Bumpy landings and air carrier liability under the Montreal Convention 1999

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Does a hard landing, albeit still made within the normal operating range of an aircraft and which results in an injury to a passenger, constitute an 'accident' within the meaning of Article 17 of the Montreal Convention 1999 ('MC99')? This is the question considered by the Court of Justice of the European Union ('CJEU') in a judgment handed down on 12 May 2021. The request for a preliminary ruling on the question was lodged by the Supreme Court of Austria in February 2020 (YL v Altenrhein Luftfahrt GmbH, Case C-70/20). In international carriage by air, in a claim by a passenger for death or bodily injury, establishing an Article 17 "accident" under the MC99 opens the door to the recovery of damages against the air carrier. Judicial consideration of the term is therefore of key interest to carriers and their aviation insurers both in the defence handling of passenger claims and in the monitoring of claim trends.

The bumpy landing

The passenger claimed to have sustained a spinal disc injury by reason of a 'hard' landing at St. Gallen/Altenrhein airport, Switzerland (on a flight originating in Vienna). She brought an action against the carrier (Altenrhein Luftfhart) before the Handelsgericht Wien (Commercial Court, Vienna, Austria). She sought (i) a declaration that the hard landing that she experienced constituted an accident within the meaning of Article 17 of the MC99, (ii) a finding that the carrier was therefore liable for her alleged bodily injury, and (ii) an award of damages of Euro 68,858.00, plus interest and costs.

The air carrier denied liability. The defendant acknowledged that a harder landing was more likely than a soft one at St Gallen/Altenrhein airport because of its alpine situation. However, the landing was within the normal operating range of the relevant aircraft. The flight data recorder noted a vertical load on landing of 1.8g. This was within the maximum tolerance for the landing gear and the structural parts of the aircraft type concerned (2g) as determined by the aircraft manufacturer's specifications. Taking these matters into account, there was no identifiable 'accident' within the meaning of Article 17 of the MC99 and on which the passenger might ground her convention claim.

A hard landing, technically speaking

The phrase 'hard landing' is commonly used by passengers when the aircraft experiences a jolt or a bounce on touchdown, or there is perceived hard braking in the landing phase. The better term for such an occurrence is a 'firm' or 'positive' landing. From a technical perspective and as understood by airframe and landing gear manufacturers and also flight crew, a hard landing is something more than this. It is when the landing is made or suspected of being made outside the aircraft's normal operating range such that the load on the landing gear and load bearing members is above tolerance limits. An occurrence or suspected hard landing occurrence is logged in the aircraft's log records and dials up need for technical inspection both of the aircraft and its landing gear. In the most extreme of cases, significant hull damage can result, as seen in the hard landing of a B737-400 freighter aircraft at Exeter airport in January 2021.

Factors contributing to a 'hard' landing

Both the approach and landing phases of an aircraft are highly complex phases and in terms of accidents, account for a significant percentage of non-fatal hull losses over the past 20 years. At a less extreme level, and outside the realms of air accident or incident, most air travellers can recall an aircraft landing that was a bit bumpy possibly due to the weather or other adverse condition impacting on the landing phase. The flight is memorable for this reason but likely, it is otherwise uneventful.

Undeniably, some airports have a reputation for firm landing of aircraft. The aircraft type and pilot experience also play a part. Aircraft operations manuals tend to guide towards 'fixing' the aircraft on the runway. From an operational perspective, a landing aircraft may need to clear a runway promptly to make way for others stacked behind and waiting their turn to land. A short runway length presents challenge as can geographical location, prevailing weather conditions, runway surface and state of repair. Surrounded by the Alps, Courchevel in France has one of the world's shortest runways at 1,761 feet (537m) long added to which it has a sloped runway with a gradient of 18.66%. Paro international airport in Bhutan is located in a valley at 2,225m above sea level surrounded by peaks reaching 5,468m and is approached through a narrow

gap in the mountains. At Barra airport in the Outer Hebrides the few scheduled flights that operate to the island land on a tidal beach. Dial in strong cross winds, unpredictable air currents, rain or snow and realistically the chance of executing a soft landing at many airports drop considerably. In the majority of cases, however the landing event does not give rise to passenger bodily injury.

An 'unforeseen, harmful and involuntary event.'

Prior to the subject referral, the CJEU had most recently considered the interpretation of the term 'accident' under the MC99, in its judgment of December 2019 (*Niki Luftfahrt* Case C-532/18). That earlier case (again on referral from the Austrian court) was in the context of an unexplained coffee cup spillage from an aircraft seat-back tray, causing a second-degree burn injury to a seated minor. The defendant carrier in that case argued for an interpretation of the term 'accident' that requires the event or occurrence relied upon to be related to the functioning of the aircraft, an interpretation that has gained support in some quarters in recent times. The CJEU's approach was refreshingly simple and straight forward. It endeavoured to apply an 'ordinary meaning' of the term 'accident.' It characterised this as an, '*unforeseen, harmful and involuntary event*.' Informative also is this, from the same judgment: "*a harmful event that is the result of the victim's own reactions to the usual, normal and foreseeable functioning of the aircraft…… cannot be classified as an "accident"*.

Maintaining an equitable balance of interests

Air carriers and their insurers will be relieved to know that the question referred has received fairly short shrift from the CJEU. After hearing the Advocate General ('AG'), the court proceeded to judgment on 12 May 2021, without first receiving an AG's Opinion. In summary:

- The classification of a harmful event as 'unforeseen' must be made taking into account the normal operating range of the aircraft on board which the event occurred rather than from the perspective of the passenger concerned, "*..Insofar as perspectives and expectations may vary from one passenger to another… [the latter]… 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*".
- Interpreting the concept of 'accident' in the MC99 as meaning that the assessment of the unforeseen nature of the event in question depends solely on the relevant passenger's perception of that event could extend that concept in an unreasonable manner to the detriment of air carriers. The system of strict liability for air carriers that is embedded with the MC99, implies however, as is apparent from the fifth paragraph of its preamble, that an 'equitable balance of interests' be maintained.
- In conclusion, the answer to the question referred is that Article 17(1) of the Montreal Convention must be interpreted as meaning that the concept of 'accident' laid down in that provision does not cover an aircraft landing that has taken place in accordance with the operating procedures and limitations applicable to the aircraft in question, including the tolerances and margins stipulated in respect of the performance factors that have a significant impact on landing, and taking into account the rules of the trade and best practice in the field of aircraft operation, even if the passenger concerned perceives that landing as an unforeseen event.

'The language of the Convention itself must always be the starting point.'

The MC99 entered into force for EU member states (then of course including the UK) in 2004. In subsequent years provisions of the convention to include Article 17 have been the subject of judicial decision both by member states and on referral to the CJEU, giving rise to a rich body of case law on issues of interpretation. Consequently, referrals to the CJEU have dwindled in number and yet there remains a trickle of cases, each undertaking yet further forensic examination of the term 'accident.' The risk in so doing is that whilst seeking to provide helpful guidance, the term becomes over analysed, its concept stretched and perhaps altered from that originally intended by adoption of the term. The CJEU, in its recent MC99 Article 17 judgments, has provided refreshing clarity on the matter. This is of benefit both to the claimant passenger and the defendant air carrier interest alike when considering the merits of an Article 17 claim.

In a MC99 claim in which the crux of the matter is whether there is or is not an Article 17 'accident' we can do well to remember the words of Lord Scott of Foscote in the seminal House of Lords decision in the Air Carrier DVT judgment[1], "*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….. a judicial formulation of the characteristics of an article 17 accident should not, in my opinion, ever be treated as a substitute for the language used in the Convention.*"

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[1] Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72

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