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Recto: **Air Carrier Liability and Air Passenger Rights**

Verso: **Journal of International and Comparative Law**

<AT>AIR CARRIER LIABILITY AND AIR PASSENGER RIGHTS: A GAME OF TUG OF WAR?

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<Abs>Abstract: In the wave of growing consumer demand for global air travel, one can observe how domestic and international regulation of certain market aspects of aviation has not always developed in the same direction or at the same speed; this purports to challenge orderly progress of international law. Different legal frameworks, legal and political ideologies and respective realities have influenced the development of, for instance, multi-level regulation of aspects of civil aviation vis-à-vis consumer protection and limited liability regimes. Such developments are reflected in the most recent progress at the international level, following the adoption by the International Civil Aviation Organization of core principles on consumer protection for air passengers. This article provides an exposé on the increasingly contentious area of divergent approaches for the development of consumer protection initiatives, focusing on what are air passenger rights and how the impetus to provide them uniformly has risen up the agenda of the international aviation community. The article considers existing international law on air carrier liability, and the EU and US air passenger rights regimes, before locating the new core principles, to determine alignment of the existing systems.

<KW>Keywords: consumer protection; air carrier liability; air passengers; core principles</KW>

I. Introduction<H1>

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The global law scape for consumer protection has undergone significant changes over the past decade. As a case study of the wider debate on global consumer protection policy and regulation, this article identifies and discusses consumer protection and airline liability in the air transport sector. Legal and policy developments within this specific area, and the resulting call for global order, were briefly explored in a comment published in the inaugural issue of the *Journal of International and Comparative Law*.¹

In the interim of three years, one has witnessed an incremental increase in the number of air passenger rights regimes vis-à-vis domestic and international law.² While consumer protection initiatives tended traditionally to stem from policy responses to domestic concerns such as unfair contract terms and damage caused by defective products, the origins of today's law and policy on "specialised" consumer rights are visible at all levels.³ Sector-specific

¹ See Steven Truxal "Consumer Protections and Limited Liability: Global Order for Air Transport?" (2014) 1(1) *Journal of International and Comparative Law* 111–119.

² Examples include the United States (Air Passenger Protections Bill of Rights 2011), Canada (Flight Rights), Russian Federation (Law on protection of consumer rights), China (Rules of civil aviation passenger and baggage in Decrees No 49 and 70 CAAC), Saudi Arabia (Consumer Protection Regulations 2005), Israel (Airline Passenger Rights law 2012) and most recently, Malaysia (Aviation Consumer Protection Code 2016). These are in addition to the relevant law of the European Union, under Regulation (EC) 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 [2004] OJ L46/1.

³ In the United Kingdom, one may refer for instance to the Unfair Contract Terms Act 1977 and Consumer Protection Act 1987, and most recently the Consumer Rights Act 2015. Relevant European Union (EU) law in this area include Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 and Directive 2011/83/EU of 25 October 2011 on consumer rights [2011] OJ L304/64.

guidance has been issued as recently as in 2016 in the area of “tourism”.⁴ With that said, more general international guidelines have been in existence for some time now.⁵

Of concern about a markedly rapid proliferation of domestic legislation in the specialised area of air passenger rights, the international community called on the International Civil Aviation Organization (ICAO) in 2013 to develop “a set of high-level, non-prescriptive core principles on consumer protection”, which are to guide domestic policy with an ultimate aim of striking “an appropriate balance between protection of consumer and industry competitiveness and which take into account the needs of States for flexibility, given different State social, political and economic characteristics; with existing instruments”.⁶ International law already exists in the area of air carrier liability under the Montreal Convention 1999, which provides a two-tier liability regime for “accidents” occurring during the performance of an international contract of carriage of air passengers, baggage and cargo: strict liability and presumptive liability.⁷ As one might expect, it will be necessary to develop our understanding of the concepts of “air passenger rights” and “air carrier liability”, and any tensions between them, later in this article.

⁴ UNCTAD, “United Nations Guidelines for Consumer Protection” (2016) p.24, available at http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf.

⁵ At international level, the UN Guidelines on Consumer Protection were first adopted by consensus in 1985, following a call in 1975 by Consumers International (then International Organisation of Consumer Unions) to create a Model Code for Consumer Protection. See United Nations, “United Nations Guidelines for Consumer Protection” (2003), available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf.

⁶ ICAO, Report of the Economic Commission on Agenda Item 40 (Working Paper A38-WP/409, 2013) pp.40–46.

⁷ Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999) ICAO Doc 9740 (Montreal Convention), available at http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf. Its two-tier character is discussed below in further detail.

This article begins by identifying existing international law on air carrier liability concerning contracts of carriage of passengers, baggage and cargo by air. The article then moves on to outline the core principles on consumer protection recently adopted by ICAO. Before focusing the discussion on four selected criteria that should guide air passenger rights regimes, the article reviews current EU and US laws relating to air passengers. On the basis that traditionally, principles of international law derive from customary trade practice, the article challenges in conclusion that in the absence of a common understanding of consumer protection in the global air transport sector, the core principles may prove as yet unhelpful.

II. Current International Law: Warsaw and Montreal<H1>

ICAO is the United Nations specialised agency responsible for the safe and orderly growth of international aviation. ICAO adopted the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) 1999 as successor to the original convention on air carrier liability, the Warsaw Convention 1929.⁸ The Warsaw Convention created world's first, single and uniform international system of rules for international carriage of passengers and cargo by air, including limitations of air carrier liability. The practical benefit to passengers, shippers and consignees was protection; for carriers, it was knowledge of the extent of their liability, the risk of which may be insured against.

The Montreal Convention establishes a modernised, compensatory regime for passengers and shippers by way of a simplified and limited liability regime for air cargo and carriage of passengers. Entering into force in 2003, the Montreal Convention creates a two-

⁸ The author appreciates that the Montreal Convention 1999 does not benefit from universal application, which in some respects exacerbates the current situation. To date, only 103 of the 191 ICAO member states have ratified the Montreal Convention 1999. The EU has also ratified the Montreal Convention; Council Decision (EC) 2001/539 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [2001] OJ L194/38.

tiered liability system for “accidents”.⁹ The first tier provides strict liability of airlines that is limited to SDR 131,100 (ca USD 176,000) for death or personal injury to passengers. The second tier provides presumptive liability to an unlimited amount. An air carrier may defend claims brought in excess of this amount if it can show that the damage was not due to its negligence or wrongful act or that solely of another person. For air cargo, the air carrier’s liability is limited by the Convention under a weight concept: SDR 19 per kilogramme.

Under the provisions of the Warsaw Convention, an “accident” was defined as “damage sustained in event of the death or wounding of a passenger or any other bodily injury suffered by a passenger”,¹⁰ which gave rise to numerous cases being brought before national courts seeking correct interpretation of undefined terminology; in particular “accident” and “carriage”.¹¹

Helpfully, the Montreal Convention now provides for air carrier liability for “damage sustained in the case of death or bodily injury”, but only if the “accident” causing the death or personal injury or death “took place on board the aircraft or in the course of any of the operations of embarking or disembarking”. What then, under this law, is an accident? A situation involving a discarded plastic blanket bag on the floor of an aircraft, for instance,

⁹ It should be noted that while this is a relatively young convention, it preserves many features from its long-standing predecessor, the Warsaw System.

¹⁰ Convention for the Unification of Certain Rules Relating to International Carriage by Air (12 October 1929) 137 LNTS 11, 49 Stat 3000, TS No 876, ICAO Doc 7838 (Warsaw Convention), art.17.

¹¹ See the cases of US Supreme Court: *Eastern Airlines, Inc v Floyd* 499 US 530, 111 SCt 1489 (1991) and *Air France v Saks* 470 US 392 (1985), and more recently, the case of UK House of Lords: *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495; and the case of Australian High Court: *Povey v Qantas Airways* [2005] HCA 33. For an academic discussion, see Paul Dempsey “Accidents & Injuries in Air Law: The Clash of the Titans” (2008) available at <https://www.mcgill.ca/iasl/files/iasl/Titans.pdf>.

which causes a passenger to slip and suffer a personal injury would not be categorised as an “accident” under Montreal, as this would not amount to an “unusual or unexpected event or happening”.¹² Crucially, there must also be a causal link between the damage and accident; the event giving rise to the damage must be also be qualified as an “accident”.¹³ A claim brought within the scope of Montreal Convention would be subject to far more generous levels of compensation for death or personal injury than was available under the Warsaw system; the limits are reviewed every five years.¹⁴ It also abolished limits under Warsaw, which were commonly held to be arbitrary, and replaced these with the two-tiered strict liability regime.

The intention is that the entire Warsaw system¹⁵ eventually will be replaced by the Montreal Convention. Until then, where both conventions apply to a single international contract of carriage, Montreal rules will prevail.¹⁶ The Montreal Convention’s coherence and uniformity are heralded as a major improvement to Warsaw’s patchwork system of protocols. At the time of writing, there are 124 state parties to the Montreal Convention, plus the EU.¹⁷ The total number of ICAO member states is 191. Thus, only around 65 per cent of ICAO member states have ratified the Montreal Convention to date. Nonetheless, given that most

¹² See *Rafailov v El Al Airlines, Ltd* [2008] US Dist Lexis 38724 (SDNY 2008); See Dempsey, “Accidents & Injuries” (n.11).

¹³ Montreal Convention, art.17.

¹⁴ Noting that the limits of liability have been amended since 1929 under the Hague Protocol 1955, Montreal Agreement 1966 and subsequent protocols.

¹⁵ Including its protocols. This was a problem prior to Montreal Convention as in many cases it was unclear for passengers and shippers to which “version” of the Warsaw System the relevant states were parties. See *Chubb & Son Inc v Asiana Airlines* [2000] 214 F3d 301, 314 (2d Cir 2000).

¹⁶ See Montreal Convention 1999, art.55.

¹⁷ Montreal Convention, ICAO Doc 9740 (n.7).

states of chief importance to air transport and air navigation are already signatories, there is relatively good global coverage of the Montreal Convention.¹⁸ There is concern within the airline industry, however, that in reality the levels of application and enforcement are unsatisfactory. The result of this, according to the International Air Transport Association (IATA) that represents airlines as:

<Block Quotes>“...is that the patchwork of different liability regimes that [Montreal] was designed to replace continues to exist around the world. This causes complexity in claims handling and means that in many cases, passengers do not have the enhanced protections that [Montreal] provides... [and] likewise, airlines and shippers are unable to enjoy the significant benefits that [Montreal Convention] offers them”.¹⁹</Block Quotes>

It seems that it is precisely this lack of common, global approach that has prompted states to respond in the form of a call for development of core principles within the international forum for civil aviation, ICAO.

III. ICAO’s Core Principles<H1>

In July 2015, in response to a request made by Singapore and other ICAO member states, ICAO Council adopted non-binding, core principles for air passengers.²⁰ The core principles

¹⁸ Neither Thailand nor Russian Federation for instance is currently party to the Montreal Convention 1999.

¹⁹ IATA, “A Universal Liability Regime for International Carriage by Air — Montreal Convention 1999”, available at https://www.iata.org/policy/Documents/Position_Paper_mc99.pdf.

²⁰ ICAO, “ICAO Council Adopts Core Principles on Consumer Protection and New Long-Term Vision for Air Transport Liberalization” (Montreal, 9 July 2015), available at www.icao.int/Newsroom/Pages/ICAO-Council-Adopts-Core-Principles-on-Consumer-Protection-and-New-Long-Term-Vision-for-Air-Transport-Liberalization.aspx; see also ICAO, “ICAO Core Principles on Consumer Protection”, available at http://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf.

are intended to be a “living document”, which will be refined and improved in future.²¹ This evidences that *global* policymaking in this area very much remains a work-in-progress, which is interesting because international law on air carrier liability has existed for nearly a decade. The new core principles are categorised according to three different stages of travel: (1) before the travel, (2) during the travel and (3) after the travel. Key provisos are summarised in the next section.²²

Before the travel, passengers should:

<List>

- (1) *have access to information on their rights, legal or other protections, including assistance in case of service disruption, if available;*
- (2) *be provided with help to make choice — price/service offerings;*
- (3) *be given consumer education to increase awareness of rights and potential avenues of recourse; and*
- (4) *be made aware of all relevant characteristics of the product including*
 - (a) *the price (air fare, taxes, charges, surcharges and fees),*
 - (b) *all general conditions applying to the fare and*
 - (c) *which is the operating airline, and in event of change to operator, notification as soon as possible.*

During the travel, passengers should:

<List>

²¹ See ICAO, “Consumer Protection”, available at

http://www.icao.int/sustainability/pages/eap_ep_consumerinterests.aspx.

²² Please note that, for accuracy, much of the language reproduced in italics is directly quoted or paraphrased from the ICAO Core Principles on Consumer Protection: ICAO, “Economic Development”, available at https://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf.

- (1) be kept informed of special circumstances affecting journey, especially if there is a disruption to the service;*
- (2) receive due attention in event of rerouting, refund, care and/or compensation, where provided by relevant regulations;*
- (3) receive adequate attention in the event of massive disruptions that leave them in a particularly vulnerable position; and*
- (4) have access to air transport in a non-discriminatory manner with appropriate assistance if they are disabled.</List>*

After the travel, passengers should:

<List>

- (1) receive clear communication of complain handling procedures and be able to rely on them.</List>*

At first sight, the core principles read as guidelines for ICAO member states to consider when embarking on development of new, general consumer protections and national legislation for providing air passengers with specialised rights. With that said, one may question how best to reconcile the core principles with the air passenger rights regimes already in place in many states and regions. Nevertheless, the phrase “where provided by relevant regulations” is chosen, which underscores that the core principles do not refer to the Montreal Convention provisions. As we will see in the next section(?) in Part V(?), air passenger rights legislation typically seeks to consider what happens to the passenger *and* what happens to the flight. The aim of such legislation is to protect passengers from their vulnerable position when stranded (by providing assistance), and, if the cause is not an extraordinary circumstance, to punish the airlines for its failure to perform as planned (by requiring the airline to pay compensation).

The core principles also clearly emphasise the need for states to educate consumers on their rights once they exist and for airlines to provide full transparency and ensure clear

communication. This suggests that, as far as air travel is concerned, a passenger may be located in more than one jurisdiction on a single journey; often this will not be “home” for the passenger. It should not be difficult for a passenger to acquire information on their rights and lodge a complaint at the place where they book (before the travel), where the service disruption occurs (during the travel) or after they have arrived (after the travel). To achieve a truly seamless system of regulatory cover, much coordination at international level is required. While ICAO recognises that individual governments should have the flexibility to develop national consumer protection regimes, it also cautions that any national rules should be balanced between offering consumer protections and ensuring industry competitiveness. As a global industry, air transport touches many different states, and each has different social, political and economic characteristics; opportunities and challenges. Air passenger rights regimes should therefore “reflect the principle of proportionality, consider the impact of major disruptions, and be consistent with the Warsaw and Montreal Conventions”.²³

It can be said that overlapping or conflicting regimes generally cause a confusing situation for air passengers.²⁴ At the same time, the overlapping and complex nature of regimes in different parts of the world makes for an uncertain operating environment for airlines. Unfortunately, consumer protection initiatives and their impact on international aviation have not yet been fully analysed.

Likely on the basis that some standardisation of the global approach to devising air passenger rights will bear out more legal certainty and the ability to assess financial risks, the airline industry vis-à-vis IATA unanimously approved the core principles.²⁵

²³ ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

²⁴ See Steven Truxal, *Economic and Environmental Regulation of International Aviation: From International to Global Governance* (Abingdon, UK: Routledge, 2017), Chapter 3.

²⁵ IATA, “Core Principles for Passenger Rights Regulation” (Press Release No 32, 3 June 2013), available at www.iata.org/pressroom/pr/Pages/2013-06-03-03.aspx.

Then again, do “standards” for air passengers not already exist at international law? The Montreal Convention provides “an exclusive and uniform legal framework for air carrier liability in the international air carriage of passengers and baggage, including damages caused by flight delays”.²⁶ Indeed, while many have criticised other regimes as incompatible and inconsistent with the Montreal Convention, most notably the EU’s Air Passenger Rights (APR) Regulation 261/2004, others argue that the Convention deals specifically with the misfeasance of the contract of carriage, which leaves “nonfeasance” to remedy in the domestic law of obligations.²⁷ With that said, the lawmakers concerned with establishing air passenger rights regimes seek principally to provide assistance and redress to affected *passengers* rather than engage with what actually happens to their *flights*. This, as we will see, underscores the differences between “air passenger rights” and “air carrier liability” regimes.

IV. EU and US Air Passenger Rights<H1>

In this section, we focus our attention on the EU and the US and the actions taken to develop the air passenger rights in both places. After a brief historical review and current snapshots of the EU and US rules offered, we will identify four criteria — safety, massive disruptions, proportionality and level playing field — which should also appear in these examples of domestic and international²⁸ air passenger rights and the Montreal Convention. The criteria appear in the new core principles on consumer protection for air passengers.

²⁶ ICAO, “Consumer Protection: A Joined up Approach Required between Governments and Industry” (Working Paper ATConf/6, WP/68, 2013) p.2.

²⁷ See PPC Haanappel, “The New EU Denied Boarding Compensation Regulation of 2004” (2005) 54 *Zeitschrift für Luft- und Weltraumrecht* 22.

²⁸ In this section, the EU’s Regulation 261/2004 is categorised as an international air passenger rights regime.

Let us begin with the EU, noting that air transport was its first sector to benefit from passengers rights following Directive 90/314/EEC (the Package Travel Directive)²⁹ and Regulation (EEC) No 295/91 (Denied Boarding Regulation),³⁰ the latter of which was repealed by Regulation (EC) No 261/2004. Taken as a whole, this EU APR legislation aims to achieve not only a high level of consumer protection for air passengers but also accentuate the importance of striking a fair balance between the interests of air carriers and the passengers.

According to Recital 1 of Regulation 261/2004:

<Block Quotes>“Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.”³¹</Block Quotes>

This is also consistent with arts.12 and 169 of the Treaty on the Functioning of the European Union on promoting interests of consumers and ensuring high level of consumer protection.³²

²⁹ Council Directive 90/314/EEC of 13 June 1990 on travel, package holidays and package tours [1990] OJ L158/59, 23 June 1990; See also “Commission Working Document on the Council Directive 90/314/EEC of 13 June 1990 on travel, package holidays and package tours”, Brussels, 26 July 2007. The Package Travel Directive was one of eight directives covered by the “Review of the Consumer Acquis”. In the light of the outcome of the consultation on the Green Paper and the input to the consultation in this working document, the Commission will consider the need for a reform of the Directive.

³⁰ Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport [1991] OJ L36/5.

³¹ Regulation 261/2004, Recital 1.

³² Other EU law relating to air carrier liability include Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents [1997] OJ L285/1, 17 October 1997; Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L138/1; Regulation (EC) No 2111/2005 of the European Parliament

Consumer protection is at the very core of EU policymaking. Regulation 261/2004 applies to all flights departing from an EU airport and to all EU carriers; flights operated by non-EU carriers bound for the EU do not fall within its scope.³³

The Court of Justice of the European Union (CJEU) has on numerous occasions, in response to references made by national courts of member states, interpreted the legislation's meaning and applicability.³⁴ In fact, some 15 rulings have been adopted by the CJEU in this area, which have had a major impact on the interpretation of Regulation 261/2004 by national enforcement bodies (NEBs) and national courts. The rulings apply directly and are therefore legally binding on airlines. Nevertheless

<Block quotes> “In the absence of a common approach on this case law, air carriers and other operators in the aviation chain, air passengers as well as the national

and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC, [2005] OJ L344/15; Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L204/1; Commission Implementing Regulation (EU) No 295/2012 of 3 April 2012 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community [2012] OJ L98/13.

³³ Regulation 261/2004, art.3.

³⁴ The CJEU has considered, for instance, the compatibility of passenger rights to compensation in the event of delay or cancellation of flights under the Common Rules with passenger rights under the Montreal Convention, whereby confirming its decision in Joined Cases C–581/10 and C–629/10 *Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v Deutsche Lufthansa AG* (C–581/10) and *The Queen, on the application of TUI Travel plc, British Airways plc, easyJet Airline Co Ltd, International Air Transport Association v Civil Aviation Authority* (C–629/10), 15 May 2012 (references for preliminary rulings). The CJEU's finding in *Sturgeon* was confirmed in Joined Cases C–581/10 and C–629/10 *Emeka Nelson and others* (C–581/10), and *The Queen, on the application of: TUI Travel plc, British Airways plc, easyJet Airline Company Ltd, International Air Transport Association v Civil Aviation Authority* (C–629/10), 23 October 2012.

enforcement bodies do not always know how to apply these ECJ rulings outside the specific context of the case law. This has led to divergent interpretations of the rules and hence divergences of application/enforcement of the Regulation across Member States”.³⁵

It should be highlighted here that the rights granted to air passengers under Regulation 261/2004 are, according to the CJEU, consistent with but additional to existing international law, in particular the Montreal Convention 1999. The CJEU considered in *IATA/ELFAA* that the requirements to pay compensation to passengers for delay at arrival and to provide assistance to passengers in the event of delay at departure are compatible with the Montreal Convention.³⁶ The Court held that:

“Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such *standardised and immediate compensatory measures*, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates *at an earlier stage* than the system which results from the Montreal Convention.”³⁷

It can be easily contended that, owing to the number of preliminary references made by national courts to the CJEU, Regulation 261/2004 has failed at many levels and must be

³⁵ European Commission, “Roadmap on Interpretative Guidelines on Regulation N 261/2004 on Air Passenger Rights” (2016) p.2, available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_move_034_air_passenger_rights_en.pdf.

³⁶ Case C-344/04 *The Queen, on the Application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, [43], [45]–[47].

³⁷ *Ibid.*, [46] (emphasis added).

updated.³⁸ Thijssen goes even further to argue that “the judicial miscarriages in the *Sturgeon*, *Nelson*, and *McDonagh* rulings are sufficient proof that the Regulation is in urgent need of a revision”.³⁹ These preliminary rulings will be discussed in greater detail below.

Critics from both consumer groups and industry have also been vociferous in their concerns that the CJEU’s interpretations of the rules, which arguably are at times divergent, can be seen as lacking certainty and therefore promote confusion around air passenger rights and air carrier liability. The cost for the airline industry is also immense. Nonetheless, the complaints against the law seem to have become fewer; Regulation 261/2004 is the law of the land and will not disappear anytime soon. What industry and consumer groups are asking for, unsurprisingly, is clarity.

With that in mind, the European Commission published a *White Paper on Transport* in 2011.⁴⁰ Mentioned among its initiatives was the need to:

<Block Quotes>“develop a uniform interpretation of EU law on passenger rights and a harmonised and effective enforcement, to ensure both a level playing field for the industry and a European standard of protection for the citizens”.⁴¹</Block Quotes>

The Commission proposed a number of changes to Regulation 261/2004 in 2013, with a view to clarifying the law, particularly on so-called extraordinary circumstances.⁴² The legislative

³⁸ See Kinga Arnold and Pablo Mendes de Leon, “Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!” (2010) 35 Air & Space Law 91, 100; Charlotte Thijssen, “The Montreal Convention, EU Regulation 261/2004, and the Sturgeon Doctrine: How to Reconcile the Three?” (2012–2013) 12 Aviation L & Pol’y 413.

³⁹ Thijssen, “The Montreal Convention” (n.38) p.446 (emphasis added).

⁴⁰ European Commission, “Roadmap to a Single European Transport Area — Towards a Competitive and Resource Efficient Transport System” (COM(2011) 144 final, 28 March 2011), available at https://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf.

⁴¹ *Ibid.*, p.23.

proposal did not achieve much progress. Rather, the European Parliament and Commission have been working to *strengthen* existing air passenger rights.⁴³ The Commission published a roadmap on drafting a Communication on Interpretative Guidelines on Regulation 261/2004 in February 2016; the 27-page Commission Notice was published in June last year.⁴⁴ This follows on from an announcement in December 2015 of “An aviation strategy for Europe”.⁴⁵

The Interpretative Guidelines emphasise the importance of interpretations of Regulation 261/2004 for EU law on air passenger rights. In the past, air passengers have not benefitted from uniform interpretation, application and enforcement of their rights within the EU. Another point of the Interpretative Guidelines is to ensure greater uniformity of air passenger rights across all member states of the EU and across third countries where

⁴² European Commission, “Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air” (COM(2013) 130 final, 13 March 2013); see BBC, “EU Unveils New Air Passenger Rights” (13 March 2013), available at <http://www.bbc.co.uk/news/business-21767040>.

⁴³ Maria Juul, “Strengthening Air Passenger Rights in the EU” *European Parliamentary Research Service* (May 2005), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/556983/EPRS_BRI\(2015\)556983_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/556983/EPRS_BRI(2015)556983_EN.pdf).

⁴⁴ European Commission, Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, C(2016) 3502 final [2016] OJ C214/5.

⁴⁵ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — an aviation strategy for Europe” (COM(2015) 598 final, 7 December 2015).

respective airlines benefit from the EU air transport market vis-à-vis bilateral and multilateral air services agreements.

In order to discharge its duty under EU law, an air carrier must therefore be knowledgeable of other air passenger rights regimes in states to which they operate under which an affected passenger may have rights or may already have exercised his rights. For example, if a passenger's service is disrupted on a flight departing from an airport outside the EU (New York JFK), bound for the EU (Amsterdam Schiphol), on an EU carrier (KLM), it may be that the passenger will be entitled to certain rights under US law. To avoid paying the passenger any compensation and/or care otherwise due under Regulation 261/2004, it must now show that the passenger affected already received both under US law.⁴⁶ This coordination and work towards alignment — internal and external — of an international air passenger's rights is crucial. "Indeed, addressing regulatory gaps and inconsistencies in EU law in an uncoordinated manner generates more fragmentation and exacerbates the problem."⁴⁷

In the United States, the Department of Transportation introduced air passenger rights in 2009 as the (First) Enhanced Protections for Airline Passengers. The Second rule, published in 2011, and the Third rule, now in force, create the US Air Passenger Bill of Rights (APBOR).⁴⁸ The purpose of the rule is "to mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers' accountability to consumers".⁴⁹ The APBOR is available to all air passengers flying on US and foreign carriers

⁴⁶ Interpretative Guidelines, Pt.2.1.3: "Scope of the Regulation in relation to compensation and/or assistance received in a non-EU country and the effects on the recipients' rights under the Regulation."

⁴⁷ European Commission, "Roadmap on Interpretative Guidelines" (n.35) p.3.

⁴⁸ 14 CFR Pt.259 (2009).

⁴⁹ 14 CFR Pt.259.1.

both to and from the United States.⁵⁰ APBOR addresses common operational disruptions such as tarmac delays, delays, cancellations and diversions, as well as commercial disruptions owing to involuntary and voluntary “bumping”. Air passengers are provided with a 24-hour right to cancel bookings made in error, subject to certain conditions.⁵¹

If a passenger is involuntarily “bumped” from his confirmed flight, that is, if the passenger is “denied boarding” under EU rules, and the airline arranges substitute transportation that is scheduled to arrive at the final destination between one and two hours after the original arrival time (between one and four hours on international flights), the airline must pay passengers an amount equal to 200 per cent of the one-way fare to final destination that day, with a USD 650 maximum. If the substitute transportation is scheduled to get the passenger to his destination more than two hours later (four hours internationally) or if the airline does not make any substitute travel arrangements, the compensation doubles (400 per cent of your one-way fare, USD 1300 maximum). For voluntary bumping, the amount can be negotiated between the carrier and the passenger, subject to full communication of the amount paid and any restrictions on flight vouchers issued, if relevant.

According to the APBOR, if for any reason a flight is cancelled, substantially delayed or rescheduled, a passenger has the right to reroute at no extra cost or to receive a full refund, even on a non-refundable ticket. Airline policies vary, however, about what constitutes a “substantial” delay or schedule change.

V. Conclusion

In this final section of the article, we examine the aforementioned examples of air passenger rights regimes, the air carrier liability system under the Montreal Convention and the new

⁵⁰ If the aircraft used was not originally been designed to fit more than 30 seats, or the air carrier does not take on any new passengers in the United States, the rule does not apply. See 14 CFR Pt.259.2.

⁵¹ Air passengers also have this right under EU law.

core principles on consumer protection for air passengers, and in the light of four criteria, this article identifies as concerning for air passenger rights in action: safety, massive disruptions, proportionality and level playing field for air carriers. These are aspects of aviation which lawmakers and policymakers should have in contemplation when devising air passenger protection regimes. We question how the current protections align with the new core principles.

Appropriately, this author puts safety first. It is indisputable that safety and security of civil aviation are the highest priorities of ICAO member states. Indeed, aviation safety is at the very core of ICAO's objectives. Safety encompasses a wide range of activities in aviation, ie, airworthiness of aircraft and crew, runway safety, air navigation, etc. For the purposes of our discussion, a broad definition of aviation safety is adopted.

Consumer protection regimes should never “jeopardise safety or security”.⁵² With that said, it is commonplace in the airline industry for any number of circumstances to arise that may impact on the decision to delay a flight while a problem is resolved or to operate a flight or to cancel it. An air carrier and the aircraft commander must always put the safety of passengers and crew first in weighing up its decision.

Regulation 261/2004 provides that air carriers have a duty to care⁵³ for passengers who have been denied boarding or delayed but are not required to pay compensation⁵⁴ if the disruption is caused by an “extraordinary circumstance”.⁵⁵ The legislation does not provide a helpful list of extraordinary circumstances, which in the past left room for a rather broad interpretation promulgated by airlines.⁵⁶ Following the CJEU ruling in *Friederike Wallentin-*

⁵² ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

⁵³ Regulation 261/2004, art.9.

⁵⁴ Regulation 261/2004, art.7.

⁵⁵ Regulation 261/2004, art.5(3).

⁵⁶ Regulation 261/2004, Preamble 14.

Hermann v Alitalia, airlines no longer may rely on art.5(3) “extraordinary circumstances” in the case of “technical problems” that could have been avoided if all reasonable measures had been taken.⁵⁷ Technical problems which are normal or inherent in aviation will not exempt airlines; minimum maintenance will suffice as “reasonable steps”. In turn, *Wallentin-Hermann v Alitalia* and the ruling in *Aurora Sousa Rodríguez v Air France SA* have dramatically narrowed the intended definition of extraordinary circumstances.⁵⁸

Later, the Joined Cases *Christopher Sturgeon v Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz v Air France SA*⁵⁹ were confirmed by the Grand Chamber of the CJEU in 2012 in *Emeka Nelson v Deutsche Lufthansa*.⁶⁰ In the lead up to *Sturgeon*, airlines have a:

<Block Quotes>“tendency to not cancel long delayed flights but let passengers sit out the delay (in the *Sturgeon* cases twenty-two and twenty-five hours) in order to avoid having to pay them compensation under Articles 5 and 7 of the Regulation [261/2004]”.⁶¹</Block Quotes>

In its judgment, the CJEU consequently “*extended, on the principle of equal treatment*, the Article 7 right to compensation, which applies to passengers on *cancelled* flights applies to passengers on flights *delayed* for three hours or more”.⁶² The Court considered in *Sturgeon* that the loss of time inherent in a flight delay constitutes an “inconvenience”, which is

⁵⁷ Case C–549/07 [2008] ECR I–11061.

⁵⁸ Case C–83/10, 13 October 2011.

⁵⁹ Joined Cases C–402/07 and C–432/07, 19 November 2009 (a reference for preliminary rulings). It is significant to note that *Sturgeon* was upheld by the Grand Chamber of the CJEU on appeal from the General Court in October 2012.

⁶⁰ *Emeka Nelson v Deutsche Lufthansa* (n.34).

⁶¹ Cees van Dam, “Air Passenger Rights after *Sturgeon*” (2011) 36(4/5) *Air and Space Law* 259.

⁶² *Christopher Sturgeon v Condor Flugdienst* (n.59), [50].

addressed by Regulation 261/2004, as opposed to “damage”, for which the Montreal Convention provides a basis for a potential claim.⁶³

Next, consumer protection regimes should “allow for the consideration of the impact of massive disruptions”.⁶⁴ One good, semi-recent example of a massive disruption in aviation is the closure of air space owing to risks to aircraft associated with volcanic eruptions. On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. The air space over much of Europe was closed because of potential risks to aircraft. Tens of thousands of flights were cancelled, and as a result, millions of passengers were affected. One Irish passenger was stranded abroad in Portugal and later brought a claim against Ryanair for incurred expenses, which was refused on the basis that the eruption was an extraordinary circumstance that caused the air space to close; it was beyond the control of the airline. A Dublin court referred a question to the CJEU asking if this could be interpreted as an extraordinary circumstance that excuses the contracting airline from reimbursing the stranded passenger for her expenses. The CJEU held:

<Block Quotes>“Massive disruptions could include situations resulting from circumstances outside of the operator’s control that are of a magnitude such that they result in multiple cancellations and/or delays of flights leading to a considerable number of passengers stranded at the airport... [e.g.] meteorological or natural phenomena of a large scale including hurricanes, volcanic eruptions, earthquakes, floods, political instability or similar events...”.⁶⁵</Block Quotes>

⁶³ *Ibid.*, [51]. The *Sturgeon* ruling was confirmed by the Grand Chamber in *Emeka Nelson v Deutsche Lufthansa* (n.34).

⁶⁴ ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

⁶⁵ *Ibid.*

The CJEU reiterated referring to previous case law⁶⁶ that while air carriers are exempted from the obligation to pay art.7 compensation when exceptional circumstances arise, their duty to provide care to passengers under art.9 remains in any case.⁶⁷ Obviously the volcanic eruption constituted extraordinary circumstances. Ryanair was thus ordered to discharge its duty to care for the passenger by reimbursing her reasonable expenses, which were considerably excessive when compared to the inexpensive fare paid for the ticket. As Thijssen puts it, Regulation 261/2004 has therefore “been criticized for being a populist ‘protection’ for passengers, which makes air carriers liable to provide assistance even in situations that are entirely beyond their control”.⁶⁸

Conversely, claims brought under the US APBOR are unlikely to succeed on the grounds that a volcanic eruption is beyond the control of the air carrier. While an air carrier is required to take all reasonable steps to avoid delays and cancellations, it will not be liable for damage caused by delay or cancellation for situations involving the closure of air space.

This is also the position under the Montreal Convention, which provides:

<Block Quotes>“the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures”.⁶⁹</Block Quotes>

At first glance, it appears that this position makes for a confused situation for states and air carriers. Contracting states to the Montreal Convention, which are also EU member states, are squeezed between international and EU law requirements, which apparently do not appear.

⁶⁶ *Friederike Wallentin-Hermann v Alitalia* (n.57), [18], and *Emeka Nelson v Deutsche Lufthansa* (n.34), [72].

⁶⁷ Case C-12/11 *Denise McDonagh v Ryanair Ltd*, 22 March 2012, [31].

⁶⁸ Thijssen, “The Montreal Convention” (n.38) p.444.

⁶⁹ See Montreal Convention, art.19.

This question was raised in the first reference to the CJEU following the entry into force of Regulation 261/2004. The IATA and the European Low Fares Airline Association brought before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), judicial review proceedings against the Department for Transport relating to the implementation of Regulation 261/2004.⁷⁰ The main argument brought by the claimants here was that Regulation 261/2004 was not consistent with international law, namely the Montreal Convention provisions. The CJEU held:

<Block Quotes>“Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such *standardised and immediate compensatory measures*, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates *at an earlier stage* than the system which results from the Montreal Convention”.⁷¹</Block Quotes>

Notwithstanding that the Montreal Convention provides in art.29 its exclusivity for claims arising on the basis of its provisions, the CJEU held that Regulation 261/2004 is consistent law as it operates at an earlier stage and is additional to Montreal claims. Academics and industry players disagree. Ultimately, it will be consumers who will foot the bill for the benefit of enjoying “additional” EU protections.

<Block Quotes>“The Regulation contradicts the Montreal Convention, which does provide an effective defense to air carriers when a delay is beyond their control. The Regulation thereby creates dubious advantages for passengers, since they will be the ones who have to defray its costs sooner or later.”⁷²</Block Quotes>

⁷⁰ *The Queen v Department for Transport* (n.36).

⁷¹ *Ibid.*, [46] (emphasis added).

⁷² Thijssen, “The Montreal Convention” (n.38) pp.444–445.

The new core principles from ICAO provide, however, that passengers “may find themselves in a vulnerable position in situations of massive disruption” and therefore “mechanisms should be planned in advance by airlines, airport operators, and all concerned stakeholders, including government authorities, to ensure that passengers receive adequate attention and assistance”.⁷³ It is not suggested that additional rights should be enumerated as a matter of law, but rather that as a matter of policy and practice, air carriers should work together with airports, hotels and others involved in a passenger’s journey, so as to minimise inconvenience and costs befalling on affected passengers.

In a time in which there seem to be frequent occurrences of volcanic eruptions, hurricanes, snow storms and the like, the current lack of global certainty on air passenger protections is problematic. According to IATA, the Montreal Convention “creates an exclusive and uniform legal framework for air carrier liability in the international air carriage of passengers and baggage, including damages caused by flight delays”.⁷⁴ Yet, the steady increase in demand for air travel means that more people are flying, and therefore, the number of passengers likely to be affected by extraordinary circumstances such as these will increase too. The realities for affected passengers who find rights under EU law beyond their reaches look grim; they will not receive “adequate attention and assistance” in line with ICAO’s core principles. But the principles are merely principles. Without coordination between ICAO member states to develop a globally recognised standard of what is “adequate”, inconsistencies of passenger expectation and industry practice will remain; the result will be lasting unequal treatment. Within the EU alone, there is lack of transparency and concerted approach from member state to member state.

⁷³ ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

⁷⁴ IATA, “Passenger Rights”, available at <https://www.iata.org/policy/Documents/passenger-rights.pdf>.

According to ICAO, consumer protection regimes should also “reflect the principle of proportionality”.⁷⁵ The EU law establishes a very high threshold of consumer protection for air passengers, but has it gone too far? The burden of unexpected, even if avoidable, events could be shared between stakeholders involved in the journey: air carriers, airports, hotels and passengers too. But the air passenger as consumer will invariably be the most vulnerable party and thus deserves protection. With that said, air passengers have been protected vis-à-vis rights to compensation ever since the Warsaw Convention 1929 came into force. Are certain rights not already available to passengers under its successive protocols and the Montreal Convention itself? The most commonly cited issues are access to rights and enforcement of those rights through national courts. However, as we have seen, consumer awareness, complaint handling and enforcement also challenge the effectiveness of Regulation 261/2004.

By way of comparison, we consider other modes of transport which benefit from consumer protection legislation in the EU: carriage by railway, sea and inland waterways and bus and coach. Some critics argue that air passenger rights are too generous and are therefore disproportionate to what is available under other passenger rights regimes. While this may be true on a global scale as we have seen in the case of massive disruptions, the critics’ position may be challenged when other EU regimes are considered. Air travel usually lacks substitutes. If a flight is delayed or cancelled, an affected passenger may not have another mode of transport available. He may abandon the journey or remain at the mercy of the air carrier and airport until the journey can finally be made. Nevertheless, in the spirit of assessing proportionality, a brief discussion is necessary.

For carriage by rail covered by the EU law, passengers may, without losing the right of transport:

⁷⁵ ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

<Block Quotes>“request compensation for delays from the railway undertaking if he or she is facing a delay between the places of departure and destination stated on the ticket for which the ticket has not been reimbursed in accordance ... The minimum compensations for delays shall be as follows: (a) 25% of the ticket price for a delay of 60 to 119 minutes, (b) 50% of the ticket price for a delay of 120 minutes or more”.⁷⁶</Block Quotes>

Thus, compensation of the ticket price is offered.

Where the journey is by sea or inland waterway, passengers may request compensation, without losing the right to transport:

<Block Quotes>“if they are facing a delay in arrival at the final destination as set out in the transport contract. The minimum level of compensation shall be 25% of the ticket price for a delay of at least: (a) 1 hour in the case of a scheduled journey of up to 4 hours; (b) 2 hours in the case of a scheduled journey of more than 4 hours, but not exceeding 8 hours; (c) 3 hours in the case of a scheduled journey of more than 8 hours, but not exceeding 24 hours; or (d) 6 hours in the case of a scheduled journey of more than 24 hours. If the delay exceeds double the time set out in points (a) to (d), the compensation shall be 50% of the ticket price”.⁷⁷</Block Quotes>

Again, compensation of the ticket price is available in the event of delay in arrival.

Finally, for passengers transported by bus or coach, the relevant EU law provides:

<Block Quotes>“Inconvenience experienced by passengers due to cancellation or significant delay of their journey should be reduced. To this end, passengers departing from terminals should be adequately looked after and informed in a way which is accessible to all passengers. Passengers should also be able to cancel their journey and

⁷⁶ Regulation 1371/2007, art.17.

⁷⁷ Regulation 1177/2010, art.19.

have their tickets reimbursed or to continue their journey or to obtain re-routing under satisfactory conditions. If carriers fail to provide passengers with the necessary assistance, passengers should have the right to obtain financial compensation.”⁷⁸

</Block Quotes>

What all three “modes” above have in common is a link between ticket price and limits of compensation. Again, the situation of passengers affected by disrupted services on one of these other forms of transport may not be comparable to the situation of an air passenger. They are also more likely to be domestic or intra-EU journeys owing to the practicalities of the transport in question.

As discussed above, the US APBOR approach to compensation links not to the price of the ticket; it is the market price of a one-way ticket that is subsequently multiplied. Presumably, an involuntary “bumped” passenger, to employ the US APBOR language, could in theory purchase a new ticket on another carrier and keep the additional payment with factor as compensation; he could also keep it all and abandon the journey. In any case, there is a distinct link to a ticket price; the compensation is not standardised.

Whatever the approach to determining compensation payable to affected passengers, the legal reality for passengers will hinge on the existence and accessibility of adequate complaint handling mechanisms. For aviation, ICAO’s core principles simply provide that after the travel air passengers “should be able to rely on efficient complaint handling procedures that are clearly communicated to them”.⁷⁹

In addition, consumer protection regimes for air passengers, in keeping with ICAO, should “be consistent with the international treaty regimes on air carrier liability established

⁷⁸ Regulation 181/2011, Recital 16.

⁷⁹ ICAO, “ICAO Core Principles on Consumer Protection” (n.20).

by the [Warsaw Convention 1929] and its amending instruments, and the [Montreal Convention 1999]”.⁸⁰ Again, within the EU system:

<Block Quotes>“The result has been non-level playing fields for passengers and air carriers and unequal treatment throughout the Member States. The compatibility of the Regulation with international law is rather questionable and affects the international relationships in the aviation community.”⁸¹</Block Quotes>

From the discussion above, the very different burdens placed by Regulation 261/2004 on EU air carriers versus the US APBOR on US carriers are noteworthy. Even within the EU, current divergences brought about by a lack of consistency in enforcement and application of Regulation 261/2004 across individual EU member states weakens air passengers’ rights and threatens to distress the playing field between air carriers operating to/from and within the EU. The Interpretative Guidelines hopefully will provide more clarity for NEBs on how to enforce the regulation and for air carriers on how to comply.

Looking at the international level, it can be agreed that ICAO’s intentions are good. Consumer protection could be utilised as a tool for levelling the playing field for air carriers.⁸² ICAO’s core principles go some way in beginning to recognising consumer protection for air passengers as a welcome policy initiative for states, with the caveat that the design of new regimes should take the same point of departure. Interestingly, the high EU “standard” has not been exported to the United States or other jurisdictions. The “standards” available under the Montreal Convention appear to be reinforced through separate rules at national level, such as the case is under the US APBOR.

In this regard, the EU is identified as follows:

⁸⁰ *Ibid.*

⁸¹ Thijssen, “The Montreal Convention” (n.38) p.444.

⁸² See Truxal, *Economic and Environmental Regulation*.

<Block Quotes>“a system of rigorous market regulation for air carriers and high-level of consumer protection for passengers...with a high regulatory threshold for economic regulation through strict rules in particular jurisdictions may put domestic or regional operators at a competitive disadvantage on the global market”.⁸³</Block Quotes>

Thus, consumer protection vis-à-vis Regulation 261/2004, if similar provisions are not adopted in other key, third country air transport markets, fails to become a tool for levelling the playing field. On the contrary, Regulation 261/2004 may in fact *distort* the field altogether.

<Block Quotes>“Given the global nature of aviation, the (local) inequality projects onto the global market; its effects are felt globally. The impact on some major airlines, it is argued, is felt through loss of market share.”⁸⁴</Block Quotes>

Transboundary events will continue to affect global aviation, thus risk management policies in some shape must continue to be given government priority.

Do “standards” emerge from the EU and the US as major aviation powers? The problem here is that the Regulation 261/2004 and the US APBOR are very different species of air passenger rights regimes; elements of both have guided other states’ air passenger rights legislation, yet neither can be said to establish a global standard. The global standard remains the Montreal Convention and IATA standards as supported, for what they are worth, by the new ICAO principles.

In conclusion, this article suggests that while a pre-solution may be gleaned from the new ICAO core principles, in the absence of a new international convention on air passenger rights, IATA standards and the Montreal Convention may prove most appropriate for all

⁸³ *Ibid.*, p.81.

⁸⁴ *Ibid.*

concerned if coupled with an effective method of dispute resolution in ICAO contracting states. “IATA believes that a global industry needs a single, universal liability regime governing international carriage of passengers and cargo by air.”⁸⁵ As such, IATA calls for all remaining countries to ratify Montreal Convention to achieve the required level of uniformity in the sector; preference given by industry to strengthening existing international law over adding to what is already a patchwork of air passenger rights regimes. Thus, “air carrier liability” and “air passenger rights” appear to remain — for now — in game of tug of war.

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⁸⁵ IATA, “A Universal Liability Regime”.

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