

EUROPA CONTRA MUNDUM:
The European Community and International Air Law

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INTRODUCTION: THE PRINCIPLE OF STATE SOVEREIGNTY

It is abundantly clear that the basis on which international air law rests is the sovereignty of nation States. This is true of the system established by the Chicago Convention 1944¹, which declares in Article 1 that ‘the contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory’, language based on the equivalent article of the Paris Convention of 13 October 1919. On that basis, States have become parties to a whole network of agreements each State granting to the other the right to fly within its sovereign airspace, agreements reflected in the text of the Chicago Convention itself², in the related International Air Services Transit Agreement 1944 (the ‘Two Freedoms’ Agreement) and the International Air Transport Agreement 1944 (the ‘Five Freedoms’ Agreement), and in bilateral agreements between pairs of States³.

State sovereignty is no less the basis of the private law Conventions forming the ‘Warsaw system’ from the Warsaw Convention 1929 to the Montreal Convention 1999. Although concerned with the rights of carriers and of passengers, consignors

1 Formally the Convention on International Civil Aviation done at Chicago on 7 December 1944.

2 See Convention, Chapter II (arts 5-16).

3 For example the Air Services Agreement between Colombia and the United Kingdom of 16 October 1947 (published in the U.K. as Cmnd 9616) and the Air Transport Agreement between Colombia and the United States of 24 October 1956; both have the subject of repeated extensions and amendments.

and consignees, the effect is to create rights enforceable by States. In the English High Court decision of *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte International Air Transport Association*⁴, which is considered more fully below, the judge (Jowitt J.) accepted in this context the argument that an international treaty such as the Warsaw Convention which deals with the obligations and rights of individuals, rather than a sovereign State, is nonetheless enforceable in the international forum by any State which is a party to the treaty on behalf of those of its subjects⁵ whose rights have been adversely affected by the action of another party to the treaty. He accepted the view of the Permanent Court of International Justice in *Mavrommatis Palestine Concessions Case, Greece v. U.K.*⁶:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

THE IMPACT OF THE EUROPEAN COMMUNITY

Discourse in terms of nation States must increasingly be adjusted to reflect the emergence of regional groupings of States such as the European Community. Originally founded as the European *Economic Community*, it has developed through successive amendments to the founding Treaty of Rome (hereinafter ‘the

4 [2000] 1 Lloyd’s Rep. 242.

5 Whether natural persons or corporate bodies.

6 (1924) PCIJ Reports, Series A, n° 2, 12, at p. 302.

Treaty’) into a supranational political entity which has some of the features of a State. Indeed, in 2003 the assembly known as the Convention on the Future of Europe will produce a new document already being referred to as a constitutional treaty.

Even a supranational body is, of course, bound by international law. In the English case already cited⁷, it was accepted on all sides that the Community cannot act in breach of its own public international law obligations, nor require Member States to act in breach of their own obligations owed under public international law to non-Member States or act in a way which impedes the performance of those obligations⁸. This does not, however, prevent the growing competence of the institutions of the Community from coming into conflict with the basic principle of international air law identified above.

Two types of what can be described as aggression by the Community’s legal order illustrate this potential for conflict:

- (i) the new competences of the Community may deprive Member States of their ability to negotiate treaties with non-Member States, and may render invalid any treaties they purport to negotiate; and
- (ii) binding legal instruments created within the Community’s legal order may conflict with the existing public international law obligations of Member States.

7 *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte International Air Transport Association* [2000] 1 Lloyd’s Rep. 242.

8 Citing Case 21/72 *International Fruit Co. N.V. v. Produktschap voor Groenten en Fruit* [1972] E.C.R. II-1219 at p 1226 (the jurisdiction of the European Court to examine whether the validity of the acts of the Community Institutions may be affected by reason of being contrary to a rule of international law); Case C-286/90 *Anklagemyndigheden v. Poulson and Diva Navigation Corporation* [1992] E.C.R. I-6019 at p. 6052 (the Community must respect international law in the exercise of its powers); and Case C-162/96 *Racke GmbH and Co. v. Hauptzollamt Mainz* [1998] E.C.R I-3655 (the rules of customary international law and the principle of *pacta sunt servanda* held to be part of the Community legal order).

The experience of recent years has provided actual examples of both in the context of international air law, and they are examined in this paper.

THE *OPEN SKIES AGREEMENTS* CASES

The first example is provided by the *Open Skies Agreements* litigation before the European Court of Justice, cases brought by the Commission of the European Communities against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom⁹. Although differing in points of detail, the cases raise essentially the same principles.

BACKGROUND TO THE DISPUTE

The background lies in two developments, one outside and the other within the structures of the Community. The outside developments arose from the initiative of the United States in 1992 and following years to seek to negotiate bilateral open skies agreements with various European States. The U.S. Government sought terms which included such matters as free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of mutual disapproval for air routes between the parties to the agreement, and the possibility of code-sharing operations. These negotiations were successful in varying degrees and agreements were concluded between the United States and the States against which proceedings were taken by the European Commission (hereinafter 'the Commission') in 1998. The resulting agreements have been described by the Commission in the following terms:

9 C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, all decided on 5 November 2002; see [2003] 1 C.M.L.R. 7.

The 'Open Skies' agreements commonly negotiated by the United States, are traditional bilateral agreements in that they reserve traffic rights strictly to the airlines from the two parties to the agreement. However, they do provide for the removal of quantitative restrictions on the frequency of flights, the capacity to be provided and the number of air carriers permitted. Significantly for the EU, they also permit airlines of both parties to extend routes between them, offering unrestricted fifth freedom services to other countries. These fifth freedoms are of relatively little value on the American side of the Atlantic, given that there are relatively few viable onward destinations. However, in parts of the World where there are many international markets in close proximity, such as the EU, they are more useful. In effect, they give American carriers access to Europe's domestic market, while the US domestic market remains firmly closed to foreign operators. These rights are currently used in particular by American cargo companies to provide intra- EU parcel services¹⁰.

Within the structures of the Community, there has been something of a power-struggle, the Commission repeatedly seeking the exclusive right to negotiate such agreements with non-Member States on behalf of the Community as a whole. The Commission first sought such authority in 1990 and 1992, basing itself on what was then Article 113 of the Treaty¹¹ which speaks of the commercial policy of the Community. The Council, that is the representatives of the Governments of the Member States, rejected the request in 1993. They decided that the development of external relationships in aviation was properly based on what was then Article 84(2), now Article 80(2), of the Treaty. The effect of the Article is that the Treaty's provisions as to transport apply only to transport by rail, road and inland waterway, but:

The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

10 Communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy (COM/2002/0649 final), para. 14.

11 Now Art. 133.

Under this provision, the Council had already adopted three sets of measures (referred to as ‘packages’) affecting aviation¹². The third and most far-reaching of these packages, dating from July 1992, included Council Regulation 2407/92 on licensing of air carriers¹³; Council Regulation 2408/92 on access for Community air carriers to intra-Community air routes¹⁴; and (most significant for present purposes) Council Regulation 2409/92 on fares and rates for air services¹⁵, which lays down the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community. Before 1992, the Council had adopted Council Regulation 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems¹⁶, and in 1993 it adopted Council Regulation 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports¹⁷.

The Commission was still pressing for an extended competence in aviation matters, and in June 1996 it was given by the Council a carefully limited mandate to negotiate with the U.S. Government on particular matters¹⁸. Although the mandate was limited to bilateral negotiations with the United States and expressly excluded the important issues of market access, capacity, carrier designation and pricing, the Commission asserted in 1996 that Community competence had now been established in respect of air traffic rights. As the Commission’s position was not accepted by the

12 See generally, *Shawcross and Beaumont on Air Law* (London: Butterworths), Division IX.

13 [1992] OJ L 240/1.

14 [1992] OJ L 240/8.

15 [1992] OJ L 240/15.

16 [1989] OJ L 220/1.

17 [1993] OJ L 14/1.

18 The list eventually included competition rules; ownership and control of air carriers; computer reservation systems; code-sharing; dispute resolution; leasing; environmental matters; State aid and other measures to avert bankruptcy of air carriers; slot allocation at airports; and the economic and technical fitness of air carriers.

Governments of most Member States, it began proceedings for a declaration that the defendant Member States, by concluding bilateral agreements with the United States (the Commission having failed to do so), were in breach of their obligations within the Community's legal order.

There is little doubt that, as some of the defendant Governments alleged, the Commission was attempting, by means of the legal proceedings before the Court, to secure a Community competence for which it had been unable to obtain recognition by political means in the Council. The Court held, in effect, that the Commission's motives were irrelevant.

THE ARGUMENTS IN THE CASES: EXTERNAL COMPETENCE

The main arguments concerned the supposed existence of an exclusive external competence of the Community¹⁹. One basis for this argument was in the line of decisions beginning with Opinion 1/94 of 26 April 1977²⁰. It was argued that the Community had exclusive competence to conclude an international agreement where the conclusion of such an agreement was necessary in order to attain the objectives of the Treaty in that area, such objectives being incapable of being attained merely by introducing autonomous common rules. In the *Open Skies Agreements* cases, the Court held that these criteria were not met. It was quite possible, as the third package of measures had demonstrated, to exercise internal competence without at the same time exercising external competence.

19 See generally, I. MACLEOD, I. D. HENRY and S. HYETT, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996); A. A. MENCİK VON ZEBINSKY, *European Union External Competence and Air Transport* (The Hague: Kluwer, 1996).

20 Opinion given pursuant to Article 228 (1) of the EEC Treaty on the Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741. See Opinion 1/94 of 15 November 1994 [1994] ECR I-5267, and Opinion 2/92 of 24 March 1995 [1995] ECR I-521.

The Commission's second argument rested on the line of cases beginning with the ERTA judgment, Case 22/70 *Commission of the European Communities v Council of the European Communities (European Agreement on Road Transport)*²¹. In this judgment, the Court established that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopted provisions laying down common rules, whatever form they might take, the Member States no longer had the right, acting individually or even collectively, to make agreements with third countries which affected those rules or altered their scope.

The Commission argued that this principle applied in the *Open Skies* context. It argued that either (i) there was a complete set of common rules, such that Member States were no longer competent, whether acting individually or collectively, to enter into commitments affecting those rules by exchanging traffic rights and opening up access for third-country carriers to the intra-Community market; or (ii) if there were no such complete set of rules, the ERTA principle still applied where the relevant area was already largely covered by progressively adopted Community rules.

The Court in effect rejected the second, more ambitious, argument. It did, however, confirm that the ERTA principle was not limited to cases where a power was expressly conferred by the Treaty but applied equally in other cases in which the Community, with a view to implementing a common policy envisaged by the Treaty, adopted provisions laying down common rules. It also decided that the principle applied to cases such as that arising under Article 84(2) of the Treaty, where there was a need for a prior decision as to whether any legislative provision should be made for air transport.

But before the application of the ERTA principle could be found to have given the Community exclusive external competence, it was necessary to subject to close analysis the relevant common rules supposed to attract the principle. In some respects, this

21 [1971] ECR 263.

scrutiny led to the rejection of the Commission's arguments. So, the Court found that Regulation 2407/92 on licensing of air carriers²² did not address the granting of operating licences to non-Community carriers that operate within the Community; and Regulation 2408/92 on access for Community air carriers to intra-Community air routes²³ did not govern the granting of traffic rights on intra-Community routes to non-Community carriers. It followed that the bilateral agreements challenged by the Commission could not be said to affect those Regulations.

However, the Commission succeeded in respect of a number of pieces of European legislation:

- (i) Regulation 2409/92 on fares and rates for air services²⁴ contains a provision²⁵ that only Community air carriers are entitled to introduce new products or fares lower than the ones existing for identical products, in effect prohibiting air carriers of non-Member countries which operate in the Community from so acting. This meant that the Community had acquired exclusive competence to enter into commitments with non-Member countries relating to that limitation on the freedom of non-Community carriers to set fares and rates.
- (ii) Regulation 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems²⁶ which applies to nationals of non-Member countries who use or offer for use a computerised reservation system in Community territory; it followed that the Community thus acquired exclusive competence to agree with non-Member countries the

22 [1992] *oj* L 240/1.

23 [1992] *oj* L 240/8.

24 [1992] *oj* L 240/15.

25 Art. 3(1).

26 [1989] *oj* L 220/1.

obligations relating to computerised reservation systems used or offered for use in its territory.

- (iii) Regulation 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports²⁷ also applies to air carriers of non-member countries, with the result that the Community had exclusive competence to conclude agreements in that area with non-Member countries.

THE ARGUMENTS IN THE CASES: FREEDOM OF ESTABLISHMENT

A distinct argument advanced by the Commission concerned the freedom of establishment under Article 52 of the Treaty. The Court held that this freedom applied in the context of air transport. The background to this issue is to be found in the presence in many of the bilateral agreements with the United States of ownership and control provisions. These make the granting by each contracting party of the appropriate operating authorisations and the necessary technical permissions to airlines designated by the other party subject to the condition that a substantial part of the ownership and effective control of those airlines be vested in the contracting party designating the airline, nationals of that contracting party, or both.

The Treaty guarantees nationals of Member States of the Community who have exercised their freedom of establishment, and companies or firms which are assimilated to them, the same treatment in the host Member State as that accorded to nationals of that Member State²⁸. The effect of the clauses in the bilateral agreements was, however, to allow the United States to withdraw, suspend or limit the operating authorisations or technical permissions of an airline designated by the relevant Member State but of which a substantial part of the ownership and effective

27 [1993] OJ L 14/1.

28 See Case C- 307/97 *Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt* [1999] ECR I-6161.

control is not vested in that Member State or in its nationals. This meant that Community airlines might suffer discrimination preventing them from benefiting from the treatment which the host Member State accords to its own nationals. The clauses were accordingly held to be in breach of the Treaty.

AFTER THE JUDGMENTS

The Commission was thus partially successful in its application, but has subsequently used the judgments as a basis for a further attempt to add to its powers. Its initial response to the judgments was contained in a Communication published on 19 November 2002²⁹. This was essentially a renewal of its earlier arguments that ‘with Community initiatives today covering most aspects of air transport, from safety and security to passenger protection, it has become increasingly inappropriate for international relations to be handled by each Member State individually’³⁰. Rather more surprisingly, the Commission listed a whole series of areas not addressed in the *Open Skies* cases, in which it claimed an exclusive external competence for the Community. The list includes safety issues³¹; commercial opportunities in particular groundhandling³², customs duties, taxes and (user) charges³³; and environmental

29 Communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy (COM/2002/0649 final).

30 Communication, para. 2.

31 Citing Regulation n° 1593/2002 of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2002] OJ L 240.

32 Covered by Directive 96/67 of 15 October 1996 on access to the groundhandling market at Community airports [1996] OJ L 272.

33 Citing Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and the holding, movement and monitoring of such products [1992] OJ L 076 and the exemption of aviation fuel from excise duties covered by Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils [1992] OJ L 316.

matters³⁴; plus some further issues covered by Community legislation which applies to foreign air carriers (notably, denied boarding compensation³⁵, air carrier liability³⁶, and package holidays³⁷).

Having made its initial response, the Commission produced a further Communication in February 2003³⁸. It reminded Member States that they were now prevented not only from contracting new international obligations, but also from keeping such obligations in force if they failed to take account of Community law. The Commission asked Member States to terminate their agreements with the United States. It also asked for a mandate from the Council to open Community negotiations with the United States on the creation of a new E.C-U.S. agreement and spoke of the need to open Community negotiations with third countries (indeed with all bilateral partners) on the issue of ownership and control and on matters of Community exclusive competence.

The Commission did recognise that even with the deployment of the full political and technical means of the Commission and Member States, it will take a substantial amount of time to complete this task. In the meantime, the existing agreements should remain in force as they stand, subject to the proposals made in the Communication.

34 See Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports [1992] OJ L 76.

35 Council Regulation n° 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in air transport [1991] OJ L 36.

36 Council Regulation n° 2027/97 of 9 October 1997 on air carrier liability in the event of accidents as amended [1997] OJ L 285.

37 Council Directive n° 90/314 of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L 158.

38 Communication from the Commission on relations between the Community and third countries in the field of air transport (COM/2003/0094 final).

REFLECTIONS ON THE *OPEN SKIES* CASES

The effect of all this is to create very considerable uncertainty as to the handling of international aviation by individual Member States. It is true that the judgments in the *Open Skies* cases have clarified the law in some respects, but the position is much less clear-cut than the Commission would assert.

From the point of view of the individual Member States, it is unsatisfactory to find that, in this as in other contexts, the acceptance of some seemingly innocuous common rules has had the unexpected effect of ending national legislative competence. The constitutional treaty now being drafted will address the whole issue of the allocation of competences as between the Community and the Member States, but it is too early to say whether the effect will be to confirm, restrict, or even expand the scope of the ERTA principle.

It must be bewildering to non-Member States to find their traditional practice of negotiating with individual States being ended, and put into a form of limbo, by the operation of what must seem to be arcane principles of E.C. law. Colombia has a range of air service agreements with Member States. Their status is now uncertain. It is possible that the Commission, should it fail to get extended powers from the Council, will take further cases to the European Court challenging the validity of those agreements in whole or in part. It is equally possible that the Commission, armed with an extended mandate, will begin a programme of re-negotiation that could last for many years. In this latter case, it is far from clear whether, and by what procedure, existing agreements with individual Member States could be amended.

There is, of course, an important policy issue for the Community. Within the area covered by the Community there are many, relatively small, States. The international nature of aviation makes it very desirable that some practical aspects should be managed at the European level. A good example of this is provided by the initiatives being taken to develop a Single European Sky for the

purposes of air traffic control. The policy question is whether issues like the grant of traffic rights fall within the same category or should be matters for individual Member States. That policy issue needs to be squarely addressed: it should not be resolved by the application of principles of Community law which are both disputed and detached from the policy issues relevant in particular fields.

THE COMMUNITY AND THE WARSAW SYSTEM

THE BACKGROUND

Another line of development within the Community threatens not just bilateral but multilateral agreements. This concerns the Warsaw system of convention rules derived from the Warsaw Convention of 1929, its successive amending Protocols, and the Montreal Convention 1999.

There are six relevant international treaties: (a) the original Warsaw Convention 1929; (b) the Warsaw Convention as amended by Additional Protocol n° 1 of Montreal, 1975; (c) the Warsaw Convention as amended at The Hague 1955; (d) the Warsaw Convention as amended at The Hague 1955, and by Additional Protocol n° 2 of Montreal, 1975; (e) the Warsaw Convention as amended at The Hague 1955, and by Protocol n° 4 of Montreal, 1975; and (f) the Montreal Convention 1999, which is not yet in force. These treaties, though closely related in content, are separate treaties: a State may become a Party to any one of these treaties without thereby becoming a Party to any of the others³⁹. Colombia, like the United Kingdom, is party to all the treaties in force, and has signed but not ratified the Montreal Convention 1999.

39 For a close examination of the position in public international law, see R Gardiner, 'Treaty Relations in the Law of Carriage by Air: Article 55(1) of the Montreal Convention' [2000] T.A.Q. 245.

Which of the various treaties, if any, applies to a particular case of carriage turns on the definition of ‘international carriage’ in each treaty. Article 1(2) of each treaty gives a definition which (generalising the slightly different wording) speaks of 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 transshipment, are situated either within the territories of two States Parties to the relevant treaty, or within the territory of a single Party if there is an agreed stopping place within the territory of another State, even if that State is not a Party. It is therefore crucial to identify the places of departure and destination, and to determine to which, if any, international treaty the State in which each of those places is situated is a Party⁴⁰.

Many States are Parties to several of the treaties. The practice followed is that if the places of departure and destination are in States which are Parties to several treaties, the flight is ‘international carriage’ for the purposes of, and so will be governed by, the most recent treaty to which the two States are both Parties⁴¹.

COMMUNITY ACTION

Against this background, though earlier than the negotiation of the Montreal Convention 1999, the European Commission issued a Consultation Paper⁴² in October 1992. It noted that the compensation

40 See *Claire v. SilkAir (Singapore) Pte Ltd.* [2002] 3 S.L.R. 1 (Singapore C.A.) (Singapore party to unamended Warsaw Convention and Warsaw-Hague text; unamended Convention applied to passengers flying Singapore-Indonesia; Warsaw-Hague to passengers with return tickets Singapore-Indonesia-Singapore) and *Chubb & Sons Ltd. v. Asiana Airlines* 214 F. 3d 301 (2nd Cir, 2000), 27 *Avi* 17,877, cert. den. 121 S. Ct. 2549 (2001) (flight Seoul, South Korea to San Francisco: South Korea party to Warsaw-Hague text, U.S. then only to unamended Warsaw Convention; flight not ‘international carriage’ for the purposes of either treaty).

41 The rule that the latest common treaty applies is expressly confirmed in the Montreal Convention 1999, Art. 55.

42 Passenger Liability in Aircraft Accidents: Warsaw Convention and Internal Market Requirements.

limits set by the Warsaw system were unacceptably low in terms of reasonable minimum consumer protection standards. After consultations, which included the European Civil Aviation Conference, the Commission decided that formal action by the European institutions was necessary. It produced the text of a possible Council Regulation⁴³ on air carrier liability in case of accidents. After a sequence of amended proposals, the Council eventually adopted a Regulation⁴⁴ on 9 October 1997, limited to liability to passengers⁴⁵.

The Regulation provides that the liability of a Community air carrier for damages sustained in the event of death, wounding, or any other bodily injury by a passenger in the event of an accident is not to be subject to any financial limit, be it defined by law, convention or contract⁴⁶. For any damages up to the sum of the equivalent in euros of 100,000 Special Drawing Rights the Community air carrier may not exclude or limit his liability by proving that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures⁴⁷. In these respects the terms of the Regulation set liability rules at variance with all of the then existing versions of the Warsaw Convention.

43 See C SCAPEL, 'Vers la fin de la limitation de responsabilité du transporteur aérien de passagers' (1996) 49 R.F.D.A. 15; 'Observations sur la proposition de règlement du Conseil relative à la responsabilité des transporteurs aériens à l'égard des passagers en cas d'accidents aériens' (1996) 49 R.F.D.A. 25.

44 Regulation n° 2027/97, [1997] OJ L 285.

45 See G GANSFORT, 'Praktische Anmerkungen zu der Europäischen Verordnung über die Haftung von Luftfahrtunternehmen bei Flugunfällen mit Personenschäden' (1998) 47 Z.L.W. 263; E GIEMULLA and R SCHMID, 'Council Regulation (EC) n° 2027/97 on Air Carrier Liability in the Event of Accidents and Its Implications for Air Carriers' (1998) 23 A.&S.L. 98.

46 Regulation n° 2027/97, art. 3(1)(a). The servants and agents of the carrier, in consequence, lose the protection of the liability limits: *R. v. Secretary of State for the Environment, Transport and the Regions, ex p. IATA* [2000] 1 Lloyd's Rep. 342.

47 Regulation n° 2027/97, art 3(2). In Warsaw Convention cases, this excludes the art. 20 defence.

LEGAL CHALLENGE

IATA brought judicial review proceedings in the High Court in England seeking a declaration that the statutory instrument giving effect to the regulation in the law of the United Kingdom, the Air Carrier Liability Order 1998⁴⁸ was void, and a reference to the European Court of Justice as to the validity of Council Regulation n° 2027/97⁴⁹. The application was dismissed but the judgment⁵⁰ raises serious questions as to the implications of the Regulation in international law⁵¹.

IATA's main contention was that the Regulation was incompatible with the international law obligations of Member States, including the United Kingdom. It was argued that parties to the Warsaw Convention were under a treaty obligation to apply to its own carriers the rules of the Convention. The judge accepted this argument: the whole purpose of the Convention was to secure a uniform regime, and for one party to apply different rules to its own carriers would frustrate the Convention's purpose. The judge cited the emphasis on uniformity found in the speech of Lord HOPE in *Sidhu v. British Airways p.l.c.*⁵² and in the United States Supreme Court judgment in *El Al Israel Airlines v. Tseng*⁵³, where the primary focus was on the exclusivity of the Convention.

Counsel for IATA argued that as the European Community could not require a Member State to act in breach of its treaty obligations,

48 S.I. 1998/1751.

49 While a national Court of a Member State may make a determination that an EC regulation is valid, only the European Court of Justice may make a determination that it is invalid.

50 R. v. Secretary of State for the Environment, Transport and the Regions, ex p. IATA [2000] 1 Lloyd's Rep. 342.

51 See J. BALFOUR 'Council Regulation (EC) 2027/97 on air carrier liability - a tale of suspense' [1999] T.A.Q. 206.

52 [1997] A.C. 430, [1997] 1 All E.R. 193, H.L.

53 119 S. Ct. 662 (1999), 26 Avi 16,141.

the Regulation must be invalid. The judge referred, however, to Article 234 of the Treaty of Rome:

- (1) The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.
- (2) To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

The judge held that the effect of Article 234(1) was that the Regulation did not put the Community or Member States in collision with their public international law obligations. That interpretation involved equating the Regulation with the Treaty; on that, not wholly convincing, view, the argument that the Regulation was invalid as in conflict with international law fell away and could not be sustained.

The outcome became a little clearer as the judge commented on Article 234(2):

A consideration of this paragraph shows it is in fact incorrect to say that because all Member States have antecedent incompatible obligations to non-Member States the Regulation is invalid. It matters not whether the terms of a Regulation are such that only one, some or all the member states can invoke the first paragraph of Article 234. Even though the Member States involved are not affected by a Regulation in the sense of having to comply with it while the antecedent and incompatible obligations remain in force the Regulation would still apply in the Member State or States involved by virtue of the requirement in paragraph 2 of Article 234 to take all appropriate steps to eliminate the incompatibilities. This duty in my judgment applies whether only one, some or all the Member States are involved. It is only the

fact that, despite incompatibility, a Regulation still applies in a Member State (though held in suspense by virtue of the first paragraph) which can require it to take action under paragraph 2.

This reference to the suspensory effect of Article 234(1) is not further explained. The effect though is clear enough: the relevant Member States (indeed, in the instant case, *all* Member States) were not obliged to comply with the Regulation, and should instead seek to eliminate the incompatibilities, in this case by re-negotiating or denouncing the Warsaw Convention. In that sense, the operation of the Regulation was suspended⁵⁴. The U.K. statutory instrument giving effect to the Regulation was treated, however, as valid.

In fact no Member State took any action to denounce the Warsaw Convention, though they did participate in the negotiation of the Montreal Convention 1999, which was intended ultimately to replace it.

Once that new Convention was in place, an amending Regulation was made by the European Parliament and Council in May 2002⁵⁵. Its declared purpose was to amend Regulation n° 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’; it will only come into force when the Montreal Convention comes into force for the Community. The provisions of the original Regulation as to the principles of carrier liability are replaced by a simple statement that the liability of a Community air carrier in respect of passengers and their baggage is governed by all provisions of the Montreal Convention relevant to such liability⁵⁶.

The effect seems to be to require Member States to apply the Montreal Convention in all cases coming before their courts. In its

54 See L.S. CLARK, ‘European Council Regulation (EC) n° 2027/97: Will the Warsaw Convention Bite Back?’ (2001) 26 A.&S.L. 137.

55 European Parliament and Council Regulation 889/2002 of 13 May 2002, [2002] OJ L 140.

56 Regulation n° 2027/97, art. 3(1) as substituted by Regulation n° 889/2002, art. 1(4).

terms, however, the Montreal Convention, through its definition of 'international carriage' applies only in certain cases, depending on the places of departure and destination of the passenger concerned. In other cases, the individual Member States will remain under a treaty obligation to apply some other instrument in the Warsaw system.

REFLECTIONS ON THE CHALLENGE TO THE WARSAW SYSTEM

Once again the European institutions seem to set themselves at odds with the treaty obligations of Member States. Despite the fact that they are bound by the principles of international law, they seem determined to defy those principles. Once again we have uncertainty, both for Member States and for their treaty partners.

We can take a hypothetical case to illustrate the position. Let us assume that the Montreal Convention 1999 duly comes into force and that the Community Member States are parties to it, but that Colombia has not yet ratified that Convention. A passenger on a flight from Bogotá to London will as a matter of international law be under the regime of the Warsaw Convention as amended by Montreal Protocol n° 4, the most recent instrument of the Warsaw system to which both Colombia and the United Kingdom are parties. The United Kingdom would nonetheless be bound by the terms of Community legislation to apply the liability rules of the Montreal Convention 1999, more favourable to the passenger but more onerous to the carrier, perhaps a Colombian carrier. The United Kingdom would be in breach of its treaty obligations to Colombia. Were the United Kingdom to seek to escape from its dilemma by denouncing all the instruments of the Warsaw system apart from the Montreal Convention 1999, the effect would be that *no* Convention rules would apply to a passenger from Bogotá to London. This is wholly unsatisfactory, and the whole issue needs to be addressed, perhaps through the International Civil Aviation Organisation.

As an internal Community issue, this may seem analogous to the problem experienced by all federations in respect of international treaties affecting matters within the competence of the component States or Provinces of the federation. The solution in the United States is to accord supremacy to a treaty duly ratified with the advice and consent of the Senate. But the analogy does not hold: the Community is not a federal State (though some hope that it will become one in time), and its Commission has no democratic legitimacy. In the present stage of its constitutional development the Community would do well to acknowledge its limitations so as to avoid further conflict with the established principles of international law.