations. Her injuries were caused by an unexpected event external to her, i.e. coffee spilling over her body.

    …

    American wants us to go back in the chain of causes resulting in the spill, find as a matter of fact that the plane's inclination caused the spill, and hold that the inclination is not an article 17 accident. We need not go that far back in the chain. "Any injury is the product of

a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger". The coffee spill is a link that meets that description". (emphasis added)

11. Now that the Court has given its ruling in **GN v ZN** the case will be referred back to the Austrian Courts for disposal. Assuming that there is no finding of fact that the Claimant herself knocked the cup, it seems likely that judgment will be entered in her favour.

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