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A CONTRIBUTION TO RECOGNISING CARRIER'S LIABILITY IN INTERNATIONAL CARRIAGE BY AIR AND SEA

ABSTRACT

The paper presents the provisions of the part of Montreal Convention which refers to the air carriers' liability regarding damage to passengers and luggage, with the intention of indicating the possible influence of this Convention on the equal liability in maritime carriage, settled by the recent changes of the Athens Convention on the carriage of passengers and their luggage by sea. The provisions of these documents are compared regarding the basic principles of the carrier's liability and the amount of liability for the damage, showing both some similarities and some differences in the carriage of passengers by air, i.e. by sea.

KEY WORDS

air carrier liability, maritime carrier liability, Montreal Convention, Athens Convention, damage compensation, carriage of passengers and luggage

1. INTRODUCTION

The *Convention for the Unification of Certain Rules Relating to International Carriage by Air*[1], Montreal, 1999, has resulted in international uniformity of the legal arrangement of the air carriage of passengers, luggage and goods. The *Montreal Convention* has retained the structure of the *Warsaw Convention* and has the same scope of application as the original *Convention* from 1929[2], with subsequent amendments, and in practice replacing the private intercarrier agreements regarding the *Convention* contracting states. Although the new *Convention* represents a complete revision of the *Warsaw* system provisions[3], the most significant changes have been made in relation to the air carrier liability in the cases of injury or death of passengers on international flights. With relatively high liability amounts, this *Convention* has introduced also the term of *objective liability* of the air carrier up to the first level of liability in cases of death or injury of the passenger (*personal damage*).

This paper studies the provisions of the part of the *Montreal Convention* which refers to the air carrier liability for damage to the passengers and luggage, focusing rather on the possible influence of the *Montreal Convention* provisions on the similarly settled respective liability in maritime transport. This particularly, because of the recently changed respective provisions of the *Athens Convention on the Carriage of Passengers and their Luggage by Sea*[4].

2. CARRIERS' LIABILITY FOR DAMAGE IN AIR CARRIAGE

2.1. *The Warsaw Convention*

Already in the very beginnings of the civil aviation carriage, the basic issues of the carrier liability for possible damage have been arranged. This was done by the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (*Warsaw Convention*) which was signed in Warsaw on 12 October 1929, and came into force on 13 February 1933.

The *Warsaw Convention* starts from the assumption that the air carriers on international flights are liable for damages that may result due to death or injury of passengers, then destruction, loss and damage of luggage or goods and for damage caused by aircraft delay or delay in the carriage of luggage or goods. The *Convention* foresees a possibility of exonerating the carrier from liability if it is proven that the carrier has undertaken all the reasonable measures in order to avoid the damage or in case such measures could not have been undertaken (vis maior). This means that ac-

cording to the provisions of the *Warsaw Convention* the carrier is liable according to the principle of *assumed fault.*

The *Convention* limits the amount of carrier's liability for personal and material damage, but allows the carrier to pay even greater amounts in agreement with the passenger.

The *Warsaw Convention* was amended and supplemented several times until today: the *Hague Protocol* in 1955, the *Guadalajara Convention* in 1961, the *Guatemala City Protocol* in 1971, and the *Montreal Protocols* in 1975. Regardless of certain drawbacks and frequent criticism, especially due to the low amount of carrier's liability for damage in air carriage, the *Warsaw Convention* is still today, with 147 countries that have joined it, the most widely accepted agreement of international private law.

2.2. *The Montreal Convention*

The *Montreal Convention* is based on 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 respective sections of the *Additional Montreal Protocol No. 3*. A special section (section V) encompasses the provisions of the *Guadalajara Convention*.

The objectives of the new *Convention* are precisely indicated in the preamble, and they refer to insuring the protection of interests of the international air carriage users and the needs for fair compensation based on the principles of compensation.

The text further indicates the basic changes contained in the *Montreal Convention* compared to the provisions of the *Warsaw System*.

2.2.1. Liability for Personal Damage

The *Warsaw Convention* limited the carrier's liability to personal damage up to the amount of about US$10,000 or 20,000, depending on whether the damage compensation is determined according to the original text of the *Warsaw Convention*, or according to the text amended by the *Hague Protocol*. This liability could, indeed, be higher, but in that case the damaged party should prove that the damage is the result of the carrier's *intention* or *gross negligence*, which is not easy to prove.

The provisions that refer to the new regime of liability are contained in the 3rd section of the *Montreal Convention* entitled *Carrier's Liability and the Compensation Amount*.

Unlike the presented provisions of the *Warsaw Convention*, the *Montreal Convention* introduces a two-tier system of liability in the case of death or injury to the passenger, thus efficiently eliminating the limitations contained in the *Warsaw System*. For the claims of the damaged party not exceeding 100,000 SDR (Special Drawing Rights), approximately $135,000 - first level of liability - which is several times more than the previous limitations, the carrier is liable according to the principle of *objective liability*. For the claims in excess of this amount - second level of liability - the air carrier's liability is based on the *assumed fault* and does not contain limitation of liability.

Whereas in the original text of the *Warsaw Convention* the liability for personal damage was arranged separately from the carrier's liability for luggage and goods, the *Montreal Convention* abandons such concept and in one Article arranges the carrier's liability for the death and injury to passenger, i.e. damage to luggage. Damage to goods (cargo) is regulated by a special Article, in a much more complete manner than previously.

The *Montreal Convention* has also retained the term *bodily injury* which indicates that there is a desire not to include explicitly the psychiatric injuries[5] into the damage caused to passengers, e.g. shock, although the term *health damage* would be a much fairer expression, and it would encompass both physical and psychiatric injuries. The previous formulation of the *Warsaw Convention* was accepted with the explanation that also according to the existing text it is possible to compensate for the damage caused by psychiatric injuries in certain cases and that the law in this field will continue to develop in the future.

In both levels of liability, the claimant has to prove only the causation link between the accident and the damage. Regarding the application of the principle of *objective liability* on the first level of liability, the carrier can be exonerated from liability or may partly reduce the liability only if he can prove that the damage was caused by negligence or other failure by the damaged party (Article 20).

Otherwise, at the second level of liability applying the principle of *assumed fault,* the carrier is not liable for the damage if he proves that it was not caused by negligence or failure of the carrier or his agents, i.e. if he proves that the damage was caused exclusively due to negligence or failure of a third party. Naturally, the reasons to exonerate the carrier from liability or reduce the liability as in Article 20 of the *Convention* may be applied in this case of liability as well.

The novelty introduced by the *Montreal Convention,* and which has been probably initiated by the *IATA Intercarrier Agreement* [6] and the *Regulation 2027/97 of the European Council*[7], is Article 28 which foresees the possibility of advance payment of a part of compensation in case of death or bodily injury of the passenger, if such liability is foreseen in the provisions of the national law of the air carrier. Besides, such advance payment will not mean the carrier's acknowledgement of liability.

2.2.2. Liability for Damage to Luggage

According to the *Montreal Convention* the carrier is liable for destruction, loss or damage to the registered luggage due to the events on the aircraft or during the period the luggage is in the possession of the carrier. The carrier is liable up to the sum of 1,000 SDR (Special Drawing Rights), both for hand and for the checked luggage, if the passenger had not declared a higher sum and paid the additional amount at check-in.

According to the provisions of the *Montreal Protocol No. 4*[8], the *Montreal Convention* stipulates also the *objective liability* of the air carrier for the damage sustained to the checked luggage and goods. The carrier can be exonerated from the liability for damage due to loss, destruction or damage to luggage only if he can prove that the damage was caused due to its own faults or natural properties of the luggage.

On the other hand, for the damage to hand luggage which is for the whole time in the possession of the passenger who is liable to take care of it, the burden of proof has been transferred to the passenger who has to *prove the fault* of the carrier or his agent involved in the carriage.

In the above section, the basic principles of carrier's liability towards passengers and luggage in international air carriage have been presented according to the provisions of the *Montreal Convention* which has not as yet come into force[9]. Starting from the fact that the issue of carrier's liability towards passengers and luggage is arranged differently in different branches of traffic[10], the situation in the carriage by sea will be presented further in the text, trying to answer the question whether there are assumptions to insure the same rights for passengers travelling by sea as for those travelling by air.

3. CARRIER LIABILITY FOR DAMAGE IN THE CARRIAGE BY SEA

3.1. *The Athens Convention*

Carrier liability for damage in carriage by sea has been arranged by the *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea,* from 1974[11].

Up to now, three *Protocol*s to the *Athens Convention* have been brought.

With the Protocol from 1976, SDR was introduced as the accounting unit for determining the sum of the carrier's liability. In the text of the Convention itself, as well as in the text of the already mentioned *Warsaw Convention* until 1975, the accounting unit was Poincaré franc.

Protocol No. 2 to the *Athens Convention* was brought in 1990. This Protocol increased the limits of carrier's liability for the damage sustained in the event of death or bodily injury of the passenger, i.e. due to the loss or damage to luggage. Besides, this Protocol stipulates also the procedure of its amendment which refers to increasing the sum of the limitation of carrier liability. This Protocol has still not come into force, since only three states have committed themselves to this Protocol until now[12].

The *Athens Convention* has not been accepted as widely as expected at the time of its acceptance. One of the reasons lies in the sums of limitations of carrier liability, since certain more developed maritime countries regard the mentioned sums as too low. At the same time, the maritime less developed countries regarded these limits as too high.

The second reason for unsatisfactory acceptance of the *Athens Convention* refers to the basis of the carrier liability for the damage sustained in the event of death or bodily injury of the passenger.

Regarding both mentioned reasons, one should remember that these were the basic reasons which have been emphasised for years with the request to radically change the *Warsaw System.*

Recognising the specific characteristics of the passenger carriage by sea compared to the passenger carriage by air, the beliefs were increasingly present that there were no justified reasons to any major differences in arranging the liabilities of the sea and air carriers.

All this led to the *Protocol No. 3* to the *Athens Convention* which was accepted at the Diplomatic Conference in London at the end of 2002[13]. This Protocol has provided better protection of passengers by introducing objective liability for certain damages and by increasing the sum of limitation of liability.

According to the *Athens Convention,* the carrier is liable for the damage due to the death or bodily injury of the passenger and for the loss and damage of luggage, if the event that caused the damage occurred during the carriage by sea due to the negligence or failure of the carrier or his agents. For the injury of the passenger body integrity, as well as for the damage to hand luggage, in principle the carrier is responsible on the basis of the *proven fault*. Justification for such milder liability lies in the fact that the passengers alone take care of themselves, i.e. of their hand luggage. However, the fault of the carrier is *assumed* in case the death or bodily injury to the passenger, or loss or damage to the hand luggage are the direct or indirect result of *maritime incident* (shipwreck, collision, grounding, explosion, fire, or ship failures). The fault of the carrier for the checked or registered luggage is always *assumed* until the opposite is proven.

Liability of the carrier for the death or bodily injury of the passenger according to the *Athens Convention* i.e. according to the Protocol from 1976 cannot exceed 700,000 francs (46,666 SDR) per journey. The liability for loss or damage of hand baggage is limited to the sum of 12,500 francs (833 SDR) per passenger and journey. For vehicles, including luggage carried in or on the vehicle, the limit is 50,000 francs (3,333 SDR) per vehicle and journey, whereas for checked luggage the liability is limited to the sum of 18,000 francs (1,200 SDR) per passenger and journey.

The carrier and the passenger may explicitly and in a written form agree to a higher limitation of liability than the one stipulated by the *Convention.* On the other hand, the carrier has no right to the benefit of limitation of liability if qualified fault is proven, i.e. that the damage was caused by an activity or failure in the intention of causing the damage, or without consideration and with knowledge that such damage is probable to occur.

The Protocol from 1990, about the amendments to the *Athens Convention* significantly increased the sums of carrier liability, but did not change the basis of the carrier liability. According to this Protocol the sum of limitation of liability in case of death or bodily injury of the passenger is set at 175,000 SDR, and for the loss or damage of hand baggage at 1,800 SDR, and for loss or damage of vehicle at 10,000 SDR, and for loss or damage to other luggage at 2,700 SDR.

The Republic of Croatia ratified in 1997 the *Athens Convention* and both mentioned protocols.

3.2. Protocol No. 3 on the Amendment of the *Athens Convention*

During the preparation of *Protocol No. 3* about the amendment of the *Athens Convention* within the framework of the *International Maritime Organisation (IMO),* the *Montreal Convention* was often mentioned as a very good example for the unification of certain rules relating to international carriage by air, from 1999, which introduced the *objective liability* up to a certain amount (100,000 SDR) for damage sustained in the event of death and bodily injury of a passenger. For the damage in excess of this limit, the air carrier is liable according to the principle of *assumed fault.* However, there is a significant difference between an air and a maritime carrier regarding the passenger's freedom of movement. In the carriage by air, namely, the passenger is constantly under carrier's supervision, whereas a passenger onboard a ship has great freedom of movement. Thus e.g., apart from the carriage itself, the passengers on a ship can use a whole series of additional services such as onboard hotel accommodation, sport programmes, leisure and entertainment programmes. They use entertainment programmes of a wide range, including night bars and dancing halls, in short, they live on the ship. This is a type of environment that does not exist in other branches of traffic, but an environment in which personal responsibility is naturally by far greater than e.g. in the carriage by air, which cannot be neglected in determining the principles of carrier liability[14].

3.2.1. Liability for Personal Damage

The Protocol on amendments of the *Athens Convention,* 2002, increases the strictness of the carrier liability for damage sustained in the event of death or bodily injury of the passenger, as a consequence of the maritime accident (shipwreck, collision, grounding, explosion, fire, or ship drawbacks). For such damage the carrier is liable according to the principle of *objective liability,* which means regardless of his fault. The Protocol stipulates the cases when the carrier is not liable after all for the damage sustained in the event of death or bodily injury caused by the maritime accident if he proves:

a) that the damage has resulted from the war, hostilities, civil war or extreme, inevitable and uncontrollable natural phenomenon; or
b) that the damage has been fully caused by an activity or negligence of a third party with the intention of causing the damage.

According to the provisions of the national law, the court can exonerate the carrier from the liability for the damage which was caused by the passenger himself.

The *objective liability* of the carrier for the damage sustained in the event of death or bodily injury of the passenger has been limited in the first level (similarly to the carriage by air), to 250,000 SDR for each passenger and each event separately (which means not per journey). However, if the sum of the damage exceeds the amount up to which the carrier is liable based on the *objective liability*, then the carrier has to pay also the remaining amount of the compensation (the second level of liability) up to 400,000 SDR per passenger and every separate event, if the carrier does not prove his innocence. This means that in this case as well, the carrier is the one who has to prove the absence of fault. Thus, this Protocol improves significantly the claimant's legal position. The national law may stipulate even higher amounts of limitation of liability, eliminating thus the risk that this Protocol may not be joined by those countries that consider the limitations of liability for damage due to death or bodily injury of passengers as too low.

In cases when the event of damage has not been caused by maritime accident, also a stricter principle of the *assumed fault* has been introduced.

A significant novelty introduced by the Protocol is the obligatory insurance of the carrier liability for per-

sonal damage, up to an amount of 250,000 SDR. In accordance with this Protocol, the possibility of direct claim against the insurance agent is foreseen for the compensation due to death or bodily injury of the passenger. According to the experiences of some countries which already have in their national regulations the possibility of direct claim (Norway, USA), such claim represents a fast, efficient and safe way of compensation, thus avoiding time-consuming litigations.

3.2.2. Liability for Damage to Luggage

For luggage there are no changes regarding the basic liability for single types of luggage. The Protocol makes a difference regarding carrier's liability, depending on the fact whether the damage is a consequence of the maritime incident or not, and whether it involves hand luggage or other passenger luggage.

If the loss or damage of hand luggage is a result of maritime incident, then the carrier is liable according to the more moderate principle of *proven fault.*

Regarding loss or damage of any other luggage that is not hand luggage (goods or vehicle transported according to the contract of carriage), the carrier is liable according to the principle of *assumed fault*. However, the Protocol has raised the limits of carrier's liability: for hand luggage (which the passengers have with them in the cabin or otherwise hold, keep or supervise) 2,250 SDR, for vehicles with luggage on the vehicle 12,700 SDR, and for the rest of the luggage 3,375 SDR.

4. CONCLUSION

It would not have been realistic to expect that the provisions of the *Montreal Convention* regarding air carrier liability for the damages to passengers and luggage could be applied in the same way to the carriage by sea, since there are different actual, social and economic bases between the air and sea carriage. However, the common characteristic of the provisions contained in the *Montreal Convention* and the *Protocol No. 3* on the amendment of the *Athens Convention* is that they have significantly improved the legal position of the passengers both regarding the basis of the carrier's liability and regarding the amount of damage.

The *Montreal Convention* has introduced a stricter criterion of *objective liability* of the air carrier in cases of death or injury of the passenger, and for the damage to the checked baggage, at least up to the first level of liability, unlike the criterion of *assumed fault* as stipulated by the provisions of the *Warsaw Convention*. Similarly, the *Protocol No. 3* on the amendment of the *Athens Convention* has imposed stricter basis of the maritime carrier liability for the damage in case of death or bodily injury of a passenger as result of *maritime accident,* and has introduced - up to the first level of liability - the principle of *objective liability* as different from the original text of the *Athens Convention* which stipulated the criterion of *assumed liability* for this type of damage. In cases when the damaging event did not occur due to *maritime accident*, instead of the previous criterion of *proven fault,* also a stricter principle of *assumed fault* has been introduced. This Protocol did not change the bases of the sea carrier liability for single types of luggage.

Regarding the extent of carrier's liability, the *Montreal Convention* has increased several times the air carrier liability in cases of personal damage, almost seven times compared to the latest amendment of the *Warsaw Convention* realised through the *Hague Protocol.* Such increase is completely understandable, since precisely the symbolic compensation foreseen by the provisions of the *Warsaw System* was the main reason of the lack of satisfaction expressed by the leading countries in the world, which threatened with a breakdown of the system.

In carriage by sea, the amount of carrier's liability for personal damage was increased substantially already earlier (by Protocol from 1990 the amount of the limit was increased to 175,000 SDR) and by Protocol from 2002 the amount was only corrected to 250,000 SDR, with the maximum amount of damage not to exceed 400,000 SDR. However, due to the character and length of the ship journey, one more novelty was introduced into the text of the Protocol, according to which the mentioned compensation refers to each passenger and each event separately, and not, as was previously the case, per journey.

Finally, it may be concluded that every of the accepted amendments of the Protocol No. 3 on the amendments of the *Athens Convention* is not just the increasing of the strictness of the carrier's liability for damage in case of death or bodily injury to passengers, but these are attempts at making the procedure of compensation as efficient and as fast as possible for the damaged party.

Therefore, there is special significance in the provision which introduces the possibility of direct claim against the insurer for the compensation of the given damage.

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NOTES

1. *Convention for the Unification of Certain Rules Relating to International Carriage by Air,* signed at Montreal on 28 May 1999.
2. *Convention for the Unification of Certain Rules Relating to International Carriage by Air,* brought in Warsaw on 12 October 1929, and came into force on 13 February 1933
3. *The Warsaw system consists of:*
   a) Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929 (Warsaw Convention),
   b) Protocol on Amendment of Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929, brought in Hague on 28 September 1955 (Hague Protocol),
   c) Convention on the amendment of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, performed by a person other than the contracting carrier, signed in Guadalajara on 18 September 1961 (Guadalajara Convention),
   d) Protocol for amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929, supplemented by the Hague Protocol on 28 September 1955, signed in Guatemala City on 8 March 1971 (Guatemala City Protocol),
   e) Additional Protocols No. 1 to 3 and the Montreal Protocol No. 4, as supplement of the Warsaw Convention, amended by the Hague Protocol or Warsaw Convention, amended both by the Hague Protocol and the Guatemala City Protocol, signed in Montreal on 25 September 1975 (Montreal Protocols),
4. *Athens Convention* entered into force on 28 April 1987, and stipulating 28 countries whose commercial fleet forms 33.53 percent of the total world ship tonnage.
5. Such provision, for example, is contained in Article 11 of the *Convention on the Contract on International Road Transport of Passengers and Luggage (CVR),* Geneva, 1 March 1973
6. *IATA Intercarrier Agreement*, 1994
7. *Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of* accidents
8. Additional *Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 2929
9. Until 11 February 2003 the *Montreal Convention* was ratified by 26 countries, and for its entry into force the ratification by at least 30 countries is needed, so that it may be expected that this Convention will soon enter into force,
10. *Convention on International Railway Transport* (Bern, 1980) contains limitation of carrier liability up to 70,000 SDR, whereas the Convention on the Contracts for International Road Transport of Passengers and Luggage (Geneva, 1973) limits the liability of the road carrier to 250,000 Gold Francs.
11. *Convention Relating to the Carriage of Passengers and their Luggage by Sea*.
12. These countries are Egypt, Croatia and Spain, and for its entry into force, it should obligate at least 10 countries.
13. *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea,* 1974 (leg/Conf. 13/20), IMO, London, 2002
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