Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 19 October 2017[1]

Joined Cases C-274/16, C-447/16 and C-448/16

flightright GmbH
v
Air Nostrum Líneas Aéreas del Mediterráneo SA (C-274/16)
(Request for a preliminary ruling from the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany))
and
Roland Becker
v
Hainan Airlines Co. Ltd (C-447/16)
and
Mohamed Barkan
Souad Asbai
Assia Barkan
Zakaria Barkan
Nousaiba Barkan
v
Air Nostrum, Lineas Aereas del Mediterraneo, SA (C-448/16)

(Requests for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(References for a preliminary ruling — Regulations (EC) No 44/2001 and (EU) No 1215/2012 — Jurisdiction for claims arising under Regulation (EC) No 261/2004 — Delayed flight — Multi-leg journey — Notion of 'matters relating to a contract' — Provision of services — Place of performance — Defendant domiciled in a third country)

I. Introduction

1. The present cases concern three claims for compensation that were brought under Regulation (EC) No 261/2004[2] against airline companies for delays and denied boarding on different segments of a multi-leg journey.

2. The first two claims have a common theme: a journey composed of two connecting flights was sold by the contractual air carrier ('CAC') to the passengers. The CAC itself operated only the second leg of the journey. The first leg was carried out by an operating air carrier ('OAC'). In both cases, delays occurred on the first leg of the journey which caused the passengers to miss the connecting flight.

1 Original language: English.

2 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).

3. These factual scenarios raise two questions of law. First, what is the nature of a claim brought by passengers against the OAC for a delay on the first leg of the journey? Can such a claim, even in the absence of a contract between the passenger and the OAC, be classified as 'a matter relating to a contract' within the meaning of Regulations (EC) No 44/2001 [3] and (EU) No 1215/2012? [4]

4. Second, which courts have international jurisdiction in relation to such compensation claims? The passengers brought their claims against the OAC before the German courts, Germany being the destination of the second leg of the journey. However, the OAC carried out the first leg of the journey, with that particular leg neither starting nor ending in Germany.

5. The third claim is also a request for compensation, but raises a separate question. That claim was brought against an OAC that was also the passenger's CAC for the leg of the journey complained of. However, the issue of jurisdiction here is of a different nature as the air carrier that denied boarding is domiciled outside the EU. Thus, the question is what rules of international jurisdiction apply in such a situation.

II. Legal framework

(a) Regulation No 261/2004

6. Section (b) of Article 2 of Regulation No 261/2004 defines 'operating air carrier' as 'an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger'.

7. Article 3(1) states that Regulation No 261/2004 applies:

'(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.'

8. Pursuant to Article 3(5), Regulation No 261/2004 applies to any OAC providing transport to passengers covered by paragraphs 1 and 2 of that same provision. The second sentence of Article 3(5) states that 'where an [OAC] which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger'.

9. Article 6(1) defines the assistance that must be provided by the OAC to passengers in case of delay, depending on the duration of the delay and the distance of the flight. Article 7(1) further sets the amounts of flat-rate compensation to be provided to passengers.

10. Article 13 of Regulation No 261/2004 concerns the 'right of redress'. It states that '… where an [OAC] pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation

3 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

4 Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). That regulation repealed Regulation No 44/2001.

shall in no way restrict the [OAC]'s right to seek reimbursement from a tour operator or another person with whom the [OAC] has a contract Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an [OAC] has a contract, to seek reimbursement or compensation from the [OAC] …'.

(b) Regulations No 44/2001 and No 1215/2012

11. Article 66(1) of Regulation No 1215/2012 states that it applies to proceedings instituted on or after 10 January 2015.

12. The proceedings in Cases C-447/16 and C-448/16 were brought before that date. For those cases, Regulation No 44/2001 remains applicable. Case C-274/16 falls under Regulation No 1215/2012. However, except for numbering, the provisions of both regulations applicable in the present cases remained identical.

13. Under Article 2(1) of Regulation No 44/2001 and Article 4(1) of Regulation No 1215/2012, 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

14. Pursuant to Article 4(1) of Regulation No 44/2001 and Article 6(1) of Regulation No 1215/2012 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall … be determined by the law of that Member State'.[5] Under Article 4(2) of Regulation No 44/2001 and Article 6(2) of Regulation No 1215/2012 'as against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, … in the same way as nationals of that Member State'.

15. The second sections of both regulations contain rules of special jurisdiction. The relevant provisions are Article 5 of Regulation No 44/2001 and Article 7 of Regulation No 1215/2012. Paragraph 1(a) of those articles provides that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question. In the case of the provision of services, the place of performance of the obligation in question shall be, pursuant to the second indent of paragraph 1(b) of the same provisions, 'in a Member State where, under the contract, the services were provided or should have been provided'.

16. Moreover, pursuant to Article 5(3) of Regulation No 44/2001 and Article 7(2) of Regulation No 1215/2012, 'in matters relating to tort, delict or quasi-delict', the courts that have jurisdiction are 'the courts for the place where the harmful event occurred or may occur'.

III. Facts, national proceedings and the questions referred

17. The facts and the procedure of each case (Claim 1 — flightright, Claim 2 — Barkan, and Claim 3 — Becker) are described in Sections A to C respectively.

5 Subject to Article 18(1), Article 21(2) and Articles 24 and 25 of Regulation No 1215/2012 and Articles 22 and 23 of Regulation No 44/2001.

A. Case C-274/16, flightright GmbH v Air Nostrum, Líneas Aéreas del Mediterráneo, SA

18. The passengers in this case purchased a journey composed of two connecting flights from Ibiza (Spain) to Düsseldorf (Germany) via Palma de Mallorca (Spain) from the air carrier Air Berlin PLC & Co. Luftverkehrs KG ('Air Berlin'). The first leg was operated by Air Nostrum, Líneas Aéreas del Mediterráneo, SA ('Air Nostrum'). The second leg was operated by Air Berlin. The first leg was delayed, resulting in the passengers missing their connecting flight. They eventually arrived in Düsseldorf with a 13-hour delay.

19. The passengers assigned the claim arising out of that delay under Regulation No 261/2004 to flightright GmbH ('flightright'). Flightright now seeks compensation of EUR 500 against Air Nostrum together with interest ('Claim 1 — flightright').

20. Flightright has brought the claim before the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany). That court doubts whether it has international jurisdiction to hear the case. More specifically it questions whether the final destination, Düsseldorf, is the place of performance within the meaning of Article 7(1)(b) of Regulation No 1215/2012. This is because the delay occurred on the first leg of the journey, which neither began nor ended in Germany, and which was operated by a different air carrier to the one with which the contract of carriage had been concluded.

21. In those circumstances, the Amtsgericht Düsseldorf (Local Court, Düsseldorf) stayed the proceedings and referred the following question to the Court:

'In the case where passengers are transported on a flight which consists of two connecting flights without any significant stopover at the connecting airport, is the place of arrival of the second leg of the journey to be regarded as being the place of performance under Article 7(1)(a) of [Regulation No 1215/2012] in the case where the claim which has been brought is directed against the air carrier which operated the first leg of the journey on which the irregularity took place and transport on the second leg of the journey was carried out by a different air carrier?'

B. Case C-448/16, Mohamed Barkan and Others v Air Nostrum L.A.M. SA

22. Mr Mohamed Barkan, his wife and their three children ('Mr Barkan and others') also purchased a journey made up of two connecting flights, from Melilla (Spain) to Frankfurt am Main (Germany) via Madrid (Spain). The contract for carriage was concluded with Iberia Líneas Aéreas de España ('Iberia'). The first leg, from Melilla to Madrid, was operated by Air Nostrum, whereas the second leg, from Madrid to Frankfurt am Main, was operated by Iberia. The departure from Melilla to Madrid was delayed, meaning that the passengers missed the connecting flight and arrived at their final destination (Frankfurt am Main) four hours late.

23. These passengers have issued a claim against Air Nostrum, each seeking EUR 250 in compensation pursuant to Article 7(1)(a) of Regulation No 261/2004. Mr Barkan also claims a reimbursement of EUR 100, together with interest, for food and telephone calls made during the delay ('Claim 2 — Barkan').

24. That claim was upheld by a first-instance court. However, on appeal, the claim was dismissed. The appellate court considered that the German courts lacked international jurisdiction. According to that court, there was no domestic place of performance within the meaning of Regulation No 44/2001. The claim at issue concerned the delay on the flight leg from Melilla to Madrid and so only those two places were considered by it to be the relevant places of performance.

25. The Bundesgerichtshof (Federal Court of Justice, Germany), seised by an appeal on points of law, notes that the international jurisdiction of German courts can in the present case only be established if the place of performance of the service at issue is in Germany. That determination depends on whether the legal relationship between the applicants in the main proceedings and Air Nostrum can be classified as contractual, despite the fact that no direct contractual link exists between these passengers and Air Nostrum.

26. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) stayed the proceedings and referred the following questions to the Court:

'(1) Is Article 5(1)(a) of [Regulation No 44/2001] to be interpreted as meaning that the concept of "matters relating to a contract" also covers a claim for compensation made under Article 7 of [Regulation No 261/2004] which is brought against an operating air carrier which is not a party to the contract with the passenger concerned?

(2) In so far as Article 5(1) of [Regulation No 44/2001] is applicable:

Where passengers are transported on two flights without any significant stopover at the connecting airports, is the passenger's final destination to be regarded as the place where the services were provided under the second indent of Article 5(1)(b) of [Regulation No 44/2001] even when the claim advanced in the application for compensation under Article 7 of [Regulation No 261/2004] is based on a disruption to the first leg of the journey and the action is brought against the operating air carrier of the first flight, which is not party to the contract of carriage?'

C. Case C-447/16, Roland Becker v Hainan Airlines Co. Ltd

27. Mr Roland Becker concluded a contract of carriage by air with the air carrier Hainan Airlines Co. Ltd ('Hainan Airlines') for a journey made up of two connecting flights. That air carrier is domiciled outside the EU. The first leg of that journey was from Berlin-Tegel (Germany) to Brussels (Belgium) and the second leg was from Brussels to Beijing (China). Mr Becker checked in for both in Berlin and received the corresponding boarding cards. His luggage was also checked all the way through to Beijing. The first leg of the journey, operated by Brussels Airlines, went according to schedule. However, in Brussels Mr Becker was denied boarding on the second leg to Beijing, which was operated by Hainan Airlines.

28. Mr Becker seeks, through a claim brought against Hainan Airlines in Germany, EUR 600 in compensation under Article 7(1)(c) of Regulation No 261/2004 together with interest and the costs of the proceedings ('Claim 3 — Becker').

29. The first-instance court dismissed the claim on the ground that the German courts lacked international jurisdiction. The appellate court reached the same conclusion. In the latter's view, there was no domestic place of performance because the first leg from Berlin to Brussels and the second leg from Brussels to Beijing were two separate flights under Regulation No 261/2004. The claim at issue relates exclusively to the Brussels to Beijing part of the journey: the place of performance was thus considered to be Brussels. That court further noted that the seat of Hainan Airlines is not in Germany and the international jurisdiction of German courts therefore cannot be based on it. As the contract at issue concerns provision of services, jurisdiction can only arise under Article 5(1)(a) and the second indent of Article 5(1)(b) of Regulation No 44/2001.

30. The Bundesgerichtshof (Federal Court of Justice, Germany), seised by an appeal on points of law, observes that whether or not German courts enjoy international jurisdiction depends on the nature of the legal relationship between Mr Becker and Hainan Airlines. It further depends on whether Berlin, the place of departure of the first flight, can be regarded as the place of performance under Regulation No 44/2001.

31. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) stayed the proceedings and referred the following question to the Court:

'Where passengers are transported on two flights without any significant stopover at the connecting airports, is the place of departure of the first leg of the journey to be regarded as being the place where the services were provided under the second indent of Article 5(1)(b) of [Regulation No 44/2001], even when the claim advanced in the application for compensation under Article 7 of [Regulation No 261/2004] is based on a disruption to the second leg of the journey and the action is brought against the party to the contract of carriage, which, although it was the operating air carrier for the second flight, was not the operating air carrier for the first flight?'

IV. Procedure before the Court

32. For Claim 1 — flightright, written observations were submitted by flightright, Air Nostrum, the Government of Portugal and by the European Commission. Concerning Claim 2 — Barkan, written observations were submitted by Mr Barkan and others, Air Nostrum, the Swiss Confederation and the Commission. Written observations for Claim 3 — Becker were submitted by Mr Becker, the Swiss Confederation, and the Commission.

33. Mr Barkan and others, flightright, Air Nostrum, the French Government and the Commission presented their arguments at a joint oral hearing that took place on 6 July 2017.

V. Assessment

34. This Opinion is structured as follows: Claim 1 —flightright and Claim 2 — Barkan fall under the scope of either Regulation No 44/2001 or Regulation No 1215/2012. I will thus start by considering the two legal issues raised by these two claims: whether the compensation claim is a matter relating to a contract (A.1.) and what is the place of performance of such a contract (A.2.). I will then address the issue of international jurisdiction in Claim 3 — Becker (B).

A. Claim 1 — flightright and Claim 2 — Barkan

35. How can the Member State whose courts have international jurisdiction for claims against an operating air carrier that was not the passengers' contractual air carrier be determined?

36. That determination requires identification of the applicable head of jurisdiction (1), and then, within the given head, ascertaining the correct international forum for those claims in the light of the Court's ruling in *Rehder*.[6] That ruling concerned a direct flight. The question thus arises as to how to apply it to *a multi-leg journey* (2).

6 Judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439, paragraph 47).

1. The applicable head of jurisdiction

(a) Nature of the claim

37. Regulation No 261/2004 defines the rights that passengers may enforce against the operating air carrier if one of the situations described therein occurs. However, quite understandably, that regulation does not itself specify the nature of the claims arising under it for the purpose of application of Regulations No 44/2001 and No 1215/2012.

38. The defendant concerned in the main proceedings, Air Nostrum, appears to be domiciled in Spain. Therefore, international jurisdiction of German courts cannot be based on the *general* head of jurisdiction under Article 2(1) of Regulation No 44/2001 and Article 4(1) of Regulation No 1215/2012.

39. Turning to the *special* heads of jurisdiction, it ought first to be recalled that the special head of jurisdiction foreseen for consumers by Regulations No 44/2001 and No 1215/2012 cannot apply in the present case either. Admittedly, Regulation No 261/2004 is an instrument ensuring a high level of protection of passengers.[7] However, the specific head of jurisdiction available to consumers under Article 16(1) of Regulation No 44/2001 and Article 18(1) of Regulation No 1215/2012 applies, by virtue of the express exclusions contained in Article 15(3) of Regulation No 44/2001 and Article 17(3) of Regulation No 1215/2012 respectively, only to contracts of carriage, which, for an all-inclusive price, provide for a *combination of* travel and accommodation. On the facts as stated by the referring courts, that is not the case in the contracts at issue in the main proceedings.

40. As other heads of jurisdiction under Regulations No 44/2001 and No 1215/2012 do not seem to be relevant, the international jurisdiction of German courts can be considered only in the light of the special head of jurisdiction for contractual or tortious matters.

41. In its order for reference in Claim 2 — Barkan, the Bundesgerichtshof (Federal Court of Justice) considers that the claims at issue are statutory claims brought under a contract. Based on an existing contract with a CAC, the passengers in the main proceedings are enforcing rights that do not follow directly from their contract of carriage but that are defined in Regulation No 261/2004. The possibility to enforce them presupposes a contract of carriage by air and a confirmed booking. Thus, on the whole, the matter relates to a contract.

42. Flightright, Mr Barkan and others, the French Government, and the Swiss Confederation consider that the claims at issue fall under the notion of 'matters relating to a contract' within the meaning of Regulation No 44/2001 or Regulation No 1215/2012. Flightright as well as Mr Barkan and others refer, in essence, to the contractual origin of the claim despite the absence of a contract signed directly by them and Air Nostrum.

43. The French Government relies on the case-law of the Court concerning the notion of 'matters relating to a contract' as also covering a claim directed against a third party that has consented to the execution of an obligation agreed between others. That government further refers to the 'agency-related' provision in Article 3(5) of Regulation No 261/2004 as confirming the contractual nature of the claims at issue.

44. Similarly, referring to the case-law of the Court of Justice and to the latter provision of Regulation No 261/2004, the Swiss Confederation argues that the statutory transfer of obligations under Regulation No 261/2004 from the CAC to the OAC indicates that the claims at issue are contractual.

7 See recitals 1 to 4 of Regulation No 261/2004, as well as judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 69); of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraphs 44, 49 and 60); and of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraphs 72 and 74).

45. The same conclusion in principle has been reached by the Commission. The Commission notes that Regulation No 261/2004 makes the OAC responsible for obligations specified therein rather than the CAC. The fact that the passengers' corresponding rights are defined in a regulation and not in a contract is irrelevant. That is because they are the legal consequence of the wrong execution of a contract.

46. Air Nostrum seems to accept the proposition that the claim at issue can be classified as contractual (although it stresses, in its written submissions concerning Claim 1 – flightright, the absence of a contractual link). It maintains, however, that it can only be held liable for the leg of the journey that it has effectively operated and whose execution was not located in Germany.

(b) Contract or tort?

47. As appears to be the case from the information provided by the referring courts as well as that confirmed at the hearing, there is essentially a 'triangular' situation involving three actors (CAC-OAC-passenger) and two contracts: the contract of carriage between the CAC and the passenger and, as seems to be common practice, an overall framework contract between the CAC and the OAC. There is, however, no contract signed *directly* by the passengers and the defendant OAC. [8]

48. Against this factual and legal background, the referring court in the Claim 2 — Barkan expresses doubts as to whether the claim directed against an entity that is not party to the relevant underlying contract can be classified as arising out of a contract.

49. Two possibilities were discussed in the course of these proceedings as to how the nature of the claims at issue may be assessed.

50. First, these claims could be considered as arising out of a delict/tort. As there is no contract between the passenger and the OAC, the OAC is being sued effectively because it failed to fulfil its obligations under Regulation No 261/2004. Thus, for the purpose of international jurisdiction, the claim could be construed as arising out of a kind of statutory tort: the content of the obligations, the consequences of the failure to meet those obligations, as well as the identity of the defendant are all defined in Regulation No 261/2004. [9]

51. Second, as discussed at the hearing, the contractual nature of the claim could be construed either as arising out of a sort of *implied* contract between the OAC and the passenger [10] or by seeing the overall framework contract (of code-sharing or other type of cooperation) between the CAC and the OAC as a type of *contract to the benefit of the third party*, namely the passenger.

52. I am of the view that the nature of the claim is indeed contractual, not tortious. However, I must admit that the constructions of an implied contract or a contract to the benefit of a third party appears somewhat cumbersome and problematic to me. The answer why, under the taxonomy of both Regulations No 44/2001 and No 1215/2012, such a claim is contractual in nature is, in my view, simpler.

8 The situation is even more complex for the claimant in Claim 1 — flightright. That claimant was not party to the contract of carriage between the CAC and the passengers who assigned the claim at issue.

9 Which would then render Article 5(3) of Regulation No 44/2001 and Article 7(2) of Regulation No 1215/2012 applicable. According to those provisions, the courts with international jurisdiction are the courts of the place where the harmful event occurred or may occur. That place has been defined by the Court as both the place where the damage occurred and the place of the event giving rise to it. For a recent restatement, see, for example, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 18 and the case-law cited). For the original statement of principle, see judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraphs 19, 24 and 25).

10 It was suggested that the existence of such an implied contract would result from the combination of a contract of carriage concluded between the passenger and the CAC, on the one hand, and the overall framework contract between the CAC and the OAC, on the other.

53. First and above all, the wording of Article 5(1)(a) of Regulation No 44/2001 and of Article 7(1)(a) of Regulation No 1215/2012 is rather open, stating that a person domiciled in a Member State may be sued in another Member State 'in matters *relating* to a contract'.[11] That wording, also present in other language versions,[12] clearly refers to '*matters* relating to a contract', not a '*party* to a contract'.

54. Thus, in my understanding, the jurisdictional rule in Article 5(1)(a) of Regulation No 44/2001 and in Article 7(1)(a) of Regulation No 1215/2012 is based on the *cause* of action, not the *identity* of the parties. What matters is whether the underlying, original source of the rights and obligations which are being disputed and the reason that claim is being brought against the specific defendant follow from a contract. If they do, the ensuing action aiming at their enforcement is a 'matter relating to a contract', even if, as is often the case with legal provisions protecting consumers, the rights and obligations that are being concretely enforced in the individual case had been 'inscribed' (namely rendered applicable without the possibility of derogation) into the contract by the operation of mandatory statutory rules.

55. There are two systemic analogies within Regulations No 44/2001 and No 1215/2012 that confirm that point. First, similarly to the interpretation of the notion of a 'matter relating to insurance', what is relevant is that the respective applicant is enforcing rights that originate from an insurance contract and not whether he or she was party to that contract.[13] Second, one can equally refer to the cases of legal succession in third parties' claims. Under specific circumstances, a third party may step into the shoes of another in order to enforce claims that arose in a legal relationship to which the claimant was not party. Again, a third party enforcing rights from the original contract may be entitled[14] to do so under the head of jurisdiction of a matter relating to a contract, even if it itself was not a party to the original contract.[15] As the Commission notes, in the *Frahuil* case the Court did not in principle exclude that 'matters relating to a contract' could cover a situation in which a third entity sued one of the parties to a contract, based on a statutory assignment of a claim to a third-party claimant, if the consent of the defendant to the relevant obligation could be established.[16] That shows again that for a matter to fall under the head of jurisdiction pursuant to Article 5(1) of Regulation No 44/2001 or Article 7(1) of Regulation No 1215/2012, the claim does not necessarily have to be between the original parties to the contract: this is the case provided that there is a contractual basis under which a third party may claim, or may be held liable, for the discharge of obligations that were subscribed to contractually by, or in favour of, that third person.

56. Second, on a general level, in transporting a passenger, a non-contractual OAC performs an obligation of contractual origin. For the OAC, the transportation of the passenger is not a statutory obligation of any kind. In this respect, I note what the Court held regarding the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001: it covers all actions which seek to establish the liability of a defendant and which are *not* related to a 'contract' within the meaning of Article 5(1)(a) thereof.[17]

11 Emphasis added.

12 In, for example, German: 'wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden'; in French: 'en matière contractuelle'; in Spanish: 'en materia contractual'; in Italian: 'in materia contrattuale'; in Czech: 'pokud předmět sporu tvoří smlouva nebo nároky ze smlouvy'.

13 Further see my Opinion in *MMA IARD* (C-340/16, EU:C:2017:396, especially points 36 and 37).

14 I wish to stress clearly that what is being suggested here is that by virtue of a claim being brought by a 'non-party' to a contract, that claim does not suddenly change the heading from a contract to a tort or whatever else. Whether or not such a legal succession will also include the passing on (the retention) of any special jurisdictional rule available only to a weaker party (such as the consumer) is a very different question, not addressed at all in the present cases.

15 Concerning the jurisdictional rules available to claimant-assignees of claims under Regulation No 261/2004, see Opinion of Advocate General Sharpston in *Flight Refund* (C-94/14, EU:C:2015:723, point 60).

16 Judgment of 5 February 2004, *Frahuil* (C-265/02, EU:C:2004:77, paragraph 25); see also judgment of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraphs 46 and 47).

17 Judgment of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraph 32 and the case-law cited).

57. *A contrario*, actions that *do* relate in one way or another to a contract, fall under the scope of Article 5(1) Regulation No 44/2001 and Article 7(1) of Regulation No 1215/2012.

58. That brings me to a third point. At the concrete level, there is no doubt that the purpose and the very reason for the claims at issue is to enforce substantive rights against the OAC for the wrongful performance of transport of carriage by air under the conditions stipulated in a contract. It was not contested that Air Nostrum, as a non-contractual OAC, agreed to transport the applicant passengers from point A to point B in execution of the contract between the passenger and the CAC.

59. The passengers are enforcing their claims against the OAC because that OAC has voluntarily acted on behalf of the CAC, within the meaning of Article 3(5), second sentence, of Regulation No 261/2004. Without such consent the passenger would simply not have been admitted on board by the non-contractual OAC. The statutory basis of the rights, namely Regulation No 261/2004, would not be sufficient for the claim to succeed without the underlying contractual basis between the passenger and the CAC.

60. Thus, all in all, a claim for compensation against an OAC remains a 'matter relating to' the contract of carriage by air concluded between the passenger and the CAC. After all, it is also generally accepted that various forms of 'subcontracting' or 'outsourcing' agreed between the original contractual party (the principal) and its potential agents do not change the nature or the scope of the obligations assumed by the principal.

61. In the light of the abovementioned considerations, I therefore conclude that Article 5(1)(a) of Regulation No 44/2001 and Article 7(1)(a) of Regulation No 1215/2012 are to be interpreted as meaning that the notion 'matters relating to a contract' covers a claim for compensation made under Article 7 of Regulation No 261/2004, brought against an operating air carrier which is not party to the contract that the passenger concerned concluded with another air carrier.

2. The forum for claims brought against the operating air carrier

(a) Rehder

62. In *Rehder*,[18] the Court took position on international jurisdiction[19] for claims arising under Regulation No 261/2004 and brought by a passenger who concluded his contract of carriage with *one* air carrier, which was also the OAC of the cancelled *direct* flight at issue. The Court held that the court having jurisdiction is that which has territorial jurisdiction over the place of departure *or* the place of arrival of the aircraft. The ultimate choice between these two options will be the applicant's.

63. The Court concluded that both of these places presented a sufficient link of proximity to the material elements of the dispute. To draw that conclusion, the Court took into account the relevant services provided in that context, namely 'the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from

18 Judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439).

19 For the sake of completeness, it ought to be added that there are two sets of rules applicable within the EU that allow for determination of the international jurisdiction concerning claims brought by passengers against air carriers: those set out by the Convention for the Unification of Certain Rules for International Carriage by Air, approved on behalf of the EC by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38) ('the Montreal Convention') and the implementing EU legislation, and those contained in Regulations No 44/2001 and No 1215/2012. In the factual context of the present cases and in view of the established case-law of the Court, only the latter rules are relevant for the present cases. As the Court most recently observed 'the rights based respectively on the provisions of Regulation No 261/2004 and of the Montreal Convention fall within different regulatory frameworks [and therefore] the rules on international jurisdiction provided for in that Convention do not apply to applications made on the basis of Regulation No 261/2004 alone, which must be examined in the light of Regulation No 44/2001'. Judgment of 10 March 2016, *Flight Refund* (C-94/14, EU:C:2016:148, paragraph 46 and the case-law cited).

the place of departure to the place of arrival, the care of passengers during the flight, and, finally, the disembarkation of the passengers'. That consideration excluded, according to the Court, the places of stopover, due to the lack of a 'sufficient link to the essential nature of the services resulting from [the relevant] contract'.[20]

64. When pondering the relevance of places of departure and arrival of a direct flight in *Rehder*, the Court pointed out that 'air transport consists, by its very nature, of services provided in an indivisible and identical manner …, with the result that a separate part of [the principal service], which is to be provided in a specific place, cannot be distinguished in such cases on the basis of an economic criterion'[21] (as opposed to the determination of the place of performance in the case of multiple locations of delivery of goods).[22]

65. Furthermore, the Court verified that its conclusion complied with the objectives of proximity and predictability as well as legal certainty. The Court noted in that respect that the choice, limited to two fora, allowed both parties to easily identify the courts before which the claim could be brought.

(b) Extension of Rehder *to multi-leg journeys?*

66. The present cases differ from *Rehder* in two respects. First, the flights concerned in the main proceedings are multi-leg journeys, not direct ones. Second, the defendant OAC is different to the passengers' CAC.

67. The defendant OAC (Air Nostrum) did not operate any leg of the journey departing from or arriving in Germany, which was the destination of the second leg of the journey. At the same time, the first leg, operated by the defendant OAC, was a part of the entire journey, the purpose of which was to transport *in fine* the passengers from Spain to Germany.

68. With those factual elements in mind and considering the reasons for the solution reached by the Court in *Rehder*, there are essentially two ways, for the purpose of the present case, in which the place of performance of the services provided could be defined.

69. First, for multi-leg journeys, the *Rehder* logic could be envisaged in a 'compartmental' way: as the CAC is responsible for the whole flight, the place of performance of the service concerned would be the place of the original departure and the ultimate arrival. The same would then apply to each OAC for the segment of the flight it carried out. Thus, in a journey consisting of two legs, the place of the performance of the non-contractual OAC who carried out the first leg of the journey would be the place of departure and the place where that particular leg ended (namely the place where the passenger changed planes). This is basically the position of Air Nostrum as well as of the Commission.

70. Second, the *Rehder* logic could also be extended *en bloc*, thus defining the place of performance in the same way for both the CAC and the OAC. For the claims at issue it could be suggested that the OAC is responsible for the whole journey: it has the obligation to ensure that its performance will allow the passengers to reach the final destination as agreed in the contract with the CAC. That translates into the place of departure of the first leg and the place of the arrival of the second (or last) leg of the journey as constituting both places of performance —for the purpose of the determination of the international forum and for claims arising out of that flight considered as whole. This is basically the position of the applicants in both referred cases, the French and Portuguese Governments, and of the Swiss Confederation.

20 Judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439, paragraph 40).

21 Judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439, paragraph 42).

22 Judgment of 3 May 2007, *Color Drack* (C-386/05, EU:C:2007:262, paragraphs 40 to 42).

71. For a number of reasons explained in the following section, I must admit that I find the latter position more convincing.

(c) Contractual and operating air carrier: mirroring the place of performance

72. There is above all the simple logic of the actual service provided, the contract of carriage by air: why is there a contract and what is expected from it? A passenger books a journey from A to C. His overall purpose for doing so is precisely to be transported from A to C, and not really, unless perhaps expressly requested, to visit B.[23] Reacting to that demand, the air carrier sells the passenger one ticket, with one reservation number, covering all segments of his flight. When the passenger arrives at the airport of (the first) departure, his luggage is checked through to the place of final destination. Normally, he would receive both boarding passes at the airport of departure.

73. The essential elements of such a service then translate into its place of performance, where the services were provided in the sense of Article 5(1)(b), second indent, or Article 7(1)(b), second indent, respectively. Both the place of overall departure and the ultimate arrival are certainly places of performance of that service.

74. The key argument against the 'compartmental' approach to jurisdiction, in which each of the OACs would have their own place of performance based on the place of the departure and arrival of the flight leg it carried out, is simple: the overall service, which is defined by the passenger's demand and the ensuing contract of carriage concluded, must remain the same, irrespective of the type and number of 'subcontractors', namely OACs that the CAC chooses to carry out the service with.

75. It might be added that, on the level of substantive rights and obligations contained in Regulation No 261/2004, this logic is reflected in two of its provisions: the second sentence of Article 3(5) and Article 13.

76. Article 3(5), second sentence, of Regulation No 261/2004 states that 'where an [OAC] which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger'. Thus, although one cannot but agree with the position expressed by the Commission in its written and oral observations, namely that the obligations set out in the regulation are in principle aimed at the OAC, Article 3(5) clearly states that the overall principal/agent relationship between the CAC and OAC remains. Article 13, and in particular its second sentence, then complements that provision by reiterating the right of redress between the air carriers.

77. Put differently, the CAC cannot escape the contractual obligations agreed with the passenger by subcontracting a part of the transport service to another air carrier. In this sense, the legal position of the OAC is derived from and in fact mirrors the legal position of the CAC and vice versa. It would appear reasonable that the solution adopted at the substantive level is ideally reflected also at the level of procedure and jurisdiction.

78. There are three additional arguments that also speak in favour of the 'mirror' approach, in which the place of performance of the service would be the same for both the CAC and the OAC.

23 This generalisation was made on the basis of the facts as presented in the cases referred, in which it appears that the place where the connecting airport will be and whether and what stopover there would be seemed to play no role. It is acknowledged that a given passenger could choose to pass through a particular connecting airport and stop at that airport (or rather the city or country where that airport is located) for a substantial amount of time which could make that location a destination on its own. A passenger may for instance agree with his air carrier that on the way from Madrid to Bratislava he will spend two days in Paris. If that were indeed the case, *quod non* here, it could be argued that such an individually negotiated stopover where the passenger leaves the airport and checks out luggage is of relevance in determining jurisdictional rules.

79. First, there are further elements relating to the substance of the claims under Regulation No 261/2004 that might provide further analogies for considerations of jurisdiction: for the purposes of calculating compensation in case of multi-leg journeys under Regulation No 261/2004, the flight is considered as a whole, without there being any examination of its possible internal segments. On one hand, whether there is a right to compensation under Regulation No 261/2004 is determined on the basis of the actual delay at the place of the *final destination*. A rather short delay at the connecting airport that would not qualify the passenger for compensation under Regulation No 261/2004 will still lead to such an entitlement if the delay at the final destination exceeds three hours.[24] On the other hand, concerning the amount of compensation, Regulation No 261/2004 provides for a scale of EUR 250, EUR 400 or EUR 600 based on the distance travelled. Also in this context, the Court explained that the relevant distance is calculated, in the case of a multi-leg journey, based on the distance between the place of the departure of the first leg and place of arrival of the second (and last) leg of the journey, notwithstanding the place of connection.[25]

80. Thus, as far as substantive rights under Regulation No 261/2004 are concerned, the relevant points are the places of the first departure and final destination, with the intermediate points effectively dropping out of the picture.

81. Second, I am of the view that the suggested solution also complies with the objective of *predictability*, one of the pillars of the common jurisdictional rules. The passengers of course know the points of departure and arrival of their journey. By contrast, predictability of the forum for the defendant, who is the OAC but not the CAC, was contested by Air Nostrum in its observations. Air Nostrum stated that when operating a certain leg of a connecting flight, the OAC does not have information as to the broader travel plans of passengers on board. The OAC does not know whether some of the passengers have connecting flights and the destination of those flights. Thus, the OAC cannot really foresee all the potential fora around Europe in which proceedings against it might be brought.

82. To my mind, the arguments advanced by Air Nostrum fail to convince, both on the factual but above all the principled level. On the factual level, I must admit that it would come as a surprise to me if in the world of interconnected electronic communication, in which two air carriers decided to code-share their flights or other forms of cooperation, the same carriers would not also share information in relation to different legs of a journey and individual passengers, when they are supposed to carry out such journeys together.

83. Be that as it may, perhaps more importantly, there is the principled argument: code-sharing or various alliances between air carriers are the result of business strategies and commercial agreements freely concluded by those airlines. It is perhaps safe to assume that such agreements are being entered into in order to increase sales and competiveness: an air carrier that can offer more destinations is likely to sell more tickets. It is only logical that the risk involved in such an endeavour should eventually fall to the entity (or entities) that stand to gain commercial benefit therefrom.

84. Yet again, in line with the commercial logic of the entire construct, it could be assumed that the individual code-sharing arrangements are likely to (or if, well drafted, certainly should) foresee how the OAC might reimburse and/or assist the CAC (or vice-versa) in terms of litigation and/or compensate litigation-related costs for failures attributable to either party. By contrast, passengers would hardly have any such possibility to cover the costs of, or otherwise facilitate litigation occurring at the place of the connecting airport, which is neither the starting point nor the destination of their journey.

24 Judgment of 26 February 2013, *Folkerts* (C-11/11, EU:C:2013:106, paragraphs 35 and 37).

25 Judgment of 7 September 2017, *Bossen and Others* (C-559/16, EU:C:2017:644, especially paragraphs 29 to 33).

85. Third, the approach on international jurisdiction that the Court is to adopt in the present case ought to be feasible not just with regard to journeys consisting of two legs, but, also for those consisting of three or even more segments. Contemplating hypothetically the applications of the 'compartmental' approach to such journeys outlined above, potentially with several OACs, clearly illustrates the practical problems. It would effectively mean that from the point of view of the passenger, the jurisdiction would likely be based on where the journey was effectively discontinued. Any such jurisdiction which can arise randomly[26] would have the potential of turning the abovementioned triangular situation (CAC-OAC-passenger)[27] into a true Bermuda Triangle, with the difference that whereas the planes and ships seem to disappear in the latter only in the works of (science) fiction, with the rules on international jurisdiction defined in such a way, passengers' rights would be bound to disappear genuinely.

86. In the light of the above, my conclusion is that in a case where passengers are transported on a journey which consists of two connecting flights, the place of departure of the first leg and the place of arrival of the second leg both constitute the place of performance under Article 5(1)(b) of Regulation No 44/2001 or Article 7(1)(b) of Regulation No 1215/2012 in the case where the claim is directed against the air carrier which operated the first leg on which the delay took place and which was not the contractual air carrier of the passenger.

B. Claim 3 — Becker

87. By its question posed in the proceedings concerning Claim 3 — Becker, the referring court seeks the interpretation of Article 5(1)(b) of Regulation No 44/2001. This is in order to ascertain which court has international jurisdiction for a claim based on Regulation No 261/2004 which a passenger of a connecting flight has brought against an air carrier that is not domiciled in the EU.

88. More specifically, the referring court seeks to ascertain the place of performance of the service at issue, considering that the journey at issue began in Berlin and was disrupted in Brussels, due to the passenger being denied boarding and continuation of the second segment of the flight to Beijing. The OAC responsible for the denied boarding was, in contrast to the other two claims discussed in Section A of this Opinion, the CAC.

89. It should be noted at the outset that pursuant to Article 4(1) of Regulation No 44/2001, 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall … be determined by the law of that Member State'. Under Article 4(2) of Regulation No 44/2001 'as against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, … in the same way as nationals of that Member State'.

90. Despite the fact that the Commission suggested, in the proposal which led to Regulation No 1215/2012, to extend the scope of application of the common rules on international jurisdiction to defendants from third countries,[28] the quoted provision remained in essence the same under Regulation No 1215/2012 as its Article 6.

91. Thus, there is a clear and recent statement made by the EU legislature on the applicability of the common rules on jurisdiction to third-country defendants: international jurisdiction for claims directed against third-country defendants remains governed by the Member States' national laws.

26 Thus, as a matter of fact, coming quite close to the head of jurisdiction previously discarded, namely tort, focusing on the place where the harmful event occurred — see above, point 50 of this Opinion.

27 See above, point 47 of this Opinion.

28 Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final, point 3.1.2, first indent and p. 23.

92. As the Commission rightly pointed out, that rule has exceptions.[29] Nonetheless, none of them appears to apply in the present case. Moreover, as the Commission also correctly notes, the order for reference does not indicate that the national procedural law refers in any way to Regulation No 44/2001, thus potentially triggering a discussion about the applicability of the *Dzodzi* line of case-law.[30]

93. For these reasons, I am of the view that Regulation No 44/2001 does not apply to the defendant in the main proceedings. The international jurisdiction (or the absence thereof) must therefore be determined according to the national rules.

94. That being said, it cannot be ignored that the claim at issue is based on Regulation No 261/2004 which also applies to non-EU carriers to the extent that, as stipulated in its Article 3(1)(a), the claim is brought by a passenger who departed 'from an airport located in the territory of a Member State to which the Treaty applies'.

95. Further, it should be recalled that that regulation aims at enhanced protection of passengers as consumers. That means that national jurisdictional rules must be reasonably accessible in order to allow for that protection to be effectively exercised. Pursuant to the requirement of effectiveness, the Member States are prevented from making the exercise of rights conferred by EU law practically impossible or excessively difficult.[31]

96. It follows from Article 3(1)(a) of Regulation No 261/2004 that that regulation confers on a passenger, such as the applicant in the main proceedings, rights that can be claimed against a defendant such as the one in the main proceedings. I am of the view that the national rules of international jurisdiction cannot compromise the effectiveness of those substantive rules.

97. However, within such parameters flowing from the provisions of substantive EU law rules, it is for the referring court to verify whether the applicable national rules satisfy that requirement and apply them, if necessary, in a manner that would ensure the effective enjoyment of the rights defined by Regulation No 261/2004.

98. In the light of the foregoing, my conclusion concerning Claim 3 — Becker is that Article 4 of Regulation No 44/2001 must be interpreted as meaning that the rules of jurisdiction defined in that regulation do not apply to a defendant domiciled outside the EU, such as the defendant in the main proceedings. The international jurisdiction of the court seised must therefore be assessed under the rules applicable in the forum of the court seised. However, such national rules on international jurisdiction cannot make the enforcement of a claim based on Article 7 of Regulation No 261/2004 by a passenger practically impossible or excessively difficult.

29 Namely exclusive jurisdiction pursuant to Article 22, which does not apply to the claim at issue, and agreed forum pursuant to Article 23 which requires that one or more of the parties to the forum-choice agreement is domiciled in a Member State.

30 Judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 36 et seq.), and of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraph 45 et seq. and the case-law cited).

31 For a recent statement in this sense, see, for example, judgment of 15 December 2016, *Nemec* (C-256/15, EU:C:2016:954, paragraph 49 and the case-law cited). See also judgment of 9 November 2016, *ENEFI* (C-212/15, EU:C:2016:841, paragraph 30 and the case-law cited).

VI. Conclusions

99. In the light of the foregoing, in Case C-274/16, *flightright GmbH* v *Air Nostrum, Líneas Aéreas del Mediterráneo, SA*, I suggest that the Court respond to the question posed by the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany) as follows:

Article 7(1)(b), second indent, of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that where passengers are transported on a journey which consists of two connecting flights, the place of departure of the first leg and the place of arrival of the second leg both constitute the place of performance under that provision in the case where the claim is directed against the air carrier which operated the first leg on which the delay took place and which was not the contracting air carrier of the passenger.

100. In Case C-448/16, *Mohamed Barkan and Others* v *Air Nostrum L.A.M. SA*, I suggest that the Court respond to the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

(1) Article 5(1)(a) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that the notion of 'matters relating to a contract' covers a claim for compensation made under Article 7 of 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 brought against an operating air carrier which is not party to the contract that the passenger concerned concluded with another air carrier.

(2) Article 5(1)(b), second indent, of Regulation No 44/2001 shall be interpreted as meaning that where passengers are transported on a journey which consists of two connecting flights, the place of departure of the first leg and the place of arrival of the second leg both constitute the place of performance under that provision, in the case where the claim is directed against the air carrier which operated the first leg on which the delay took place and which was not the contracting air carrier of the passenger.

101. In Case C-447/16, *Roland Becker* v *Hainan Airlines Co. Ltd*, I suggest that the Court respond to the Bundesgerichtshof (Federal Court of Justice) as follows:

Article 4 of Regulation No 44/2001 must be interpreted as meaning that the rules of jurisdiction defined in that regulation do not apply to a defendant domiciled outside the EU, such as the defendant in the main proceedings. The international jurisdiction of the court seised must therefore be assessed under the rules applicable in the forum of the court seised. However, such national rules on international jurisdiction cannot make the enforcement of a claim based on Article 7 of Regulation No 261/2004 by a passenger practically impossible or excessively difficult.