Code-Sharing Agreements under the Brussels Ibis Regulation and the Notion of 'Matters Relating to a Contract'

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Case note on flightright – joined cases C-274/16, C-447/16, and C-448/16

I. INTRODUCTION

89 In 1983, the Court of Justice of the European Union (CJEU) proposed a European, autonomous interpretation of the notion 'matters relating to a contract', so as to ensure that the rule of jurisdiction for contractual matters would be uniformly interpreted and applied throughout the Member States.[1] Since then, the CJEU has been flooded with preliminary references asking in essence: Is it contract or tort? In *flightright*,[2] the CJEU is once again confronted with the characterisation of claims as contractual or tortious under the Brussels I*bis* Regulation.[3] What distinguishes this case from the bulk of cases on this issue is that it signals a shift from the long-standing CJEU case law towards an ever-expanding notion of 'matters relating to a contract'.

First, this case note describes the facts and national procedures that gave rise to the preliminary questions referred to the CJEU. It then discusses the CJEU's ruling focusing mainly on the contractual characterisation of the disputed claims and the place of the provision of services. It concludes that by abandoning the requirement of a direct contractual relationship between the parties, the CJEU broadens the notion of contract under Article 7 (1) Brussels I*bis* Regulation, and therefore expands the scope of the provision.

II. THE FACTS

In the first case, two passengers booked a flight with Air Berlin, consisting of two connecting flights from Ibiza to Palma de Mallorca and from there to Düsseldorf. The first flight was operated by Air Nostrum, and the second flight by Air Berlin. Because the first flight was delayed, the passengers missed their connecting flight, and finally arrived in Düsseldorf after considerable delay.

The two passengers assigned their claims under the Flight Compensation Regulation[4] to flightright GmbH, an organisation that enforces the rights of air passengers. Subsequently, flightright brought an action against Air Nostrum – as the operating air carrier conducting the delayed first flight – before the District

1. Case 34/82 *Martin Peters Bauunternehmung GmbH* v *Zuid Nederlandse Aannemers Vereniging* [1983] ECR 988, para. 9; Case 189/87 *Athanasios Kalfelis* v *Bankhaus Schröder, Münchmeyer, Hengst und Co.* [1988] ECR 5579, para. 15.
2. Cases C-274/16, C-447/16, and C-448/16 *flightright GmbH* v *Air Nostrum, Líneas Aéreas del Mediterráneo SA*, *Roland Becker* v *Hainan Airlines Co. Ltd* and *Mohamed Barkan, Souad Asbai, Assia Barkan, Zakaria Barkan, Nousaiba Barkan* v *Air Nostrum, Líneas Aéreas del Mediterráneo SA* [2018] EU:C:2018:160.
3. Regulation (EU) 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 (recast), [2012] OJ L 351/1.
4. 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 L 46/1.

Court (*Amtsgericht*) of Düsseldorf as the court having territorial jurisdiction over Düsseldorf airport.

In the second case, a Mr. Barkan and his family booked a flight with Iberia, consisting of two connecting flights from Melilla to Frankfurt am Main via Madrid. However, Iberia operated only the second flight of the journey, while – as in the first case – Air Nostrum was the operating air carrier for the first flight. Due to the first flight's delay, the passengers missed their connecting flight, and arrived in Frankfurt am Main four hours later. The passengers brought an action for compensation under the Flight Compensation Regulation before the District Court (*Amtsgericht*) of Frankfurt am Main as the court having territorial jurisdiction over Frankfurt airport.

Since Air Nostrum is a company domiciled in Spain, Article 4 (1) Brussels I*bis* Regulation did not confer jurisdiction upon the German courts to hear the cases. The special head of jurisdiction for consumer matters also did not apply. According to Article 17 (3), this head of jurisdiction applies only to contracts of transport that for an inclusive price provide a combination of travel and accommodation. Since the contracts in question did not meet this requirement, the Düsseldorf and Frankfurt am Main District Courts turned to Article 7 (1) (b) second indent as the last resort for the establishment of their international jurisdiction. The provision allows claimants to sue in the case of a services contract, at the place where, under the contract, the services were provided or should have been provided. However, while determining the place of the provision of services, the German courts stumbled upon the CJEU's decision in the earlier *Rehder* case[5].

In *Rehder*, the CJEU ruled that in the case of the air transport of passengers from one Member State to another, courts in the Member States of both the place of departure and the place of arrival have jurisdiction to deal with a claim for compensation, and that it lies with the claimant to choose between these two fora.[6] However, unlike the *Rehder* case, the present cases concern multi-leg flights, and Air Nostrum had carried out only the first leg of each of them.

Whereas the Düsseldorf District Court had trouble determining the place of the provision of services, and referred to the CJEU the question of whether Air Nostrum could be sued before the courts having jurisdiction over the place of arrival of the second leg of the flight, the Frankfurt am Main District Court asserted its international jurisdiction. On appeal, however, the Regional Court (*Landgericht*) Frankfurt am Main was of a different view. It held that – as opposed to the *Rehder* case – the flight in question consisted of two connecting flights, and Air Nostrum operated only the first flight 90 from Melilla to Madrid. Therefore, the dispute

5. Case C-204/08 *Peter Rehder* v *Air Baltic Corporation* [2009] EU: C:2009:439. See also Case C-88/17 *Zurich Insurance plc, Metso Minerals Oy* v *Abnormal Load Services (International) Ltd* [2018] EU: C:2018:558.
6. Case C-204/08 *Peter Rehder* v *Air Baltic Corporation* [2009], para. 43.

was not sufficiently linked to Frankfurt am Main. The Regional Court additionally underlined that such a ruling did not undermine the effective protection of passengers' rights. These parties could raise an action before either the court of place of departure or place of arrival of the first leg of their journey. In order to mend the consequences of its ruling, the Regional Court also made a brief reference to the Small Claims Regulation.[7] Thanks to this Regulation, passengers were rendered able to enforce their low value claims all across Europe in a simple, cheap, and speedy way.[8]

Seized upon appeal on points of law, the Federal Court of Justice (*Bundesgerichtshof*) decided to refer the question to the CJEU for a preliminary ruling. As opposed to the lower courts, the Federal Court did not only doubt whether the place of the provision of services was in Germany; the fact that Air Nostrum was not a party to the contract between the passengers and Iberia questioned the very contractual nature of the disputed claims.[9]

In the third and last of the joined cases, a Mr. Becker booked a flight consisting of two connecting flights from Berlin to Brussels and from there to Beijing with Hainan Airlines, an air carrier incorporated in China. The first flight was operated by Brussels Airlines, and the second flight by Hainan Airlines. Although the first flight took place as planned, Mr. Becker was denied boarding on the second flight. He then brought an action for compensation before the District Court of Berlin-Wedding. The case reached the Federal Court of Justice, which was uncertain as to whether Berlin, the place of departure of the first flight, could be considered the place of the provision of services, despite the fact that the action was lodged against the air carrier operating only the second flight from Brussels to Beijing. Seeking an answer, it referred the question to the CJEU for a preliminary ruling.

III. AIR CARRIERS DOMICILED OUTSIDE THE EUROPEAN UNION

Taking the last case first, the CJEU reiterates that Article 5 Brussels Regulation – now Article 7 Brussels I*bis* Regulation – applies only to persons domiciled in a Member State. Since Hainan Airlines is a company domiciled outside the European Union, and without a branch in Berlin or another Member State, Article 4 (1) Brussels I Regulation – now Article 6 (1) Brussels I*bis* Regulation – applies. According to this provision, if the defendant is not domiciled in a Member State, the

7. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.
8. Landgericht Frankfurt am Main, 20.8.2015, Az. 2-24 S 31/15 (Juris).
9. Bundesgerichtshof, Beschluss 14.6.2016, Az. X ZR 92/15, 6-7 (Juris).

international jurisdiction of Member State courts will be determined according to their national laws.[10]

However, in contrast to the Brussels I*bis* Regulation, the Flight Compensation Regulation encompasses claims against non-EU carriers as long as the passenger departed from an airport located in a Member State.[11] In light of this mismatch between the scopes of application of the respective regulations, the CJEU reminds the German court that while applying its national rules on international jurisdiction it should pay heed to the requirement of effectiveness of EU law, and therefore not render the exercise of the rights conferred by the Flight Compensation Regulation practically impossible or excessively difficult.[12]

IV. CONTRACT OR TORT?

1. The statutory origin of the disputed claims

Let us now turn to the contractual nature of the disputed claims. The CJEU first addresses the statutory origin of the rights and obligations in dispute and its impact on their contractual or non-contractual characterisation. In particular, the disputed claims are founded on Article 7 of the Flight Compensation Regulation. The CJEU reiterates that where an action is based on the non-performance of a contract, all obligations arising under that contract must be considered to fall under the concept of 'matters relating to a contract'.[13]

2. The absence of a direct contractual link between the parties

Subsequently, the CJEU focuses on the absence of a direct contractual relationship between the parties in trial. Following its long-standing case law, the CJEU highlights the fact that the rule of special jurisdiction for matters relating to a contract does not require the conclusion of a contract. Nevertheless, since the jurisdiction of the national court is determined by the place of performance of the obligation, the existence of a contractual obligation is essential.[14] The definition of a contractual obligation originated in the *Handte* case. In this instance, the CJEU held that

10. *flightright and Others* (n 2), paras. 51-53.
11. Article 3 (1) (a) of the Flight Compensation Regulation.
12. *flightright and Others* (n 2), para. 54. See Bundesgerichtshof, 11.9. 2018, Az. X ZR 80/15 (Juris).
13. *flightright and Others* (n 2), para. 59. See also Case 14/76 *A De Bloos, S. P. R. L.* v *Société en commandite par actions Bouyer* [1976] ECR 1498, para. 14; Case C-9/87 *SPRL Arcado* v *SA Haviland* [1988] ECR 1539, paras. 12-13; Case C-249/16 *Saale Kareda* v *Stefan Benkö* [2017] EU:C:2017:472, paras. 30-31.
14. *flightright and Others* (n 2), para. 60. See also Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA* v *Heinrich Wagner Sinto Maschinen-fabrik GmbH* [2002] ECR I-7383, para. 22; Case C-27/02 *Petra Engler* v *Janus Versand GmbH* [2005] ECR I-499, para. 50; Case C-375/13 *Harald Kolassa* v *Barclays Bank plc.* [2015] EU:C:2015:37, para. 39; Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH* v *Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH, Amazon Media Sàrl* [2016] EU:C:2016:286, paras. 34-35; Case C-196/15 *Granarolo SpA* v *Ambrosi Emmi France SA* [2016] EU:C:2016:559, paras. 23-24.

the phrase 'matters relating to a contract' should not be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[15] Conversely, a contract presupposes the existence of a legal obligation freely consented to by one person in respect of another.

Therefore, the CJEU has to examine whether Air Nostrum freely assumed an obligation towards the passengers. The CJEU underlines that the rule of special jurisdiction in matters relating to a contract is based on the cause of action, not on the identity of the parties.[16] Based on Article 3 (5) of the Flight Compensation Regulation – that regards the operating air carrier performing obligations under this regulation as doing so on behalf of the contracting air carrier – the court reaches the conclusion that the operating air carrier must be regarded as fulfilling freely consented obligations vis-à-vis the contracting partner of the passengers. These obligations, in turn, arise under the contract for carriage by air.[17] Consequently, the CJEU rules that the disputed compensation 91 claims are contractual in nature despite the absence of a contract between the passengers and Air Nostrum.

3. Requiem for *Handte*?

The CJEU's conclusion that the special jurisdiction in contractual matters is based on the cause of action as opposed to the identity of the parties is what makes *flightright* special. In multiple rulings, starting with *Handte,*[18] the CJEU has held that the term 'matters relating to a contract' requires a direct contractual relationship between the claimant and the defendant. Therefore, in *flightright* the CJEU spells the death for the *Handte* ruling and its progeny.[19]

Back in 1984, the company TMCS, established in Bonneville France, purchased from a Swiss company two machines to which a suction system was fitted. The suction system was manufactured by Handte Germany but sold and installed by Handte France. TMCS raised an action against all three companies before the Regional Court in Bonneville, seeking compensation for damage incurred on the ground that the suction system did not comply with French safety and hygiene rules, and was unsuitable for its intended purpose. As regards the German manufacturer, TMCS based its action on Article 5 (1) of the Brussels Convention, the predecessor of

15. Case C-26/91 *Jacob Handte and Co. GmbH* v *Traitements Mécanochimiques des Surfaces SA (TMCS)* [1992] ECR I-3990, para. 15; Case C-51/97 *Réunion européenne SA and Others* v *Spliethoff's Bevrachtingskantoor BV and the Master of the Vessel 'Alblasgracht V002'* [1998] ECR I-6534, para. 17; *Tacconi* (n 14), para. 23; Case C-265/02 *Frahuil SA* v *Assitalia SpA* [2004] ECR I-1546, para. 24; *Engler* (n 14), paras. 50-51; *Kolassa* (n 14), para. 39.
16. *flightright and Others* (n 2), para. 61.
17. *Ibid*., paras. 61-65.
18. *Handte* (n 15).
19. Michiel Poesen, 'Jurisdiction over 'matters relating to a contract' under the Brussels I (Recast) Regulation: No direct contractual relationship required' [2018] Maastricht Journal of European and Comparative Law 516, 521-522; Bastian Zahn, 'Der Ausgleichsanspruch der Fluggastrechte-Verordnung zwischen Vertrag und Delikt' [2018] GPR 250, 252-253.

Article 7 (1) Brussels I*bis* Regulation, and considered the place of its establishment to be the place of performance. Despite the lack of a contractual link between TMCS and Handte Germany, the former considered its claim as contractual based on the French '*action directe*', according to which a direct action of the sub-buyer against the manufacturer is contractual in nature, since it is based on a chain of contracts.

The CJEU stressed that a contractual characterisation of the claims in question would allow the buyer to raise an action before the courts of the place of performance: namely, in this case before the courts of the buyer's place of establishment. However, in the absence of a contract, the buyer – and therefore the place of his establishment – is unknown and therefore is unpredictable to the manufacturer. For this reason, the CJEU rejected the contractual characterisation of the disputed claims because there was no direct contractual relationship between the buyer and the manufacturer. A solution to the contrary would jeopardise the cardinal principles of predictability and legal certainty pursued by the Brussels regime.[20]

In multiple subsequent rulings, the CJEU has adhered strictly to the *Handte* formula, which requires a direct contractual relationship between the claimant and the defendant. In the absence of a direct contractual link, the disputed claims cannot be characterised as contractual, and Article 7 (1) Brussels I*bis* Regulation does not apply. Consequently, the CJEU has excluded from the scope of Article 7 (1) disputes involving third parties that were not a party to the contract. Assignees and subrogating persons can therefore not pursue their claims in the *forum contractus*.[21] However, opposing voices in the literature have pointed out that a change in the identity of the parties does not affect the nature of a claim. It is the initial legal relationship that defines a claim, which remains unaltered despite such a change.[22] Furthermore, Article 7 (1) (b) Brussels I*bis* Regulation determines the place of performance in the case of contracts for the sale of goods or the provision of services in an autonomous way, negating any recourse to the *lex causae*. As a result, letter (b) currently fixes the place of performance irrespective of a change in the creditor's identity, thereby preserving its predictability to the debtor.[23]

20. Handte (n 15), paras. 19-20. See also Karl-Nikolaus Peifer, 'Anmerkung zu EuGH 17.6.1991 – C-26/91 Handte', Juristenzeitung [1995] 91, 92; Richard Plender and Michael Wilderspin (eds), *The European private international law of obligations* (Sweet & Maxwell 2015), para. 2-026; Mankowski, in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law* (2016), Art. 7 Brussels I*bis* Regulation, para. 43.
21. *Réunion européenne* (n 15), paras. 18-20; *Frahuil* (n 15), para. 26; *Kolassa* (n 14), paras. 39-40.
22. Stephan Lorenz and Hannes Unberath, 'Der Bürgenregress im Vertragsgerichtsstand - Mutation durch Gläubigerwechsel?, Anmerkung zu EuGH 5.2.2004 - C-265/02 Frahuil' [2004] IPRax 298; Peter Mankowski, 'Entwicklungen im IPR und IZVR 2003/2004' (2004) RIW 481, 495; Peter Mankowski, 'Bürgenregress, Übergegangene Zollforderung, Erfüllungsortgerichtsstand, vertragliche Streitigkeit: Anmerkung zu EuGH C-265/02 Frahuil' [2004] EWiR 379; Alexander Wittwer, 'Die EuGH-Rechtsprechung zum Europäischen Zivilprozessrecht aus den Jahren 2003 und 2004' [2005] ZEuP 868, 876.
23. See also Haimo Schack, *Der Erfüllungsort im deutschen, ausländischen und internationalen Privat- und Zivilprozessrecht* (Metzner 1985), 136; Martin Gebauer, 'Neuer Klägergerichtsstand durch Ab-

In support of its ruling, the CJEU refers to the *Kareda* case.[24] There, the CJEU characterised a recourse action brought by a jointly and severally liable debtor who had paid the whole loan against the other debtor as contractual. In particular, the CJEU held that the obligations between the debtors were contractual because they originated in the contract concluded between these parties and the bank.[25] However, the *Kareda* case offers little - if any - support to the present ruling. Contrary to *flightright*, in *Kareda* both the claimant and the defendant were parties to the loan agreement.

Viewed against this backdrop, the ruling in *flightright* signals a change in the CJEU's case law. It acknowledges that contractual relationships may involve third parties, and thus alleviates the notion of contract from the *Handte* formula requiring the parties in trial to be identical with the parties to the contract. As Advocate General Bobek pointed out, actions that do relate 'in one way or another' to a contract fall under the scope of Article 7 (1) Brussels I*bis* Regulation.[26] This change becomes even more apparent if we bear in mind the opinion of Advocate General Cosmas a few years earlier in the *Réunion européenne* case, noting that, '*in order for there to be a "matter relating to a contract" [..] it is not sufficient that there is any kind of contract, even relating to the case, between the plaintiff or the defendant and a third party; there must be a contract between the plaintiff and the defendant*'.[27]

V. THE PLACE OF PROVISION OF SERVICES IN MULTI-LEG FLIGHTS

The CJEU's ruling that – notwithstanding the absence of a contract – claims against the operating air carrier are characterised as being matters relating to a contract, paved the way for the third part of the ruling. In this part, the CJEU answers the question as to whether in the case of a connecting flight the place of the provision of services, in the sense of Article 7 (1) (b) second indent Brussels I*bis* Regulation, could 92 be located at the place of arrival of the second flight even though the defendant air carrier only operated the first flight.

The CJEU holds that although the concept of place of performance as set out in the *Rehder* ruling referred to a direct flight operated by the contracting partner of the passengers, it also applies *mutatis mutandis* to multi-leg flights against the

tretung einer dem UN-Kaufrecht unterliegenden Zahlungsforderung?: Anmerkung zu OLG Celle, 11.11.1998 - 9 U 87/98' [1999] IPRax 432.

24. *flightright and Others* (n 2), para. 61.
25. *Kareda* (n 13), para. 31.
26. Opinion of Advocate General Bobek in joined Cases C-274/16, C-447/ 16, and C-448/16 *flightright and Others*, para. 57.
27. Opinion of Advocate General Cosmas in Case C-51/97 *Réunion européenne SA and Others* v *Spliethoff's Bevrachtingskantoor BV and the Master of the Vessel Alblasgracht V002*, para. 29.

carrier that solely operated the first leg of the flight.[28] The CJEU bases its judgement on the fact that the contract for carriage by air consisted of a single booking covering the entire journey. The fact that the operating air carrier did not conclude the respective contract with the passengers, and did not conduct the second leg of the journey, does not stipulate a different finding.[29] For that reason, the CJEU considers the journey to be an indispensable whole, and adopts the *en bloc* approach that treats both the contracting and the operating air carrier in the same way, thereby allowing for the latter to be sued before the courts of the ultimate destination.[30]

In addition, the CJEU rules that the forum of the final destination satisfies the principles of proximity and predictability. Following an almost circular argumentation, it holds that the place of final destination possesses a sufficiently close link to the material elements of the dispute, and therefore satisfies the close connection required by the special rules of jurisdiction.[31] Regarding the predictability of the forum of the final destination, the CJEU underlines that the contract covered both legs of the flight, and therefore encompassed both the first flight carried out by the operating air carrier as well as the second flight. In addition, the operating air carrier freely entered into a contract with the contracting air carrier, and therefore freely assumed the position to act on behalf of the latter. Consequently, on the basis of the initial contract as well as the willful involvement of the operating air carrier, the CJEU rules that the application of the *Rehder* formula in multi-leg flights satisfies the requirement of foreseeability.[32]

VI. CONCLUSION

In *flightright,* the CJEU broadens the notion of contract under Article 7 (1) Brussels I*bis* Regulation, and expands the scope of the provision by ruling that the special jurisdiction rule for contractual matters is based on the cause of action as opposed to the identity of the parties. In this manner, the CJEU alleviated the notion of 'matters relating to a contract' from the requirement of a direct contractual relationship between the parties, thereby allowing third parties to bring their claims before the *forum contractus*.

28. *flightright and Others* (n 2), para. 69.
29. *Ibid.*, paras. 71-72.
30. Opinion of Advocate General Bobek in *flightright and Others* (n 26), paras. 69-70.
31. *flightright and Others* (n 2), para. 74.
32. *Ibid.*, paras. 75-77. Trends in Organized Crime https://doi.org/10.1007/s12117-019-09366-7