

Reports of Conferences

Jeroen Mauritz*

Current Legal Developments: The ICAO International Conference on Air Law, Montreal, May 1999.

1. Introduction

The latest attempt at the update of the Warsaw system on an inter-governmental level was made during the ICAO International Conference on Air Law in Montreal from 10 to 28 May 1999. It was attended by 118 states and representatives of various international organizations.¹

The aim of the Conference was to modernize and consolidate the current Warsaw System, which also has been modified by means of various contractual waivers of limits such as the 1966 Montreal Agreement, the Japanese Initiative of 1992 and the IATA Inter-carrier Agreement of 1995 and its Implementing Agreement of 1996.²

Furthermore, the European Community has adopted Council Regulation 2027/97 on Air Carrier Liability in the Event of Accidents, which creates a separate liability regime for its EC Carriers on both international and domestic flights.³

This article is meant to give a number of observations on the scope and some of the main provisions of the new Convention.

2. The Convention for the Unification of Certain Rules for International Carriage by Air

The Conference based its negotiations on the so-called 'Draft Convention for the Unification of Certain Rules for International Carriage by Air'.⁴ This article will focus on the final outcome, the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999, i.e. the Montreal Convention.⁵

The Convention, which is preceded by a preamble, consists of 57 articles divided in seven Chapters.

2.1. Scope

The scope of the Convention encompasses all

international carriage of persons, baggage or cargo performed by aircraft for reward and applies equally to gratuitous carriage by aircraft performed by an air transport undertaking (Article 1 para 1). The Convention also applies to carriage by air performed by a person other than the contracting carrier (Article 1 para 4 jo Chapter V, which gives specific provisions on the relationship between contractual and actual carriers) and to carriage performed by the State or by legally constituted bodies if the conditions of Article 1 are met (Article 2).

2.2 Liability Regime for Passengers and Jurisdiction

The core of the Draft, which was treated as a package in the Conference, consists of Articles 17, 21, and 33.

* PhD Candidate of the E.M. Meijers Institute of Legal Studies, Leiden University, The Netherlands

1. Observers of the international organizations AFCAC, ACAC, ECAC, EC, IAC, IATA, ICC, ILA, IUAI, ALADA, and LACAC attended the Conference; the only non-contracting State present was the Holy See, see DCW List of Delegates No. 5 for an enumeration of the participating states.

2. The Montreal Inter-carrier Agreement only applies to carriage to and from the United States, and consists of a voluntary raise of the limits for passenger injury or death up to \$75000, including legal costs. In full: The *IATA Inter-carrier Agreement on Passenger Liability* (IIA) signed at Kuala Lumpur on October 21, 1995 and the *IATA Agreement on Measures to Implement the IATA Agreement*, of May 1996.

3. Council Regulation (EC) No 2027/97 of 9 October 1997, O.J L/285, which came into force on 18 October 1998.

4. The text of the Draft Convention was approved by the 30th Session of the ICAO Legal Committee, Montreal, 28 April - 9 May 1997 and amended by the Special Group on the Modernization and Consolidation of the 'Warsaw System', Montreal, 14-18 April 1998, see DCW Doc No.3 of 9/11/98.

5. See DCW Doc No.57 of 28/5/99 for the text of the Convention

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Article 17 para 1, on liability for death and injury of passengers, reads:

'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

The discussions focused on the question if – and to what extent – mental injury should be compensated as a separate head of damages.⁶

The question of recoverability of mental injury has also been a point of controversy under the current system of Warsaw, which allows damages for 'death, wounding or any other bodily injury' in Article 17 of the Warsaw Convention. In the final analysis, taking the draft records of the original Warsaw Convention into account, Article 17 was not intended to cover mere mental injury.⁷

During the Conference, the issue of mental injury was discussed on the basis of a range of arguments in favour of or against the concept, such as the notion that there is no clear division between bodily and mental injury, the problem that mental injury can be simulated and lead to false claims⁸, the problem of proof of mental injury, etc.⁹ In the final compromise on Articles 17, 21, and 33, mental injury was not accepted as a separate head of compensable damages. This seems a far to broad omission, in a field of damage law which is gradually becoming more receptive to this type of damage. Evidently, compensable mental injury in aviation cases should only be limited to provable cases of severe emotional distress, and not allow compensation for any form of minor claim based on 'fear of flying' related phenomena such as turbulence. But it seems doubtful that the distinction courts would have to make between justifiable and fraudulent claims based on severe mental injury poses an insurmountable problem.¹⁰

The other point of discussion was on the question if the last sentence '*However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger*' of Article 16 para 1 of the Draft Convention should be deleted or retained with or without adding the word 'solely'.¹¹

In the end, the entire sentence was deleted. This seems a wise move, since the sentence is unnecessary if one bears the adage 'the tortfeasor takes the victim as he finds him' in mind.

The second article of the package, article 21, on compensation in case of death or injury of passengers, is based on a two-tier liability system with a first tier based on strict liability up to 100,000 SDR and a second tier of unlimited liability based on presumed fault of the carrier.

In order to escape the second tier the carrier has to prove either that '(a) such damage was not due to the negligence or other wrongful act or omission

6. See the proposal to include 'or mental injury' made by Norway and Sweden contained in DCW Doc. No.10.

An interesting draft history is given starting with the change from 'lésion corporelle' (the original wording of the Warsaw Convention) to personal injury in the Guatemala City Protocol, to 'bodily and mental injury' by the ICAO Legal Committee (LC/30), and back again to bodily injury by the Special Group on the Modernization and Consolidation of the 'Warsaw System' (SGMW). The countries that were in favour of mental injury as a separate head of recoverable damage initially included Canada, most of the European Countries, the Holy See, Korea, Lebanon and the 21 Latin American States (see the LACAC position in DCW Doc No.14, of 6/5/99, p.3), in views expressed during the Third Meeting of the Commission of the Whole of 12 May 1999. Opponents included Saudi Arabia, Austria, China, and India. The IATA and IUAI representatives also opposed a separate mental injury heading, the former on basis of the US Supreme Court decision of *Eastern Airlines, Inc. v. Floyd*, 499 U.S.530 of 1991 and on the fear of unsubstantiated claims for e.g. turbulence, thunderstorms, etc; the latter on the fear of raise of premiums.

7. See Caroline Desbiens, 'Air Carrier's Liability for Emotional Distress under Article 17 of the Warsaw Convention: Can it still be invoked?', *Annals of Air and Space Law*, 1992, pp.153 ff.

8. Despite the difficulty of proof of mental injury, the fear of false claims argument is not convincing in any context, for it would lead to the entire elimination of substantiated claims of severe mental injury on the mere fear of a small number of false claims.

9. See also the discussions on the matter in the Report of the First Meeting of the SGMW, Montreal, 14-18 April, 2-13 ff., in which the concept of mental injury was left out of Article 16 para 1.

10. See for a detailed description of the various tests applied in mental injury cases Carel J.J.M. Stolker and David I. Levine, 'Compensation for Damage to Parties on the Ground as a Result of Aviation Accidents', *Air and Space Law* (1997), pp.63-68. Although this article covers ground victims, the applied tests are identical for all claimants of mental injury. For an overview of English law, see H. Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries', *Cambridge Law Journal* 57(1), March 1998, pp.91-122.

11. See the proposal by Norway and Sweden to delete the entire sentence in DCW Doc. No.11.

of the carrier or its servants or agents;¹² or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.'

Defence (a) could be met if e.g. the carrier can prove force majeure in case of alleged negligence. Defence (b) does not seem to be of much use for the carrier, since the word 'solely' would force the carrier to prove full negligence of a third party, which in many cases of major or minor accidents is likely to be impossible due to the inherent complexity of most accidents. In most cases, it would therefore be more likely for the carrier to fall back on defence (a), which leaves the determination of the degree of negligence of the parties involved to the court without the 'all or nothing' risk of defence (b). In short, defence (b) does not seem to add anything extra to defence (a).¹³

The general defence allowed for carriers for all provisions relating to liability is provided by Article 20, which partly or wholly exonerates the carrier from liability if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation. The contributory negligence defence also applies to the first tier of Article 21.

The new regime will presumably make the exact scope of these defences important in the future, for they are the only barriers left to airlines between the limited liability of 100,000 SDR and unlimited liability.¹⁴ Thus the Convention could finally end the problems faced in the United States arising out of the need to prove wilful misconduct in order to break the limits of the current Warsaw Convention.

Article 21 was also preceded by discussions on practically every aspect of its wording, such as the type of liability per tier, the number of tiers, and the burden of proof.¹⁵ In its final wording, Article 21 resembles the two-tier liability systems adopted by the IATA Intercarrier Agreement and EC Council Regulation 2027/97.¹⁶

Article 28 leaves the issue of advanced payments to those entitled in case of aircraft accidents resulting in death or injury of passengers to the discretion of national law. These payments may be offset against future damage awards that the carrier may have to pay.¹⁷

The third article of the package, Article 33, introduces the fifth jurisdiction. The fifth jurisdiction gives access to the courts of the

country of principal or permanent residence of the passenger in case of damage resulting from his death or injury if certain cumulative conditions are met.¹⁸ This jurisdiction has been added to the four jurisdictions of Article 28 the original Warsaw Convention, which are now codified in article 33 para 1 of the new Convention.¹⁹

Article 33 para 2 enumerates the cumulative conditions for the fifth jurisdiction to apply and reads:

'2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by

12. The former wording of criterion (a) in Article 20 of the Draft Convention is less difficult to perceive; it read: 'The carrier shall not be liable... if he proves that (a) the carrier and its servants had taken all necessary measures to avoid the damage; or (b) it was impossible for the carrier or them to take such measures.' (derived from Article 20 para 1 of the Warsaw Convention).

13. Perhaps one of the scarce examples is an aircraft that is hit by a missile fired from an unknown source, as given in the IATA Liability Reporter, Vol.1 No.1, February 1998, p.8. But even in that case, defence (a) is sufficient.

14. Although claimants will obviously have to justify the level of claimed damages.

15. See The ICAO Journal, Number 5, 17/5/99 and e.g. the proposals made in DCW Doc Nos. 18 (India), 21 (the 53 African Contracting States), 24 (Vietnam) and 28 (IUAI). The African Contracting States proposed a regime of three tiers, with a first tier of 100,000 SDR based on strict liability; a second tier of 500,000 SDR based on presumptive liability; and a third tier of unlimited liability based on fault, see DCW Doc. No.21, p.2.

16. See the text of the IATA Intercarrier Agreement and Article 3 of Council Regulation (EC) No 2027/97 OJ L285/2-3.

17. For European carriers, advance payments are mandatory under the conditions set out in Article 5 of Council Regulation (EC) No 2027/97 OJ L285/3.

18. Article 33 para 3 sub b defines 'principal and permanent residence' as the one fixed and permanent abode of the passenger at the time of the accident and determines that the nationality of the passenger is not a determining factor for application of the fifth jurisdiction, although it can be taken into account.

19. See DCW Doc. No.4, p.14, which indicates that the four jurisdictions were derived from Article 28 of the Warsaw Convention and modified slightly by LC/30.

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air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.²⁰

In short, the following criteria must be met:

- (a) the principal or permanent residence of the passenger *and*
- (b) (the country/state) to or which the carrier operates, either on his own aircraft or on another aircraft on the basis of a commercial agreement *and*
- (c) (the country/state) in which the carrier or other carrier with which it has a commercial agreement has leased or owned premises from which it conducts its business.

The practical difficulty could lie in the exact interpretation of criteria (b) and (c) in relation to the exact nature of the agreement between e.g. a US carrier and an African carrier.

In an explanation²¹ given to Cote d'Ivoire by the United States delegate based on Article 27 of the Draft Convention (the predecessor of Article 33), the following example was given: a United States citizen flies from the United States to Paris on a United States carrier on its own code, and from Paris to Cote d'Ivoire on an African carrier with which the United States carrier has a code-sharing agreement. The ticket for the second stretch is obtained in Paris. According to the US Delegation, the African carrier would not be subjected to the fifth (United States) jurisdiction if an accident happened on the flight from Paris to Cote d'Ivoire, because the criterion of Article 27 para 2b is not met in that case.²²

However, the catch of the example lies in the fact that the ticket Paris – Cote d'Ivoire was construed as a separate agreement by the US delegation, which would in practice seem to be an exception to the more realistic scenario of the passenger buying one ticket for the entire journey. For if that had been the case, the fifth jurisdiction would have applied for the African carrier, since all criteria of Article 33 para 2 are then met on the premise that their code-sharing agreement with the US carrier qualifies as a commercial agreement. The crucial determining factor seems to lie in the scope of the phrase 'commercial agreement', which will force courts to scrutinize the nature of the agreement between carriers at hand. It could turn out that the fifth jurisdiction will apply more frequently than the cumulative criteria of Article 33 para 2 initially seem to suggest.

The United States, as one of the main proponents of the fifth jurisdiction enumerated a number of reasons for its introduction, e.g. the fairness of the right of passenger or heirs to claim in the courts of the State where the passenger lived at the time of the accident. These courts are best equipped to assess the level of damages, since they are based on the local living standards of the passenger. Furthermore, the task of determining the proper jurisdiction has become more complicated nowadays due to current inter-carrier alliances, code sharing, electronic ticketing, etc, which would be simplified by a fifth jurisdiction.²³

The main opponents to the fifth jurisdiction included France, that favoured an option clause for the fifth jurisdiction, India, the African States, Vietnam, and the Arab States.²⁴

One of the main fears expressed was that the

20. Article 33 para 3 sub a defines a 'commercial agreement' as an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air, which encompasses code-sharing and alliance agreements (*see* Report SGMW/1, 2-9). The exact scope and technical details of the different forms of cooperation between airlines could prove to be crucial in the future assessment of the question if the fifth jurisdiction applies.

21. This example was given during the Ninth Meeting of the Commission of the Whole on 19 May.

22. Note that Article 27 para 2a,b,c applied the same criteria as Article 33 of the final Convention, albeit with a different wording of criterion 27 2b which read: '*to or from which the carrier actually or contractually operates services for the carriage by air*'.

23. *See* DCW Doc No. 12 of 4/5/99 for a more detailed summary of reasons for introducing a fifth jurisdiction. In the Eighth Meeting of the Commission of the Whole of Monday 17 May, these arguments were reinforced by an explanation of the US delegation: in short, the original Warsaw Convention already contains two 'carrier' jurisdictions; non-American passengers would benefit equally; the fifth jurisdiction narrows down possibilities of forum shopping, due to the common law doctrine of *forum non conveniens*; since it only applies in a small number of cases, insurance rates will not be effected; and finally, the cumulative criteria of Article 27 bar the fifth jurisdiction for a great number of carriers. *See* DCW Doc No.27 of 12/5/99 for the US Law position on *forum non conveniens*.

24. For the option clause, *see* Article 27 para 3bis in DCW Doc No. 4 (Draft Reference Text). *See* DCW Nos 33 and 36 for the position of France, DCW Doc No. 20 (India), DCW Doc No. 23 (the 53 African Contracting States), DCW Doc No. 26 (Vietnam), DCW Doc No. 29 (Arab Member States of ACAC).

fifth jurisdiction would lead to the increase of insurance rates, since the passengers and carriers from certain countries would in effect be subsidising claims for passengers residing in countries with extreme levels of potential compensation.²⁵

2.3 Other Provisions

The Convention makes electronic ticketing and electronic airwaybills possible (*see* Articles 3 para 5 and 9), as well as arbitration on cargo disputes within the jurisdictions of Article 33 (Article 34).

Liability for damage to baggage (Article 17 paras 2-4), cargo (Article 18) and damage due to delay (Article 19) are limited by Article 22. Article 22 para 5 introduces the possibility of breaking the limits of liability for delay and baggage 'if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with the intent to cause damage recklessly and with knowledge that damage would probably result'. Notably, the liability for destruction, loss, damage, or delay of cargo is subjected to an unbreakable limit of 17 SDRs per kilogramme. This is in conformity with the regime of Montreal Protocol No.4.²⁶

Another novelty is the insurance provision of article 50, which requires contracting States to ensure that the potential liability of their carriers is adequately insured. The term 'adequately' has not been specified in terms of, e.g., the requirement of a certain minimal tier of insurance coverage per incident/accident.²⁷

3. A Final Note

The new Convention has managed to create a two-tier regime of unlimited liability for death and injury to passengers, a higher level of liability for destruction, loss, damage or delay to baggage, and has retained the current level of liability in respect of cargo. It has been signed by 52 of the participating States and will come into force after ratification by 30 States.²⁸ The Convention could prove to be a welcome initiative, if it at least leads to a universally accepted and ratified instrument which could replace the current system.²⁹

However, in case of a limited number of ratifications, the new Convention could also turn out to be just another instrument in the web of Warsaw.

The most remarkable change introduced by the

Convention is the codification of the long debated fifth jurisdiction, which in many cases will enable plaintiffs to file claims in their local courts, with the advantage of being represented by local lawyers.

Perhaps one of the only drawbacks in terms of passenger-protection is the fact that mental injury, even of a severe nature, has not survived as a separate head of compensable injury under Article 17 of the Convention despite the fact that this type of damage is gradually gaining ground in many countries.³⁰ This implies that the exact scope of the phrase 'bodily injury' of Article 17 of the Convention will have to be determined by the courts and perhaps by legislators.³¹

25. The IUIAI warned that a fifth jurisdiction could significantly drive up the exposures of air carriers, which will lead to an increase in insurance charges, which would be difficult especially to airlines of the developing world. *See* DCW Doc No. 28, p.4-5.

26. The notion of unbreakable limits was endorsed by IATA, arguing that reintroduction of breakable cargo limits would lead to costly and unproductive litigation on the sole issue of whether the air carrier's insurer or the shipper's insurer must pay for the damages, *see* DCW Doc No.9, p.5. However, a number of delegates, such as those of the United Kingdom, Sweden, Norway, the Netherlands, and Germany suggested that the limits should be breakable in cases of severe maltreatment of cargo by the carrier or its servants.

27. No amount is specified either in Article 7 of EC Council Regulation 2407/92 (O.J. L240 of 24.8.92), which makes liability insurance mandatory for European carriers, *see* J. Balfour, *European Community Air Law*, London 1995, p.36.

28. *See* Article 53 paragraph 2 sub 6.

29. In an IATA Statement of 31 May 1999, the IATA welcomed the new Convention, which builds on the IATA Inter-carrier Agreements in terms of liability regime.

30. *See* for an overview of the position of various European countries on the position on mental injury Van Gerven e.a., *Tort Law, Scope of Protection*, Oxford 1998, p. 92-97, 106-113, 152-153, 160-161, 166-168.

31. During the Conference, the EC Representative acknowledged that EC Council Regulation 2027/97 only refers to 'bodily injury' in Article 3, which he found unacceptable. This might lead to a legal clarification of the phrase by means of a European redefinition of 'bodily injury' including mental injury.