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DOI:10.1017/ilm.2021.1

INTRODUCTORY NOTE TO CASE C-532/18 G.N. V. Z.U. (NIKI LUFTFAHRT) (C.J.E.U.)

BY STEFAN BOHLSEN*

[December 19, 2019]

Introduction

On December 19, 2019, the Court of Justice of the European Union (CJEU, the Court) interpreted Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on May 28, 1999 (Montreal Convention), in its judgment in the *Niki Luftfahrt* case.[1]

Following a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) issued by the Supreme Court of Austria, the Court was asked whether the concept of "accident" in Article 17(1) of the Montreal Convention only covers situations that stem from hazards that typically are associated with aviation.

Background

The decision dealt with a flight from Mallorca (Spain) to Vienna (Austria) carried out by the defendant company Niki Luftfahrt GmbH. During the flight, a passenger was served hot coffee on a fold-out tray table. The coffee was spilled onto the chest of his six-year-old daughter, who suffered a second-degree scalding. As a result, the passenger demanded compensation from the company.

The central question underlying the dispute results from the fact that it could not be clarified in retrospect whether the coffee mug tipped due to the fold-out tray table being defective or due to heavy turbulence during the flight.

In CJEU jurisprudence, controversy as to whether liability for damages under the Montreal Convention only arises if the accident is due to a hazard typically associated with aviation.[2] The type of injury suffered in this case highlights such controversy, as it could have occurred as a result of passenger carelessness or through no fault of the passenger at all, due to turbulence.

The Austrian courts also disagreed on this issue. Before the request for a preliminary ruling by the Supreme Court of Austria, the Regional Court Korneuburg[3] assumed that a risk typically associated with aviation (i.e., turbulence) resulted in the accident. To the contrary, the Higher Regional Court of Vienna[4] overturned this judgment and declared that there had not been any evidence indicating that the personal injury could be linked to a risk typically associated with aviation.

The CJEU's Judgment

The CJEU's decision renders any discussion concerning the evidence void. At the outset, the Court referred to its competence to interpret the Montreal Convention by way of the preliminary ruling following from the fact that the Convention is incorporated into the Union's legal order.[5] Therefore, the Court underlined, concepts in the Montreal Convention "must be interpreted uniformly and autonomously."[6]

Based on these merits, the Court ruled that liability under Article 17(1) of the Montreal Convention does not require the event giving rise to the damage to be linked to a risk typically associated with aviation. It based this finding on two main arguments:

Firstly, the wording of the provision supports its point of view. Though Article 17(1) of the Montreal Convention does not define the concept of "accident," a literal understanding of the term provides for the inclusion of "unforeseen, harmful and involuntary" events.[7]

Secondly, the origin and purpose of the provision further supports the argument. According to the preamble of the Montreal Convention, the states parties wanted to protect consumer interests and, accordingly, implemented "a system of strict liability for air carriers." Therefore, they intended an "equitable balance of interests."[8] This balancing of interests is a constant guiding principle of the Court when interpreting the Montreal Convention.[9] Moreover,

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https://doi.org/10.1017/ilm.2021.1 Published online by Cambridge University Press

according to the Court, even if the wording of the provision was tightened during the legislative process in order to counteract excessive liability,[10] a restrictive interpretation is not appropriate.

Pursuant to Article 20 of the Montreal Convention, the air carrier can be released from its liability, in whole or in part, if it can prove that the claimant caused or contributed to the damage by an illegal act or omission. In addition, liability in the event of death or personal injury can be excluded or limited within the framework of the limit values. The Convention provides in Article 21(1) that the air carrier may not exclude its liability up to a materiality threshold, while above this threshold, according to Article 21(2), it can exclude its liability by proving that the damage was not caused by its negligence or solely by a third party's negligence. Here a differentiated system for the exclusion of liability was created in the Convention, which makes it clear that the air carrier's interest in keeping its liability predictable, as well as reasonable, has sufficiently been taken into account.[11]

If the concept of "accident" underlying Article 17(1) of the Montreal Convention was additionally limited to only encompass typical aviation risks, the liability of the air carrier would in fact be undermined and the intended "equitable balance of interests" could not be achieved.

Significance

Beyond the discrete facts of this case, the Court's judgment demonstrates that claimants are not required to prove the cause of the damage suffered; rather, the existence of an injury alone seems to suffice. This is a positive development, in part because it is often difficult to establish causality, due to a lack of technical expertise. This relaxed burden of proof therefore corresponds to the intention behind this provision in the Convention. Indeed, one has to agree with the Court in attaching greater importance to the purpose of the Convention rather than to a small part of the drafting history, which would have called for a restrictive interpretation of the concept of "accident" in Article 17(1) of the Montreal Convention.

The decision paves the way for a more comprehensive and consumer-friendly liability of air carriers within the sphere of application of the Montreal Convention.

ENDNOTES

1 The Convention was signed by the European Commission on December 9, 1999 and approved on its behalf by Council Decision of April 5, 2001, which entered into force on June 28, 2004.

2 Case C-532/18 GN, represented for legal purposes by HM v. ZU, acting as administrator in the insolvency of Niki Luftfahrt GmbH (Dec. 19, 2019) [hereinafter CJEU Judgment] ¶¶ 22-26; see also the opinion of Advocate General Saugmandsgaard Øe (Sept. 26, 2019) ¶¶ 29-35.

3 Judgment of the Regional Court Korneuburg (Dec. 15, 2015).

4 Judgment of the Higher Regional Court of Vienna (Aug. 30, 2016).

5 CJEU Judgment ¶ 30 with reference to Case C-258/16 Finnair Oyj v. Keskinäinen Vakuutushytiö Fennia (Apr. 12, 2018) ¶ 19 f.

6 CJEU Judgment ¶ 32 with reference to Case C-213/18 Adriano Guaitoli et al. v. easyJet Airline Co. Ltd. (Nov. 7, 2019) ¶ 47.

7 CJEU Judgment ¶¶ 34 f.

8 *Id.* ¶ 36.

9 See also Case C-63/09 Axel Walz v. Clickair SA (May 6, 2010) ¶¶ 31, 33 and Case C-410/11 Pedro Espada Sánchez v. Iberia Líneas Aéreas de Espña SA (Nov. 22, 2012) ¶¶ 29 f.

10 CJEU Judgment ¶ 37: "accident" instead of "event". In this regard, the Court refers to the opinion by the International Union of Aviation Insurers, DCW Doc No 28 and the report of the Rapporteur on the Modernization and Consolidation of the Warsaw System, C-WP/10576.

11 CJEU Judgment ¶¶ 38-41 with reference to the opinion of Advocate General Saugmandsgaard Øe (Sept. 26, 2019).

https://doi.org/10.1017/ilm.2021.1 Published online by Cambridge University Press

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DOI:10.1017/ilm.2021.1

CASE C-532/18 G.N. V. Z.U. (NIKI LUFTFAHRT) (C.J.E.U.)*
[December 19, 2019]**

JUDGMENT OF THE COURT (Fourth Chamber)
19 December 2019**

(Reference for a preliminary ruling — Air transport — Montreal Convention — Article 17(1) — Air carrier liability in the event of accidents — Concept of 'accident' — Aircraft in flight — Spillage of a cup of coffee placed on the tray table of a seat — Bodily injuries caused to the passenger)

In Case C-532/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 26 June 2018, received at the Court on 14 August 2018, in the proceedings

GN, represented for legal purposes by HM,

v

ZU, acting as administrator in the insolvency of Niki Luftfahrt GmbH,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe, Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2019, after considering the observations submitted on behalf of:

– GN, represented for legal purposes by HM, by G. Rößler, Rechtsanwalt,

– ZU, acting as administrator in the insolvency of Niki Luftfahrt GmbH, by U. Reisch, Rechtsanwältin,

– the French Government, by A.-L. Desjonquères and I. Cohen, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by G. Braun and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2019, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by

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**Language of the case: German.

https://doi.org/10.1017/ilm.2021.1 Published online by Cambridge University Press

the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38) ('the Montreal Convention'), which entered into force, so far as the European Union is concerned, on 28 June 2004.

2 The request has been made in proceedings between GN, represented for legal purposes by HM, her father, and ZU, acting as administrator in the insolvency of Niki Luftfahrt GmbH, an air transport company, concerning a claim for compensation brought by the former on account of scalding suffered on a flight operated by the latter.

Legal context

International law

3 In the third paragraph of the preamble to the Montreal Convention, the States Parties '[recognise] the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'.

4 The fifth paragraph of the preamble states:

' ... collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests'.

5 Article 17(1) of the Montreal Convention provides:

'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

6 Under Article 20 of the Montreal Convention:

'If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.'

7 Article 21 of the Montreal Convention provides:

'1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.'

8 Article 29 of the Montreal Convention states:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

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9 Following the signing of the Montreal Convention, Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1) was amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2) ('Regulation No 2027/97').

10 Recitals 7 and 10 of Regulation No 889/2002 state:

'(7) This Regulation and the Montreal Convention reinforce the protection of passengers and their dependants and cannot be interpreted so as to weaken their protection in relation to the present legislation on the date of adoption of this Regulation.

. . .

(10) A system of unlimited liability in case of death or injury to passengers is appropriate in the context of a safe and modern air transport system.'

11 Article 2(2) of Regulation No 2027/97 provides:

'Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Montreal Convention.'

12 Under Article 3(1) of that regulation:

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

The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

13 In 2015, GN, the applicant, who was then 6 years old, travelled on board an aircraft with her father, HM, next to whom she was sitting. The journey between Mallorca (Spain) and Vienna (Austria) was operated by Niki Luftfahrt.

14 During the flight, HM was served a cup of hot coffee which, while it was placed upon the tray table in front [of] HM, tipped over onto his right thigh and onto GN's chest, causing her second-degree scalding.

15 It could not be established whether the cup of coffee tipped over due to a defect in the folding tray table on which it was placed or due to vibration of the aircraft.

16 The applicant, represented for legal purposes by her father, filed a claim on the basis of Article 17(1) of the Montreal Convention seeking that the now insolvent carrier be ordered to pay compensation for the harm caused to her, estimated at EUR 8 500.

17 The defendant contends that, because there was no accident, it cannot be held liable under that provision. No sudden and unexpected incident led to the sliding of the cup of coffee and the spillage of its contents. According to the defendant, the concept of 'accident' within the meaning of Article 17(1) of the Montreal Convention requires the materialisation of a hazard typically associated with aviation, a condition that was not fulfilled in the present case.

18 By judgment of 15 December 2015, the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) upheld the applicant's claim for compensation. That court took the view that the harm caused to GN stemmed from an accident caused by an unusual event that was based on an external action.

19 That court held that a hazard typically associated with aviation had materialised, since an aircraft is subject to varying, operationally inherent inclinations that could result in objects placed on a horizontal surface in the aircraft starting to slide, without any special manoeuvres being necessary for that to occur. It also found that there was no fault on the part of the defendant, as serving hot drinks without a cover is common practice and socially appropriate.

20 By judgment of 30 August 2016, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) set aside the judgment delivered at first instance. According to that court, Article 17 of the Montreal Convention

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covers only accidents triggered by a hazard typically associated with aviation and, in the present case, the applicant was unable to adduce any evidence to that effect. In those circumstances, the defendant could not be held liable.

21 The applicant then brought an appeal on a point of law (*Revision*) before the Oberster Gerichtshof (Supreme Court, Austria) seeking a declaration that the carrier is liable and that her claim for compensation for the harm suffered is well founded.

22 According to the referring court, the interpretation of Article 17(1) of the Montreal Convention is at issue in respect of whether the concept of 'accident' within the meaning of that provision is limited to cases where a hazard typically associated with aviation materialised. The referring court refers, in that regard, to two distinct interpretative approaches.

23 Following the first approach, the concept of 'accident' within the meaning of Article 17(1) of the Montreal Convention covers only situations in which a hazard typically associated with aviation materialised. That approach requires the materialisation of a hazard arising from the nature, condition or operation of the aircraft, or from an aviation facility used when embarking on or disembarking from the aircraft. Consequently, that would mean that accidents, such as the accident in the main proceedings, which have no connection to aviation activity and which are likely to occur in other circumstances cannot trigger the carrier's liability, which was the intention of the States Parties to the Montreal Convention. Furthermore, the burden of proof is, in that case, on the person claiming injury. In the present case, such an approach would result in the action brought by the applicant being dismissed in so far as it was not possible to determine the cause of the accident.

24 By contrast, under the second approach, triggering the carrier's liability does not require that a hazard typically associated with aviation materialised. That approach is based on the wording of Article 17(1) of the Montreal Convention, which does not lay down such a requirement. Furthermore, accepting that requirement would deprive the system of liability laid down in that provision of its substance. Indeed, almost all injury would be excluded, since it could occur in a similar way in other circumstances of life. In any event, there should be no concerns regarding the unlimited liability of air carriers as a result of such an approach, in so far as the carrier may be exonerated from its liability in cases of contributory negligence of the injured party, in accordance with Article 20 of the Montreal Convention.

25 In that regard, the referring court states that spillages of hot drinks or food onto the body of a passenger are recognised by some commentators in the legal literature as an 'accident' within the meaning of Article 17(1) of the Montreal Convention. In the present case, that approach would result in the defendant being held liable.

26 The referring court also envisages as an 'intermediate solution' an interpretation of Article 17(1) of the Montreal Convention whereby liability is based solely on the fact that an accident occurred on board the aircraft or while using embarking and disembarking facilities and does not require the materialisation of a hazard typically associated with aviation, while imposing the burden of proving that there is no connection with the operation or nature of the aircraft on the air carrier in order for it to be exonerated from that liability. In the present case, that approach would also result in the defendant being held liable in so far as the cause of the accident could not be identified.

27 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Where a cup of hot coffee, which is placed on the tray table of the seat in front of a person in an aircraft in flight, for unknown reasons slides and tips over, causing a passenger to suffer scalding, does this constitute an "accident" triggering a carrier's liability within the meaning of Article 17(1) of the [Montreal Convention]?'

Consideration of the question referred

28 By its question, the referring court asks, in essence, whether Article 17(1) of the Montreal Convention must be interpreted as meaning that the concept of 'accident' within the meaning of that provision covers a

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situation in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether that accident stems from a hazard typically associated with aviation.

29 As a preliminary point, it should be noted that, as regards the liability of air carriers for the carriage of passengers and their baggage by air in the territory of the European Union, Regulation No 2027/97, applicable in the case in the main proceedings, implements the relevant provisions of the Montreal Convention. It is apparent, in particular, from Article 3(1) of that regulation that the liability of European Union air carriers in respect of passengers and their baggage is to be governed by all provisions of the Montreal Convention relevant to such liability (see, to that effect, judgment of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraph 18).

30 It must be stated that the Montreal Convention, which entered into force, so far as the European Union is concerned, on 28 June 2004, has, as from that date, been an integral part of the European Union legal order and, accordingly, the Court has jurisdiction to give a preliminary ruling concerning its interpretation (judgment of 12 April 2018, *Finnair*, C-258/16, EU:C:2018:252, paragraphs 19 and 20 and the case-law cited).

31 In that regard, Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331), which codifies general international law binding on the European Union, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (judgment of 12 April 2018, *Finnair*, C-258/16, EU:C:2018:252, paragraph 21 and the case-law cited).

32 Furthermore, the Court has already stated that the concepts contained in the Montreal Convention must be interpreted uniformly and autonomously, so that, when interpreting these concepts for a preliminary ruling, it must take into account not the various meanings that may have been given to them in the internal laws of the Member States of the European Union, but rules of interpretation of general international law, which are binding on it (judgment of 7 November 2019, *Guaitoli and Others*, C-213/18, EU:C:2019:927, paragraph 47).

33 In the present case, it is apparent from the wording of Article 17(1) of the Montreal Convention that, in order to engage the liability of the carrier, the event causing the death or bodily injury of the passenger must be classified as an 'accident' and that accident must take place on board the aircraft or in the course of any of the operations of embarking or disembarking.

34 Since the concept of 'accident' is not defined anywhere in the Montreal Convention, reference must be made to the ordinary meaning of that concept in its context, in the light of the object and purpose of that convention.

35 The ordinary meaning given to the concept of 'accident' is that of an unforeseen, harmful and involuntary event.

36 Furthermore, in accordance with the third paragraph of the preamble to the Montreal Convention, the States Parties, recognising 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution', decided to lay down a system of strict liability for air carriers. A system of that kind implies, however, as is apparent from the fifth paragraph of the preamble to the Montreal Convention, that an 'equitable balance of interests' be maintained, in particular the interests of air carriers and of passengers (see, to that effect, judgments of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraphs 31 and 33, and of 22 November 2012, *Espada Sánchez and Others*, C-410/11, EU:C:2012:747, paragraphs 29 and 30).

37 In that regard, it is clear from the *travaux préparatoires* that led to the adoption of the Montreal Convention that the concept of 'accident' was preferred by the contracting parties to the concept of 'event' proposed in the original draft (see, inter alia, the opinion submitted by the International Union of Aviation Insurers, DCW Doc No 28, 13 May 1999, and the report of the Rapporteur on the Modernization and Consolidation of the Warsaw System, C-WP/10576). The reason for that preference is that the term 'event' was considered too broad, encompassing all circumstances and liable to result in excessive litigation.

38 By contrast, it was decided, following the change in the use of that word, to delete the last sentence of Article 17(1) of the Montreal Convention, which provided that the carrier was not liable in so far as the

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death or injury resulted from the passenger's state of health. It was considered, in essence, that keeping such an exoneration would unbalance the interests at stake to the detriment of the passenger and that, in any event, the convention already laid down a general exoneration clause in Article 20 thereof.

39 That is why, in order to maintain such balance, the Montreal Convention provides that, in certain circumstances, the carrier may be exonerated from its liability or its obligation to pay compensation may be limited. Article 20 of the convention provides that, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger, the carrier is to be wholly or partly exonerated from its liability to that passenger. Moreover, it is apparent from Article 21(1) of that convention that the air carrier may not exclude or limit its liability for damages arising under Article 17(1) of that convention where those damages do not exceed a certain compensation threshold. It is only above that threshold that the air carrier may exclude its liability pursuant to Article 21(2) by proving that the damage was not caused by its negligence or that it was caused solely by the negligence of a third party.

40 Those limits enable passengers to be compensated easily and swiftly, yet without imposing a very heavy compensation burden on air carriers, which would be difficult to determine and to calculate, and would be liable to undermine, and even paralyse, the economic activity of those carriers (see, to that effect, judgments of 6 May 2010, *Walz*, C-63/09, EU:C:2010:251, paragraphs 34 to 36, and of 22 November 2012, *Espada Sánchez and Others*, C-410/11, EU:C:2012:747, paragraph 30).

41 It follows that, as the Advocate General observes in point 60 of his Opinion, making the carrier's liability subject to the condition that the damage is due to the materialisation of a hazard typically associated with aviation or to there being a connection between the 'accident' and the operation or movement of the aircraft is not consistent with the ordinary meaning of the concept of 'accident' referred to in Article 17(1) of the Montreal Convention or the objectives pursued by that convention.

42 Furthermore, limiting the obligation on air carriers to pay compensation solely to accidents related to a hazard typically associated with aviation is not necessary in order to avoid imposing an excessive compensation burden on air carriers. As noted in paragraph 39 of the present judgment, those carriers may exclude or limit their liability.

43 In those circumstances, the answer to the question referred is that Article 17(1) of the Montreal Convention must be interpreted as meaning that the concept of 'accident' within the meaning of that provision covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001, must be interpreted as meaning that the concept of 'accident' within the meaning of that provision covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

[Signatures]

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