RESOLVING AIRLINE PASSENGER DISPUTES BY ALTERNATIVE DISPUTE RESOLUTION METHODS: AN APPRAISAL OF THE UK SYSTEM

A. INTRODUCTION

Passenger disputes with airlines for their death, bodily injury, delay and the loss, damage, destruction and delay of their baggage have historically been the remit of courts. This was not the result of airlines imposing onerous terms on their customers to limit the litigation forums. Instead, the international legal framework governing such claims established a uniform code to be applied by the courts of State parties. This code, designed to be uniform and exclusive of resort to domestic laws, sets the conditions and venues for passengers to establish the airlines' liability.

This framework was established in 1933 when the 1929 Warsaw Convention (WC29) came into force.[1] It was conceived to protect "the fledgling and still fragile aviation industry.".[2] While the WC29 was amended several times,[3] the four litigation forum provisions (for which see below in Section II) remained intact until 2004 when the Montreal Convention 1999 (MC99)[4] came into force to replace the WC29 and its amendments and ensure "protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.".[5] Despite this shift of focus from protecting the industry to protecting consumers-passengers, MC99 did not change the four litigation forum provisions of WC29 but added a fifth jurisdiction only available for passengers' injury and death claims.[6]

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[1] Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11.

[2] *Morris v KLM* [2002] 2 AC 628 [12] per Lord Steyn.

[3] The Warsaw Convention 1929 was amended by the Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (adopted 28 September 1955, entered into force 1 August 1963), 478 UNTS 371, the Guadalajara Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (adopted 18 September 1961, entered into force 1 May 1964) 500 UNTS 32 and the Montreal Additional Protocols 1975 which consist of the Montreal Additional Protocol No 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (adopted 25 September 1975, entered into force 15 February 1996) ICAO DOC 9145, the Montreal Additional Protocol No 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (adopted 25 September 1975, entered into force 15 February 1996), ICAO Doc. 9146 and the Montreal Protocol No 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 (adopted 25 September 1975, entered into force 14 June 1998), ICAO Doc 9148. The Guatemala City Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 (adopted 8 March 1971) ICAO Doc 8392 and the Montreal Additional Protocol No 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (adopted 25 September 1975, entered into force 15 February 1996), ICAO Doc 9147 never came into force.

[4] Montreal Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309.

[5] Ibid., Preamble.

[6] Ibid., Article 33.

This international legal system is designed to provide a level playing field between airlines and their passengers; airlines that fly internationally know the jurisdictions they need to defend claims from their passengers, and passengers are protected from restrictive terms and conditions imposed by airlines that attempt to restrict their litigation options.

This almost 100-year-old system, for the reasons discussed in Section III, does not make provision for the resolution of passenger disputes by alternative means, be they arbitration, mediation, adjudication, etc, and has its exclusive focus on resolving them through courts. However, this one-sided focus is lagging behind domestic initiatives to streamline consumer-protection disputes to alternative forums so that the judicial systems are not burdened with thousands of relatively low-value claims, and their resolution does not usually raise complex evidentiary and legal issues.

While these initiatives did not have aviation in mind at first, they have become an integral part of airline passenger disputes due to the popularity of domestic consumer protection regulations, which are more flexible in terms of the means of resolving disputes within their scope of application and they produce a more significant number of claims. The comparison becomes more evident with judicial activism enabling some of these regulations to contest the exclusive nature of the international legal framework (see Section IV below) and raise questions about the potential reform of the international legal framework to accommodate them.

This paper does not aim to analyse the debate on the co-existence of domestic consumer protection legislation and the MC99. Still, it will examine the role that alternative means of resolving airline passenger disputes (ADR) have played so far, what role they should play in the future and whether they can be integrated into the MC99.

II. COURT JURISDICTION IN MONTREAL CONVENTION 1999

The MC99 provides the exclusive framework for resolving passenger disputes with airlines involving bodily injury, death and delay,[7] as well as disputes involving the loss, damage, destruction and delay (LDDD) of checked-in baggage and carry-ons arising from international air carriage.[8] It also covers disputes for cargo LDDD from international air carriage.[9] The jurisdictions where a passenger or cargo interest is permitted to bring a claim against the airline are also identified as part of this exclusive framework; which one to choose is the option of the claimant:[10]

(i) Domicile of the airline;
(ii) Principal place of business of the airline;
(iii) Place of business of the airline through which the contract of carriage has been made;
(iv) Place of destination of the carriage in question

provided that these countries are parties to the MC99.

[7] See Articles 17.1 and 19.
[8] See Articles 17.2 and 19.
[9] See Articles 18 and 19.
[10] See Article 33.

Providing a detailed analysis of each jurisdiction is outside the scope of this paper,[11] but a few points must be raised to inform our discussion. Of these four forums, the first two (domicile and principal place of business of the airline) usually direct claimants to the country where the airline is based, namely where it is incorporated.[12] This results from commercial airlines adhering to strict ownership and control requirements, which require them to have their place of incorporation in the same jurisdiction as their main place of business. These jurisdictions are not linked to the passenger's itinerary but to the airline's business and give the airline certainty that the claims will be filed before this country's courts.

The other two jurisdictions (nos ii and iii) relate to the claimant's itinerary, either the place where the ticket is purchased or the country of destination for their trip. The requirement that the ticket be bought via an airline's "place of business" links the claim to the airline's operational network, with US courts accepting that the premises of an authorised agent of a carrier can be considered an establishment of the airline for this Article.[13] Similarly, the place of destination as a forum links the itinerary to the claim, as it is expected that both the passenger and the airline have links to this country. One thing to note here is that under the Convention, the place of destination in return itineraries (e.g. LHR-ATH-LHR) is the place of origin (namely the UK), which increases the chances that the claimant and the airline have strong links to the jurisdiction in question.[14]

The Warsaw Convention 1929 (and its amendments) did not provide for the right to bring a claim in the country where the claimant was living; this was resisted because the claimant's residence jurisdiction might not be linked to the itinerary or the airline's network of operations. Still, the main reason for resisting its inclusion was the concern that the litigation floodgates would open as passengers could bring claims where they reside irrespective of their actual itinerary, especially in the US, which is considered the most expensive jurisdiction, even if the airline has no operational connection to the jurisdiction of their residence. [15]

However, this resistance gave way (after a long fight) in MC99,[16] where a fifth jurisdiction was added permitting claimants to bring claims for death or bodily injury (but not for passenger delay, baggage and cargo LDDD claims) where they have their principal and permanent residency at the time of the accident, provided that the country is a party to the Convention and the airline has a direct (by operating its aircraft) or indirect (e.g. via code-sharing or leasing agreements with other airlines) relation to this jurisdiction. The fifth jurisdiction was a compromise to enable passengers to bring a claim where they live while protecting airlines' interests by only permitting claims where the defendant has a commercial presence. This dual requirement might explain why the inclusion of the fifth jurisdiction has not opened the litigation floodgates as some delegates have predicted during the drafting of the MC99.

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[11] See Timothy M Ravich, Grégory Laville de la Plaigne and Romain Verté, "Article 33 Jurisdiction" in George Leloudas, Paul S Dempsey, Laurent Chassot (eds*), The Montreal Convention. A Commentary* (Elgar Publishing 2024) (*Montreal Convention Commentary*) and George Leloudas et al., *Shawcross and Beaumont on Air Law* (Lexis Nexis, Issue 187, 2024) Vol 1, Division VII [416]ff (*Shawcross and Beaumont*).
[12] *Montreal Convention Commentary*, n 11, [33.14].
[13] Ibid., [33.42] – [33.45].
[14] See Article 1.
[15] *Shawcross and Beaumont*, n 11, [441.1].
[16] Ibid.

Overall, this arrangement does not prevent forum shopping after multi-casualty accidents, yet it works well in most other situations, providing certainty and stability in applying the Convention. To this effect, the principle of exclusivity of Article 29 MC99 has played a significant role, as the claimant must file the claim in one of the said forums, which have "exclusive" jurisdiction over the dispute. This provision has been chiefly used by airlines to "restrain" passengers from bringing claims in non-Convention jurisdictions and re-direct them to the regime of the Convention. At the same time, Article 26 MC99 prevents airlines from restricting the jurisdictions available to the claimant under the Convention via their terms and conditions and Article 27 permits airlines to add jurisdictions to the prescribed ones via their contract conditions.

III. ADR IN MONTREAL CONVENTION 1999

The drafters of the MC99 disagreed on whether to permit arbitration to settle disputes arising from the carriage of passengers and baggage. This discussion followed the drafting of Article 34 MC99; Article 34 permits arbitration clauses for cargo claims to be included in contracts of carriage by air, giving an additional way of resolving cargo disputes. The delegate of Sweden to the Montreal Convention Conference provided a brief explanation of why the drafters did not permit arbitration clauses to cover passenger disputes:[17]

> Arbitration may, in Europe, be extremely expensive; its cost could reach the amount mentioned in the draft Convention for the first tier of liability. The Delegate of Sweden therefore did not wish to see an arrangement whereby passengers, upon purchasing their tickets, agreed on arbitration.

Several delegates from European countries agreed with this view, prominent among them the French delegate:[18]

> Having recourse to such a system could only occur when it involved a balanced situation with two parties of virtually equal strength. That was why in the *travaux preparatoires* the issue of arbitration in respect of cargo had been included, since it was difficult to envisage an individual involved in arbitration with an airline.

Overall, the delegates were concerned that airlines could use arbitration to exercise undue influence on claimants, predominantly by increasing costs to force claimants to settle or abandon their claims. While several arbitration rules deal with such concerns by having a set of provisions for controlling arbitral expenses, the truth remains that this was a valid concern at the time of drafting the Convention. ADR methods, such as adjudication, which provide cheaper and more balanced ways to resolve disputes than arbitration, were not on the drafters' radar and were not even considered. As such, the delegates retained the court-focused system with its inherent weaknesses in terms of delays and forum shopping because they thought it provided better protection from manipulation for the passenger. However, they did not discuss in detail the impact of the safeguards built in Article 34, such as the right of the claimant/cargo

[17] ICAO, 'International Conference on Air Law – Volume I – Minutes' (10–28 May 1999), Doc 9775-DC/2, p 188 (Montreal Convention 1999 Minutes Vol 1).
[18] Ibid.

interest to choose the place of arbitration among the forums of Article 33 and the requirement for arbitrators to apply the provisions of the MC99 to the dispute.

The MC99 does not preclude referring passenger disputes to arbitration or other alternative dispute resolution methods after they have arisen.[19] Essentially, it permits ad-hoc non-litigation procedures to resolve passenger disputes. Several (especially arbitration and mediation) are regularly used to resolve passenger claims under the Conventions, especially in multi-fatal aircraft accidents where global settlements are typical. Yet, these would usually be accompanied by a court action to save the limitation period of two years of the MC99.[20] This is necessary because initiating alternative dispute resolution proceedings does not stop the limitation period of the MC99.

In that respect, the MC99 does not preclude using alternative dispute resolution methods for passenger claims provided they are not agreed upon before the accident, for example, as part of the airline's terms and conditions, but are opted for in its aftermath. The logic here is that the claimants will take legal advice in the aftermath of an accident and will make an informed decision on their potential choices for resolving a dispute. The MC99 does not regulate this alternative option, as it does with cargo arbitration, but leaves it to domestic arbitration laws and the general provision of the Convention; for example, it is plausible that the claimant files a claim in one of the five forums of the MC99 to protect the limitation period but arbitrate the dispute in a different jurisdiction. In principle, this option is not available to cargo arbitrations as Article 34 requires that the arbitration "shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33".

III. AVIATION CONSUMERISM AND PASSENGER COMPLAINTS

The drafters of the MC99 were not keen on ADR methods for passenger claims, demonstrating a conservative and (somewhat outdated) view. One reason for such an approach was that at the time of drafting the MC99, the full effect of consumerism in international civil aviation was not apparent. While the Conventions had produced a fair share of case law over the years, this was nothing compared to consumer protection legislation's influx of cases from the mid-noughties to today. The reasons behind the consumerisation of air travel can be briefly described as follows:[21]

> The expansion of low-cost/charter carriers and the regular failures of full-cost air carriers to deliver the "innovative products, [and] personalised services" promised to their passengers have contributed significantly to this trend: "Airlines are now less service-oriented and more impersonal. As a consequence, passengers are less likely to relate personally to air crew and more likely to see them as representatives of an airline that has emphasised cost rather than service, and consequently someone that they can vent their anger on."….

[19] Ibid. and Michael Chatzipanagiotis, "Article 34 Arbitration" in George Leloudas, Paul S Dempsey, Laurent Chassot (eds*), The Montreal Convention. A Commentary* (Elgar Publishing 2024).
[20] See Article 35.
[21] George Leloudas, *Risk and Liability in Air Law* (Informa Law 2009) [3.44] to [3.45] (*Leloudas Risk*).

> This inclination is further supported by a legislature-driven desire to create a consumer-friendly environment in which grievances are dealt with through claims and complaints. The resulting rule-bound culture has fostered the establishment of consumer-advocacy groups, which use advertising, demonstrations, and lobbying to promote their agendas and communicate their hostility to corporate organisations that do not uphold their part of the bargain. Consumer activism - combined with the introduction of conditional fee arrangements (CFA), after-the-event insurance (AEI), legal-expenses insurance (LEI), and claims-management companies - has arguably increased public awareness of consumer rights, demystified the complexities of claims handling, and lifted litigation costs from the shoulders of the consumer/claimant...[quotations omitted].

This decline in airline confidence was amplified by the MC99's rigid litigation system and a pro-carrier interpretation of its terms despite the change in public attitudes towards airlines.[22] But driven mainly by a general dissatisfaction with the air travel experience. This trend was most recently expressed in the 2023 Aviation Consumer Survey published by the Civil Aviation Authority (CAA):[23]

> The proportion of recent flyers who were satisfied with their most recent flight has fallen from 80% in 2022 to 79% this year. This is a small change and is not in itself a cause for concern. However, a decline of this kind has occurred every year since 2019, and consequently the cumulative, longer-term trend is more noteworthy. In March 2016, 9 in 10 consumers (90%) were satisfied with their most recent journey, a figure considerably higher than the one recorded in 2023 (79%). Satisfaction saw a decline during the pandemic, much like flight frequency. However, unlike flight frequency, satisfaction has continued to fall post-pandemic, rather than returning to previous levels.

These feelings seem to be fuelled by the increasing number of disruptions faced by air travellers. In 2023, only 42% of air passengers faced no travel problems (the corresponding shares were 38% in 2022, 45% in 2021, 65% in 2020, and 56% in 2019).[24] Flight delays seem to be one of the most prevalent forms of air travel disruption, with 22% of passengers experiencing a flight delay in 2023.[25]

To deal with such disruptions, domestic consumer protection legislation emerged that was initially designed to supplement (rather than take over) the Conventions. The most prominent legislation to do so was the (European) Regulation 261/2004 on denied boarding compensation and compensation and assistance to passengers in the event of cancellation or long delay of flights (Regulation 261), [26] With many to follow. The Preamble highlighted the need for a

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[22] Ibid., Chapter 5.
[23] CAA, "CAP 2622: Wave Twelve: UK Aviation Consumer Survey: Full Survey Report" (January 2024) p 9, <https://www.caa.co.uk/our-work/publications/documents/content/cap2622/> (last accessed 17 May 2024) .
[24] Ibid., p 40.
[25] Ibid., p 41.
[26] 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 OJ L 46, 17.2.2004, p. 1–8. The Regulation has been assimilated into the British legal systems following Brexit and in 2023 was amended by the Aviation (Consumers) (Amendment) Regulations 2023, SI 1370/2023. The amendment does not change the philosophy of

stronger consumer-protection focus by "raising the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.". In this context, the Regulation identified three situations, namely denied boarding, cancellations, and delays, that inconvenience passengers regularly and aimed to address their impact.

Similarly, Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air was enacted to protect disabled passengers from unjustified denied boardings from airlines: "Disabled persons and persons with reduced mobility should therefore be accepted for carriage and not refused transport on the grounds of their disability or lack of mobility, except for reasons which are justified on the grounds of safety and prescribed by law".[27]

These Regulations were designed to accompany the Conventions, not interfere with their application sphere or breach the principle of exclusivity. Disputes concerning denied boarding and flight cancellations are not part of the Conventions' regimes, so, in principle, there is no direct conflict with them. This relation explains why Regulation 261 provides the affected passengers the right to compensation based on the distance of their affected flights; [28] This compensation is supplemented by assistance and care measures, such as reimbursement of the ticket cost, return or re-routing flights, and provision of refreshments, meals, hotel accommodation, transport between the airport and place of accommodation, etc.[29] However, claiming damages for delayed flights is part of Article 19 of the Conventions, and to avoid any conflict with them, the text of the Regulation did not give delayed passengers the right to compensation but instead provided a set of assistance and care measures.[30]

When the Court of Justice of the European Union (CJEU) was asked to decide on whether such measures conflict with the MC99, it justified their co-existence with the Convention's exclusive regime on the basis that they cover damage that is "almost identical for every passenger, redress for which may take the form of standardized and immediate assistance or care for everybody concerned",[31] While the MC99 covers "individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.".[32]

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the Regulation but codifies some of the significant decisions of the Court of Justice of the European Union. As such, our analysis here is valid for both the EU and the British version of the Regulation.

[27] Preamble of 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 OJ L 204, 26.7.2006, p. 1–9. The Regulation is now part of assimilated law in the UK.

[28] See Article 7 which provides that passengers will receive compensation amounting to (i) £220 for all flights of 1500 kilometres or less; (ii) £350 for all flights between 1500 and 3500 kilometres; (iii) £520 for all flights not falling under (i) or (ii).

[29] See Articles 8, 9 and 10.

[30] See Articles 8 and 9.

[31] Case C-344/04 *R (on application of International Air Transport Association) v Department for Transport* [43] [2006] ECR I-403, [2006] 2 CMLR 20.

[32] Ibid.

Despite the criticism against this artificial distinction,[33] the logic of this interpretation is straightforward. To respect the exclusivity of the Convention under Article 29, only those areas of (international) carriage outside its scope can be regulated domestically. This is why the Regulation gives the right of compensation to denied boarding and cancellation claims (which do not fall into the scope of the Conventions) and does not provide for the right to compensation in cases of delay (which is regulated in Article 19 MC99), which was left to the MC99 regime to determine.

IV. JUDICIAL ACTIVISM

This sensitive balance between the two regimes was permanently disturbed by the case of *Sturgeon v Condor Flugdienst GmbH* (*Sturgeon*),[34] which made the need for ADR in aviation passenger disputes necessary. The CJEU, in the *Sturgeon* case, held that flight delays over three hours must be treated as cancellations and attract the compensation regime of Article 7 of Regulation 261 (see Section III). However, the text of Article 7 on purpose does not give such right to passengers who experience delays (for the reasons explained in Section III). As such, the CJEU rewrote the Regulation to read that passengers who arrive at their destination with more than a three-hour delay can claim compensation under it. This compensation does not require proof of actual damages or a causative link but is based on the distance of the flight.[35]

This activist decision surprised the European judicial system, with several domestic courts refusing to apply it "because the European Court supposedly overstepped its competence in extending the rights under the Regulation beyond its wording.".[36] But the CJEU, in the joined cases of *Nelson v Deutsche Lufthansa GmbH* and *R (on the application of TUI Travel) v Civil Aviation Authority*,[37] confirmed its decision in *Sturgeon* and justified it by making a further artificial distinction between "loss of time" and "delay" to accommodate the two regimes:[38]

> … a loss of time cannot be categorised as "damage occasioned by delay" within the meaning of Article 19 of the Montreal Convention, and, for that reason, it falls outside the scope of Article 29 of that convention….First of all, a loss of time is not damage arising as a result of a delay, but is an inconvenience, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay… Next, a loss of time is suffered identically by all passengers whose flights are delayed and, consequently, it is possible to redress that loss by means of a standardised measure... Lastly, there is not necessarily a causal link between, on the one hand, the actual delay and, on the other, the loss of time considered relevant for the purpose of giving rise to a right to compensation under Regulation No 261/2004 or calculating the amount of that compensation.

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[33] For a strong criticism of the relationship between Regulation 261 and the MC99 see Laurent Chassot and Paul S Dempsey, "Article 29 Exclusivity" in George Leloudas, Paul S Dempsey, Laurent Chassot (eds), The Montreal Convention. A Commentary (Elgar Publishing 2024).

[34] Joined cases C-402/04 and C-432/07 *Christppher Sturgeon v Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz v Air France SA* [2009] ECR I-10923.

[35] Namely (i) £220 for all flights of 1500 kilometres or less; (ii) £350 for all flights between 1500 and 3500 kilometres; (iii) £520 for all flights not falling under (i) or (ii).

[36] *Shawcross and Beaumont*, note 11, Division VIIA [51].

[37] Joined Cases C-581/10 and C-629/10, *Nelson v Deutsche Lufthansa GmbH* and *R (on the application of TUI Travel) v Civil Aviation Authority* [2013] All ER (Comm) 385.

[38] Ibid., [49] – [53].

Since then, domestic European courts have accepted this distinction between delay and loss of time and the right to compensation for delayed arrivals of more than three hours at the destination.[39] Most recently, the Canadian Federal Court of Appeals approved the equivalent provision of the Canadian regulations, following the CJEU logic.[40] In the UK, this logic has been approved in *Dawson v Thomson Airways Ltd* and Gahan v Emirates, which have accepted the reasoning of the CJEU and have not been overturned following Brexit. Furthermore, the Aviation (Consumers) (Amendment) Regulations 2023 (see note 26) have made such decisions part of the assimilated Regulation 261 as they unequivocally provide in art 3(7) and (8) that the obligation to pay compensation for such delays "does not constitute a liability for damage occasioned by delay for Article 19 of the Montreal Convention".

The other related issue that needs to be addressed here is jurisdiction under Regulation 261. While the MC99 has four forums for passenger delay claims (the fifth is reserved for personal injury or death claims) and baggage claims (see Section II above), the Regulation does not contain any provisions regarding jurisdiction. In that respect, it is more flexible than the Convention and permits ADR mechanisms agreed upon before the flight to resolve such disputes.

The relevant case law has established that complaints under the Regulation can be brought at the place of departure and the place of destination of the flight in question.[41] For example, a Regulation 261 claim can be brought in either country if a flight from London to Milan is delayed or cancelled. This arrangement has been extended to connecting flights that are part of a single itinerary. For example, the passenger can bring a claim to the UK or Greece on an itinerary from London to Athens via Milan and Paris. In addition, case law has established that a claim under Regulation 261 can be brought to the country of the carrier's domicile and the country where the airline has a branch office involved in the carriage contract. While the last two forums resemble the MC99's, the place of departure is unavailable as a forum in MC99 delays claims, and the place of destination is defined differently in the MC99 (see also Section II).

So, in the first itinerary above (one way from London to Milan), delay claims under MC99 can not be brought to the UK (as it is the itinerary's departure place). At the same time, if this itinerary was on a return basis, i.e. London-Milan-London, the MC99 delay claims cannot be filled in Italy as it is not the destination for the Convention's purposes; the same will happen in the second itinerary on a return basis, i.e. London-Milan-Paris-Athens and back to London; an MC99 delay claim cannot be brought in Greece as it is not the country of departure. Still, in all these scenarios, a Regulation 261 claim can be filed in Italy or Greece as they are the destination countries for the Regulation purposes. In that respect, the MC99 and the Regulation provide two jurisdictional systems regarding delay that do not always point in the same direction. Unsurprisingly, in Case C-213/18 *Guaitoli v easyJet Airline Co Ltd*,[42] the CJEU held that the two jurisdiction regimes are to be determined independently, although this might lead to having the claims heard before different forums.

[39] See *Shawcross and Beaumont*, note 11, Division VIIA [53].
[40] *IATA v Canadian Transport Agency and Attorney General of Canada* [2022] FCA 211.
[41] For a detailed analysis of the relevant case law, see *Shawcross and Beaumont*, note 11, Division VIIA [38] – [44].
[42] ECLI:EU:C:2019:927.

V. THE EFFECT OF JUDICIAL ACTIVISM ON PASSENGER COMPLAINTS

The impact of this judicial rewriting of Regulation 261 is evident in the most recent (2023) statistics released by the two aviation ADR providers operating in the UK, namely Aviation ADR and CEDR (for which see Section VI below).[43] The work of these two aviation ADR providers is supplemented by the CAA's Passenger Advice and Complaints Team (PACT), which deals with complaints against airlines that are not members of any of the two ADR providers.[44] These three providers cover the following types of disputes between airlines and their passengers:

- Complaints for denied boarding or cancellation of flight under Regulation 261;
- Complaints for delay of flights under Regulation 261 and the MC99;
- Complaints for the LDDD of checked-in baggage and carry-ons under the MC99;
- Complaints by passengers with reduced mobility under Regulation 1107/2006;
- Any disputes arising where the consumer alleges that the business is not trading fairly – PACT has no authority to deal with such disputes.

The number of complaints filed before the two aviation ADR providers is astonishing.[45] In 2019, approximately 32,500 complaints were logged before the two ADR bodies; in 2020, a total of 39,554 complaints; in 2021, more than 26,000 complaints were logged; in 2022, approximately 23,000 complaints were logged; and in 2023, approximately 55,700 complaints were logged – a significant increase over the previous years that might be attributed to "some unforeseen circumstances seen this year such as environmental issues like the fires in Europe or the air traffic control problems experienced recently.",[46] as well as "disruption of flights due to ground handling issues experienced by airports around the UK".[47] To understand the magnitude of those figures, one must consider that they don't include the complaints filed before the CAA PACT and those that ended up in the judicial system.

In 2023, the vast majority of complaints submitted before the two aviation ADR providers (47,184 out of 55,700) were under Regulation 261, with the remaining claims split among Regulation 1107 (77 complaints), claims for the LDDD of checked-in and carry-on bags (1942 complaints), and several other smaller categories, such as medical issues, in-flight facilities and services, etc. Of the 47,184 complaints under Regulation 261, the vast majority of them are for compensation, namely 15,865 complaints because the flight in question was cancelled, 18,907 complaints for compensation because the flights were delayed (the *Sturgeon* compensation right), 1256 complaints for compensation because the passengers were denied boarding. The second largest group of complaints was the payment of expenses due to the cancellation, delay and denied boarding of the flights, namely 2,053 complaints. The third

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[43] See Aviation ADR < https://www.aviationadr.org.uk/ > and CEDR < https://www.cedr.com/consumer/aviation/make-a-complaint/> (last accessed 17 May 2024).

[44] See CAA, "How the CAA can help. If you are not satisfied with the response from your airline or airport" < https://www.caa.co.uk/passengers/resolving-travel-problems/how-the-caa-can-help/how-the-caa-can-help/> (last accessed 17 March 2024).

[45] The statistics derive from the 2023 Annual reports that the two providers compiled to comply with Reg 11 (and Schedule 5) of The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended). The reports can be found in the following links: <https://www.aviationadr.org.uk/> and < https://www.cedr.com/consumer/aviation/reports/> ((last accessed 17 March 2024).

[46] 2023 Aviation Consumer Survey, n 23, p 40.

[47] Aviation ADR 2023 report, n 47, [3].

largest group was claims for the LDDD of checked-in and carry-on baggage, namely 1,942. Similar divisions have been experienced in the past years; for example, in 2022, Regulation 261 complaints amounted to 20,957 out of 26,000 complaints, with compensation complaints amounting to 16,148 out of 20,957.

In addition, the 2023 Aviation Consumer Survey indicated that 41% of the passengers who formally complained wanted financial compensation (an increase of 7% from 2022), 40% complained as a way of expressing their disappointment (an increase of 8% from 2022), 38% wanted the airline/airport to make changes so that the issue was less likely to happen in the future, and 36% wanted an apology from the airline/airport.[48]

It is evident from the above that Regulation 261 complaints account for the lion's share of passenger-related claims in the UK. The most popular are complaints for compensation because the flights were delayed (the *Sturgeon* right). These figures also demonstrate that Regulation 261 delay claims have taken over the delay claims of MC99, as there were no reported delay court cases under the MC99 in the UK in 2022 and 2023 and no ADR claims for passenger delay under the MC99 in 2023.

We believe that the main reason for the popularity of Regulation 261 is its relative ease of use (which we see more about in Section VI). Its legal framework gives the impression of a more straightforward regime in that terms such as delay have been defined in a mechanical manner that leaves little to interpretation; the same applies to the compensation provided under the Regulation where there is no requirement to prove the actual damage that the passenger suffered as a result of the delay (cancellation or denied boarding) but is linked to the distance of the disrupted flight.

On the contrary, the delay regime under the MC99 is complicated in that delays are identified on a case-by-case basis by reference to "the length of the flight, weather conditions or events like congestion at airports or ATC problems."[49] In addition, to be awarded damages for delay under MC99, the claimants must prove that they suffered damage from the delay and its quantum. This task is not always easy, as several countries do not compensate for emotional damages, such as a loss of enjoyment or loss of income caused by delay.[50] One also has to consider that Regulation 261 claims can be brought at the place of departure or arrival of the flight, either of which would usually be the country of the passenger's residence – with the MC99 not providing for the residence of the claimant (which is reserved for bodily injury and death claims) as a potential forum.

Last but not least, we believe that the availability of a relatively straightforward dispute resolution system that does not have many formalities and does not require the instruction of lawyers has undoubtedly contributed to the amplification of the number of complaints filed under Regulation 261 before the two aviation ADR providers. We now turn our attention to that system to explain its operation.

[48] 2023 Aviation Consumer Survey, n 23, p 52.
[49] Wolf Müller-Rostin and Jae Woon (June) Lee, "Article 19 Delay" in George Leloudas, Paul S Dempsey, Laurent Chassot (eds), The Montreal Convention. A Commentary (Elgar Publishing 2024) [19.11].
[50] Ibid., [19.24] – [19.33] and *Shawcross and Beaumont*, note 11, Division VII [1023].

VI. ADR IN AIR PASSENGER DISPUTES

The use of Regulation 261 triggered a myriad of claims as passengers were given a relatively easy legal tool to receive compensation as well as a series of care and assistance measures; the number of claims we discussed in Section V makes the use of out-of-court settlement systems not only advisable for the benefit of consumers but essential to prevent the clogging of the judicial system, especially of county courts. Still, it creates doubts about the efficiency of Regulation 261 – producing 47,184 complaints per year in the UK alone (without considering the CAA PACT complaints and those ending up in court), despite the dissatisfaction with airlines, also questions the role and purpose of the Regulation (this is a discussion outside the scope of this paper and relates to its reform). Such complaints fit nicely into the reasoning for using ADR schemes: they mainly consist of low-value claims (£520 is the maximum amount a passenger can get under Regulation 261—see Section IV) that are not evidence-heavy and can be quickly resolved by an independent intermediary rather than via the more expensive and lengthier judicial process.

Aviation is a particular case in the context of consumer ADR, as the use of ADR by airlines is not mandatory, making it the only regulated sector without compulsory schemes. Most British airlines are part of two voluntary schemes, namely CEDR Aviation and ADR Aviation, while several non-British airlines are also part of the same schemes.[51] Overall, 32 airlines are registered with an ADR scheme that arguably covers 80% of those departing the UK by air.[52] Still, most non-British airlines that fly to/from the UK are not members, and complaints against them must be filed before the CAA PACT.

The basic philosophy of the Aviation ADR Schemes is that a passenger's complaint that falls into one of the categories in Section V and is against an airline that subscribes to either of the two Schemes will be determined by an independent adjudicator appointed by either Scheme. The decision of the adjudicator becomes binding only when the passenger accepts it. Our analysis herein follows the 2022 Rules of the Aviation ADR Scheme as it was by far the most popular one, with 46,996 complaints filed before it in 2023 (in contrast, the CEDR Scheme received 8,706 complaints).[53]

Airline passengers can refer complaints to the ADR Scheme if they have followed the subscribed airline's complaints procedure and i) have not received a response from the airline (a so-called "deadlock letter") within eight weeks as to whether the airline accepts the complaint or ii) the airline rejects the complaint.[54] The geographical scope of application of the Scheme covers direct flights with their origin and destination in the UK or directly connecting flights with their origin, destination or connection taking place in the UK;[55] This is quite broad as it covers flights that depart from, connect via, or terminate in the UK (whether they are part of a more extensive itinerary with connecting flights or not).

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[51] For a list, see <https://www.aviationadr.org.uk/> and https://www.cedr.com/consumer/aviation/companies-covered/ (last accessed 17 May 2024).

[52] See CAA, "Alternative dispute resolution. Information on CAA-approved ADR" <https://www.caa.co.uk/passengers/resolving-travel-problems/how-the-caa-can-help/alternative-dispute-resolution/> (last accessed 17 May 2024).

[53] The Rules can be located in <https://www.aviationadr.org.uk/> (last accessed 17 May 2024).

[54] Rule 1.1.2.

[55] Rule 1.1.3.

The Schemes will not entertain complaints from the same passenger about an incident affecting the same flight that has been the subject of an existing or previous valid application to the Scheme or a complaint that has been the subject of court proceedings or other ADR procedures unless they have been abandoned, stayed or suspended.[56] Also, the Scheme will not entertain complaints of more than £25,000 in value and complaints that have not been filed within "12 months from the date upon which the Airline gave their final response on the Complaint (or, where no response is given, it has been more than 12 months since the Passenger's last attempt to contact the Airline).".[57] Once a passenger files a complaint, airlines must submit their defences to the ADR Scheme within twenty-eight days of being notified of the complaint.[58] No party can add evidence once the adjudicator determines that the complaint file has been completed.[59]

The decision-making process has been simplified to facilitate the resolution of complaints and keep costs under control. Once the complaint is filed with the ADR Scheme, the adjudicator assesses whether it falls within the scheme's scope; if not, the passenger is notified within three weeks.[60] If the complaint is accepted, it will be passed to the airline, which has twenty-eight days to confirm whether it wishes to defend or settle the complaint;[61] A third alternative is for the airline to notify the adjudicator (within fourteen days) that "it considers that the complaint raises a genuinely complex and novel issue" and a particular procedure must be followed.[62]

If a settlement is reached at this stage, the airline has twenty-eight days to implement it, for example, by compensating the passenger.[63] But suppose the airline decides to defend the complaint. In that case, the passenger has seven calendar days to comment on the airline's defence, provided the defence raises new evidence not offered in the original passenger's response.[64] Once the passenger comments to the airline's defence, the file is completed, and no further evidence is accepted, apart from exceptional circumstances authorised by the Scheme's Chief Adjudicator.[65]

From that moment onwards, the complaint will be determined in writing within ninety calendar days unless it involves a highly complex issue, in which case the ninety-day deadline will be extended and the parties informed.[66] Deciding on the complaint does not usually require a hearing unless the parties agree otherwise, which is rare. The language used in the decision (and any oral proceedings) is the language used by the carriage contract.[67] The passenger can withdraw from the complaints process at any stage and bring a claim to court. The airline does not have the right to withdraw from the process unilaterally unless the complaint involves a complex issue. [68]

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[56] Rule 1.2.4.
[57] Rules 1.2.5 and 1.2.6.
[58] Rule 3.2.
[59] Rule 3.3.
[60] Rules 4.2 and 4.3.
[61] Rule 4.4.
[62] Ibid. For the special procedure, refer to Appendix 4 of the Rules.
[63] Rule 4.5.
[64] Rule 4.6.
[65] Rule 4.7.
[66] Rule 4.8.
[67] Rule 9.11.
[68] Rue 6.

One potential issue that might delay the decision is that the complaints involve a legal issue that has not been determined in the past and is currently the subject of court proceedings either in the UK or in European courts (see, for example, the aftermath of *Sturgeon* in Section IV): in that case, the passenger is given the option of either proceeding with its complaint before the adjudicator or putting it on hold until the judicial decision is rendered; if the passenger agrees to put it on hold, the ADR Scheme must inform the CAA. [69]

Overall, the ADR system seems to be working as intended from the perspective of offering a low-cost and quick way of resolving complaints. In 2023, the two Schemes reported that the average time to resolve complaints was between 32 and 77 days,[70] which can only be described as lightning speed. They also reported that they refused to deal with a minority of complaints (6,708 complaints out of the 55,700 received ones), with the vast majority of them (92.93% and 71%, respectively) because they were out of the Schemes' scope.[71]

While the number of annual complaints seems to correlate to the gravity of disruptions experienced during the year, there is an expectation that the figures shall (rather than will) increase as the 2023 CAA Customer Survey indicated that only a small proportion of consumers express dissatisfaction with how their travel issue is handled by making a complaint. In 2023, 56% of the passengers took no action whatsoever, 12% filed a claim for expenses incurred and/or compensation, 15% made a formal or informal complaint, 16% decided to avoid flying with the disrupted airline/airport in the future and 17% warned friends and family about flying with the disrupted airline/airport in the future.[72]

At the same time, the current level of complaints might be fuelled by low satisfaction with the airlines' complaints handling process. As the Survey indicated, only 43% trust airlines to handle complaints effectively.[73] Similarly, only 50% of the passengers who complained to the airline or the airport were satisfied with the complaint process overall – the level of satisfaction has dropped by 2% since 2022 and 13% since 2019, the pre-COVID years.[74] At the same time, the level of satisfaction with the claims handling process was much lower than that with other elements of the travel experience, such as booking, with an 87% satisfaction rate, travelling to and from the airport in the UK with 81%, onboard and on-flight experience with 76%, airport experience with 76%, and value for money with 67%.[75]

The statistics in this Section indicate that the number of claims that end up in the two ADR systems is unlikely to reduce significantly. Our final Section will propose some ideas on how to improve the system.

VII. SOME THOUGHTS ON THE WAY FORWARD

The level of trust in the ADR Schemes, evidenced by the vast number of complaints filed before them, indicated that the use of ADR for at least the non-MC99 disputes must become mandatory for airlines operating to/from the UK to avoid not only spillover into the judicial

[69] Rule 5.
[70] See the respective 2023 Annual Reports, n 47.
[71] Ibid.
[72] 2023 Aviation Consumer Survey, n 23, p 44.
[73] Ibid., p 49.
[74] Ibid., p 74.
[75] Ibid., p 15.

system but also the unnecessary use of CAA resources in resolving disputes via PACT. The British Government indicated in 2023 that it aimed to make aviation ADR Schemes mandatory,[76] but it is unlikely that this will happen before the 2024 elections. It is important to note that the MC99 disputes (baggage LDDD and MC99 delay claims) cannot be the subject of a mandatory regime for the reasons we mentioned in Section III above. That will create a dual system that might confuse passengers, yet we believe that the relatively low number of MC99 claims that end up in ADR will not distort the benefits of having a mandatory system for non-MC99 disputes.

At the same time, we believe that a rapprochement of the jurisdiction provisions of the two regimes needs to be achieved. While we will not delve into the debate of amending the MC99 to incorporate the essence of consumer protection regulations, we believe that creating such a regime is the best way forward, provided it enables passenger ADR and unifies the forums for judicial and out-of-court actions against airlines. Long are the days of the Montreal Diplomatic Conference with the mistrust of European delegates for ADR; its extended use has shown that, in certain instances, it provides a better service to the consumer than court litigation. Such a unified regime will provide certainty of the applicable law to passengers and airlines, reduce costs, limit the number of parallel claims, and enable cheaper and quicker resolution of disputes.

However, the aviation ADR schemes are not required to publish the adjudicators' decisions. This has the effect that thousands of cases interpreting the content of consumer protection regulations and the baggage provisions of the MC99 are not published, which leaves a gap in knowing how the legal instruments are interpreted in the UK. The provision that novel and complex cases will be referred to the CAA is insufficient to close this gap, as there is no discernible manner to publicise such cases. Also, they constitute a small part of the case law produced by the adjudicators.

We believe it is misplaced to argue that the adjudicators provide for the mechanical application of legal instruments, and their decisions have little precedential value. The existing case law demonstrates that issues of evidence submitted by the airlines (such as weather reports, crew statements, etc) remain open to interpretation and shape the final decision of the adjudicators. As such, we believe it is necessary for at least a sample of cases to be published (after anonymising personal data) as it will enable the development of the case law on consumer protection regulation and will assist courts in the interpretation of those cases that end up in the judicial system. Furthermore, the publication of such cases will also inform the debate about the future of consumer protection regulations, especially Regulation 261.

It is also important to note that the ADR adjudicators decide baggage claims and delay claims under the MC1999, cases that the law's application is not as mechanical and raises issues of interpretation of an international convention: with only a handful of MC99 baggage cases and no delay cases published the last few years in the UK, it is necessary to have access to issues of interpretation that have the potential to shape the understanding of the MC99 globally. Reducing the number of judicial decisions is a success for the proponents of the ADR system, as these cases (or a significant proportion of them) have been withdrawn from the judicial

[76] Department for Transport, "Consultation outcome. Response to the aviation consumer policy reform Consultation" (June 2023)< https://www.gov.uk/government/consultations/reforming-aviation-consumer-policy-protecting-air-passenger-rights/outcome/response-to-the-aviation-consumer-policy-reform-consultation> (last accessed 17 May 2024).

system. Yet, without publishing their outcomes, a considerable interpretation gap is created concerning the MC99 that has wider than the UK repercussions.