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AIR CARRIER'S LIABILITY FOR DAMAGES ACCORDING TO THE NEW MONTREAL CONVENTION

ABSTRACT

The liability of air carriers in international air traffic is still regulated by the Warsaw Convention from 1929 and its amendments. In 1999 the Montreal Convention was accepted, which completely substitutes the rules contained in the Warsaw Convention including all its later amendments, and the most important modifications have been made regarding the air carriers' liabilities in case of passenger injury or death on international flights.

KEY WORDS

air carrier, liability, Montreal Convention

1. INTRODUCTION

There are two basic multilateral international conventions which globally regulate air traffic in the world and these are the *Warsaw Convention* in the field of *international civil law* and the *Chicago Convention* in the field of *international public law*. Apart from these conventions, three security conventions have been accepted as reaction of the world community to the escalation of international terrorism and some dozen other conventions that regulate other issues of air traffic law.

The Convention for Unification of Certain Rules for International Carriage by Air (Warsaw Convention) was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. Today, with 147 countries that have joined *the Warsaw Convention*, it is the most widely accepted agreement in the *international civil law*.

The Warsaw Convention is based on the assumption that air carriers on international flights are liable for the damages that might occur due to the death or injury of passengers, then destruction, loss or damage of the baggage or cargo, and for the damage caused by the delay of aircraft or delay in the transportation of luggage and cargo. *The Convention* considers also the

possibility of finding the air carrier not liable if it is proved that the carrier has undertaken all the necessary measures in order to avoid the accident, or that it was impossible to undertake such measures (*force majeure*). Similarly, if the air carrier proves that the damage was caused by the passenger himself, the court proceedings may apply the provision of *liability share* in order to reduce or completely eliminate the liability of the air carrier.

The maximum amount of air carrier's liability for personal damage is limited to 125,000 Poincare Francs (approximately 10,000 US\$) per passenger, and for material damage to 250 Francs per one kilogram. The air carrier cannot plead these limits if the damaged person manages to prove that the damage resulted from the carrier's wilful misconduct in the concrete case.

Regardless of these limits, the *Convention* enables the carrier to pay even higher amounts, in agreement with the passenger, but prevents contracting amounts lower than the damage compensation.

The Warsaw Convention has been amended and supplemented several times up to now: by the *Hague Protocol* in 1955, the *Guadalajara Convention* in 1961, the *Guatemala City Protocol* in 1971 and the *Montreal Protocols* in 1975. *The Warsaw Convention* and its amendments are in professional literature called shortly the *Warsaw System*.

The latest and most complete revision of the previous five legal documents known as the *Warsaw System* was carried out by the 1999 *Montreal Convention* which was concluded at the diplomatic conference under the ICAO umbrella.

2. AIRCRAFT ACCIDENTS IN THE WORLD

The majority of public worldwide, but also the majority of air traffic passengers, are not aware of the significance and influence of the *Warsaw System* on the li-

abilities of air carriers, until an accident occurs in their vicinity. Only huge aircraft disasters such as the crash of the Korean flight KAL 007, in 1983, explosion of a bomb on the PAN AM flight 103 above Lockerbie in Scotland in 1988, the American Airlines plane crash in Cala, Columbia in 1955, TWA 800 aircraft explosion above Long Island, New York in 1996, or the most recent example, the crash of the supersonic Air France Concorde at the Charles de Gaulle airport in 1999, have reminded us of the obsolescence of the *Warsaw System*, and especially its provisions regarding almost insignificant amounts for the compensation in case of passenger death or injury.

Although the number of aircraft accidents is negligible in relation to the number of accidents in other traffic branches, and the fatalities in air traffic cannot be compared to the fatalities in road traffic, still aircraft accidents are much better covered by the media, so that all the world press and TV-media report on every aircraft accident.

This can be confirmed by the data about the total number of carried passengers, on the one hand, and the number of aircraft accidents, on the other hand.

According to the ICAO data, the total number of carried passengers (on national and international flights) between 1989 and 1999, had the tendency of constant growth, especially after 1994, so that 1,558 million passengers were transported over the last years of the mentioned period.

The same period marked a similar growth in the total number of carried passengers per flight kilometres.

On the other hand, the analysis of the number of aircraft accidents depending on the realised aircraft traffic performance (flight kilometres and number of landing operations), as well as the analysis of the passenger fatalities depending on the passenger kilometres in the period from 1978 to 1999, confirms the trend of improvement in the safety level, regardless of certain fluctuations.

According to the ICAO data, 20 fatal aircraft accidents occurred during 1999 in commercial air traffic, similar to the year 1998. These data refer to the accidents with fatalities, so that in 1999, 489 passengers were killed, and a year before that, as many as 905. There is no significant change in the number of fatalities, and it amounts to about 0.02 fatalities per 100 million passenger kilometres. The number of aircraft accidents with fatalities, per 100 million passenger kilometres in 1999 stagnated at 0.10. The number of aircraft accidents per 100,000 landing operations showed the tendency of decrease, from 0.11 in 1998 to 0.10 in 1999.

The safety level is different for certain types of aircraft that operate in regular passenger traffic. For example, in turbo-jet aircraft that realise almost 95% of

the totally carried passenger kilometres, there were in 1999 eight accidents with 347 fatalities, and in turbo-fan and piston aircraft, which allow for only 5% of the regular air traffic, there were 12 accidents with 142 fatalities. These data let us conclude that the percentage of turbo-jet aircraft is much lower than with fan propelled aircraft.

This paper will indicate the basic provisions of the new *Montreal Convention*, primarily from the aspect of air carriers' liability for personal and material damage, but also of other novelties introduced by this convention.

3. MONTREAL CONVENTION

The convention for unification of certain rules on international carriage by air (the *Montreal Convention*) was planned as a unique document which fully substitutes the previous *Warsaw System* regulations.

It consists of a preamble and a total of 57 Articles grouped in seven sections. *The Montreal Convention* retains the structure of the *Warsaw Convention* and has the same scope of application as the original *Convention* from 1929. Although the new *Convention* represents a complete revision of the *Warsaw System* provisions, the most significant changes have been made in relation to the air carrier's liabilities in case of passenger injury or death on international flights. The basis of the *Convention* are the *Warsaw Convention* and the *Hague Protocol*. Besides, the *Convention* completely includes the *Montreal Protocol No. 4*, several elements of the *Guatemala City Protocol* and the relevant elements of the *Additional Protocol No. 3*. A special section (section V) contains the *Guadalajara Convention* provisions.

3.1. Two-level Liability System

The Warsaw Convention limited the carrier's liability for personal damage up to the amount of about 10,000 or 20,000 US\$, depending on whether the damage compensation is defined according to the original text of the *Warsaw Convention* or according to the text modified by the *Hague Protocol*. This liability, however, could have been higher but in that case the damaged party should have been able to prove that the damage resulted as a consequence of the carrier's *wilful misconduct* or *gross mistake*, which was no easy proof.

Provisions that refer to the new regime of liabilities are contained in section III of the *Convention* entitled *Carriers' liabilities and the damage compensation amount*.

Contrary to what has been said up to now, *the Montreal Convention* introduces a two-level liability system in cases of the passenger death or injury, thus effi-

ciently eliminating limitations contained in the Warsaw System. For the charges submitted by the damaged party that do not exceed 100,000 SDR (about 135,000 US\$) – *the first level of liability* – which is a multiple increase with regard to the previous restrictions, the carrier is responsible according to the principle of *objective liability*. For the charges that exceed this amount – *the second level of liability* – the air carrier's liability is based on the *presumptive fault* and does not contain liability restrictions.

Not wanting to elaborate in more detail on the first level of liability up to the amount of 100,000 SDR, we would like to remind of the previous practice according to which the majority of litigations against the carrier operating into and out of the countries with *low premiums* (the majority of the countries in the world), did not exceed the amount of 100,000 SDR. Besides, this amount is much higher than the amounts defined by some earlier international agreements regulating liability for passenger death or injury in rail, road and sea transportation. Thus, e.g. the *Convention on Carriage of Passengers and their Luggage by Sea* (Athens, 1974) regulates the liability limit for passengers up to 46,666 SDR (however, this amount was increased in 1990 to 175,000 *Special Drawing Rights*); the *Convention on International Rail Transport* (Bern, 1980) contains a limit of 70,000 SDR, and the *Convention on Contracts for International Road Transport of Passengers and Luggage* limits the liability to 250,000 *Poincare Francs*.

Both in the first and in the second level of liability, the plaintiff will only have to prove the cause-effect relation between the accident and the damage. Regarding the application of principles of *objective liability* in the first level of liability, the carrier can be exempted from liability or partly reduce it, only if he proves that the damage was caused by negligence or other omission by the damaged party (Article 20).

On the contrary, in the second level of liability (Article 21, Item 2), applying the principle of *presumptive fault*, the carrier will not be considered liable for the damage if it is proven that it is not the result of negligence or failure by the carrier, his servants or agents, i.e. if he proves that the damage resulted exclusively from the negligence or failure by a third party. Of course, the reasons for exemption from liability or its reduction according to Article 20 of the *Convention* may be applied also in this liability case.

3.2. Liability Limit due to Delay and Damage on Luggage and Cargo

For the damage caused by delay in air transport, the carrier is liable up to the amount of 4,150 SDR per passenger.

The carrier is liable for the damage caused by *loss, destruction or damage of the luggage*, both the checked and hand luggage, up to the amount of 1,000 SDR unless the passenger during check-in declared higher value and paid an additional fee.

The damage compensation for which the carrier is liable due to the *loss or damage of cargo*, cannot exceed 17 SDR per kilogram unless the consignor made a special declaration of higher value of cargo and paid an additional fee (Article 22).

In accordance with the decisions contained in the *Montreal Protocol No. 4*, the *Montreal Convention* provides also for the damage on checked baggage and cargo, the *objective liability* of the air carrier. The carrier can avoid liability for the damage due to *loss, destruction or damage of the luggage* if it is proved that the damage was caused by poor quality or inherent properties of the luggage.

Similarly, the carrier may avoid liability for *cargo loss or damage* only if it is proven that the damage was caused due to inherent properties or inherent defect of cargo, defective packing, war or armed conflict i.e. act of public authority regarding cargo import, export or transit (Article 18).

Apart from the limited amounts of damage compensation provided in Articles 21 and 22 of the *Convention*, the authorised court may award payment of the expenses of litigation and interest. However, this provision will not be applied if the amount of damages awarded, excluding court costs and other expenses of litigation, does not exceed the amount in the written offer made by the carrier to the plaintiff within 6 months of the accident, or before litigation is commenced, if litigation is commenced later than 6 months (Article 22, Item 6).

The purpose of this provision is to avoid unnecessary litigation and time-consuming and expensive court procedures, and it stimulates the carrier to make a fair settlement offer for the damage done, and the damaged party to accept such offer.

3.3. Modernised Clause

Apart from the two-level liability system introduced by the *Montreal Convention*, the introduction of the so-called *modernised clause* is also a novelty with the aim of maintaining thus the compensation value regarding inflation. This clause, namely, allows revision of liability amounts in five-year intervals, according to the changed economic conditions. According to Article 24 of the *Convention* it is necessary to review the liability limits every five years, if the average accumulated inflation rate is based on the *estimate of the average annual growth rate or fall of consumers' index of the countries whose currency unit includes Special Drawing Rights*, and if it exceeds ten percent of the

previous revision or from the date of signing this *Convention*. The *Convention* depositor (ICAO) will inform the member countries about the revision of liability limits that will come into force within six months unless the majority of countries opposes this revision.

The *Montreal Convention* has taken over the provisions of the Warsaw System according to which the carrier can contract even higher limits of liability than provided by the *Convention*, i.e. higher than unlimited (Article 25).

Similar to the provision in the *Regulation on Air Carrier's Liability in case of Accident*, of the European Council (EC No 2027/97) which allows for the possibility of making part payments in advance in case of the passenger's death, the *Montreal Convention* also contains provisions on advance payments. Thus, in case of aircraft accident resulting in *passenger death or injury*, there is a provision on the carrier's liability to make advance payments to victims with the aim of satisfying direct economic requirements of these persons. The carrier will not be required to make advance payments unless required by the carrier's national law. Besides, such advance payments will not mean that the carrier has admitted the responsibility (Article 28).

3.4. Other Significant Provisions

In the passenger carriage, a single or collective document on transport will be issued and it will contain:

- a) the arrival and destination place,
- b) if arrival and destination places are within the territory of one member country, and one or more agreed interlandings are located on the territory of another country, the data of at least one such interlanding (Article 3, Item 1).

Regarding the possibility of electronic ticketing, the *Convention* provides for the application of *other means* for preservation of transportation documents. If *other means* are applied, the carrier has to offer the passenger a written statement with the note contained in the transportation document, and saved in the electronic medium. Such statement can be useful for presentation to immigration authorities (Article 3, Item 2).

The carrier has to give the passenger the baggage identification tag for each piece of checked baggage. Such document on the checked baggage is necessary so that the passengers could claim the damage, no matter whether a ticket was issued or it is only an electronic record (Article 3, Item 3).

Furthermore the carrier has to inform the passenger in writing about the application of the carrier's limited liability (Article 3, Item 4). Correct passenger information (e.g. clear, short, understandable and

timely information) about the possible limit of the carrier liability represents the basic protection of the service user rights. Besides, the passenger requires such notice also in order to make a timely decision whether to use other measures of insuring life and health.

Whereas the *Warsaw Convention* sanctioned the failure to deliver a ticket or air waybill so that the carrier lost his right to call for limited liability, the *Montreal Convention* does not sanction the mentioned failures.

4. CONCLUSION

According to provision contained in Article 53 Item 6, the *Convention* will come into force on the sixtieth day from the date of saving the thirtieth document on ratification, acceptance, approval or joining the depositor, i.e. *International Civil Aviation Organisation (ICAO)* in Montreal. Although the *Convention* was accepted by a great number of countries that participated in its drafting, it is difficult to predict today when it would come into force. However, we believe that the waiting time will be shorter than in the case of the *Warsaw Convention* (drafted in 1929 and came into force in 1933), or the *Hague Protocol* (drafted in 1955 and came into force as late as 1963).

Regarding obvious difficulties in the application of the *Warsaw System*, the *Montreal Convention* should come into force soon, and the member countries that will ratify this *Convention* should be given opportunity of automatically cancelling all the other documents of the *Warsaw System*, whose member they are.

The sooner the *Montreal Convention* comes into force, and gets integrated in the national legislation, the greater the protection of the international air traffic users' interest and the need for fair compensation based on the compensation principle, allowing further development of international air traffic, faster and safer passenger, baggage and cargo throughput in accordance with the principles and objectives of the *Chicago Convention*.

LITERATURE

- [1] *Annual Report of the Council (Doc 9752)*, ICAO, Montreal, 2000
- [2] Cheng, B.: *The Warsaw System: the way forward*. The Aviation Quarterly, Part 3, London, 1998
- [3] *Convention for the Unification of Certain Rules for International Carriage by Air (Doc 57)*, ICAO, Montreal, 1999
- [4] Schwenk, W.: *Handbuch des Luftverkehrsrechts*. Carl Heymanns Verlag KG, Berlin, 1996.
- [5] Steiner, S.: *Elementi sigurnosti zračnog prometa*. Fakultet prometnih znanosti, Zagreb, 1998