

NEXUS OF THE LOCATION OF PERFORMANCE OF AN OBLIGATION AS THE BASIS OF JURISDICTION IN THE BRUSSELS I BIS REGULATION IN CASES VERSUS AIR CARRIERS

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Abstract As it is correctly emphasized by the European Union (EU) legislator, actions in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. The paper attempts to discuss the nexus of the location of performance of an obligation as the basis of special jurisdiction in the context of the Brussels I bis Regulation in cases versus air carriers. A passenger's choice of special jurisdiction based on the nexus of the location of performance of an obligation in the context of Brussels I bis Regulation, applicable to cross-border matters between Member States supersedes general jurisdiction based on the place of domicile of an air carrier. The nexus of the location of performance of an obligation in cross-border disputes resulting from a contract of air transport made between a passenger and an air carrier as a rule enables the passenger to bring an action in a court based in the location of arrival or departure of the flight.

Keywords

European Union law, civil procedural law, procedural autonomy, European civil procedural law, Regulation no 1215/2012, Brussels I bis

1 Introduction

Rules governing special jurisdiction provided for in EU Procedural Civil Law based on the nexus of the location of performance of an obligation apply to claims raised by passengers versus air carriers due to flight cancellation before courts of another Member State of the EU. Provisions of Article 7(1)(b) second indent of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)¹ (hereinafter: Brussels I bis Regulation) specifies that the place of performance of the obligation in question shall be, in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided (Article 7(1)(b) of Brussels I bis Regulation) (Kropholler, 2005: 131). The nexus of the place of performance of the obligation specified in Article 7(1)(b) second indent of Brussels I bis Regulation constitutes a basis for initiating proceedings in a court located in a different Member State for claims resulting from the cancellation of flights raised by passengers versus air carriers (Stadler, 2017: 3092; Weitz, 2004: 222). In its judgment rendered in case C-213/18 *Adriano Guaitoli*, the European Court of Justice (hereinafter: CJEU) found that ‘the rule of special jurisdiction for the supply of services laid down in the second indent of Article 7(1)(b) of Brussels I bis Regulation designates as the court having jurisdiction to deal with a claim for compensation based on air transport contract of persons, at the applicant’s choice, that court which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that transport contract.’² The air carrier is aware of the fact that passengers may file an action with a court located in the place where the air carrier is required to perform its obligation resulting from the transport contract (Weitz, 2005: 501).

The aim of the article is to present a passenger pursuit of claims in cross-border cases against air carriers for flight cancellation based on the nexus of the place of performance of an obligation under the Brussels I bis Regulation. If a passenger chooses a special jurisdiction based on the nexus of the place of performance of obligation, this situation results in the displacement of the general jurisdiction based

¹ OJ L 351, 20. 12. 2012, p. 1-32.

² Case C-213/18, *Adriano Guaitoli and Others v EasyJet Airline Co. Ltd*, ECLI:EU:C:2019:927, para. 42 (*Adriano Guaitoli*).

on the place of residence (seat) of the air carrier. In EU law, the rules on special jurisdiction based on the nexus of the place of performance of obligation resulting from Article 7(1)(b) second indent of the Brussels I bis Regulation apply to passenger claims against air carriers for flight cancellation in court in another Member State of the EU. The performed research shows that the nexus of place of performance of obligation enables the passenger to pursue against the air carrier claims resulting from the flight cancellation. In such a case, this nexus constitutes the basis for submitting an action to the court of the place of performance of obligation, which does not preclude submitting an action to the court of the place of residence (seat) of the air carrier pursuant to Article 4 in conjunction with Article 63(1) of the Brussels I bis Regulation. The passenger's choice, as the plaintiff, of special jurisdiction is optional for them, because the passenger's autonomous decision in the choice of special jurisdiction based on the nexus of the place of performance of an obligation displaces the general jurisdiction based on the place of residence (seat) of the air carrier specified in Article 4 of the Brussels I bis Regulation.

The aim of the article is the possibility to pursue claims against air carriers for flight cancellation based on the nexus of the place of performance of an obligation under Article 7 (1)(b) second indent of the Brussels I bis Regulation. The article will analyse the issues related to the optional nature of special jurisdiction, as for the plaintiff the grounds of special jurisdiction are optional, and for the defendant they are absolutely binding. It should be clarified that special jurisdiction resulting from Article 7 of the Brussels I bis Regulation is complementary to general jurisdiction governed by Article 4 of the Brussels I bis Regulation, as jurisdiction based on the nexus of the place of residence should be supplemented by jurisdiction based on other nexuses, which should be admitted due to a close connection between the court and the legal dispute or because it is in the interests of the proper administration of the system of justice (recital 16 of the preamble to the Brussels I bis Regulation). Therefore, the article will discuss the following issues regarding special jurisdiction based on the nexus of the place of performance of an obligation against air carriers for flight cancellation: 1) Optional nature of special jurisdiction; 2) Existence of a close connection between the court and the legal dispute; 3) Passenger's right to compensation from an operating air carrier; 4) Determining the nexus of place of performance of an obligation based on the location of arrival and departure in the case of direct flights; 5) Determining the nexus of place of performance of an

obligation in the case of connecting flights; 6) Determining the nexus of place of performance of an obligation in the case of a connecting flight based on the place of arrival (final destination) of the second leg of the journey; 7) Claims against air carriers not domiciled in a Member State. In the first paragraph, authors present the rules governing special jurisdiction provided for in EU procedural civil law. The second paragraph concerns the optional nature of special jurisdiction, while the third – the existence of a close connection between the court and the legal dispute. In the fourth paragraph the passenger's right to compensation from an operating air carrier is discussed. Paragraphs 5 - 7 are focused on determining the nexus in cases versus air carriers. In the eighth paragraph claims against air carriers not domiciled in a Member State are analysed.

2 Optional nature of special jurisdiction

Respondents whose domicile is located in a Member State of the EU may be sued in cross-border cases before courts in member states only in accordance with regulations provided for in sections 2 to 7 of chapter II or Brussels I bis Regulation, which regulate matters related to jurisdiction. In particular, domestic jurisdiction regulations do not apply to this category of persons (Article 5(1) and (2) of Brussels I bis) (Geimer, 2010: 189–190). According to provisions of Article 7(1), included in section II of Brussels I bis Regulation, regulating special jurisdiction, a person domiciled in a Member State may be sued in another Member State in matters relating to a contract in the courts for the place of performance of the obligation in question (Article 7(1)(a) of Brussels I bis Regulation) (Golaczyński, Zalisko, 2019: 66; Rauscher, 2006: 156). The concept of a 'matter relating to a contract' within the meaning of Article 7(1) of Brussels I bis Regulation should be interpreted in an autonomous manner so as to ensure its uniform application in all member states of the EU (Świerczyński, 2015: 48). In case *Harald Kolassa*³ rendered in the context of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,⁴ the CJEU found that provisions of Article 5(1)(a) of Regulation No. 44/2001 do not require finding that a contract was concluded. Nevertheless, the application of this provision requires that an obligation is identified, since the jurisdiction of the

³ Case C 375/13, *Harald Kolassa v Barclays Bank plc*, ECLI:EU:C:2015:37 (*Harald Kolassa*).

⁴ OJ L 012, 16.01.2001, p. 1-23.

national court under that provision is determined by the place where the obligation in question was performed or was to be performed, as a presupposition exists that a close connection exists between such a court and the transport contract (Junker, 2016: 96-97).⁵

Pursuant to Article 7(1)(b) of Brussels I bis Regulation, unless the parties agree otherwise, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered (Article 7(1)(b) first indent of Brussels I bis Regulation),
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided (Article 7(1)(b) second indent of Brussels I bis Regulation).

If provisions of Article 7(1)(b) of Brussels I bis Regulation do not apply, then provisions of Article 7(1)(a) of Brussels I bis Regulation shall be applied when determining jurisdiction (Article 7(1)(c) of Brussels I bis Regulation). According to literature on the subject, these regulations apply in particular to other contracts than those referred to in Article (1)(b) of Brussels I bis, or where the place of performance of the obligation resulting from Article 7(1)(b) of Brussels I bis Regulation is located in a non-EU country or cannot be precisely determined. The place of performance of a contract with regards to a contractual obligation may also be specified by the parties in the contract (*lex causae*). In such event, the place of performance of the contract must be determined through the application of Article 7(1)(a) of Brussels I bis Regulation (Geimer, 2010: 211-212; Popiolek, 2013: 2013; Świerczyński, 2015: 49; Weitz, 2005: 506). Article 7(1)(b) first indent of Brussels I bis Regulation, concerning the sale of goods, will not apply (due to obvious reasons) to claims raised by passengers against air carriers under transport contracts.

⁵ Case *Harald Kolassa*, paras. 37-39.

The nexus of the place of performance of an obligation, resulting from provisions of Article 7(1) of Brussels I bis Regulation enables passengers to seek claims resulting from the cancellation of flights versus air carriers. In such event, this nexus constitutes a basis for initiating proceedings before a court located in the place of performance of the obligation, which does not preclude initiation of proceedings before a court located in the domicile of the air carrier as per Article 4 in conjunction with Article 63(1) of Brussels I bis Regulation. The choice of special jurisdiction by the passenger as a claimant is optional for the passenger, as the passenger's autonomous decision as to the choice of jurisdiction based on the nexus of the place of performance of an obligation takes precedence over the general jurisdiction based on the domicile of the air carrier as per Article 4 of Brussels I bis Regulation (Gołaczyński, 2007: 34-35).⁶

It bears noting that persons who purchase air transport services are passengers who require a high level of protection. However, note must be taken of the general requirements concerning the protection of consumers (recital 1 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (hereinafter: Regulation No. 261/2004).⁷ A passenger is a natural person who enters into an air transport contract with an air carrier. However, pursuant to provisions of Brussels I bis Regulation, jurisdiction in matters concerning consumer contracts does not apply to contracts of transport. Provisions of section 4 in chapter II of Brussels I bis Regulation, regulating jurisdiction in matters concerning consumer contracts, apply to consumer matters but do not apply to contracts of transport, with the exception of contracts which, for an inclusive price, provide for a combination of travel and accommodation. (Article 17(3) of Brussels I bis Regulation).

⁶ Case 56/79, Siegfried Zelger v. Sebastiano Salinitri, ECLI:EU:C:1980:15; Case C-722/17 Norbert Reitbauer, Dolinschek GmbH, B.T.S. Trendfloor Raumausstattungs-GmbH, Elekrounternehmen K. Maschke GmbH, Klaus Egger, Architekt DI Klaus Egger Ziviltechniker GmbH versus Enrico Casamassima, ECLI:EU:C:2019:577.

⁷ OJ L 46, 17.2.2004, pp. 0001-0008.

3 Existence of a close connection between the court and the legal dispute

The claimant may decide whether to initiate proceedings with a court in accordance with the principle of special jurisdiction under Article 7(1)(b) second indent of Brussels I bis Regulation or in accordance with the principle of general jurisdiction under Article 4 of Brussels I bis Regulation, based on the nexus of the respondent's domicile (*actor forum sequitur rei*) (Zalisko, 2011: 93). Special domestic jurisdiction resulting from Article 7(1)(b) second indent of Brussels I bis Regulation based on the nexus of the respondent's domicile should be allowed due to the close connection between the court and the legal dispute or in the interests of sound administration of justice, as noted by the Advocate General in case C-25/18, Brian Andrew Kerr.⁸ Recital 16 of Brussels I bis Regulation states that 'the existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen.'

4 Passenger's right to compensation from an operating air carrier

A passenger's right to seek compensation from an operating air carrier is regulated by provisions of Article 5(1)(c) in conjunction with Article 7 Regulation No. 261/2004.

Pursuant to Article 5(1)(c) of Regulation No. 261/2004, in case of cancellation of a flight, the passengers concerned shall have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

⁸ Opinion of Advocate General J. Kokott of 31/01/2019 in Case C-25/18 Brian Andrew Kerr versus Pavel Postnov, Natalia Postnova, ECLI:EU:C:2019:86, para. 55.

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport (Article 5(2) of Regulation No. 261/2004). An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (Article (3) of Regulation No. 261/2004). According to case law of the CJEU, ‘extraordinary circumstances’ are defined as events that by their nature or origin are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier’s actual control, with the above two conditions being cumulative.⁹ The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier (Article 5(4) of Regulation No. 261/2004). This solution was adopted due to the fact that the passenger is the weaker party in relations with an air carrier.

In its judgment in case C-559/16 *Birgit Bossen*, the CJEU stated that ‘the justification for compensation for passengers falling under Article 5(1)(c)(iii) of that regulation is that, as a result of the flight cancellation at the very last moment, they are in practice denied the opportunity to reorganise their travel arrangements freely. Consequently, if, for one reason or another, they are absolutely required to reach their final destination at a particular time, they cannot avoid the loss of time inherent in the new situation, having no leeway in that regard.’¹⁰ Compensation available to

⁹ Case C-501/17 *Germanwings GmbH versus Wolfgang Pauels*, ECLI:EU:C:2019:288, para. 20; Case C-159/18 *André Moens versus Ryanair Ltd*, ECLI:EU:C:2019:535, para 16; Case C-832/18, *A and others versus Finnair Oyj*, ECLI:EU:C:2020:204, para. 37 (*A and others*).

¹⁰ Case C-559/16, *Birgit Bossen, Anja Bossen, Gudula Gräßmann versus Brussels Airlines SA/NV*, ECLI:EU:C:2017:644, para. 27 (*Birgit Bossen*).

passengers under Regulation No. 261/2004 amounts to EUR 250, EUR 400 and EUR 600, is fixed and depends on the distance of the flights concerned and does not constitute an excessive burden for air carriers.¹¹ As the Advocate General noted in his opinion in case C-344/04 *The Queen*, the provision of three different levels of compensation depending on the length of the flight is designed to ensure that the compensation is proportionate to the inconvenience suffered by the passengers.¹² The concept of ‘distance’, in the case of air routes with connecting flights, relates only to the distance calculated between the point of departure and the final destination on the basis of the ‘great circle’ method, regardless of the distance actually flown.¹³

As regards the bases that enable passengers to claim compensation from operating air carriers, it bears noting that with regard to air transport, passengers whose flights are cancelled are in a much more difficult situation than that experienced by passengers on other means of transport. This is in particular the result of the location of airports, which are generally outside urban centres, and of the particular procedures for checking-in and reclaiming baggage, as well as the fact that passengers need to travel to their destination as the place of arrival.¹⁴

Airline passengers are also entitled to compensation in case of a cancellation of their original flight and a delay in their alternative flight, as denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers (recital 2 of Regulation No. 261/2004). Each of these inconveniences entitles passengers to claim separate compensation from air carriers. The fact that a passenger received compensation for the cancellation of their original flight does not preclude the passenger from receiving further compensation of the delay in the alternative flight which was offered as a replacement for the original flight pursuant to Article 7(1) of Regulation No. 261/2004 where the alternative flight is operated by the same carrier who operated the cancelled flight and the delay in the alternative flight was such that it entitled the passenger to claim compensation. In its judgment in case C-832/18 *A* and others, the CJEU found that an air passenger, who has received compensation for the cancellation of a flight and has accepted the re-

¹¹ Case C-344/04, *The Queen*, International Air Transport Association, European Low Fares Airline Association versus Department for Transport, ECLI:EU:C:2006:10, para. 91 (*The Queen*).

¹² Opinion of Advocate General L.A. Geelhoed of 8/09/2005 in Case *The Queen*, ECLI:EU:C:2005:530, para. 144.

¹³ Case *Birgit Bossen*, para. 33.

¹⁴ Case *The Queen*, para. 97.

routing flight offered to him, is entitled to compensation for the delay of the re-routing flight where that delay is such as to give rise to entitlement to compensation and the air carrier of the re-routing flight is the same as that of the cancelled flight.¹⁵

However, if a passenger is seeking compensation from an air carrier for a delayed flight pursuant to Article 7 of Regulation No. 261/2004, they may pursue such claims before courts of law or domestic control authorities (Article 16 of Regulation No. 261/2004). Provisions of Articles 205a and 205b of aviation law of 3 July 2002 (Journal of Laws of 2019, item 1580) grant the Chairman of the Civil Aviation Authority the competence to render decisions concerning compensation. Lodging a complaint with domestic control authorities does not preclude a passenger from pursuing claims before a domestic court, as both these measures of legal protection of proceedings are of a parallel nature¹⁶. In case C-12/11 *Denise McDonagh*, the CJEU ruled that each Member State designates a body responsible for the enforcement of Regulation No. 261/2004 which, where appropriate, takes the measures necessary to ensure that the rights of passengers are respected and which each passenger may complain to about an alleged infringement of that regulation, in accordance with Article 16 of Regulation No. 261/2004.¹⁷

5 Determining the nexus of place of performance of an obligation based on the location of arrival and departure in the case of direct flights

According to the judgment of CJEU in case C-204/08 *Peter Rehder*, (Junker, 2016: 87)¹⁸ rendered in the context of Regulation No. 44/2001, the services the provision of which corresponds to the performance of obligations arising from a contract to transport passengers by air in particular include:

- 1) checking-in and boarding of passengers,
- 2) the on-board reception of those passengers at the place of take-off agreed in the transport contract in question,
- 3) the departure of the aircraft at the scheduled time,

¹⁵ Case C-832/18, *A and others*, paras. 20-33.

¹⁶ Resolution of the Supreme Court of 07/02/2014, III CZP 113/13, Legalis.

¹⁷ Case C-12/11, *Denise McDonagh versus Ryanair Ltd*, ECLI:EU:C:2013:43, para. 22.

¹⁸ Case C-204/08, *Peter Rehder versus Air Baltic Corporation*, ECLI:EU:C:2009:439, para. 40 (*Peter Rehder*).

- 4) the transport of the passengers and their luggage from the place of departure to the place of arrival,
- 5) the care of passengers during the flight,
- 6) the disembarkation of the passengers in conditions of safety at the place of landing and at the time scheduled in that contract.

According to the above list, compiled for the purposes of case C-204/08 *Peter Rehder*, places where the aircraft may stop over do not have a sufficient link to the essential nature of the services resulting from that contract. The provision of an adequate aircraft and crew and the location of entering into an air transport contract or provision of an airplane ticket are logistical and preparatory measures for the purpose of carrying out a contract relating to air transport and are not services the provision of which is linked to the actual content of the contract.¹⁹

Where there are several places at which services are provided in different Member States, it is also necessary to identify the place with the closest linking factor between the contract in question and the court having jurisdiction, in particular the place where, pursuant to that contract, the main provision of services is to be carried out.²⁰ In that regard, the only places which have a direct link to those services, provided in performance of obligations linked to the subject-matter of the contract, are those of the departure and arrival of the aircraft. The words ‘places of departure and arrival’ must be understood as agreed in the contract of carriage in question, made with one sole airline which is the operating carrier.²¹ The place of arrival and the place of departure of the aircraft must be considered as the place of provision of the services which are the subject of an air transport contract, which have a sufficiently close link of proximity to the material elements of the dispute.²² Furthermore, ‘places of departure and arrival’ ensure the close connection between the contract and the competent court, required under principles of special jurisdiction as per Article 5(1) of Regulation No. 44/2001.²³ It bears specifying that air transport consists, by its

¹⁹ Case *Peter Rehder*, paras. 39-40.

²⁰ Case *Peter Rehder*, para. 38.

²¹ Case *Peter Rehder*, para. 41; Case C-11/1,1 *Air France SA versus Heinz-Gerke Folkerts, Luz-Tereza Folkerts*, ECLI:EU:C:2013:106, paras. 37-39.

²² Case *Peter Rehder*, paras. 43-44; Case C-83/10 *Aurora Sousa Rodríguez, Yago López Sousa, Rodrigo Manuel Puga Lueiro, Luis Ángel Rodríguez González, María del Mar Pato Barreiro, Manuel López Alonso, Yaiza Pato Rodríguez versus Air France SA*, ECLI:EU:C:2011:652, para. 42.

²³ Case *Peter Rehder*, para. 44; Case C-88/17, *Zurich Insurance plc, Metso Minerals Oy versus Abnormal Load Services (International) Ltd*, ECLI:EU:C:2018:558, para. 17.

very nature, of services provided in an indivisible and identical manner from the place of departure to that of arrival of the aircraft, with the result that a separate part of the service which is the principal service cannot be distinguished in such cases.²⁴ Due to the above, in its judgment rendered in case C-204/08 *Peter Rehder* the CJEU ruled that in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.²⁵

The judgment rendered in case C-204/08 *Peter Rehder* confirms that in the case of air travel from one Member State of the EU to another Member State, no single place of performance of all contractual obligations resulting from a contract of international transport of persons should be determined for the purposes of applying provisions of Article 7(1)(b) second indent of Brussels I bis Regulation.

6 Determining the nexus of place of performance of an obligation in the case of connecting flights

In its judgment rendered in case C-606/19 *Flightright GmbH*, the CJEU resolved a dispute in a situation where a passenger had confirmed a booking of a route comprising several legs, a so-called connecting flight. In the case of connecting flights, it is important that they are effected under a single reservation,²⁶ which is defined as the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator (Article 2(g) of Regulation No. 261/2004). In the above case, the CJEU was required to resolve whether the 'place of performance' can be the place of departure of the first leg of the journey, where transport on those legs of the journey is performed by two separate air carriers and the claim for compensation rises from the cancellation of the final leg of the journey and is brought against the air carrier in charge of that last leg.²⁷

²⁴ Case *Peter Rehder*, para. 42; Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH versus Silva Trade SA*, ECLI:EU:C:2010:137, para. 40.

²⁵ Case *Peter Rehder*, para. 47.

²⁶ Case C-537/17, *Claudia Wegener versus Royal Air Maroc SA*, ECLI:EU:C:2018:361, para. 25.

²⁷ Case C-606/19, *flightright GmbH v IBERIA LAE SA Operadora Unipersonal*, ECLI:EU:C:2020:101, para. 22.

Provisions of Article 1 subsection 3 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)²⁸ may be of assistance in determining the characteristic features of connecting flights. Pursuant to the above provision, carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

Conversely, the definition of an ‘operating carrier’, found in Article 2(b) of Regulation No. 261/2004, may help in determining the nexus of the place of performance of an obligation resulting from a connecting flight; the definition applies to all operating carriers that perform transport services to passengers in accordance with requirements specified in Article 3(1) and (2) of Regulation No. 261/2004. Where an operating air carrier performs obligations resulting from Regulation No. 261/2004 without being bound by a contract with a passenger, it is considered to do so on behalf of the person who did enter into a contract with the passenger. However, Regulation No. 261/2004 does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. Under Regulation No. 261/2004, an operating air carrier is an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger. Regulation No. 261/2004 also uses the definition of a ‘final destination’, which means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected (Article 2(h) of Regulation No. 261/2004).

Although the concept of ‘place of performance’ refers to direct flights, it also applies, *mutatis mutandis*, with respect to connecting flights consisting of several legs and to the operating air carrier on the flight at issue who did not conclude a contract with

²⁸ Official Journal L 194, 18/07/2001 P. 0039 – 0049.

the passengers concerned.²⁹ In its judgment rendered in case C-606/19 *Flightright GmbH*, the CJEU explained that where a flight consists of a confirmed single booking for the entire journey and comprises two legs, the person bringing a claim for compensation can also choose to bring the claim either before the court or tribunal which has territorial jurisdiction over the place of departure of the first leg of the journey or before the court or tribunal which has territorial jurisdiction over the place of arrival of the second leg of the journey.³⁰

With regards to connecting flights, the ‘place of performance’, within the meaning of Article 7(1)(b) of Brussels I bis Regulation, can be the place of departure of the first leg of the journey, as one of the principal places of provision of the services which are the subject of a contract for carriage by air. The place of departure has a sufficiently close link with the material elements of the dispute and, therefore, ensures the close connection required by the rules of special jurisdiction set out in Article 7(1)(b) of Brussels I bis Regulation. Adopting such a solution allows both claimant and defendant to identify the court or tribunal for the place of departure, as set out in the air transport contract.³¹ The rules of special jurisdiction set out in Article 7(1) of Brussels I bis Regulation do not require the conclusion of a contract between the passenger and the air carrier operating the second leg of the flight, but provide for the existence of a legal obligation on part of the air carrier operating the second leg of the flight in respect of the passenger, enabling the passenger to pursue claims against that air carrier. The use of this solution must be deemed as correct, as it is confirmed by the provisions of Article 3(5) of Regulation No. 261/2004, pursuant to which where an operating air carrier which has no contract with the passenger performs obligations under Regulation No. 261/2004, it shall be regarded as doing so on behalf of the person having a contract with that passenger. Therefore, the carrier operating the second leg of the flight must be regarded as fulfilling the freely consented obligations *vis-à-vis* the contracting partner of the passengers concerned.³²

²⁹ Joined Cases C-274/16 C-447/16 and C-448/16 *flightright GmbH versus Air Nostrum, Líneas Aéreas del Mediterráneo SA* (C-274/16), *Roland Becker versus Hainan Airlines Co. Ltd* (C-447/16), and *Mohamed Barkan, Souad Asbai, Assia Barkan, Zakaria Barkan, Nousaiba Barkan versus Air Nostrum, Líneas Aéreas del Mediterráneo SA* (C-448/16), ECLI:EU:C:2018:160, section 69 – hereinafter referred to as judgment in joined cases C-274/16, C-447/16 and C-448/16 *flightright GmbH versus Air Nostrum and others*.

³⁰ Case *Flightright GmbH*, para. 28.

³¹ Case *Flightright GmbH*, paras. 30-32.

³² Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH versus Air Nostrum and others*, para. 63.

Given the above considerations, in its judgment rendered in case C-606/19 *Flightright GmbH*, the CJEU ruled that in the case of connecting flights, the second indent of Article 7(1)(b) of Brussels I bis Regulation must be interpreted as meaning that the ‘place of performance’, within the meaning of that provision, in respect of a flight consisting of a confirmed single booking for the entire journey and divided into several legs, can be the place of departure of the first leg of the journey where transport on those legs of the journey is performed by two separate air carriers and the claim for compensation brought on the basis of Regulation No. 261/2004 arises from the cancellation of the final leg of the journey and is brought against the air carrier in charge of that last leg. Judgment of the CJEU in case C-606/19 *Flightright GmbH* confirms that an air carrier operating a second leg of a journey may be sued in proceedings brought by the passenger before a court located in the place of departure of the first leg of the flight, which is considered to constitute the ‘place of performance’ within the meaning of Article 7(1)(b) second indent of Brussels I bis Regulation.³³

7 Determining the nexus of place of performance of an obligation in the case of a connecting flight based on the place of arrival (final destination) of the second leg of the journey

Judgment of the CJEU in joined cases C-274/16, C-447/16 and C-448/16 *Flightright GmbH* provides guidelines concerning the ‘place of performance of an obligation’ in the case of a connecting flight based on the place of arrival (final destination) of the second leg of the journey.

In the first case, C-274/16, concerning a connecting flight comprising two legs, the CJEU was required to resolve whether the place of arrival of the second leg of the journey to be regarded as being the place of performance under Article 7(1)(a) of Brussels I bis Regulation in the case where the claim which has been brought is directed against the air carrier which operated the first leg of the journey on which the irregularity took place and transport on the second leg of the journey was operated by a different air carrier.³⁴ In the second case, C-448/16, also concerning a connecting flight comprising two legs, the CJEU had to resolve whether the

³³ Case C-606/19, *Flightright GmbH*, paras. 16, 36.

³⁴ Joined cases C-274/16, C-447/16 and C-448/16 *Flightright GmbH*, para. 28; Case C-249/16, *Saale Kareda versus Stefan Benkö*, ECLI:EU:C:2017:472, para. 23.

passenger's final destination was to be regarded as the place where the services were provided under the second indent of Article 5(1)(b) of Regulation No. 44/2001 even when the claim advanced in the application for compensation was based on a disruption to the first leg of the journey and the action is brought against the operating air carrier of the first flight, which is not party to the contract of carriage.³⁵

It bears explaining that if an operating air carrier that did not directly enter into a contract with the passenger performs obligations based on Regulation No. 261/2004, then the existence of an obligation enabling a passenger to claim compensation based on the principles of special jurisdiction should be assumed. Such an air carrier acts on behalf and to the benefit of the entity that entered into a contract of air transport with the passenger. It performs obligations based on the contract of air transport made between the business partner of the air carrier not directly bound by contract with the passenger and the passenger.

The notion of 'place of performance' also applies in situations where a booked connecting flight comprises two legs and the air carrier operating a given leg does not enter into a contract directly with the passengers. If an air carriage contract stipulates a single booking of the entire flight route, the air carrier is required to transport the passenger from the place of departure to the place of arrival of the plane operating the first leg of the journey and to the final place of arrival of the plane operating the second leg of the journey. In such circumstances, a service is provided where the main place of performance is located in the place of final destination of the plane operating the second leg of the journey. The place of performance of such a flight, for the purposes of the second indent of Article 5(1)(b) of Regulation No. 44/2001 and the second indent of Article 7(1)(b) of Brussels I bis Regulation, is the place of arrival of the second leg, as one of the main places of provision of services under a contract for carriage by air (Sznajder, 2005: 496-498).³⁶

As a result, in its judgment in joined cases C-274/16, C-447/16 and C-448/16 *Flightright GmbH*, the CJEU ruled that Article 5(1)(a) of Regulation No. 44/2001 must be interpreted as meaning that the concept of 'matters relating to a contract', for the purposes of that provision, covers a claim brought by air passengers for

³⁵ Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, para. 42.

³⁶ Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, paras. 69-75; Case C-249/16, *Saale Kareda versus Stefan Benkő*, ECLI:EU:C:2017:472, para. 46.

compensation for the long delay of a connecting flight, made under Regulation No. 261/2004, against an operating air carrier with which the passenger concerned does not have contractual relations.³⁷ In the same judgment, the CJEU also ruled that in the case of a connecting flight, the ‘place of performance’ of that flight within the meaning of Article 7(1)(b) second indent of Brussels I bis Regulation is the place of arrival of the second leg, where the carriage on both flights was operated by two different air carriers and the action for compensation in connection with that connecting flight was based on an irregularity which took place on the first of those flights, operated by the air carrier with which the passengers concerned do not have contractual relations.³⁸

8 Claims against air carriers not domiciled in a Member State

In the case of claims against air carriers, it bears considering whether Article 7(1)(b) second indent of Brussels I bis Regulation apply to defendants not domiciled in a Member State. Regulations governing jurisdiction in respect of persons not domiciled in a Member State are specified in Article 6 of Brussels I bis Regulation. In the case of companies and legal persons, a domicile is defined as the place where they have their statutory seat, central administration or principal place of business (Article 63(1) of Brussels I bis Regulation). Due to the fact that air carriers are air transport businesses holding a valid licence to operate, Article 63(1) of Brussels I bis Regulation which regulates domiciles of defendants organised as companies and legal persons is likely to be applied most frequently (Junker, 2016: 85). However, it cannot be ruled out that an air transport business could be operated by a natural person, which would require the application of Article 62 of Brussels I bis Regulation to determine the domicile of a natural person. In such event, the domestic court resolving the case would apply domestic substantive law (*lex fori*) to determine the defendant’s domicile (Gołaczyński, 2007: 34-35).

In joined cases C-274/16, C-447/16 and C-448/16 *Flightright GmbH*, in the context of Article 5 of Regulation No. 44/2001, constituting an equivalent of Article 7 of Brussels I bis Regulation, the CJEU ruled that this Article applies only to persons domiciled in a Member State. A company is domiciled at the place where it has its

³⁷ Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, para. 65.

³⁸ Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, para. 78; Opinion of Advocate General Yves Bot of 26/04/2017 in Case C-249/16, *Saale Kareda versus Stefan Benkö*, ECLI:EU:C:2017:305, paras. 44-47.

statutory seat, central administration, or principal place of business.³⁹ If an airline business is domiciled in a non-member state and has no statutory seat, central administration or principal place of business in the EU, Article 7 of Brussels I bis Regulation cannot apply to that air carrier. Provisions of Article 6(1) of Brussels I bis Regulation will apply to air carriers domiciled outside of the EU, pursuant to which if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State. In such event, the jurisdiction of the courts of each Member State is to be determined by the law of that Member State, which in consequence will lead to the recognition and enforcement of such court judgments (Trocha, 2019: 1523; Schlosser, 2011: 1360-1365; Peers, 2007: 98).⁴⁰ However, Member State courts have no jurisdiction in respect of the defendant not domiciled in a Member State in the category matters of matters covered by jurisdiction in consumer matters (Article 18(1)), jurisdiction in employer matters (Article 21(2)), exclusive jurisdiction (Article 24) and contractual jurisdiction (Article 25). In case C-310/14 *Nike European Operations Netherlands BV*, the CJEU rightly ruled that ‘in the absence of harmonisation of such rules under EU Law, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU Law (principle of effectiveness).⁴¹

Against defendants not domiciled in any Member State, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State (Article 6 (2) of Brussels I bis Regulation). Notification made pursuant to Article 76(1) of Brussels I bis Regulation concerns the rules of jurisdiction referred to in Article 5(2) and Article 6(2) of Brussels I bis Regulation. In the context of Polish law, the rule of jurisdiction under Article 5(2) of Brussels I bis Regulation applies to Article 1103⁷ (4) of Code of civil

³⁹Joined cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, para. 51.

⁴⁰Joined Cases C-274/16, C-447/16 and C-448/16, *Flightright GmbH*, para. 53.

⁴¹Case C-310/14, *Nike European Operations Netherlands BV versus Sportland Oy*, in liquidation, ECLI:EU:C:2015:690, para. 28; Case C-54/16, *Vinyls Italia SpA*, in liquidation, versus *Mediterranea di Navigazione SpA*, ECLI:EU:C:2017:433, para. 26.

procedure and the rule of jurisdiction under Article 6(2) of Brussels I bis Regulation applies to Article 1110 of Code of civil procedure to the extent that this provision provides for the jurisdiction of Polish courts solely based on one of the following circumstances of the applicant: Polish citizenship, domicile, place of habitual residence or statutory seat (Zalisko, 2017: 1678).⁴²

In consequence, it bears concluding that provisions of Article 7(1)(b) second indent of Brussels I bis Regulation does not apply to defendants who are air carriers not domiciled in a Member State.

9 Conclusion

A passenger's choice of special jurisdiction based on the nexus of the location of performance of an obligation in the context of regulation Brussels I bis Regulation, applicable to cross-border matters between Member States supersedes general jurisdiction based on the place of domicile of an air carrier. The nexus of the location of performance of an obligation in cross-border disputes resulting from a contract of air transport made between a passenger and an air carrier as a rule enables the passenger to bring an action in a court based in the location of arrival or departure of the flight. Each dispute requires a separate qualification as to which of these locations has a direct connection to services rendered in the performance of individualized obligations under the contract of transport. However, seeking claims from air carriers before courts of law does not preclude passengers from seeking further claims before national control authorities. Proceedings before courts of law and national control authorities are of a parallel nature.

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⁴² Information referred to in Article 76 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 09.01.2015 (OJ C 4, 9.1.2015, p. 2–14).

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