



CHALLENGES IN SPAIN REGARDING COMPENSATION UNDER REGULATION (EC) 261/2004 IN CASES GOVERNED BY THE 1999 MONTREAL CONVENTION

International passenger air transport, experiencing constant growth, presents challenges that need to be addressed harmoniously to ensure its smooth functioning. Among these challenges, one of the most pressing issues for airlines is quantifying the compensation that may be due to passengers affected by flight disruptions. This task is further complicated by the various compensatory measures provided by different legal instruments.

Determining which law applies to address these issues require consideration of numerous factors, including the departure and destination locations, as well as the nationality of the airline involved. These considerations can sometimes lead to overlaps and imbalances unintended by legislators¹.

In turn, determining the applicable law is crucial to clarify the potential compensation amount. However, this matter is often subject to debate and may result in solutions that deviate significantly from the intent of the legal texts.

For this reason, in this newsletter, we will explore the scope of application and the compensation framework outlined in the Montreal Convention². Additionally, we will highlight some practical discrepancies that arise when the provisions of Regulation (EC) 261/2004³ are improperly applied in Spain to aviation incidents governed by the Montreal Convention.

SCOPE OF APPLICATION OF THE MONTREAL CONVENTION IN RELATION TO REGULATION (EC) 261/2004

To begin, let us recall that the Montreal Convention was adopted to standardize regulations concerning airline liability in international air transport. This pivotal agreement serves as a crucial legal framework aimed at safeguarding passengers' rights and delineating airlines' liability in case of air incidents. It encompasses provisions governing airline liability for damages incurred by passengers, baggage, and cargo during international air transport. Additionally, it sets liability limits in specific scenarios and outlines procedures for submitting claims and resolving disputes.

Unlike Regulation (EC) 261/2004, which ensures predetermined compensation in specific cases of cancellation, denied boarding, and significant delays, the Montreal Convention does not offer automatic compensation for passengers affected by air incidents. Instead, its primary focus is on establishing airline liability without specifying precise compensation amounts.

Regarding its scope of application, the Convention applies to international flights operated by airlines from countries that have ratified it. Consequently, in most cases, passengers encountering issues during international flights are covered by its provisions.

Article 3 of Regulation (EC) 261/2004 limits its application to flights departing from an airport located in a Member State or departing from a third country and operated by a community carrier. This requirement establishes a specific connection between the contract of carriage and EU law for its enforcement.

Thus, it is crucial to clarify to the reader that under the Convention, compensation is only applicable to flight delays, as outlined in Articles 19 and 22. However, compensation for flight cancellations or denied boarding is excluded, a point acknowledged by most of the legal doctrine⁴.

Furthermore, it is essential to emphasize that each of these regulations serves a different purpose, resulting in different compensation solutions. Therefore, when addressing cases falling within their respective scopes of application, it is imperative to adhere to the compensation regime outlined in each legal text.

In this context, as ruled by the Court of Justice of the European Union (CJEU), *Regulation No 261/2004 establishes a system to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay and cancellations to flights cause*. The CJEU maintains that *this system operates at an earlier stage than the Montreal Convention and, consequently, is independent of the system stemming from that convention*⁵. Therefore, considering the differing objectives of the two instruments, it

¹ For more details on applicable conflicts of law in relation to passenger rights, please refer to our [November 2023 newsletter](#)

² Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28th May 1999 (hereinafter referred to as the 'Montreal Convention').

³ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11th 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 (hereinafter 'Regulation (EC) No 261/2004').

⁴ PAZOS CASTRO, R., *La protección del consumidor en el transporte aéreo de pasajeros*, Wolters Kluwer, 2018, Madrid, page 131.

⁵ Judgment of the CJEU of 22nd November 2012 (Case C-139/11).

⁶ Judgment of the CJEU of 19th November 2009 (Joined Cases C-402/07 and C-432/07).



is inappropriate to apply the provisions of one to cases falling under the scope of the other. Each regulation operates autonomously to provide compensation for specific air incidents⁶.

Additionally, concerning the Spanish legal framework, it is worth briefly noting the difference in judicial competence between the two regulations. While matters related to Regulation (EC) 261/2004 and incidents involving checked baggage under the Montreal Convention fall under the jurisdiction of the Courts of First Instance, actions concerning flight delays under the Montreal Convention are within the purview of the Commercial Courts due to judicial specialization. Thus, recognizing compensation under Regulation (EC) 261/2004 within the Montreal Convention framework may not align with the interests of the legislator itself, as they were configured separately.

COMPENSATION UNDER THE 1999 MONTREAL CONVENTION

Regarding compensation amounts, it is important to reiterate that the Montreal Convention does not stipulate fixed or automatic compensation. Instead, it sets a compensation limit applicable to both non-material and material damages resulting from flight delays⁷. The quantification of this sum is further restricted by specific conditions and limits, determined by the extent of the damage suffered rather than the duration of the flight delay.

Moreover, the Convention stipulates that airlines are not liable for certain types of damages, such as those resulting from the negligence or other wrongful acts or omissions of the person seeking compensation.

Therefore, for compensation to be granted under the Montreal Convention, it is mandatory to prove the alleged harm suffered. In essence, passengers are required to demonstrate that they have incurred tangible and quantifiable damage due to an air incident. This contrasts with the compensation mechanism outlined in Regulation (EC) 261/2004, which mandates automatic compensation under specific circumstances without the necessity of proving specific damages.

Recognizing the disparities between these two regulations is crucial when evaluating claims for compensation related to air incidents. As acknowledged by our courts, automatically awarding compensation under the Montreal Convention could contravene its fundamental principles and objectives⁸. Furthermore, it may potentially conflict EU case law, as the CJEU has consistently indicated regarding the automatic application of compensation awarded under the Montreal Convention to incidents involving checked baggage⁹.

ANALOGY IN THE LIGHT OF THE SPANISH CIVIL CODE AND CASE LAW

Despite the noted disparities, Spanish courts often apply the compensatory framework of Regulation (EC) 261/2004 to cases governed by the Montreal Convention through the principle of analogy. This approach is done to address what may be perceived as a 'legal gap' in the Montreal Convention regime, by incorporating provisions of EU law.

This allowance, articulated in Article 4 of the Spanish Civil Code, permits for the analogous application of a rule to a situation governed by another rule when the latter regulates similar cases characterized by an 'identity of reason.' However, case law has nuanced this requirement of 'identity of reason,' interpreting it as the presence of a similarity in the underlying basis or rationale of a rule that extends to other situations lacking normative regulation¹⁰. This occurs even when there is no evident legal gap in the specific case at hand.

Furthermore, it is important to recall that, as established by the CJEU, the regime outlined in the Regulation (EC) No 261/2004



operates at an earlier stage than the Montreal Convention. Hence, these two sets of rules can be regarded as governing distinct cases.

Consequently, analogical application is deemed inappropriate because due to the absence of "identity of reason" between the two rules. The liability regime outlined in the Convention pertains to a scheme of liability for damages caused by delay, which may not necessarily align with the inconvenience of time loss compensated by the EU legislature. For instance, consider the scenario of a passenger on a flight from a third country operated by a non-European airline experiencing a three-hour delay. Applying the Regulation (EC) No 261/2004 by analogy could result in compensation of 600 euros, even if no material or non-material damage occurred -a situation that is common due to the broad range of circumstances covered-. This practice contradicts the fundamental purpose of the Regulation (EC) No 261/2004.

Hence, there is no doubt that analogically applying the compensations outlined in Regulation (EC) 261/2004 to cases beyond its scope would result in illogical situations that deviate from its intended objective.

⁷ Art. 22.1 CM. This limit currently stands at 5 346 Special Drawing Rights, following the latest [revision by ICAO on 28 December 2019](#)

⁸ For illustrative purposes, we refer to Madrid Provincial Court Ruling 251/2012, of 17 September, which states that "the figure of 1,000 D.E.G. (currently 1,131 D.E.C.) simply constitutes a maximum limit to the compensability of the case in the absence of a special declaration of value and in no way a fixed and pre-established right to compensation, which, it goes without saying, does not relieve the claimant of the burden of justifying the identity and value of the contents of the lost luggage".

⁹ Judgment of the CJEU of 9th July 2020 (Case C-86/19).

¹⁰ For better reference, we refer to the provisions of Supreme Court Ruling 463/2006, of 18th May.



CONCLUSIONS

Considering the aforementioned points, it becomes evident that the compensation rulings issued by certain courts in cases falling outside the scope of Regulation (EC) 261/2004 not only contravene the provisions of the regulation itself but also contradict the established case law by the CJEU and national courts.

In essence, as detailed, passengers are entitled to compensation under the Montreal Convention only if the proven damage –whether moral or material– is proven. Unlike the Regulation (EC) No 261/2004, which presumes compensation for mere inconveniences, passengers seeking compensation for flight delays under the Montreal Convention must substantiate, with legally valid evidence, the actual material or non-material damages incurred. Failure to do so should result in the rejection of their claims by the Courts.

Moreover, the identified discrepancies underscore the importance of achieving not only a consistent interpretation but also establishing a transparent legal framework that effectively addresses compensation, considering both passengers' rights and airlines' imperatives to maintain the safety and efficiency of international air transport.

To achieve this goal, it is imperative for the competent courts and regulatory bodies to refrain from interpretations that exceed the rule's scope. They must ensure legal certainty and fairness for all parties involved in every instance.

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