OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 6 March 2008 [1]

1. Regulation No 261/2004 [2] provides for compensation to be paid to air passengers in the event of a flight cancellation. However, it does not apply to passengers departing from a third country to a Member State on a non-Community carrier. The Oberlandesgericht (Higher Regional Court) Frankfurt am Main (Germany) essentially asks the Court whether a *return* flight from a third country to a Member State should be regarded as part of a flight departing from that Member State, at least where the outward and return flights were booked at the same time.

Relevant legislation

Regulation No 261/2004

2. Regulation No 261/2004 aims to increase the protection available to air passengers in the Community. [3] It repeals Regulation No 295/91, [4] whose scope was limited to providing, for scheduled flights only, reimbursement or re-routing, free services and minimum levels of compensation for passengers denied boarding. The new regulation covers all commercial flights and addresses flight cancellations and delays in addition to boarding refusals. It provides for compensation for passengers not only when they are denied boarding, but also when their flight is cancelled.

3. Recital 1 in the preamble to Regulation No 261/2004 states that Community action in the field of air transport should aim at ensuring a high level of passenger protection and take full account of the requirements of consumer protection in general.

4. Recital 6 states that '[t]he protection accorded to passengers departing from an airport located in a Member State should be extended to those leaving an airport located in a third country for one situated

1 — Original language: English.

2 — Regulation (EC) of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1). The regulation came into force on 17 February 2005.

3 — See in particular recitals 1 to 4 in the preamble.

4 — Council Regulation (EEC) of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5).

in a Member State, when a Community carrier [5] operates the flight'.

5. Article 3, headed 'Scope', defines the personal scope of the regulation. Article 3(1) provides that the regulation is to apply:

'(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier'.

6. At this point it is appropriate to note a difference between the wording of Article 3(1) in most language versions of the regulation and the German version, which forms the basis of the referring court's question.

7. Most language versions use a construction similar to the phrase 'passengers departing from an airport', which appears in the English version of Article 3(1)(a) and (b). [6] The German version however includes the word 'flight', rendering the phrase as 'passengers who embark on a flight at airports …'. [7]

8. As France correctly points out in its written observations, the difference in wording between the German and other language versions does not alter the actual sense of the provision. Embarkation on a flight is the normal preliminary to departure. When passengers depart from an airport, it is understood and obvious that they do so by embarking on a flight.

9. Under Article 5(1)(c), passengers whose flight is cancelled have, under certain circumstances, the right to compensation by the air carrier in accordance with Article 7.

5 — A 'Community carrier' is defined in Article 2(c) as an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1).

6 — The French wording is 'passagers au départ d'un aéroport', and the Spanish, 'pasajeros que partan de un aeropuerto'. Equivalent formulations are found, for example, in the Dutch, Italian and Portuguese versions.

7 — 'Fluggäste, die auf Flughäfen … einen Flug antreten.' Similar wording is used in the German version of recital 6.

10. Article 7(1) specifies the amounts of compensation to which passengers are entitled if they are denied boarding or their flight is cancelled. Under Article 7(1)(c), EUR 600 is payable to passengers in respect of flights of more than 3 500 kilometres which are not intra-Community.

11. Article 12(1) states that the regulation should apply without prejudice to a passenger's rights to further compensation, from which compensation granted under the regulation may be deducted.

12. Finally, Article 17 provides:

'The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and results of this Regulation, in particular regarding:

— …

— the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" to which Directive 90/314/EEC [8] applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,

— …'

The Montreal Convention [9]

13. The Montreal Convention, to which the Community is a signatory, modernises and consolidates the Warsaw Convention. [10] It seeks, inter alia, to protect the interests of consumers in international carriage by air and to provide equitable, restitutionary compensation. [11]

14. Article 1(1) applies the convention to international carriage by aircraft. Article 1 continues:

8 — Council Directive of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59).

9 — Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999, approved on behalf of the Community by Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38).

10 — Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929.

11 — See the second and third recitals in the preamble.

'2. For the purposes of this Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. …

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts …' [12]

The main proceedings and the reference made

15. Dr Schenkel booked a round trip in March 2006 from Düsseldorf via Dubai to Manila and back, flying with Emirates Airlines ('Emirates'). [13] Emirates is not a Community carrier.

16. The return flight from Manila on 12 March 2006 was cancelled. Dr Schenkel flew back to Germany two days later.

17. He subsequently filed a claim with the Amtsgericht (Local Court) Frankfurt am Main for EUR 600 as compensation for the flight cancellation, relying on Articles 5(1)(c) and 7(1)(c) of Regulation 261/2004.

18. Whether he is entitled to that compensation turns on whether he is within the personal scope of the regulation as defined in Article 3(1).

19. Before the Amtsgericht, Dr Schenkel maintained that the outward and return flights were both parts of one flight. Thus, the cancellation related to a flight which began in Germany. [14] Emirates contended

12 — This article is almost identical to Article 1 of the Warsaw Convention.

13 — I use this abbreviation to denote both the company Emirates Airlines and Emirates Airlines Direktion für Deutschland, the party in the main proceedings.

14 — In respect of the domestic proceedings, it should be remembered that the German version of Article 3(1) uses the phrase 'passengers who embark on a flight at airports'.

that the outward and return flights were to be regarded as two separate flights. As a non-Community carrier, it was thus not liable to pay compensation for the cancelled return flight from Manila.

20. The Amtsgericht upheld Dr Schenkel's claim. It considered that the term 'flight', as used in (the German version of) Article 3(1)(a) of Regulation No 261/2004, encompassed both the outward and return flight, at least when both were booked at the same time.

21. Emirates appealed to the referring court.

22. The referring court is inclined, since the aim of Regulation No 261/2004 is to protect consumers, to regard the outward and return flights of a journey as one flight when they are booked at the same time. It notes that, under the Warsaw and Montreal Conventions, carriage by successive carriers constitutes one international carriage when regarded by the parties to the contract as a single operation, as when both parts of a round trip are booked simultaneously. The regulation supplements those conventions by providing immediate compensation for passengers faced with a flight cancellation. The protection it affords would lag behind that of the conventions if outward and return flights booked at the same time were not considered to be one flight.

23. On the other hand, the referring court notes that the term 'flight' is used elsewhere in the regulation to mean the part of a journey by air made from one place to a particular destination.

24. The referring court therefore asks the Court:

'Is Article 3(1)(a) of [Regulation No 261/2004] to be interpreted as meaning that "a flight" includes the flight from the point of departure to the destination and back, at any rate where the outward and return flights are booked at the same time?'

25. Emirates, Dr Schenkel, France, Greece, Poland, Sweden and the Commission have submitted written observations. No hearing was requested and none has been held.

Assessment

26. As I have indicated,[15] the word 'flight' does not appear in most language versions of Article 3(1)(a). I shall therefore reformulate the question. The referring court essentially wishes to know whether persons travelling on a return flight from a third country to a Member State are 'passengers departing from an airport located in the territory of a Member State' within the meaning of Article 3(1)(a) of Regulation No 261/2004, at any rate where the outward and return flights were booked at the same time. If so, the regulation applies and such passengers will prima facie be entitled to compensation if the return flight is cancelled.

27. Since the word 'flight' is absent from most language versions of Article 3(1)(a), a contextual analysis of the use of 'flight' in other provisions of the regulation is not called for.

28. Dr Schenkel submits that 'embarking on a flight' ('Antreten eines Fluges') would normally be understood to refer to all parts of a flight, including the return flight. The term 'departing' (or similar) used in other language versions of Regulation No 261/2004 refers to the start of the whole journey. Furthermore, the outward and return flights of a round trip are usually booked as a single transaction and the passenger receives one ticket.

29. If, says Dr Schenkel, the term 'flight' in (the German version of) Article 3(1) referred only to a section carried out in the Community, that would undermine the purpose of the regulation, namely to ensure a high level of protection for passengers. Passengers would be denied protection outside the Community, where they needed it most. The Warsaw and Montreal Conventions regard a round trip as a flight from A to B and back. If the Community legislator had wanted to deviate from those conventions by reducing the notion of 'flight' to a part of a journey, it would have made its intentions clear.

30. All the other parties submitting written observations agree that outward and return flights do not constitute a single 'flight' under Regulation No 261/2004.

Article 3(1)

31. The natural meaning of the expressions 'embark on a flight at airports …' (in

15 — Points 6 to 8 above.

the German version) and 'departing from an airport' (in other versions) in Article 3(1) is that both refer to a particular one-way journey by air. If one is considering the return flight of a round trip, the departure of the initial outward flight is history. Someone boarding a return flight from Singapore to Rome is not normally described as 'embarking on a flight' from Rome. Nor are they 'departing' from Rome.

32. If the Community legislator had intended the phrases used in the different versions of Article 3(1) to cover the return flight, it would have been easy enough to draft the provision differently. A subparagraph could have explained that the entire round trip — there and back — is to be assessed by reference to the point of departure of the flight that is its first component.

33. The construction of the actual Article 3(1) advanced by Dr Schenkel requires one (i) to treat a round trip as a single flight; (ii) to treat that flight as being 'to' the point of original departure. The effect, in terms of the protection afforded to a passenger, appears to be as follows. A passenger starting his round trip from a Community airport (to a third country and back) will be covered on both outbound and inbound legs, irrespective of carrier. However, a passenger starting his round trip in a third country (to a Community airport and back) will be without protection under the regulation. Even if he flies with a Community carrier, he will not be flying *to* 'an airport situated in the territory of a Member State to which the Treaty applies'.

34. It would have been possible to draft the legislation so that it was weighted in favour of affording the fullest protection to passengers starting their travels in the European Union, at the expense of those starting in a third country. That was not, however, the legislator's choice.

35. Rather, the plain meaning of the text is that it covers all outbound flights leaving 'an airport located in the territory of a Member State to which the Treaty applies' (Article 3(1)(a)) but covers inbound flights only where they are operated by a Community carrier (Article 3(1)(b)).

The purpose of the regulation

36. It is evident that Regulation No 261/2004 seeks to ensure a high level of protection for passengers and to raise the standards of protection set by Regulation No 295/91.

37. It is equally clear that Article 3(1) limits the scope of that protection. All passengers departing from an airport located in the territory of a Member State are covered. Passengers departing from an airport in a third country to travel to an airport in a Member State are covered only if they are flying on a Community carrier. [16]

38. The *travaux préparatoires* show that the proper scope of the proposed new regulation in relation to flights from third country airports to the Community was the subject of specific consideration.

39. Under Article 3(1) of the Commission's original Proposal, [17] passengers departing from a third country to a Member State were to be covered if they had a contract with a Community carrier or with a tour operator for a package offered for sale in the territory of the Community.

40. A subsequent Council document issued following discussions both in COREPER and by the relevant Council Working Party, presenting the revised draft of the regulation, indicates that one of the two 'major outstanding issues' concerned, precisely, the scope of the regulation in relation to flights from third countries, as now defined by Article 3(1)(b). [18] A lengthy footnote to the text of that subparagraph (by then identical to the text finally adopted) shows that certain Member States favoured extending further the protection offered to passengers boarding a flight to a destination within the Community at an airport in a third country, whilst others opposed it; and that possible problems of extra-territoriality, unenforceability and discrimination between passengers were (variously) canvassed. [19]

41. The following week, the Presidency presented an unchanged text for, inter alia, Article 3(1)(b). However, it asked delegations to reflect on the possibility of entering into the Council minutes a statement by Member States related to what was at that stage Article 19 (entitled 'Report'), inviting the Commission, when drafting the report envisaged in that article, to focus in particular on the possibility of enlarging the scope of the

16 — The inclusion of the latter category of passengers itself extends the scope of protection beyond that conferred by Regulation No 295/91. See recital 6 in the preamble to Regulation No 261/2004.

17 — COM(2001) 784 final, dated 21 December 2001.

18 — Council Report 14444/1/02 REV 1 of 22 November 2002. An English language version is accessible on http://register.consilium.europa.eu.

19 — In its press release of 16 February 2005 (published the day before Regulation No 261/2004 came into force), the Commission suggested, as an explanation for why the new regulation did not cover flights operated by a non-Community carrier from a third country to a Member State, possible problems with extra-territoriality.

regulation in respect of flights from third country airports to the Community. [20]

42. In December 2002 the Council reached political agreement on its common position on the draft regulation; and the suggestion for an entry in the Council minutes was elevated into a drafting amendment to the text of Article 19. [21] The regulation as promulgated duly requires the Commission to report 'in particular regarding ... the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" ... and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community ... carriers'. [22]

43. Against that background, I find it impossible to accept that Article 3(1) should be read as covering a passenger on a return flight operated by a non-Community carrier from a third country to a Member State.

44. It is true that, in general, *travaux préparatoires* have to be treated with caution. Their use, moreover, is only ancillary to other techniques of interpretation. [23] That said, the Court has on occasion used them as an aid to interpretation when ascertaining the legislator's intention, notably when they are confirmatory of a conclusion already arrived at by other means. [24]

45. I add only that, if the construction of the existing Article 3(1)(a) advanced by Dr Schenkel were correct, most (although not all) [25] 'passengers having a contract with a Community carrier or holding a flight reservation which forms part of a package tour ... and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community ... carriers' [26] would already be included within the scope of the regulation. The reporting requirement expressly inserted by the Council would therefore, in that respect, largely be otiose.

20 — Council Report 14724/02 of 28 November 2002. An English language version is accessible on http://register.consilium.europa.eu.

21 — See Council Report 15595/02 of 16 December 2002. That document may also be accessed on http://register.consilium.europa.eu.

22 — Article 17, introduction and second indent.

23 — See Case C-133/00 *Bowden* [2001] ECR I-7031, point 30 of the Opinion of Advocate General Tizzano.

24 — See, for example, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 46.

25 — Passengers in these categories who *started* their travels in the third country would, on this interpretation, be excluded: see point 33 above.

26 — The terms of the reporting requirement themselves become questionable if Dr Schenkel's construction of 'flight' and/or 'depart' is correct.

The relevance of booking outward and return flights at the same time

46. The nature of a product or service is, as a rule, independent of the way in which it is bought. It is therefore not immediately obvious to me why the way in which the outward and return flights are booked should affect the answer to the question whether a round trip should be regarded as a single 'flight' departing from the airport used at the start of that trip. Within the ambit of a single commercial transaction, one may (for example) purchase several single journeys, one or more (different) round trips or indeed a season ticket conferring entitlement to multiple flights.

47. The referring court and Dr Schenkel consider, however, that the Montreal Convention indicates that a round trip booked as one transaction should be considered as a single flight. Under Article 1(2) of the Montreal Convention, 'international carriage' takes place when, according to the agreement between the parties, the place of departure and the place of destination are situated either (a) within the territories of two different States Parties, or (b) within the territory of a single State Party, but with an agreed stopping place within the territory of another State. The Montreal Convention thus necessarily envisages the possibility that there may be a stopping place en route. Article 1(3) provides that carriage by successive carriers to the place of destination 'is deemed … to be regarded as one undivided carriage if it has been regarded by the parties as a single operation'.

48. There is some national authority (mainly, but not exclusively, from common-law jurisdictions) for the proposition that, under the 1929 Warsaw Convention (the predecessor to the Montreal Convention), in a contract of international carriage for a round trip, the destination of that round trip is the point of departure. [27]

49. However, whilst the Community is a signatory to the Montreal Convention and is bound by it, [28] Regulation No 261/2004 is not a Community measure implementing the convention. Rather, it operates in parallel with it. Regulation No 261/2004 contains one passing reference to the convention (in the

27 — See *Grein* v *Imperial Airways Ltd* [1937] 1 K.B. 50 at 78 to 79 per Greene L.J.: 'The use of the singular in this expression [place of departure and place of destination] indicates that in the minds of the parties to the Convention every contract of carriage has one place of departure and one place of destination. An intermediate place at which the carriage may be broken is not regarded as "place of destination". Having regard to its context, and particularly to the fact that it is in the contract that the place of departure and the place of destination are to be looked for, the meaning of the expression appears to me to be "the place at which the contractual carriage begins and the place at which the contractual carriage ends". … If the contract is for a circular voyage, starting at Berlin, visiting various European capitals and ending at Berlin, the contractual carriage begins at Berlin and ends at Berlin.' See also *Lee* v *China Airlines*, 669 F.Supp. 979 (C.D.Cal. 1987), and *Qureshi* v *K.L.M. (Royal Dutch Airlines)* (1979), 41 N.S.R. (2d) 653 (two procedural decisions from the US and Canada respectively on whether to strike out claims for lack of jurisdiction). See further, in Germany, the decisions of the Bundesgerichtshof [1976] ZLW, 255, and the Landgericht Berlin [1973] ZLW, 304. I have not found equivalent authority in respect of the Montreal Convention. Certain academic writers consider that the same applies under that convention. See, for example, E. Giemulla and R. Schmid (eds), *Montreal Convention 1999* (2006, loose-leaf) Kluwer Law.

28 — Article 300(7) EC states that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. The Montreal Convention was signed by the Community on the basis of Article 300(2) EC. See Decision 2001/539, cited in footnote 9, and Case C-344/04 *IATA* [2006] ECR I-403, paragraphs 35 to 36.

preamble). [29] That is in striking contrast to Regulation No 2027/97, as amended, [30] which implements particular parts of the convention. [31] Article 2(2) of that regulation states in terms that concepts contained but not defined therein are equivalent to those used in the convention.

50. I agree, moreover, with Emirates, Poland and Sweden in particular that there are clear differences between the Montreal Convention and Regulation No 261/2004. Above all, the expression 'international carriage', which is defined in Article 1(2) of the convention and which has been interpreted by various national courts, [32] does not appear in the regulation.

51. It seems to me that one should not seek to apply (different) terms contained in the Montreal Convention in order to define the scope of Regulation No 261/2004 in a way that is clearly at variance with its text and its legislative history.

52. The referring court and Dr Schenkel further argue that if the concept of a 'flight' in Regulation No 261/2004 did not include a round trip when such a trip is booked as one transaction, the regulation's level of passenger protection would lag behind that afforded by the Montreal Convention. That would contradict the express aim of the regulation, which is to ensure a high level of passenger protection.

53. I do not accept that argument.

54. First, the regulation's scope of application is different from that of the convention. In many respects the former addresses situations not covered by the latter. For example, the regulation is applicable to purely internal flights within a Member State and to flights from a Member State to a third country which is not a State Party to the convention. Unlike the convention, the regulation covers boarding denials and flight cancellations. Conversely, the regulation's field of application is limited by territorial considerations. It does not apply to flights between two coun-

29 — Recital 14 refers to the convention in the context of an exoneration provision in the regulation. However, that reference is general in nature. It merely links the two texts, without mentioning any specific provision. That is particularly apparent in the French version of the recital, which begins: 'Tout comme *dans le cadre* de la convention de Montréal …' (emphasis added).

30 — Council Regulation (EC) of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1) as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2). According to recital 6 of the latter regulation, it was necessary to amend Regulation No 2027/97 in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport. A consolidated version of Regulation No 2027/97, dated 30 May 2002, may be accessed via http://eur-lex.europa.eu.

31 — See Article 1 of Regulation No 2027/97, as amended.

32 — See point 48 above and the footnote thereto.

tries that are States Parties to the convention but not Member States of the Community.

55. In those circumstances, I do not think that it can be said that the overall level of protection conferred by the regulation is necessarily lower than that of the convention on the ground that a particular situation is covered only by the latter.

56. Second, Regulation No 261/2004 supplements the protection which the convention affords to air passengers. It is not a substitute for the convention. That is clear from Article 12 of the regulation, which expressly provides that it should apply 'without prejudice to a passenger's rights to further compensation'.

57. In *IATA*, [33] the Court held that flight delays may, in general terms, cause two types of damage which call for different remedies. The first is identical for every passenger. The second is particular to each individual traveller and requires subsequent compensation on an individual basis. [34] While the convention covers the second type of damage, the regulation offers standardised, immediate compensatory measures for the first type. It thus 'simply operates at an earlier stage than the system which results from the Montreal Convention'. [35] The regulation's measures to address flight delays 'do not themselves prevent the passengers concerned … from being able to bring in addition actions to redress [the] damage under the conditions laid down by the [convention]'. [36] Rather, they 'enhance the protection afforded to passengers' interests and improve the conditions under which the principle of restitution is applicable to passengers'. [37]

58. Thus the protection which the regulation affords in respect of flight delays is complementary in nature. That must *a fortiori* be true of compensatory and other measures it provides in respect of flight cancellations and boarding denials. The convention offers passengers no protection at all against such occurrences.

59. In those circumstances, I cannot accept the argument that the regulation's level of protection will lag behind that offered by the convention unless it is construed in a way that runs counter to its plain text, its legislative history and its ostensible purpose.

33 — Cited in footnote 28.
34 — Paragraph 43.
35 — Paragraphs 44 and 46.
36 — Paragraph 47.
37 — Paragraph 48.

Conclusion

60. I therefore suggest that the Court should answer the referring court's question as follows:

Passengers on a return flight from a third country to a Member State are not 'passengers departing from an airport located in the territory of a Member State' within the meaning of Article 3(1)(a) of Regulation No 261/2004, and are hence not within the personal scope of that regulation if the operating air carrier of the flight concerned is not a Community carrier, even if the outward and return flights were booked at the same time.