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Montreal Convention 1999 – Merits and Flaws...

“Better a diamond with a flaw than a pebble without”.
Confucius

This unification of private law of international carriage by air has been a success, although it is by far not perfect and while many opportunities have been missed in its drafting. It is currently in force for 86 States, among them the States with largest share in international air transport. That represents slightly over 45% States of the 190 membership of ICAO. However, the scope of its applicability is creeping even to the carriers of non-contracting states in specific geographic context:

Example: India is not yet a party to the Convention. An Air India flight from New Delhi to Toronto with a return to New Delhi remains governed by the Warsaw Convention as amended at The Hague. However, a passenger on Air India ticketed Toronto – New Delhi-Toronto would be governed by the Montreal Convention of 1999 because the point of origin and point of ultimate destination is in Canada (a contracting State) with an agreed stopping place in India (a non-contracting state). The absurdity of this situation is further illustrated by the fact that two passengers sitting next to each other may be governed by different regimes depending on their point of origin...

While the Convention is a success (but with considerable flaws), the process of its formulation was painfully slow and controversial. The Warsaw Convention was a farsighted and progressive instrument in 1929 but in less than three decades became antiquated – in particular with respect to the unrealistically low limits of liability and excessive formalism of the documentation of carriage. Only the 1955 Protocol of The Hague and the 1961 Supplementary Convention of Guadalajara effectively introduced some improvements while the 1971 Guatemala City Protocol and the 1975 Montreal protocols remained in limbo for a quarter of the century. Governments took no action for the modernization of the “Warsaw system” for over 20 years between the Montreal Conference of 1975 and the session of the Legal Committee in 1996. The initiative for an effective action was not taken by states but by airlines themselves – the Japanese initiative of 1992 was a trailblazer for admission that airlines do not need the shield of unrealistically limited liability; in 1995 IATA at its Kuala Lumpur session pioneered the *Passenger Liability Agreement* under which scores of major airlines accepted the two-tier system of liability without limit modeled on the Japanese initiative.

There was a historic opportunity for States to advance and modernize the unification of private international air law. However, many opportunities have been missed due, in particular, to irregular procedures and lack of transparency within the ICAO mechanism.

There are some obvious innovations in the 1999 Montreal Convention:

- we now have a single instrument instead of a patchwork of a Convention, Protocol, Protocol-to-Protocol and Protocol-to-Protocol-to-Protocol;
- we now have the (dubious) advantage of having the Convention “authentic” in five languages (English, French, Spanish, Russian, Arabic and Chinese) rather than having the main body of “Warsaw” only in French with some amendments also in English and Spanish and some also in Russian; however, all drafting at the Montreal Conference was done in English and the other versions are translation made on the spot and under time pressure by linguistic experts who were not necessarily lawyers; even a superficial analysis of the texts reveals disparities in the different versions and it will be important to lead the Courts of law to an admission that only the English text is “truly authentic”;
- the best elements of the previous amendments (Guadalajara 1961, Guatemala City 1971, Montreal Protocol #4 1975) were mechanically accepted by the Conference; among them is the simplification of the documents of carriage and their separation from the regime of liability – a considerable saving for the airlines;
- the two-tier regime of liability initiated by Japan and the IATA was adopted after tortuous negotiations;
- the Convention has a specific provision on insurance (that States required anyway for the granting of air carrier’s permit);
- “Hong Kong Clause” accepted at the request of China worked differently than expected – China ratified the Convention first (also with respect to Macao) and Hong Kong later;
- European Union is a “party” to the Convention – surely to the joy of the Brussels bureaucracy and some misgivings among several of the 25 member States of the EU.

Where did the unification fail so far?

- The concept of “**accident**” was not discussed and was not clarified; in the relatively recent jurisprudence this concept was interpreted to loosely to the detriment of the airlines and was deemed to encompass events totally unrelated to the typical risks of aviation and to the operation of the aircraft (see *Wallace v. Korean Air* or *Olympic Airways v. Hussain*). Such approach distorts the concept of aviation risks and places the air carrier into the position of an insurer for any types of risks. The decision of the US District Court, Puerto Rico of 2 September 2005 (available to the participants for

downloading under “accident 2005”) gives a ray of hope that “accident” will be interpreted as arising out of the specific aviation risks.

- The concept of “**bodily injury**” was not clarified and for the airlines and their insurers it remains a potential minefield of (possibly frivolous) litigation; a new massive attempt to achieve compensation for “mental trauma” followed the Air France accident at Pearson airport, Toronto on August 2005 in which – miraculously - there was no fatality. The decision of the Quebec Cour Superieure of 15 January 2006 (Croteau v. Air Transat – available for downloading to participants) touches upon the issue, albeit not with a substantive clarity.

Due attention should be paid to the fact that the European Union in the implementing legislation takes considerable liberties with the interpretation of the 1999 Montreal Convention that appear to have extraterritorial applicability and may affect foreign, non-European carriers. The case in point is the EC Regulation 261/2004 (text available for downloading to participants) for air carriers’ liability for denied boarding, cancellation of flight or delay. Surprisingly, the validity of this Regulation was confirmed by the EC Court (Case C-344 of 10 January 2006) by a decision that was labeled by IATA as “absurd” and potentially costing the airlines US\$700 million per year (<http://www.iata.org/pressroom/pr/2006-01-10.htm>). The EC Regulation is a populist “protection” of the passengers that makes airlines liable to provide assistance to passengers even in cases that are totally outside their control – e.g., delays caused by adverse weather conditions, air traffic control disruptions, etc. The Regulation contravenes the Montreal Convention of 1999 that provides effective defence to air carriers in cases of delay that is beyond their control. It is a dubious advantage to the passengers who will have – sooner or later - to defray the cost incurred by the airlines. The EC Regulation and the Court’s decision overlook an important aspect that in many cases a delay permits to take appropriate safety precautions while undue haste in the dispatch of the flight could jeopardize the safety.

The 1999 Montreal Convention is far from perfect but the airlines and their users will have to live with its flaws – possibly for decades to come. It is doubtful that the Convention would diminish the number of litigations – the litigations will target the concept of “accident”, “bodily injury”, quantum of damages in the second tier and – thanks to EC attitude – also the issue of delay. However, on the whole the airlines have a more solid and reliable legal regulation than that provided under the antiquated “Warsaw” system. In the interests of global unity of the legal regulation the airlines should press their governments to expedite the ratification of the 1999 Montreal Convention.