Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 20 December 2017 [1]

Case C-258/16

Finnair Oyj
v
Keskinäinen Vakuutusyhtiö Fennia

(Request for a preliminary ruling from the Korkein oikeus (Supreme Court, Finland))

(International carriage by air — Montreal Convention — Article 31 — Liability of the carrier for damage to checked baggage — Requirements as to the form and content of a written complaint made to the carrier — Certificate from an airline company regarding damage to a passenger's baggage, drafted at the request of the passenger for use in a claim against the passenger's insurance company)

1. This request for a preliminary ruling concerns the interpretation of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Montreal on 28 May 1999 ('the Montreal Convention'), and more specifically the requirements in Article 31 thereof that complaints in respect of checked baggage shall be made 'in writing' and within seven days of receipt of the baggage.

2. The request has been made in proceedings between an insurance company (Keskinäinen Vakuutusyhtiö Fennia: 'Fennia') and an airline (Finnair), concerning damage resulting from the loss of items from checked baggage belonging to Ms Mäkelä-Dermedesiotis, who was a passenger on a flight operated by that company. Ms Mäkelä-Dermedesiotis had taken out insurance with Fennia against such loss, and Fennia, after compensating Ms Mäkelä-Dermedesiotis and having been subrogated to her claim, has brought proceedings to recover from Finnair.

Regulation No 2027/97

3. Article 1 of Council Regulation (EC) No 2027/97 [2] states:

'This Regulation implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions …'

4. Article 3(1) of Regulation No 2027/97 provides:

'The liability of a [European Union] air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

1 Original language: English.

2 Regulation of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2).

Montreal Convention

5. The Montreal Convention was approved on behalf of the then European Community by Council Decision 2001/539/EC. [3]

6. According to the third recital of the Montreal Convention, the parties to the convention recognise 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'.

7. In that connection, the fifth recital states that 'collective State action for further harmonisation and codification of certain rules … through a new Convention is the most adequate means of achieving an equitable balance of interests'.

8. Article 1 ('Scope of application') states that the Montreal Convention applies to 'all international carriage of persons, baggage or cargo performed by aircraft for reward'.

9. Article 17 is entitled 'Death and injury of passengers – damage to baggage'. Paragraph 2 of that article provides essentially that the carrier is to incur strict liability in respect of damage to checked baggage.

10. Monetary limits for carriers' liability in respect of, inter alia, damaged baggage are set out in Article 22.

11. Article 29 ('Basis of claims') provides that 'any action for damages' arising from the carriage of baggage can be brought only subject to the conditions and limits set out in the Convention.

12. Article 31 of the Montreal Convention, entitled 'Timely notice of complaints', reads as follows:

'1. Receipt by the person entitled to delivery of checked baggage … without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 [4] …

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage … In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage … [has] been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.'

Facts, procedure and questions referred

13. Ms Mäkelä-Dermedesiotis was a passenger on a Finnair flight from Malaga (Spain) to Helsinki (Finland). On arrival in Helsinki on 1 November 2010, she found that items were missing from the baggage that she had checked in.

3 Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38).

4 Article 3(2) provides that 'any other means which preserves [certain information regarding the places of departure and destination and, where applicable, stopping places] may be substituted for the delivery of the document [of carriage]. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved'.

14. Ms Mäkelä-Dermedesiotis notified a Finnair customer service representative by telephone that same day. She identified the lost items and informed the representative of their value. The representative entered the information provided by Ms Mäkelä-Dermedesiotis into the Finnair electronic information system. On 3 November 2010, Ms Mäkelä-Dermedesiotis again telephoned the Finnair customer service in order to obtain a certificate for her claim under her insurance policy with Fennia. Finnair duly issued her with that certificate.

15. Fennia thereupon compensated Ms Mäkelä-Dermedesiotis for the loss suffered and — having been subrogated to Ms Mäkelä-Dermedesiotis' original claim — brought an action on 2 September 2011 before the Helsingin käräjäoikeus (District Court, Helsinki, Finland) claiming repayment from Finnair.

16. Finnair contested the action, arguing in essence that the claim for repayment was barred, since Ms Mäkelä-Dermedesiotis had not filed a written claim within the periods laid down in Article 31 of the Montreal Convention. The Helsingin käräjäoikeus (District Court, Helsinki, Finland) found for Finnair and dismissed the action by judgment of 4 September 2012.

17. Fennia appealed to the Helsingin hovioikeus (Court of Appeal, Helsinki, Finland). That court examined, inter alia, the instructions to passengers on Finnair's website, which contained different indications for giving a notice of complaint and actually making the written complaint. A notice of complaint could be made by telephone, whereas a written complaint had to be made using a particular form within seven days after receipt of the baggage. The court considered the instructions on Finnair's website 'not sufficiently clear and unambiguous for a passenger as a consumer'. Since the instructions did not mention for what purpose the notice of complaint was to be made, the passenger, as a consumer, could legitimately believe that a complaint made over the telephone and registered by an employee of the undertaking would also satisfy the requirements of a formal written complaint. The passenger had given notice to Finnair setting out the loss precisely and had received a written certificate, from which it appeared that the complaint was entered in time in Finnair's information system. Having received the notice of complaint, Finnair did not inform the passenger that it considered such notice insufficient for it to be held liable and that a further notice in writing needed to be submitted.

18. The Helsingin hovioikeus (Court of Appeal, Helsinki) concluded that, on those facts, the passenger had made a valid complaint in due time against the carrier. By judgment of 28 February 2014, that court set aside the judgment of the Helsingin käräjäoikeus (District Court, Helsinki) and ordered Finnair to make repayment to Fennia.

19. Finnair appealed to the Korkein oikeus (Supreme Court, Finland), claiming that it should set aside the judgment of the Helsingin hovioikeus (Court of Appeal, Helsinki) and confirm the judgment of the Helsingin käräjäoikeus (District Court, Helsinki).

20. The Korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 31(4) of the Montreal Convention to be interpreted as meaning that, to preserve a right of action, it is necessary, in addition to giving notice of a complaint in due time, that the complaint be made in writing within the times specified, in accordance with Article 31(3)?

(2) If, to preserve a right of action, a complaint must be made in writing in due time, is Article 31(3) of the Montreal Convention to be interpreted as meaning that the requirement of writing may be fulfilled in an electronic procedure and also by the registration of the damage in the information system of the carrier?

(3) Does the Montreal Convention preclude an interpretation by which the requirement of writing is regarded as fulfilled where, with the knowledge of the passenger, a representative of the carrier records in writing the notice of complaint/the complaint either on paper or electronically in the carrier's system?

(4) Does Article 31 of the Montreal Convention subject a complaint to further substantive requirements than that of giving notice to the carrier of the damage sustained?'

21. Written observations were submitted by Finnair, the Italian Government and the European Commission.

22. At the hearing on 23 March 2017, Finnair, Fennia and the European Commission made oral submissions.

Assessment

General remarks

23. The provisions of the Montreal Convention have been an integral part of the European Union legal order since 28 June 2004 and the Court therefore has jurisdiction to give preliminary rulings concerning its interpretation. [5]

24. The Montreal Convention does not contain any definition of the expressions 'made in writing' or 'in writing'. Accordingly, 'in the light of the aim of that convention, which is to unify the rules for international carriage by air, [those terms] must be given a uniform and autonomous interpretation, notwithstanding the different meanings given to [those concepts] in the domestic laws of the States Parties to that convention' and 'must be interpreted in accordance with the rules of interpretation of general international law, which are binding on the European Union'. [6]

25. In that connection, Article 31 of the Vienna Convention on the Law of Treaties ('the VCLT'), [7] which codifies rules of general international law, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. [8]

26. As to the latter, the third and fifth recitals of the Montreal Convention refer to 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution' and to collective State action through a new convention as being the 'most adequate means of achieving an equitable balance of interests'.

The first question

27. By its first question the referring court asks, in essence, whether an action against the carrier for damage to checked baggage is barred under Article 31(4) of the Montreal Convention where a complaint has been made within the time limits laid down by Article 31(2) but where that complaint fails to satisfy the condition of being made 'in writing' within the meaning of Article 31(3) thereof.

5 See judgment of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraph 20 and the case-law cited.

6 See, to that effect, judgment of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraphs 21 and 22 (the passages cited deal with the definition of the term 'damage' in Article 22 of the Montreal Convention).

7 Signed in Vienna on 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331).

8 See judgment of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraph 23 and the case-law cited.

Preliminary remarks — 'loss of baggage' or 'damage to baggage'

28. It will be recalled that Ms Mäkelä-Dermedesiotis' original claim concerned items that were packed inside her checked baggage that were missing when it was delivered to her in Helsinki. As the Commission has noted in its written submissions, that raises the question whether the injury suffered when items packed within checked baggage are lost should be categorised as 'damage to baggage' or 'loss of baggage'.

29. Article 17(2) of the convention states that the 'carrier is liable for damage sustained in the case of destruction or loss of, or of damage to, checked baggage [upon certain conditions] …'. Article 31(2) provides that complaints regarding damage to checked baggage must be made to the carrier within seven days of the date of receipt of the baggage. However, no specific deadline is set in Article 31 for complaints regarding lost baggage. [9]

30. In my view, the better way to characterise the loss of items from checked baggage is as 'damage to baggage'. In that regard, the distinguishing criterion should be whether the checked baggage was received by the passenger (albeit in less than perfect order), as happened in the present case, or was not received at all.

31. Article 31(1) of the Montreal Convention states that receipt by the person entitled to delivery of checked baggage without complaint constitutes prima facie evidence that the baggage was delivered in good condition. Upon receipt, the passenger is in a position to determine whether the baggage is in good order or not, including whether the baggage is intact. If any damage has occurred, the passenger must file a complaint within the time limits prescribed and in the form required in order to preserve his rights. Once the carrier has handed over the checked baggage, it has no control over it and limited means of verifying whether any subsequently claimed damage was incurred while the baggage was in the carrier's custody, or whether the baggage was actually damaged after delivery. These concerns apply a fortiori where items are claimed to be missing from checked baggage. It is therefore reasonable to require the passenger to report any damage to the baggage within a short period of time after delivery. Similarly, a complaint of damage to checked baggage or its contents is likely to be more complex than the simple statement 'my bag is lost'. It is therefore reasonable, in the interests of handling matters efficiently and smoothly, to require there to be a *written record* of such a complaint.

32. Those concerns are not present where checked baggage has been lost. The carrier accepted custody of the checked baggage. The loss took place whilst the baggage was in the carrier's care. There is therefore not the same need to lay down formal requirements regarding notice periods or to prescribe the form of the notice to be given. I would also observe that, to the extent that there is no 'receipt' by the passenger — within the meaning of Article 31(1) — of baggage that is *lost* (that is, indeed, the passenger's whole problem!), it seems to me that no part of Article 31 can be triggered by circumstances in which the checked baggage has gone missing and is never delivered to the passenger.

33. I would therefore classify receipt by a passenger of checked baggage with contents missing as receipt of baggage that is 'damaged', rather than 'loss of baggage'. Accordingly, the requirements of Article 31 do apply.

9 Article 17(3) simply states that if the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage, without providing any limitation on the timing or form of the complaint, other than the limitation of actions provided for in Article 35, which provides for the extinction of the right to damages if an action is not brought within a two-year period.

Must notice be in writing within the seven-day period to be valid?

34. Article 31(4), which bars actions against the carrier if no complaint is made within the prescribed time limits, does not include an explicit reference to the claim being 'made in writing'. That requirement is only expressly stated in Article 31(3). That raises the question what the consequences are of a timely complaint made in a form that does not satisfy the requirement of being 'made in writing'.

35. It could be argued that the carrier is on notice once the complaint has been made orally; and that the requirement as to writing is merely an evidentiary requirement. However, that interpretation is not, in my view, supported by a straightforward reading of the text of Article 31. Article 31(3) states that 'every complaint must be in writing' and given or dispatched within the prescribed periods. That general rule suggests that a non-written complaint would be defective for the purposes of the Montreal Convention. The logical consequence would appear to be that in order to preserve the right of action, the complaint must be made not only within the specified periods, but also (and within those periods) 'in writing'.

36. I therefore suggest that the Court's answer to the first question should be that an action against a carrier for damage to checked baggage is barred under the Montreal Convention where a complaint has been made within the time limits laid down by Article 31(2) but fails to satisfy the condition of being made 'in writing' within the meaning of Article 31(3) thereof.

The second question

37. By its second question, the referring court asks whether Article 31(3) of the Montreal Convention should be interpreted as meaning that the requirement as to writing may be fulfilled in an electronic procedure – such as, for example, registration of the claim in the carrier's information system.

38. Although that question is ostensibly concerned with whether writing on electronic media qualifies as 'made in writing', the referring court here essentially asks whether the Montreal Convention must be interpreted to mean that only documents written on paper (the conventional medium of written communication when the Montreal Convention was drafted) constitute valid claims under Article 31(3) thereof. If the convention is not to be interpreted so restrictively, what are the types of media upon which a complaint, once submitted, may be made in order to be treated as being 'in writing'?

39. It is useful first to recall what 'writing' is and the purposes that are served by a requirement that notice must be given 'in writing'.

40. Writing has been part of mankind's history for substantially longer than flying. Written texts have been created on a large number of different media, ranging from clay tablets, vellum, paper and papyrus to rune sticks and slabs of marble and granite — and, most recently, electronic media. All of these texts would appear to be 'in writing' in the ordinary meaning given to that term.

41. The term 'in writing' in these instances describes the finished state of the text as it is captured and recorded for posterity. It is *not* a statement about the inspiration for, or authorship of, the text. Thus, it is extremely unlikely that the *author* of the decree issued in Memphis, Egypt, in 196 BC on behalf of King Ptolemy V was the person who actually cut the letters of the three parallel versions (in hieroglyphic script, demotic script and ancient Greek) into a granodiorite stele – but that does not undermine the conclusion that the resulting text of the Rosetta Stone is 'in writing'.

42. When contemplating what distinguishes a message in written form from one passed on orally, the main differences that spring to mind are the permanence of the written form and its retrievable character. Written statements can generally be archived and retrieved, and they may even be certified in various ways to enhance the proof of (inter alia) their provenance, unadulterated content and when precisely they were delivered.

43. Oral statements, though they can be recalled from the parties' memories, are much less suitable as proof; and disagreements frequently arise as to what exactly was said or stated and when precisely that occurred.

44. A requirement that only text recorded on paper suffices as being 'in writing' does not reflect the ordinary meaning of the term 'writing'. To the extent that it would exclude forms of communication (such as facsimile and latterly email) that are in everyday use in commerce, industry and business, it would seem, indeed, an archaic interpretation to adopt. Nor does it make sense in the context of modern air travel and the way airlines interact with their customers. It is common knowledge that airlines make extensive use of electronic communication in their dealings with their customers – including online ticket purchases, online check-in, electronic boarding passes and online information regarding claims procedures. A restrictive reading of the term 'in writing' would thus also appear to run counter to a stated purpose of the Montreal Convention, namely to 'ensure protection of the interests of consumers' (as recognised in the third recital of the convention). In summary, I find no explicit requirement in the Montreal Convention that a written complaint has to be made on paper; and see no convincing reason why writing on electronic media should not qualify as a 'written' complaint as long as the writing in question satisfies the purposes that underlie the requirement.

45. True, some additional measure of practicability and some form of general requirement that the parties act in good faith must be interpreted into the provisions of the Montreal Convention on notification of claims. If carriers are to deal with passengers' complaints expeditiously, certain forms of written notification of complaints (for example, on a slab of rock or a clay tablet) may be less useful than others.[10] Conversely, a complaint that for all practical purposes fulfils the purposes of the requirement of written form should not be disregarded for the lack of a physical piece of paper. Thus, the interpretation of the term 'in writing' must, I think, sensibly take into account the purpose of the requirement, issues of practicability and common usage at the time of the relevant facts. It cannot without leading to absurd results ignore the way in which businesses normally do business with their customers.

46. Today it is normal business practice in many sectors of the economy to scan and to store documents in electronic form only, generating print-outs on paper of those documents only as and when specifically required.

47. Finnair has not suggested that 'writing' onto the hard-drives of its information system fails to serve the purposes of permanency and retrievability as adequately as writing onto a piece of paper. The latter is comparable with a properly backed-up computer system in terms of perishability; and is arguably more likely to be misplaced or lost than an electronic file that can be searched for on the relevant electronic medium. It has likewise not been suggested that an electronic 'paper trail' is inferior to a paper trail on 'hard copy' (that is, on paper) for the purposes of documenting when information concerning damage to checked baggage was notified to the carrier and any subsequent amendments or additions thereto.

10 Students of the English common law have long delighted in the (fictional) story of Mr Albert Haddock, who settled his tax bill with HM Inland Revenue by writing a cheque for the sum due on the back of a cow (*Board of Inland Revenue v Haddock*: the case of the negotiable cow). First published in the satirical magazine *Punch* as part of the author's series of *Misleading Cases in the Common Law*, it later acquired almost legendary status as part of a collection of similarly acute parodies: see A.P. Herbert, *Uncommon Law* (Methuen, 1935) — or, if that is not readily to hand, https://en.wikipedia.org/wiki/Board_of_Inland_Revenue_v_Haddock.

48. In my view, if the necessary information regarding damage to checked baggage has been written onto a medium of permanence from which it can be retrieved and which is in the carrier's possession and under its control, that should suffice for the claim to be considered to be 'in writing' for purposes of the Montreal Convention. It should not matter in this respect whether the storage medium for the complaint is paper and the means of retrieval comprises going to a physical archive, pulling out a drawer and extracting the paper copy, or whether the medium is a computer hard drive and the means of retrieval is to open the relevant file and read it on a computer screen (or print it out onto paper).

49. In the present case, a physical claims certificate, printed on paper, was issued by Finnair and given to the passenger, who used it in her claim against her insurance company. Under my analysis, it is not necessary for that document to be produced in order for the claim to have been made in writing. The conversion into writing of the information Ms Mäkelä-Dermedesiotis gave to the Finnair customer service representative over the telephone happened when that representative entered the information into Finnair's information system. However, the fact that the same or another Finnair customer service agent, by clicking on the 'print' button, could issue a paper certificate that could (and did) serve as a proof of the claim vis-à-vis the passenger's insurance company underlines the fact that Finnair had all the necessary information regarding the claim available in written form.

50. Consequently, I suggest that the Court's answer to the second question should be that Article 31(3) of the Montreal Convention should be interpreted as meaning that the requirement as to writing may be fulfilled in an electronic procedure, including by registration of the passenger's claim in the carrier's information system.

The third question

51. By its third question the referring court asks, in essence, whether the requirements of Article 31 of the Montreal Convention are satisfied if the carrier's customer service representative records the complaint in writing, be it on paper or electronically in the carrier's information system, on behalf of the passenger.

52. It is uncontested that the Finnair customer service representative recorded the information given by Ms Mäkelä-Dermedesiotis in Finnair's information system. Thus, the passenger was both the *source* of the information and the *substantive author* of the complaint. Subsequently, Finnair issued a certificate to Ms Mäkelä-Dermedesiotis, which it sent to her. It is unclear whether Finnair retained a paper copy of that certificate for its files.

53. Whereas the referring court's second question was concerned with 'what does "in writing" mean?', its third question addresses the issue: 'does the passenger have himself to put the complaint into writing; or is it sufficient that the complaint be put into writing on his initiative and under his direction?'

54. The text of Article 31 of the Montreal Convention does *not* say in terms that the complaint 'must be made in writing *by the passenger*'. Rather, Article 31(2) states that, 'In the case of damage, the person entitled to delivery must complain to the carrier [within certain strict time limits]'; and Article 31(3) confines itself to requiring that, 'Every complaint must be made in writing and given or dispatched within the times aforesaid'.[11] I accept that the French text, by following the usual rules of French legal drafting (which tends to use nouns rather than verbs) and using the noun 'protestation'

11 The French text has 'En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie …' (Article 31(2)) and 'Toute protestation doit être faite par réserve écrite et remise ou expédiée dans le délai prévu pour cette protestation' (Article 31(3)). Since the grammatical structure of Spanish is, in this respect, similar to that of French, it is unsurprising that the Spanish text likewise uses the same noun ('una protesta') in both Article 31(2) and Article 31(3) ('… el destinatario deberá presentar … una protesta …' and 'Toda protesta deberá hacerce por escrito y darse o expedirse dentro de los plazos mencionados', respectively).

in both Article 31(2) and Article 31(3), comes closer to implying that the passenger himself must *create* the complaint (the 'protestation') in written form which is then 'remise ou expédiée' (given or dispatched) to the carrier. However, the English text, through its use of verbs, is more flexible. The verb 'must complain' in Article 31(2) indicates merely that the complaint must *originate* with 'the person entitled to delivery' (the subject of that verb). The verb 'be made' in Article 31(3) has the passenger's complaint as its subject. That does not automatically lead to the conclusion that the complaint must have been created in writing by the passenger himself. Rather, it describes what must exist at the end of the complaint process (namely, a complaint in writing) in order for the complaint to be valid.

55. The different language versions of the Montreal Convention are equally authentic.[12] Applying Article 31 of the VCLT, Article 31 of the Montreal Convention is to be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [convention] in their context and in the light of [the convention's] object and purpose'. It seems to me that the actual wording leaves scope for exploring whether a complaint *originating with the passenger* but rendered into written form by someone else may be regarded as a valid complaint if such a reading better satisfies the object and purpose of the Montreal Convention in the conditions of the 21st century.

56. Here, I also note that the convention does not stipulate that the complaint must be signed; or require the use of registered mail (or some other specific form of delivery) in order to provide proof of the origin of the complaint. Indeed, the convention does not require the complaint to be posted at all: Article 31(3) merely states that the complaint must be 'given or dispatched'. Nor does the convention regulate how to prove the content and timing of a claim if the parties subsequently disagree on those issues (or indeed, disagree as to whether a complaint has been made at all). All that is left to the procedural rules of the Contracting States. The complaint simply serves to state the passenger's claim to the carrier. It does not appear to have other any legal effect.

57. Thus, nothing in the actual wording of the Montreal Convention specifically bars a passenger from enlisting someone else's assistance to transform *the complaint that he wishes to make* into written form.

58. Let us begin with two obvious illustrations.

59. Passenger A is a businessman. On unpacking his checked baggage after a business trip, he notes with displeasure that it has been broken into and that several items have disappeared. The following day, he calls his secretary into his office and dictates the necessary information to her as a curt letter. She types it out. He initials the bottom of the printout (illegibly) and tells her to send it off. She scans the printout and emails it to the airline.

60. Passenger B flies to a remote destination to begin a fortnight's trekking holiday. He arrives late at night and when he retrieves the rucksack that he checked in, he finds that it has been damaged. No one is at the desk marked 'information' and his onward transport is about to depart. There is a large sign in international English saying, 'Bag problem? Ring [a telephone number]'. He scribbles down the number and, the following morning (while he still has a signal), uses his mobile phone to contact the ground handling staff to lodge his complaint. The customer service agent enters the information into the airline's computerised database and sends a text message with an attachment to passenger B's mobile phone, with a copy to his email.

12 The convention was done 'in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic'.

61. Passenger A's complaint has been processed electronically by a person acting under his immediate direction, printed out, then reconverted into electronic form and dispatched. Does that invalidate it? Should it make any difference if the businessman signed the letter in full rather than initialling it (or did not sign it at all), or if the secretary sent it by registered mail?

62. Passenger B found himself in a situation in which it was in practical terms impossible for him personally to render his complaint into writing and dispatch it to the airline within seven days of receipt of his damaged rucksack. Airlines frequently use ground handling staff to deal with problems about lost baggage at airports where they do not have a physical presence. The ground handling staff were not there when passenger B's flight arrived; but there was a contact number. Passenger B duly did exactly what he was invited to do to lodge his complaint within time with the ground handling staff for onward transmission to the carrier.

63. In both of my illustrations, the complaint clearly originates with the passenger. *It is the passenger's complaint*. It has merely been transformed into writing by someone else. As a result, there is now a clear written record of the content of the complaint. It seems to me that that satisfies the object and purpose of the Montreal Convention. Put more formally: it should suffice for the purposes of Article 31(3) of the Montreal Convention that the writing is done *on behalf of the passenger* or *upon instruction by the passenger*, so that the information underlying the complaint clearly comes from the passenger and the complaint entered actually corresponds to the passenger's claim.

64. I see no reason why the representative of a carrier should not be able to record the claim in writing on behalf of the passenger. Businesses, including airline companies, routinely perform services for their customers — sometimes in return for payment made for that specific act but frequently in connection with the performance of other services or the delivery of goods that the customer has paid for. Such assistance not infrequently includes helping customers with complaints. [13]

65. A passenger may legitimately expect the carrier's customer service representative to act in good faith and enter the complaint in written form in the carrier's information system for the treatment of complaints — and, a fortiori, when the carrier's customer service department issues a certificate as confirmation of the entry in the computerised system.

66. The facts of the present case are not unusual. Within the time limits specified, a passenger calls the customer services of a carrier on a *telephone number provided by the carrier for that purpose* to give notice of a claim for damaged baggage. The carrier's customer service representative on behalf of the passenger writes down and processes the information given by the passenger (normally, today, electronically). All the necessary elements are present for the carrier to safeguard its interests. The carrier's own representative, recording the information given by the passenger, is hardly likely to exaggerate the claim to the latter's benefit. A typical passenger travelling as a consumer would not, I think, expect to be required to undertake the (prima facie pointless) additional exercise of then setting down in writing exactly the same information as the carrier's customer service representative has just entered in the carrier's information system and dispatching it himself to the carrier.

67. Although it is ultimately a matter for the national court as sole judge of fact, it seems to me that in such circumstances there is a valid claim made in writing under Article 31 of the Montreal Convention.

13 See, for example, the description found in Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, Customer Service Representatives, available on the Internet at https://www.bls.gov/ooh/office-and-administrative-support/customer-service-representatives.htm (visited 30 October 2017). Under the heading 'What Customer Representatives Do', that manual states: 'Customer service representatives interact with customers to *handle complaints*, process orders, and provide information about an organisation's products and services' (emphasis added).

68. Finally, I observe that a purposive interpretation of Article 31 of the Montreal Convention accords with the objective of consumer protection identified in the third recital thereof and with the consumer-friendly approach adopted by the Court in its interpretation of passengers' right to compensation from airlines under Regulation (EC) No 261/2004 (the Air Passengers Regulation).[14]

69. I therefore suggest that the Court's answer to the third question should be that the requirements of Article 31 of the Montreal Convention are satisfied if the carrier's customer service representative records the complaint in writing, be it on paper or electronically in the carrier's information system, on behalf of the passenger.

The fourth question

70. By its fourth question, the referring court asks whether Article 31 of the Montreal Convention subjects a complaint to further substantive requirements than that of giving notice to the carrier of the damage sustained.

71. It suffices to observe that Article 31 of the Montreal Convention (as its title indicates) deals exclusively with what constitutes 'timely notice of complaints'. It is thus concerned solely with the conditions precedent that must be satisfied for an action to lie against the carrier (namely, that the complaint must be lodged within time and in writing). If those conditions are *not* satisfied, then — save in the case of fraud on the part of the carrier — no action shall lie (Article 31(4)). Where those conditions are satisfied, an action against the carrier will be admissible. If the carrier contests the claim, whether that action will, in due course, succeed or fail will depend on the observance of applicable procedural and evidential rules and the material placed before the court seized of the case. But none of those matters are addressed by Article 31 of the Montreal Convention.

72. I therefore consider that the answer to the fourth question referred should be that Article 31 of the Montreal Convention does not subject the admissibility of a complaint to substantive requirements other than that notice to the carrier should be given within the time limits and in the form specified by that article.

Conclusion

73. In the light of all the above considerations, I suggest that in answer to the questions referred by the Korkein oikeus (Supreme Court, Finland), the Court should rule as follows:

(1) An action against a carrier for damage to checked baggage is barred under the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Montreal on 28 May 1999, where a complaint has been made within the time limits laid down by Article 31(2), but fails to satisfy the condition of being made 'in writing' within the meaning of Article 31(3) thereof.

(2) Article 31(3) of the Montreal Convention should be interpreted as meaning that the requirement as to writing may be fulfilled in an electronic procedure, including by registration of the passenger's claim in the carrier's information system.

14 Regulation 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 2004 L 46, p. 1). See, in particular, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, and of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657.

(3) The requirements of Article 31 of the Montreal Convention are satisfied if the carrier's customer service representative records the complaint in writing, be it on paper or electronically in the carrier's information system, on behalf of the passenger.

(4) Article 31 of the Montreal Convention does not subject the admissibility of a complaint to substantive requirements other than that notice to the carrier should be given within the time limits and in the form specified by that article.