The Meaning of “Accident” under the Montreal Convention in Light of cjeu Jurisprudence

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1 Introduction

The legal framework of aviation is relatively young. It can be recalled that air transport appeared on the global scene much later than maritime, rail and road transport. The first passenger flights were undertaken as adventures due to the technical characteristics of the planes. At present, the airplane is a common vehicle and is recognized as an efficient and safe method of travel. However, it was not so at the beginning.[[1]](#footnote-1) Historically, on 17 December 1903, the Wright brothers undertook their first flight at Kitty Hawk, North Carolina. Since then, aviation has progressed remarkably. The same can be said about aviation law, which hardly existed, previously, but now it occupies an established position within the international legal system.[[2]](#footnote-2)

At the beginning of the era of passenger carriage in aviation, a dire necessity for an international regime was perceived. The drafters of an anticipated future convention no doubt had a difficult mission to fulfill. They were tasked with developing a liability regime related to passengers in the event of an accident. Since aviation was still in its infancy, they had to come up with a regime that would strike a balance between support for a growing industry on the one hand and a suitable compensation system on the other.

As an outcome of this international effort, the first international instrument was negotiated and adopted in 1929. Its name was the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention).[[3]](#footnote-3) This Convention was amended several times by Protocols,[[4]](#footnote-4) and later by the new Montreal Convention in 1999. In the *traveaux préparatoires* of the Montreal Convention, the Warsaw Convention was described as “one of the most widely adhered-to instruments of private international law”.[[5]](#footnote-5) It was also postulated that –

While complete unification of law neither attainable nor desirable, the Warsaw Convention laid down certain vitally important rules for international carriage by air. It determined the internationally accepted liability rules regarding passengers, baggage and cargo in case of accidents; it set out the requirements as to format and content of air transport documents; and it established ground rules regarding procedure.[[6]](#footnote-6)

Subsequently, civil aviation underwent considerable changes and transformations giving rise to several amendments and finally the adoption of a new convention. The Convention for the Unification of Certain Rules for International Carriage by Air was signed on 28 May 1999 in Montreal, Canada by 52 participating States, and entered into force on 4 November 2003.[[7]](#footnote-7) This new convention incorporates provisions of the previous instruments in one document having its goal to create a uniform regime for air carrier liability. As described by one commentator, “the Montreal Convention is no longer a Convention for airlines. It is a Convention for consumers/passengers”.[[8]](#footnote-8)

The global success of the Convention is evidenced by the fact that some 135 State Parties, including the EU, have adopted it, which has been hailed “a major triumph as an act of international uniformity”.[[9]](#footnote-9) That commentator admits that the Convention regardless of being perfect “represents the compromise for the difficult equitable balance of interest we all wanted, we all needed and which we were all hoping against hope for”.[[10]](#footnote-10) The Montreal Convention like its predecessor deals with international carriage of persons, baggage or cargo performed by aircraft for reward. It creates a liability regime for bodily injury and death to a passenger, damage to cargo and delay related to passengers and cargo.

2 Liability Regime Under the Montreal Convention and the Meaning of “Accident”

Liability of the carrier and the extent of compensation for damage is contained in Chapter iii of the Convention. One of the most important provisions relating to carrier liability is Article 17 titled “Death and Injury of Passengers”. In it, there is a slight alteration from the Warsaw Convention, meaning that the jurisprudence based on it is still valid. Article 17(1) provides that

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.

At this juncture one can distinguish between the liability for death and bodily injury under Article 17 and liability for damage and cargo provided in Article 18 which states the following:

The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

The carrier can be wholly or partly exonerated from liability as per Article 20 “if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights …”. Pursuant to Article 21 of the Montreal Convention, the carrier can limit its liability for damages in case of death or injury of passengers amounting to 113,100 sdr s[[11]](#footnote-11) for each passenger.

While the Convention mentions “accident” in Article 17(1), the term is not defined in the Convention.[[12]](#footnote-12) It is notable, however, that a number of courts have provided guidance as to its proper interpretation.[[13]](#footnote-13) Therefore, it is crucial to understand what this term means in the context of air law and the Montreal Convention. The word “accident” in its ordinary meaning is defined in a Dictionary as “an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated”.[[14]](#footnote-14)

In a leading case *Fenton* v. *J. Thorley and Co Ltd.* cited in several decisions relating to the Warsaw or Montreal Convention, the term “accident” was examined by the Law Lords.[[15]](#footnote-15) The case concerned a workman who suffered injury by an act of over-exertion in trying to turn a wheel. Lord Lindley held that -

The word ‘accident’ is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word ‘accident’ is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.

Lord McNaughton added, “the expression ‘accident’ is used in the popular and ordinary sense of the word as denoting an unlooked – for mishap or an untoward event which is not expected or designed”.

Another expression peculiar to Article 17(1) is “damage so sustained”. The Montreal Convention does not define the term “damage”, and is silent as to whether it should be interpreted as also including non-material damage. However, as noted by a duo of authors, the measure of damage is usually a prerogative of the national court.[[16]](#footnote-16) Notably, the term “bodily injury” used in the Montreal Convention 1999 excludes any compensation for mental damage, as explicitly stated in the *traveaux préparatoires.*[[17]](#footnote-17) Lord Hope noted, *inter alia*, in *Sidhu* that-

No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.[[18]](#footnote-18)

In *Cowden* v. *British Airways*, it was stated that the convention clearly provides a remedy for monetary loss flowing from “bodily injury” and also from delay to baggage.[[19]](#footnote-19) The judge further referred to the judgment in *Morris* v. *KLM* in which the House of Lords discussed the meaning of “bodily injury” in Article 17. After reviewing the international and domestic authorities, the Court held that the term “bodily injury” was not intended to include purely psychological injury.

Lord Wilberforce and Lord Fraser considered the precise meaning of “damage” in *Fothergill* v. *Monarch Airlines Ltd*.[[20]](#footnote-20) They concluded that both “damage” and its French equivalent “dommage” are restricted to damage giving rise to monetary losses in Articles 17 and 19. It held that only compensatory damages can be awarded and not punitive damages, and that it does not create a cause of action in respect of psychological or emotional injury to a passenger caused by delays. Similarly, a claim for mental anguish caused by delay in the carriage of baggage cannot succeed.[[21]](#footnote-21) From the leading cases in the UK, USA and Canada,[[22]](#footnote-22) it can be gleaned that the courts in these countries adopted the same approach in concluding that Articles 17 and 19 of the convention do not permit the recovery of damages for distress, discomfort or loss of enjoyment unless an actual monetary loss or physical injury can be established by expert evidence.[[23]](#footnote-23) In *Morris* v. *KLM*,[[24]](#footnote-24)and later in *Deep Vein Thrombosis*,[[25]](#footnote-25) it was heldthat it was not the intention of the state parties of the Warsaw Convention’s to provide compensation for purely psychological injury. The same view was confirmed in the decision in *Eastern Airlines, Inc*. v. *Floyd*.[[26]](#footnote-26)

In the *Stott* case, decided by the UK Supreme Court, their Lordships made it explicit that the time and place of the accident or mishap is of paramount importance; the convention sets the carrier’s liability for whatever might physically happen to passengers between embarkation and disembarkation.[[27]](#footnote-27)

Another notable feature of the Montreal Convention is its exclusivity. This implies that where the carrier is liable under the convention, claims based on other causes of action are pre-empted. As Article 29 states:

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 without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Thus, any measures relating to matters with which the convention attempts to deal, irrespective of their legal nature, are precluded.[[28]](#footnote-28) Remarkably so, most courts in common law jurisdictions have endorsed the exclusivity of a cause of action for passenger claims in international air carriage, and have dismissed claims where the convention did not provide a remedy including any nonmaterial damage.[[29]](#footnote-29) The leading case decided by the House of Lords[[30]](#footnote-30) is *Sidhu* in whichLord Hope delivered a speech supported by other Law Lords. It is noteworthy that the decision in *Sidhu* has been applied and followed in numerous other cases decided by the English courts and in other common law jurisdictions.[[31]](#footnote-31) After analysing the history and background to the Warsaw Convention, the *travaux préparatoires* and decisions made by the UK and foreign courts,[[32]](#footnote-32) Lord Hope held that:

To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier.[[33]](#footnote-33)

That uniform interpretation of an international instrument like the Montreal Convention is of considerable significance has been observed in a number of decisions related to air transportation. It was rightly held in *O’Mara* v*. Air Canada*[[34]](#footnote-34)as follows:

Given that a major purpose of the Conventions was to introduce consistency and uniformity in the international law applicable to air carriage, in interpreting the Convention, it is important that there be consistency in interpretation from one country to another, and, thus, there must be a very sound reason to depart from the precedents established from around the world.

In *Gontcharov* v. *Canjet* it was similarly held as follows:

It is therefore of fundamental importance that there be consistency in interpreting the provisions of the Convention from one country to another. However, where a body of case law interpreting a particular provision has been applied consistently in other jurisdictions, it would be a mistake to depart from it without very sound reasons.[[35]](#footnote-35)

One author remarks that the drafters did not aim for the Warsaw Convention to be an exclusive remedy for every injury associated with air travel and that there was no intention to provide absolute uniformity of remedy for all events faced by air travellers.[[36]](#footnote-36) The same author explains that at that time, the aviation industry was concerned with plane crashes, which could result in serious personal injuries and deaths and thus expose the industry to financially devastating claims.[[37]](#footnote-37) In *King* v. *Bristow Helicopters ltd*. and *Morris* v. *KLM* it was reiterated that international uniformity of interpretation of Article 17 is highly desirable. Furthermore, it has been stated that-

It follows from the scheme of the Convention, and indeed from its very nature as an international trade law convention, that the basic concepts it employs to achieve its purpose are autonomous concepts. It is irrelevant what bodily injury means in other contexts in national legal systems. The correct inquiry is to determine the autonomous or independent meaning of "bodily injury" in the Convention.[[38]](#footnote-38)

In *Deep Vein Thrombosis* Lord Scott of Foscote stated that-

It is not the function of any court in any of the Convention countries to try to produce in language different from that used in the Convention a comprehensive formulation of the conditions which will lead to article 17 liability, or of any of those conditions. The language of the Convention itself must always be the starting point. The function of the court is to apply that language to the facts of the case in issue.[[39]](#footnote-39)

In *Olympic Airways* v. *Husain,*[[40]](#footnote-40) adecision stemming from the US Supreme Court, Scalia J. observed in dissentthat it is paramount to consider the decisions of other State parties while interpreting treaty provisions. He stated – “[u]nless there has been an accident, there is no liability, whether the claim is trivial, or cries out for redress”. Finally, he postulated that-

A legal construction is not fallacious merely because it has harsh results. The Convention denies a remedy, even when outrageous conduct and grievous injury have occurred, unless there has been an ‘accident’ … It is a mistake to assume that the Convention must provide relief whenever traditional tort law would do so.[[41]](#footnote-41)

In *Air Link Pty Ltd* v. *Paterson*[[42]](#footnote-42) Allsop P and Ipp JA of the New South Wales Court of Appeal held, *inter alia,* that the passenger’s injury must be caused by an unexpected or unusual event external to the passenger to be caused by an “accident”. In addition, they opined that the externality does not exclude an event, which involves the participation of the passenger, as long as the event was unexpected or unusual and was caused otherwise than by the passenger.[[43]](#footnote-43)

The requirement that the accident should be external to the passenger was tested in a number of other cases in the common law jurisdictions. How the requirement for externality may affect the outcome of the case is scrutinized below. Some of these cases include claims for spilling of hot drinks.[[44]](#footnote-44) The first case examined is *Air France* v. *Saks,* a decision of the US Supreme Court, which laid the foundation for interpretation of the term “accident”; it was followed and confirmed by courts in the US and abroad.

2.1 *A**ir France* v. *Saks*

In that case,[[45]](#footnote-45) a passenger felt severe pressure and pain in her left ear during the flight. Shortly afterwards, she consulted a doctor, who concluded that she had become permanently deaf in her left ear. She claimed that her hearing loss was caused by negligent maintenance and operation of the jetliner’s pressurization system. It was held by the Court that –

Liability under Article 17 arises only if a passenger's injury is caused by 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, in which case it has not been caused by an accident under Article 17.

The Court added that this definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries. In reaching this conclusion, the Court scrutinized Article 17, including the *travaux préparatoires* and cases decided by the courts in other jurisdictions. It concluded that the text of Article 17 refers to an accident, which caused the passenger’s injury, and not to an accident, which *is* (emphasis added) the passenger’s injury, stressing that this distinction is significant. It was recognized that the meaning of “accident” is defined neither in the Convention, nor in the *travaux préparatoires*. Thus, in order to determine the meaning of the term “accident” in Article 17, the court referred to its French legal meaning since the Warsaw Convention was drafted in French. This examination revealed that the term ”accident” in terms of its French legal meaning differs from the meaning of the term in Great Britain, Germany, or the United States. Thus, while the word “accident” is often used to refer to the event of a person’s injury, it is also sometimes used to describe a cause of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. The Court concluded that the text of the Convention suggests that the passenger’s injury must be caused by an unexpected or unusual event.

The Court also noted that the causes of liability for persons were intended to be different from the causes of liability for baggage. As gleaned from *travaux préparatoires* – a passenger’s injury must be caused by an accident, since ”event” is too broad and could lead to an increase in claims.[[46]](#footnote-46) The Court considered jurisprudence from other State parties to the Convention and found that-

European legal scholars have generally construed the word "accident" in Article 17 to require that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the plane.[[47]](#footnote-47)

The Court emphasized that any amendments to Article 17 of the Warsaw Convention can only be done by the State parties, and until then, this article cannot encompass carrier liability for injuries that are not caused by accidents.

The US Supreme Court’s conclusion in *Saks,* and in particular, the opinion of O’Connor J regarding the interpretation of “accident” has been accepted and widely followed in the United States and in the courts of other State parties. The importance and authority of this judgment has been particularly mentioned and affirmed by the English courts in *Deep Vein Thrombosis*, *Morris* v. *KLM*, *Barclay* v. *British Airways Plc*[[48]](#footnote-48)and *Labbadia* v. *Alitalia.*[[49]](#footnote-49) However, Lord Scott of Foscote in *Deep Vein Thrombosis* criticized the approach taken in *Olympic Airways* v. *Husain*[[50]](#footnote-50) in that, what was interpreted in that case was not the language of the convention but rather the language of the leading judgment interpreting the convention (meaning *Saks*). His Lordship rightly mentioned that this approach might distort the essential purpose of the judicial interpretation.[[51]](#footnote-51)

2.2 Deep Vein Thrombosis

Lord Scott of Foscote in his judgment made a number of important findings. From the outset, he repeated the importance of adopting a uniform interpretation of the Convention by the courts of the respective State parties.[[52]](#footnote-52) He further pointed out that the claimant does not need to establish the negligence of the carrier. At the same time, he stressed that in accordance with previous authorities, if a remedy for the injury is not available under the Convention, it is not available at all. In a similar manner as in *Saks*, he distinguished between the terms “accident” and “occurrence” in relation to baggage or cargo. Although both terms contemplate that something has happened, the term “occurrence” is more general. In contrast, the term “accident” denotes an occurrence having particular characteristics. Thus, the courts in several decided cases had to establish whether the occurrence qualified as an “accident”, and thus fell under Article 17.[[53]](#footnote-53)

In continuing the analysis of Article 17 Lord Scott of Foscote distinguished between bodily injuries and the “accident” which caused the bodily injury. He observed that-

The "unintended and unexpected" quality of the happening in question must mean "unintended and unexpected" from the viewpoint of the victim of the accident. It is the injured passenger who must suffer the "accident" and it is from his perspective that the quality of the happening must be considered.[[54]](#footnote-54)

He summarized that to obtain a remedy under Article 17 three requirements must be met. First, that a passenger sustained death, wounding or other bodily injury. Secondly, that an accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Thirdly, that the death, wounding or bodily injury was caused by the accident, where “accident” is in reference to the cause rather than the injury itself.[[55]](#footnote-55)

In *Labbadia* v*. Alitalia*[[56]](#footnote-56) the Court examined the term “accident” within the meaning of Article 17(1) of the Montreal Convention in a similar vein as in the above decisions. It was described as an autonomous concept; hence, for the sake of uniformity and certainty, domestic law principles and domestic rules of interpretation do not apply. It was also reiterated that as the Montreal Convention is an international instrument the definition of “accident” has been the subject of judicial interpretation in many jurisdictions. In that case, the components of an “accident” were also examined, and included the following: Was there an event? If so, was the event unusual, unexpected or untoward from the Claimant’s perspective? Was the event external to the Claimant?[[57]](#footnote-57) As discussed above, this corresponds to the analysis of Article 17 made by other courts in similar cases.

2.3 *B**arclay* v. *British Airways Plc*

A passenger suffered an injury to her right knee when she slipped on a plastic strip embedded in the floor of the aircraft while walking to her seat. There was no explanation for the cause of the slipping. The Court of Appeal dismissed the appeal and held that the term “accident” in Article 17(1) contemplated a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happened independently of anything done or omitted by the passenger. The causative event had to be “external” to the passenger. The court held that there was no accident that can be considered as external to the claimant. It was an instance of the passenger’s particular, personal or peculiar reaction to the normal operation of the aircraft.[[58]](#footnote-58)

The court stated further that the appellant must show that her injuries were caused by an accident within the meaning of Article 17(1). Thus, the scope of the term “accident” is critical since it cannot mean any occurrence on the aircraft, which causes injury. An example is when a member of the cabin staff slips in the gangway and spills hot coffee, burning a passenger. Finally, it was stated that this interpretation is consistent with the leading authorities from *Saks* onwards, which emphasize the importance of the causative event being “external” to the passenger.[[59]](#footnote-59)

2.4 *B**uckley* v*.* *Monarch Airlines Ltd*

Mrs. Buckley asked for a warm cup of water to make a chocolate drink, which she kept in her handbag. She opened the sachet of hot chocolate and poured the powder into the cup. Shortly thereafter, she realized that the plastic cup had slid from the table onto her lap. She stated that she did not touch the cup or had begun to stir the powder into the water. According to her explanation, the tray table “moved up and down and was slightly flexible”. The defendant objected that there was an “accident” for the purposes of Article 17 of the Convention and that the attendant checked that the lid of the cup was secure, and had placed the cup on the tray table in front of Mrs. Buckley, warning her that the cup contained hot water.

Against this background, the Court examined whether the injury was caused by “accident”. It held that it was not necessary for the claimant to prove that the defendant had been negligent, but instead had to demonstrate that: (i) she suffered injury as a result of (ii) an accident (iii) on board the aircraft.[[60]](#footnote-60) In other words, the claimant must establish a causal link between the incident and the injury, rather than to prove fault on the part of the defendant. Furthermore, the claimant must first establish facts, which amount to an “unexpected or unusual event” and then show that the event was “external”, namely, thatit was not caused or contributed to by the claimant herself.

As the injury was caused by the spillage of hot liquid, this is not a case of a “passenger’s own internal reaction”, nor is there any evidence to suggest that the spillage was caused by the “expected operation of the aircraft”.[[61]](#footnote-61) The Court further found that the claimant probably removed the lid from the cup in order to add the chocolate powder and thus there was at least one occasion on which the claimant touched the cup.[[62]](#footnote-62) It concluded that the claimant had failed to establish that an “accident” which was external to the claimant in the sense of having happened independently of anything done by her. Thus, her claim was dismissed.

2.5 *D**iaz Lugo* v*. American Airlines, Inc.*

In a decision rendered by the US District Court of Puerto Rico,[[63]](#footnote-63) a passenger Ms Figueroa suffered injuries due to a cup of coffee sliding from a seat-back table and spilling over the claimant’s lap. There was no suggestion that the passenger herself had knocked the cup. After the take-off, Ms Figueroa asked for a cup of coffee. She did not notice when the flight attendant had placed the cup on the table. While she was arranging some papers, the flight attendant asked if she wanted cream and sugar with the coffee. With a slight head movement, Ms Figueroa looked at the flight attendant and indicated – “yes”. Then, the coffee cup spilled on Figueroa’s lap causing scalding. The Court found that the coffee spill was an unusual or unexpected event external to Figueroa and thus was an “accident” within the meaning of Article 17. It added –

When a person boards a plane, 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.[[64]](#footnote-64)

The Court pointed out that Ms Figueroa’s injuries did not result from her internal reaction to normal airplane operations, but were caused by an unexpected event external to her, *i.e.,* coffee spilling over her body. The Court rejected the argument presented by the airlines that the spill was caused due to the plane’s inclination, which is not an Article 17 “accident” and stated that the passenger must be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. The Court concluded that the coffee spill is a link that meets that description but also added that the defendant Airline could avoid some or even all liability if it could prove that the passenger caused or contributed to the spill of the coffee.[[65]](#footnote-65)

2.6 *M**edina* v. *American Airlines*

In that case,[[66]](#footnote-66) Dr. Medina was served coffee during the flight. The flight attendant placed the cup of coffee with no lid in front of Dr. Medina on the folding tray table following which, the coffee spilled and the passenger suffered serious scalds, which took months to heal, and left visible scars. There was no evidence of any turbulence or other unexpected movement of the aircraft that caused or contributed to the accident. The Court concluded that American Airlines had met its burden of proving not only that Dr. Medina was comparatively negligent in causing the accident, but that he was its sole proximate cause. The only evidence there was, established that Dr. Medina attempted to drink it when, by his own admission, it was too hot to handle and he could have put it back on the tray and/or allowed some cooling to take place. The Court concluded that the Airline took all “necessary measures” to prevent the accident as required by Article 20(1) of the Warsaw Convention. It held further that the claim was based only on the testimony of the passenger; what he thought was “too hot” and what every other person may have thought was “too hot” does not create an issue that required any response.

Another interesting case that was settled with Ryanair for eur 150,000 concerned an eight-year old girl who suffered serious scalding due to a hot chocolate spill. It took some time for her to recover and the incident left scars. As claimed, she took a sip of hot chocolate but due to a very high temperature, the paper cup fell on top of her. It was alleged by the claimant that Ryanair failed to provide a safe method for serving hot beverages suitable for minors; also, the child was not warned about the danger of hot drinks. Even though Ryanair denied all claims, they agreed to settle the claim without admission of liability.[[67]](#footnote-67)

3 EU Law and Jurisprudence on Carrier’s Liability and Air Passengers’ Rights

3.1 Background

At the outset, it is vital to understand the relationship between the EU and the Montreal Convention. The EU is a party to the Montreal Convention, together with all the EU Member States, and thus the Montreal Convention belongs to the so-called “mixed agreements”.[[68]](#footnote-68) The convention was approved on behalf of the European Community by Council Decision 2001/539/ec, in which the matters covered by the Montreal Convention fall under the shared competence of the Community and its Member States. The Decision notes that the EU strives for uniformity in the field of air carriage, but with the focus on application at the EU level.

In recent years there has been a significant number of preliminary rulings in the field of air transportation, in which the Court interpreted both the Warsaw and Montreal Conventions. Those cases illustrate the Court’s approach to the interpretation of these conventions and raise various legal issues. The EU legislation on air carriage includes several regulations, among them Regulation (ec) No 889/2002, Regulation (ec) No 261/2004,[[69]](#footnote-69) and Regulation (ec) No 1107/2006.[[70]](#footnote-70) Notably, Regulation (ec) No 889/2002 implements the Montreal Convention regarding air carrier liability in cases of accidents. Article 3 provides that “the liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability”.

Regulation (ec) No 261/2004 establishes common rules on compensation and assistance to passengers in the event boarding is denied and of cancellation or long delays of flights. In the Preamble, a high level of protection for passengers is mentioned. As gleaned from the cjeu rulings, this objective has been continuously repeated by the Court as a ground for justification of its approach to the interpretation of the convention.[[71]](#footnote-71) Regulation (ec) No 261/2004 became a contentious issue in the *iata* and *elfaa* case.[[72]](#footnote-72) This landmark judgment laid the foundation for subsequent rulings concerning the interpretation of the Regulation and its compatibility with the Montreal Convention.[[73]](#footnote-73) The analysis of the cases decided by the cjeu, leads to the conclusion that the Court of Justice made an attempt to interpret substantive provisions of the Montreal Convention such as material and non-material damage, which is the prerogative of the national courts of State Parties. The exclusivity of the cause of action laid down in Article 29 of the Convention was hardly mentioned by the Court, despite the fact the EU is also a party to the Montreal Convention and has the same obligations under international law to perform treaties in good faith and not invoke the provisions of its internal law.

3.2 Decision GN v. ZU (Niki Luftfahrt)

A brief description of the facts of the case is presented below.[[74]](#footnote-74) In 2015, gn, the applicant, a six-year old girl, travelled with her father, hm, from Spain to Austria. The flight was operated by Niki Luftfahrt. During the flight, hm was served a cup of hot coffee which, while it was placed upon the tray table in front hm, tipped over onto his right thigh and then onto gn’s chest, causing her second-degree scalding. It could not be established whether the cup of coffee tipped over due to a defect in the folding tray table on which it was placed or due to vibration of the aircraft.[[75]](#footnote-75) The claim for compensation for bodily injuries, estimated at eur 8500 was based on Article 17(1) of the Montreal Convention. The defendant asserted that there was no accident in the context of the Montreal Convention, and thus, it is not liable under Article 17. The defendant also submitted that the concept of “accident” within the meaning of Article 17(1) requires the materialization of a hazard typically associated with aviation, a condition that was not fulfilled in this case.[[76]](#footnote-76)

The Regional Court upheld the applicant’s claim for compensation. It was held that the damage sustained by gn was due to an accident caused by an unusual event that was based on an external action. It was further added that a hazard typically associated with aviation had materialized, since an aircraft is subject to varying, operationally inherent inclinations that 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.[[77]](#footnote-77) Subsequently, the Higher Regional Court in Vienna set aside the judgment delivered at first instance based on its analysis that Article 17 covers only accidents triggered by a hazard typically associated with aviation. The decision was appealed on a point of law (*Revision*) before the *Oberster Gerichtshof* (Supreme Court) Supreme Court which decided to stay the proceedings.[[78]](#footnote-78)

The *Oberster Gerichtshof* (Supreme Court) stated that spillages of hot drinks or food onto the body of a passenger are recognized in the legal literature as “accident” in light of Article 17(1) of the Montreal Convention. Thus, this approach would result in the liability of the carrier. The Court of Justice by firstly examining Recitals 7 and 10 of Regulation (ec) No 889/2002 had submitted that the Regulation and the Montreal Convention could not be interpreted to weaken the protection of passengers and its dependants. The Court admitted that the concept of “accident” is not defined in the Montreal Convention. Therefore, it must be interpreted in its ordinary meaning in the light of the object and purpose of that convention.[[79]](#footnote-79) It was found that the ordinary meaning given to the concept of “accident” is that of an unforeseen, harmful and involuntary event.[[80]](#footnote-80) In its Judgment, the Court also made reference to paragraph 3 of the preamble to the Montreal Convention, where the States Parties, presumably recognize “the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution”.[[81]](#footnote-81) Moreover, the limits established by the Convention enable passengers to be compensated easily and swiftly, without imposing a heavy compensation burden on air carriers.[[82]](#footnote-82) Finally, the Court ruled that-

Article 17(1) must be interpreted as meaning that the concept of ‘accident’ within the meaning of that provision covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

The Opinion of Advocate General Saugmandsgaard Øe is instructive in this regard.[[83]](#footnote-83) As pointed out, the Court of Justice is faced with the definition of “accident” within the meaning of Article 17(1) of the Montreal Convention for the first time. The ag noted that neither Article 17, nor the *travaux préparatoires* provide any requirement that the event was caused by the hazard typically associated with aviation or has a causal link with the nature or the operation of the aircraft. The ag presumes that the drafters of the convention would have included that in the convention explicitly.[[84]](#footnote-84) In his Opinion, the ag refers to Article 31 of the Vienna Convention, to point out that the concept of “accident” under Article 17(1) of the Montreal Convention must be interpreted in accordance with the “ordinary meaning to be given to [the term concerned]”. A positive observation of the ag related to the necessity to consider the interpretation of that concept employed by various courts of state parties, in order to draw any inspiration from those judicial precedents, even though they are not binding for the Court.[[85]](#footnote-85) As gleaned from the Opinion, -

The victim must demonstrate that the event that occurred during the period of carriage by air, whether on board the aircraft or during the operations of embarking or disembarking, and that caused the physical injury relied on, first, is ‘sudden’ or ‘unusual’ and, second, has an origin ‘external’ to the person of the passenger concerned.[[86]](#footnote-86)

Additionally, a harmful event that is the result of the victim’s own reactions to the usual, normal and foreseeable functioning of the aircraft, or which was caused by the victim’s pre-existing state of health, cannot be classified as an “accident”. Here, the ag refers to the leading judgement of the U.S. Supreme Court – *Air France* v. *Saks*[[87]](#footnote-87) on the interpretation of “accident” and proposed that the Court of Justice might apply the same criteria in the current case.[[88]](#footnote-88) The ag also referred to two other US cases where it was held that the spilling of a hot beverage on a passenger on board an aircraft constituted an “accident” within the meaning of Article 17 of the Warsaw Convention.[[89]](#footnote-89) Another positive tendency in the Opinion is the mention of “uniformity” as the purpose of the Montreal Convention, and in particular, Article 29 dealing with the exclusivity of the cause of action under the Montreal Convention.[[90]](#footnote-90) Finally, the ag proposed that the Court answer the question in the following way:

Article 17(1), must be interpreted as meaning that any event that has caused the death or bodily injury of a passenger and that occurred on board the aircraft, or in the course of the operations of embarking or disembarking, which is sudden or unusual and has an origin external to the person of the passenger concerned, is an ‘accident’ capable of rendering the air carrier liable, without it being necessary to examine whether the event is attributable to a hazard typically associated with aviation or is directly connected with aviation.[[91]](#footnote-91)

If the judgment and the Opinion are compared, it is obvious that the Court did not take into consideration some of the propositions made by the Advocate General. In particular, the ag was explicit about the externality requirement, whereas the Court did not even mention it. Also, the ag referred to other cases on similar issues, but the Court did not embark on any such discussion. Even though it is not compulsory for the Court to follow the ag’s Opinion, in this particular case, it seems that the Advocate General was more precise and consistent with regard to the existing jurisprudence. One final remark is the use of the word “involuntary” in relation to accident which was not mentioned by the Advocate General. Only on one occasion was the word “accident” mentioned which was in footnote 46 where there is reference to *vocabulaire juridique*, apparently a translation from French. However, the Court is determined to use it in the Judgment, which seems to be problematic and has not been used by other courts in describing “accident”.

3.3 Reaction to and Criticism of the Judgment

It is not surprising that the ruling prompted discussion among scholars and lawyers who raised concerns about the interpretation of Article 17(1) by the Court of Justice. In their commentary on the judgment, one duo of authors have stated that airlines might be concerned by the heavy pro-consumer approach taken by the Court of Justice, which was already evident from the application of Regulation (ec) No 261/2004, and now moving towards the air carriers’ liability cases.[[92]](#footnote-92)

A remark of another author is that the judgment lacks clarity and was based on a purposive interpretation of the convention and its incorporation into the EU legal order rather than on the textual analysis of the language of the Convention.[[93]](#footnote-93) The cited author recalled that the English Courts have also rejected the requirement that the accident should relate to a risk inherent in air travel but 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.[[94]](#footnote-94)

A notable scholar is critical of the judgment as being “ridden with policy arguments” and has pointed to the fact that the cjeu mainly focused on the proclaimed aim of the Montreal Convention to protect passengers. The same scholar submits that the Court’s reasoning is rather weak and provides no analysis of the *Saks* case, which remains the main authority on what constitutes an accident.[[95]](#footnote-95)

In another comment regarding this judgement, it was observed that the Court did not consider the case law from other State Parties, or that part of the ag’s Opinion which mentions the widely accepted definition of accident as a sudden or unusual event that is external to the passenger concerned. The Court’s definition of accident as being “an unforeseen, harmful and involuntary event” leaves absent the requirement of externality emphasized by the US and UK courts’ definition of “an unexpected or unusual event or happening that is external to the passenger”.[[96]](#footnote-96) Another commentator has referred to Lord Phillips in *Morris* v. *KLM* who already stated that the “accident” does not have to relate to the operation of the aircraft or be a characteristic of air travel.[[97]](#footnote-97) The judgment was also characterized as “regrettable and poorly reasoned” for the same above-noted reasons. The same author has expressed curiosity over whether this decision can distort the certainty and uniformity of that matter. In case it does, perhaps there is a necessity to revise Article 17 to reinforce the *Saks* interpretation.[[98]](#footnote-98)

Before closing this discussion, it is necessary to mention another judgment regarding interpretation of “accident” that has recently been rendered by the Court of Justice and is relevant to the present discussion. In Case C-70/20 *YL* v. *Alternhein Luftfahrt GmbH*,[[99]](#footnote-99) a passenger claimed suffering a spinal disk injury because of the hard landing and sought compensation in the amount of eur 68,585. The airline objected that it was an accident and that hard landings are safer in a mountainous environment and within the normal operating range of the aircraft. In its Judgment, the Court referred to the case of *GN* v. *ZU* for the first time reiterating its initial interpretation of “accident” as unforeseen, harmful and involuntary event. In para. 35 the Court made an important statement as follows:

It is necessary to reject from the outset, however, an interpretation of the concepts referred to in the preceding paragraph based on the perspective of each passenger. In so far as perspectives and expectations may vary from one passenger to another, such an interpretation could lead to a paradoxical result if the same event were classified as ‘unforeseen’ and, therefore, as an ‘accident’ for certain passengers, but not for others.

The above statement is incompatible with the well-established position made in *Deep Vein Thrombosis* mentioned earlier where it was held- “It is the injured passenger who must suffer the ‘accident’ and from his perspective that the quality of the happening must be considered”.[[100]](#footnote-100) It reveals that the Court’s interpretation implies a shift towards the assertion that negligence must be proven instead of focusing on whether there was an accident suffered by the passenger. Changing the commonly accepted interpretation of “accident” under Article 17 can lead to serious legal implications including the application of domestic negligence concepts which would be a highly undesirable result.[[101]](#footnote-101)

4. Concluding Remarks

In concluding this chapter, several observations and resulting submissions are made by the author. Regarding the judgment in *Niki Luftfahrt,* it is observed that the numerous decisions stemming from the Court of Justice and hinging on the Montreal Convention have been largely debated and criticized.[[102]](#footnote-102) It is indisputable that the cjeu’s approach to interpretation of international conventions is somewhat disconcerting. It can be perceived as an obstacle to the uniform application and interpretation of the convention. Courts in some Member States have decidedly disagreed with the cjeu’s reasoning and are unwilling to apply its rulings in subsequent cases, whereas others have followed them. There is a further concern that the Court can establish and endorse its own unique approach to interpretation of the autonomous concepts of the Montreal Convention, which poses the potential risk of creating conflicts at both the EU and international levels. An outcome is that courts in the Member States will be under an obligation to comply with these rulings based on the supremacy of EU law. In this regard, it is instructive to refer to Article 27 of the Vienna Convention on the Law of Treaties 1969 which provides that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Article 31 is also of relevance and provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

Be that as it may, it is advisable that the Court is more careful in its approach to interpreting the Montreal Convention regardless of it being adopted as EU law, and should consider judgments on similar issues made by the highest courts in other State Parties to the Montreal Convention. Otherwise, there is a serious risk that the Court will create a parallel pro-European interpretation of the convention, different from already established jurisprudence on the same issues. This in turn can undermine uniformity and legal certainly.

As seen from the above discussion, the notion of “accident” under the Montreal Convention has been dealt by the highest courts in various State Parties to the convention. The outcome of each case depended on the facts and particular circumstances in which the alleged event happened. Whether that event amounted to an “accident” under Article 17 of the Montreal Convention was carefully examined in each of the case. A common observation made by the majority of courts is the requirement of externality, *i.e.,* the accident must be external to the passenger in order to meet the criteria of Article 17. It was also evident that on some points, there was disagreement among the courts or sometimes even among the judges who rendered dissenting opinions on particular issues. This leads to the conclusion that the issue is at once crucial and complex. It is excellently described by a notable commentator -

That the highest courts in the U.S., U.K., and Australia which are all influential common law jurisdictions have spoken on the subject which is of some importance to the development of Air Law worldwide. That these courts have disagreed so fundamentally on these important issues however is troubling. This Clash of the Titans does not square well with a Convention intended for the Unification of Certain Rules for International Carriage by Air.[[103]](#footnote-103)

With due regard to the above statement, perhaps it is time to re-open this question to the State parties to the convention in order to re-consider Article 17 and clarify the notion of “accident” internationally. Be that as it may, uniformity and legal certainty must always be the goals for any convention that govern a global industry. It remains to be seen, whether the author’s proposal to amend Article 17 is practically feasible. Such an initiative will seemingly attract both supporters and opponents. As optimistically proposed by Callinan J. in *Povey* v. *Qantas Airways Limited* decided by the High Court of Australia-

Perhaps the time has come to revise these instruments in the light of increased knowledge and improved technology, in the interests both of consumers, and greater certainty of application.[[104]](#footnote-104)

Otherwise, the Court of Justice of the European Union can do this unilaterally in the years to come and create parallel jurisprudence on the Montreal Convention as was illustrated in *Niki Luftfahrt* and in a more recent case *YL* v. *Altenrhein Luftfahrt*. That would be manifestly undesirable.

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41. ibid*.*, pp. 7–8. [↑](#footnote-ref-41)
42. [2009] nswca 251. [↑](#footnote-ref-42)
43. ibid. [↑](#footnote-ref-43)
44. See in particular *Buckley* v. *Monarch Airlines* [2013] 2 Lloyds Rep 235 and *Lugo* v. *American Airlines* (686 F Supp 373) and *Medina* v. *American Airlines,* US District Court, Southern District of Florida*,* Case No. 02-22133-civ-cooke/brown. [↑](#footnote-ref-44)
45. 470 U.S. 392 (1985). [↑](#footnote-ref-45)
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47. *Air France* v. *Saks*, 470 U.S. 392 (1985), p. 405. [↑](#footnote-ref-47)
48. [2008] ewca Civ 1419. [↑](#footnote-ref-48)
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51. *Deep Vein Thrombosis* [2005] ukhl 72, para. 22. [↑](#footnote-ref-51)
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54. ibid., para. 14. [↑](#footnote-ref-54)
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61. Para. 40. [↑](#footnote-ref-61)
62. Para. 50. [↑](#footnote-ref-62)
63. 686 F. Supp. 373 (d.p.r. 1988). [↑](#footnote-ref-63)
64. ibid*.*, p. 375. [↑](#footnote-ref-64)
65. ibid*.*, p. 376. [↑](#footnote-ref-65)
66. *Medina* v. *American Airlines,* US District Court, Southern District of Florida*,* Case No. 02-22133-civ-cooke/brown. [↑](#footnote-ref-66)
67. Mary Carolan, ‘Girl (8) settles case with Ryanair for €150,000 over hot chocolate spill’, May 28, 2019, <www.irishtimes.com/news/crime-and-law/courts/high-court/girl-8-settles-case-with-ryanair-for-150-000-over-hot-chocolate-spill-1.3907158> accessed 31 May 2021. [↑](#footnote-ref-67)
68. Article 53(2) of the Montreal Convention entitles a Regional Economic Integration Organisation to join the Convention in the same way as a sovereign State. [↑](#footnote-ref-68)
69. Regulation (ec) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (ec) No 2027/97 on air carrier liability in the event of accidents; Regulation (ec) No 261/2004 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. [↑](#footnote-ref-69)
70. Regulation (ec) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. [↑](#footnote-ref-70)
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72. Case C-344/04, *iata and elfaa* [2006] ecli:eu:c:2006:10. [↑](#footnote-ref-72)
73. Joined Cases C-402/07 and C-432/07 *Christopher Sturgeon and Others* v. *Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz* v. *Air France SA.* (*Sturgeon*), Joined Cases C-581/10 and Case C-629/10 *Nelson*, *tui Travel and Others* [2012] ecli:eu:c:2009:716 (*Nelson*). [↑](#footnote-ref-73)
74. Case C-532/18, *GN* v. *ZU*, [2019] ecli:eu:c:2019:1127*(Niki Luftfahrt)*. [↑](#footnote-ref-74)
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76. Paras. 16 and 17. [↑](#footnote-ref-76)
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78. Paras. 26–28. [↑](#footnote-ref-78)
79. Paras. 24–25. [↑](#footnote-ref-79)
80. Para.35. [↑](#footnote-ref-80)
81. Para.26. [↑](#footnote-ref-81)
82. Para.40. [↑](#footnote-ref-82)
83. ag Opinion in Case C-532/18, *GN* v. *ZU*, ecli:eu:c:2019:788. [↑](#footnote-ref-83)
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89. *Diaz Lug*ov. *American Airlines, Inc.*(686 F. Supp. 373 (d.p.r 1988) and *Wipranik* v. *Air Canada, and Others*(2007 wl 2441066). [↑](#footnote-ref-89)
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