

CONNECTING THE DOTS. CJEU ANSWERS TRIO OF JURISDICTIONAL QUESTIONS ON CONNECTING FLIGHTS

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Introduction

On 7 March 2018, the Court of Justice of the European Union ('CJEU') issued its judgment in *Flightright and others*.¹ The judgment deals with three separate preliminary rulings and, in doing so, answers three jurisdictional questions of law relevant to EC Regulation 261/2004 ('Regulation 261').²

The judgment clarifies a number of points already enshrined in Regulation 261 and case law to date, specifically confirming where an EU carrier may be sued for compensation for delay in the context of directly connecting flights within the EU, even in the absence of a direct contract with the passenger. However, the practical reality of the judgment is interesting in that it expands the choice of forum for passengers, thereby leaving carriers to face claims in Member States in which they do not operate.

Background

Regulation 261 gives passengers the right to claim up to EUR 600 compensation in the event of denied boarding, cancellation or, as a result of European case law,³ long delay of flights. However, unlike the international treaty, the Montreal Convention 1999, Regulation 261 is silent on where passengers may bring a claim.

¹ *Flightright GmbH v Air Nostrum, Líneas Aéreas del Mediterráneo SA* (C-274/16); *Roland Becker v Hainan Airlines Co. Ltd* (C-447/16); and *Mohamed Barkan, Souad Asbai, Assia Barkan, Zakaria Barkan, Nousaïba Barkan v Air Nostrum, Líneas Aéreas del Mediterráneo SA* (C-448/16).

² Regulation (EC) No 261/2004 of the European Parliament and 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.

³ *Sturgeon and others v Condor Flugdienst GmbH; Böck and another v Air France SA* (Joined Cases C-402/07 and C-432/07) [2010] Bus. L.R. 1206 and *Nelson and others v Deutsche Lufthansa AG & TUI Travel Plc and others v Civil Aviation Authority* (Joined Cases C-581/10 and C-629/1).

The issue of jurisdiction is therefore determinable by existing European law, namely the Brussels Regulation, for claims brought prior to 10 January 2015⁴ and Brussels Recast for claims brought on or after 10 January 2015,⁵ which govern jurisdiction in EU civil and commercial matters.

While *Flightright and others* is determined in the context of the Brussels Regulation on the basis that the claims were originally commenced prior to 2015, the relevant provisions discussed are substantially the same as those now included in Brussels Recast. *Flightright and others* will therefore have equal relevance to future Regulation 261 cases.

The default rule under both the Brussels Regulation and Brussels Recast is that Defendants domiciled⁶ in a Member State should be sued before the courts of their domicile. However, there are also alternative or 'special' grounds of jurisdiction, which allow Claimants to sue Defendants in a court other than their domicile. For example, in a contractual dispute, a Claimant domiciled in a Member State may sue a Defendant in the courts of the place of performance of the contract⁷ (which in the case of a contract for performance of services is the Member State where, under the contract, the services were provided or should have been provided).⁸ In matters relating to tort, proceedings may be brought in the place where the harmful event occurred, or may occur.⁹

The jurisdiction question was first addressed in the context of Regulation 261 in respect of direct flights in 2009 in *Rehder v Air Baltic (Rehder)*.¹⁰ Here, the CJEU held that: '*the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on*

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⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

⁵ Council Regulation (EC) No 1215/2010 of the European parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶ See Article 2(1) Brussels Regulation and Article 4(1) Brussels Recast

⁷ See Article 5(1)(a) Brussels Regulation and Article 7(1)(a) Brussels Recast

⁸ See Article 5(1)(b) Brussels Regulation and Article 7(1)(b) Brussels Recast

⁹ See Article 5(3) Brussels Regulation and Article 7(2) Brussels Recast

¹⁰ (C-204/08)

Regulation No 261/2004 is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.'

Flightright and others goes further than *Rehder* and offers clarity in determining where the 'place of performance' of a contract of carriage under the Brussels Regulation¹¹ will be in the context of connecting flights booked together, to ascertain where passengers may bring a claim under Regulation 261. In addition, the judgment provides clarity on whether a claim can be made against an operating carrier in circumstances where it did not enter into a direct contract with the passenger concerned i.e. where the booking was made through the carrier operating the unaffected leg of the journey.

Facts in *Flightright and others*

The CJEU considered three cases together. Two of the cases (*Flightright* and *Barkan/Asbai*) concerned flights between two Member States (namely, Spain and Germany), with a connection in another city in Spain.¹² The carrier of the first flights (which were domestic flights within Spain) in both cases was Air Nostrum, a Spanish carrier, and delay to those first flights caused the Claimants to miss their connections onto their second flights. In both cases, the Claimants booked their tickets under a single booking with the carrier of the second flights (Air Berlin and Iberia respectively). However, the Claimants brought claims for compensation for delay pursuant to Regulation 261 against Air Nostrum in Germany.

The third case (*Becker*) involved flights from Germany to China, with a connection in Brussels. The Claimant made a single booking for the flights with Hainan Airlines, a Chinese carrier and operator of the second flight only. In contrast to *Flightright* and *Barkan/Asbai*, the Claimant's first flight was operated to schedule by the operating carrier, Brussels Airlines, but the Claimant was not carried on the second flight. Consequently, the Claimant made a denied boarding claim

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¹¹ Article 5(1)(a) and second indent of 5(1)(b) Brussels Regulation and Article 7(1)(a) and second indent of Article 7(1)(b) Brussels Recast

¹² In *Flightright* the routing was from Ibiza to Palma de Majorca to Dusseldorf; and in *Barkan/Asbai* the routing was from Melilla to Madrid to Frankfurt am Main.

against Hainan Airlines pursuant to Regulation 261 in Germany. The CJEU answered three key questions:

Can a passenger bring a claim against the operating carrier under Regulation 261 in one of the contractual jurisdictions permitted by the Brussels Regulation in the absence of a direct contract with that carrier?

The Brussels Regulation¹³ provides that a person domiciled in a Member State may be sued in another Member State *'in matters relating to a contract, in the courts for the place of performance of the obligation in question.'* The *'place of performance of the obligation'* in the context of provision of services will be *'the place in a Member State where, under the contract, the services were provided or should have been provided.'*

In all three cases, the contract was made via a single booking covering the entire journey, with two carriers operating different legs of the journey. This led the German Court in *Barkan/Asbai* to ask the CJEU whether the concept of *'matters relating to a contract'* in the Brussels Regulation includes claims for compensation under Regulation 261 brought by a passenger against a carrier with whom the passenger does not have a direct contract.¹⁴

The CJEU noted that, in matters relating to contract, the Brussels Regulation places significance on cause of action rather than the identity of the parties.¹⁵ Therefore, the CJEU held that, in the context of contracts of carriage freely entered into by carriers, an operating carrier that has not concluded a contract directly with the passenger is to be regarded as doing so via the carrier or agent that formed the contract with the passenger concerned.

As a result, claims under Regulation 261 can be made in the contractual jurisdictions permitted under the Brussels Regulation against a carrier with whom the passenger did not directly contract. In *Flightright* and *Barkan/Asbai*, this was Air Nostrum, i.e. the carrier who operated the first leg of the flights which were delayed. This is unsurprising since it is the operating carrier that is responsible to the passenger under Regulation 261 and, as the CJEU recognised, *'the*

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¹³ See Article 5 Brussels Regulation and Article 7 Brussels Recast

¹⁴ At paragraph 52 of the *Flightright* judgment

¹⁵ *Kareda v Benkő* (C-249/16); [2018] 2 WLR 232

second sentence of Article 3(5) of Regulation No 261/2004 states that, where an operating air carrier which has no contract with the passenger performs obligations under this regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger.'

Where is the 'place of performance' for directly connecting flights?

It was well-established in *Rehder*¹⁶ that, in respect of a direct flight between two Member States, a passenger could bring a Regulation 261 claim against the carrier in either the place of departure or place of arrival of the flight, either being the '*place of performance*' of the services under the Brussels Regulation. However, *Rehder* did not address jurisdiction in the context of directly connecting flights booked together in the same contract for carriage.

The German Courts in *Flightright* and *Barkan/Asbai* asked the CJEU whether a carrier that operates only the first leg of a connecting flight in one Member State can be sued before the courts of another Member State, being the place of arrival of the passenger's second flight which was not operated by that carrier. In other words, where is the place of provision of services and therefore the '*place of performance*' considered to be in these circumstances?

The CJEU held that, in the context of flights operated within the EU, the '*place of performance*' will be the final destination in the sequence of flights, as this is one of the main places of provision of services (the other being the place of departure of the first leg) under the contract of carriage by air. Therefore, in *Flightright* and *Barkan/Asbai*, Germany was considered to be one of the '*places of performance*' of the services provided, with the result that Air Nostrum could be sued in Germany. This was notwithstanding the fact that Air Nostrum had neither operated the second flight nor contracted with the passengers in question.

In light of this, *Flightright and others* goes beyond *Rehder* in determining the place of arrival in the context of directly connecting flights within the EU. In doing so, however, it exposes carriers to claims in jurisdictions to which they may have chosen not to operate, further underlining the increasing protection afforded to passengers by Regulation 261.

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¹⁶ *Rehder v Air Baltic Corporation* (C-204/08), [2009] All ER (D) 153

Do the special jurisdiction provisions of the Brussels Regulation apply to a non-EU carrier?

In *Becker*, the German Court asked the CJEU whether, in the context of directly connecting flights, the place of provision of services may be considered to be the place of departure of the first flight, notwithstanding the fact that the claim itself arose out of disruption to the second flight. In other words, could the Claimant sue Hainan Airlines in Germany, when the flight on which the Claimant was apparently denied boarding departed Brussels, and was destined for China?

In contrast to *Flightright* and *Barkan/Asbai*, the Defendant in *Becker* was domiciled outside of the EU in China and did not have a branch in Germany. The CJEU held that, in such circumstances, it is necessary to apply the general provisions of the Brussels Regulation and the rule that, where ‘*a defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State.*’¹⁷ Accordingly, the CJEU held that the jurisdictional test regarding where the services are provided ‘*must be interpreted as not applying to a defendant domiciled in a third State, such as the defendant in the main proceedings.*’ The question as to whether Hainan Airlines could be sued in Germany was therefore a matter for German national law.

Conclusion

The CJEU touched on the fact that its judgment should ‘*fulfil the principle of predictability*’¹⁸ in terms of confirming that, in the context of connecting flights under Regulation 261: (1) an EU carrier may be sued before the courts of the Member State of arrival of a flight that it did not operate; and (2) an EU carrier may be sued by a passenger with whom it did not directly contract.

However, in doing so, EU carriers have been exposed in the context of Regulation 261, and must be ready to respond to potential claims in Member States in which they may choose not to operate. This will inevitably lead passengers to consider ‘forum shopping’ in order to choose the

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¹⁷ See Article 4 Brussels Regulation and Article 6 Brussels Recast

¹⁸ At paragraph 12 of the *Flightright and others*

forum which is likely to be most favourable to their claim. Further, while the judgment clarifies the situation for EU carriers operating flights within the EU, it does not address non-EU carriers or flights outside of the EU. Whilst *Flightright and others* therefore goes some way to enhancing 'predictability' for EU carriers, for non-EU carriers that are deemed not to be domiciled in the EU, questions still remain.

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