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SOME ISSUES OF THE AIR CARRIER'S LIABILITY UNDER THE FRAMEWORK OF THE 1999 MONTREAL CONVENTION

Abstract

International civil aviation is a relatively new sector compared to other modes of transport and is continuously evolving under the influence of technological advancements. The development of guiding international legal norms in this field is still in progress. One of the most significant issues in this sector is the liability of air carriers, which is regulated by the 1929 Warsaw Convention and the 1999 Montreal Convention. Similar to its predecessor, the Montreal Convention establishes the liability of air carriers for bodily injury or death of passengers, as well as for damage or delay to baggage. Article 17 of the 1999 Montreal Convention can be considered a key provision on this issue; however, there are many elements associated with it that lack a unified, consistent interpretation. Consequently, courts, both domestic and international, often deliver varying rulings on similar cases. Standardized understanding and interpretation of parts of this norm are crucial to ensure that legal processes across different jurisdictions are more consistent, which in turn will lead to fairer outcomes, help airlines assess their obligations, and allow passengers to fully understand their rights. In the rapidly developing landscape of international civil aviation, reaching a consensus on such matters not only strengthens the legislative framework but also enhances international cooperation, contributing to safety and fairness for all stakeholders.

Keywords: International Civil Aviation, Montreal Convention, "Accident," "Damage," Air Carrier Liability.

This paper aims to examine the liability of carriers, focusing on Article 17 of the Montreal Convention, and exploring the complexities arising from its interpretive nuances. It emphasizes the importance of standardized and unequivocal understanding in this context. The conventional foundations of carrier liability were established at the Warsaw Conference in October 1929, where a draft of rules governing international aviation liability was presented. These rules, known as the Warsaw Convention, came into effect in 1933[1].

Prior to the Warsaw Convention, courts relied on general principles within domestic law to resolve disputes that arose, making it necessary to unify international legal norms governing air transport. The primary goal of the Warsaw Convention was to limit the liability of airlines, thereby fostering the growth of the international aviation industry, which was still relatively new at the time[2]. Under the Warsaw Convention, airlines could avoid liability if they could prove that the damage sustained by passengers or cargo was caused by an external/independent factor, and that all necessary precautions had been taken to

[1] Shaubo Aziz, The International Air Carrrier Liability (An Analytical Study of Warsaw Convention 1929 and Montreal Convention 1999), 2017, pg. 30.
[2] Ibid.

prevent such damage. Additionally, the Convention set specific limits on compensation amounts[1]. However, over time, signatory countries grew dissatisfied with the low liability limits of the Warsaw Convention and its bias toward the industry, as it clearly favored airlines over passengers.

The solution to these shortcomings was the introduction of a new international treaty, represented by the Montreal Convention. This agreement updated, improved, and ultimately replaced the Warsaw Convention. The 1999 Montreal Convention aimed to offer better protection for passengers while creating a more equitable balance of interests between passengers and airlines[2]. The Montreal Convention applies to "international air transportation" where the points of departure and destination are located within the territories of one of the 135 signatory countries. It provides a two-year statute of limitations for claims related to injury or death of passengers and imposes strict liability on airlines for damages up to approximately $160,000 USD[3]. A claimant may exceed this liability limit if the airline cannot deny its responsibility for the claimant's injuries. According to the relevant provision of the Convention, "the carrier is liable for damage sustained in case of the death or bodily injury of a passenger, provided that the accident which caused the death or injury took place on board the aircraft or during any of the operations of embarking or disembarking"[4]. This provision is further clarified in subsequent articles, outlining the conditions under which the carrier is not held liable.

As previously mentioned, according to the 1999 Montreal Convention, for a carrier to be held liable, an "accident" must have occurred on board the aircraft or during any of the operations of embarking or disembarking.[5] There is more than one element in this article that causes divergence of opinion. The Convention does not define the terms "embarking" and "disembarking," which has led courts, in certain cases, to determine when a passenger begins the process of boarding and when they finish disembarking for the purposes of Article 17. In reviewing such cases, courts have focused on several factors, including the passenger's actions at the time of injury; any restricting circumstances affecting the passenger's movement, if such exist; the proximity of the actual boarding process; and the passenger's physical proximity to the aircraft door[6]. For instance, if a passenger sustains bodily injury while in the airport, some time before boarding, the court will likely determine that this does not fall within the meaning of the term "embarking"[7]. Typically, courts interpret the actions of boarding and disembarking narrowly, requiring proximity in both time and physical space.

In the case of *Walsh v. Koninklijke Luchtvaart Maatschappij N.V.*, the court determined that a passenger who tripped over a metal bar near the gate and fell was in the process of "embarking," bringing the incident within the scope of Article 17[8]. When discussing the scope of this article, the term "accident" is particularly important, as it has been a source of differing opinions for years, both in academic circles and in court practice[9]. The lack of an agreed-upon definition poses a problem for courts and, as a result, leads to significant variations in rulings. An "accident," as a circumstance leading to liability, according to Annex 13 of the 1944 Convention on International Civil Aviation, is directly related to the operation of the

[1] Ahmed Ibrahim al-Sheikh, The Liability for the International Air Transport Damages Compensation, According to the Warsaw Convention 1929 and Montreal in 1999, (The Arab Renaissance House for Publishing, Cairo, 2008), p. 22.

[2] Erin Applebaum, How a 2022 case modernized the protection of airline passenger rights, Reuters, 8 February 2023, available at: https://www.reuters.com/legal/legalindustry/how-2022-case-modernized-protection-airlinepassenger-rights-2023-02-08/.

[3] International Civil Aviation Organization (ICAO), Convention For the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999), Art. 35(1).

[4] Ibid, Art. 17(1).

[5] International Civil Aviation Organization (ICAO), Convention For the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999), Art. 17(1)

[6] Ramos v. Am. Airlines, Inc., 2011 WL 5075674 (W.D.N.C. Oct. 25, 2011)

[7] Ibid

[8] Walsh v. Luchtvaart, 09-civ-01803 (RKE) (S.D.N.Y. Sep. 14, 2011)

[9] Olena Bokareva, The Meaning of "Accident" under the Montreal Convention in Light of CJEU Jurisprudence. In A. Basu Bal, T. Rajput, G. Argüello, & D. Langlet (Eds.), Regulation of Risk: Transport, Trade and Environment in Perspective, 2022, pg. 157-184.

aircraft and occurs during the time when the passenger is boarding the aircraft until they disembark[1]. In the Court of Justice of the European Union (CJEU) decision of December 19, 2019, in the case of GN v. ZU, it was noted that since the term "accident" is not defined in the Montreal Convention, reference must be made to its ordinary meaning, taking into account the context and the objectives of the Convention[2]. According to the facts of the case, it concerned the liability of the carrier for bodily injury sustained by a passenger during a flight from Mallorca to Vienna, specifically burns caused by the spillage of hot coffee for "unknown reasons." Austrian Airlines (the defendant) argued that the term "accident" under Article 17 of the Convention required the presence of a danger directly related to the flight itself. However, the Court of Justice of the European Union clarified that the "ordinary meaning" of the term "accident" implies something "unforeseen, harmful, and involuntary."[3] And it points out the goals of the Montreal Convention, which represents the 'establishment of a strict system of liability for air carriers.' Furthermore, the convention is not limited solely to threats directly related to aviation: the concept of 'incident'... encompasses all situations occurring on board an aircraft and caused by objects used for passenger service, without the need to investigate whether these situations are directly caused by threats related to civil aviation."[4] This decision was made on the basis that the declared goal of the convention is to ensure the safety of passengers. Although it was not inconsistent with previous court decisions, the specificity of the interpretation somewhat complicates the situation, as if an object is used for passenger service, it may not easily meet the criteria of unpredictability and unusualness. It is also noteworthy that the issue of interpretation concerns not only 'international' (as relevant to the European Court of Justice's reference), but also the opinions of domestic courts. The case Fenton v. J. Thorley was one of the first in which the issue of the interpretation of 'incident' was addressed— the term 'incident' is not a technical term defined by specific meaning. From a general perspective, and considering legal responsibilities, it refers to an unforeseen and unexpected event resulting in damage. However, it is sometimes used to denote both the cause and the result. This underscores that it can acquire different meanings in different contexts. This was later referenced in many decisions [5].

In the case of Air France v. Saks, 470 U.S. 392, 405[6], the Supreme Court of the United States explained back in 1985 that the term 'incident' should be conceptually flexible and used in a broad context, and only after all circumstances relating to the passenger's injury have been evaluated. In this case, during the flight, the passenger (the plaintiff) experienced pressure and pain in the ear area, and after consulting a doctor, it was discovered that he had permanently lost hearing in one ear. He claimed that this was caused by a malfunction in the aircraft's pressure regulation system. The court determined that liability under Article 17 arises only when the passenger's injury is caused by an unexpected or unusual event that occurs independently of the passenger, and not when it is caused by the passenger's internal reaction to the aircraft's normal, ordinary, and expected functioning, in which case it would no longer fall under the scope of Article 17. The court added that this interpretation should be applied flexibly after evaluating all circumstances related to the passenger's injury. In reaching this conclusion, the court thoroughly examined Article 17, including the travaux préparatoires and other decisions made by different courts. It concluded that the text of Article 17 pertains to an incident that causes injury to a passenger, rather than to the injury of the passenger itself (this distinction is emphasized). It was recognized that the meaning of 'incident' is not defined in either the convention or the travaux préparatoires [7]. Thus, in determining

[1] Annex 13, The Chicago Convention on International Civil Aviation, (Chicago, 1944), pg.10.

[2] CJEU, GN v. ZU, Case C-532/18, Judgment of the Court (Fourth Chamber), 19 December 2019, § 34

[3] Ibid, § 35

[4] Ibid, § 43

[5] Fenton v. J. Thorley & Co Ltd, AC 443 (1993)

[6] U.S. Supreme Court, Air France v. Saks, 470 U.S. 392 (1985)

[7] Olena Bokareva, The Meaning of "Accident" under the Montreal Convention in Light of CJEU Jurisprudence. In A. Basu Bal, T. Rajput, G. Argüello, & D. Langlet (Eds.), Regulation of Risk: Transport, Trade and Environment in Perspective, 2022, pg. 157-184.

the meaning of the term 'incident' in Article 17, the court referred to its French legal significance, as the Warsaw Convention was drafted in French. This clarified that the term, in its French legal context, differs from its meaning in the United Kingdom, Germany, or the United States. Therefore, although the word 'incident' is often used to specifically denote an event causing injury to a person, it is also sometimes used to describe the cause of the injury, and when used in this latter sense, it is generally defined as an accidental, unexpected, unusual, or unforeseen event. The court concluded that the text of the convention implies that the passenger's injury must be caused by an unexpected or unusual event[1]. The court also emphasized that the causes of a passenger's injury differ from the causes of damage to baggage[2]. There is a separate problem in that the Georgian version of the convention uses the term 'incident' in both sections (concerning passenger and baggage damage), while the English version mentions 'accident' and 'event.' As a result, it is difficult to distinguish between them in Georgian. However, referring again to the English version, as indicated in the travaux préparatoires, a passenger's injury must be caused by an accident, because if 'event' had been used, similar to baggage damage, it could have been interpreted too broadly, significantly increasing the number of claims[3]. In this case, the court considered the legal regulations of other states participating in the convention regarding this issue and noted that European courts had interpreted the word 'incident' within the scope of Article 17 in such a way that it required the passenger's injury to be caused by an unexpected event[4]. This interpretation, given that it allows for quite broad interpretation, consequently represents a problematic issue. In this regard, the 2022 decision of the Massachusetts Superior Court in the case of Moore v. British Airways PLC was significant, as it leaned in favor of passengers on this matter[5]. In this case, the plaintiff sustained physical injuries while descending the aircraft's steps. Specifically, the last step was higher than the others, and according to the plaintiff, this difference was unexpected and unusual for him, causing him to lose his balance and fall. The court's initial interpretation was that the difference in step height did not constitute an 'unexpected or unusual' event; the plaintiff argued that it should be assessed from a subjective perspective, while the airline sought an objective evaluation of the issue. The case ultimately was decided in favor of the plaintiff, and the court emphasized that the Montreal Convention is a contract that prioritizes passengers. Therefore, the plaintiff's assertion that falling from the last step of the stairs was unexpected for him was sufficient to meet the criteria for an 'incident.' The determination of liability for the air carrier in this case differed from that in Barclay v. British Airways, where the injuries sustained by the passenger did not fall under the scope of Article 17[6]. The outcome of this case was significant as it paved the way for injured passengers to seek compensation for incidents arising from unexpected conditions, even if those conditions conformed to local legislation and industry regulations. But, most importantly, it supported the goals of the drafters of the Montreal Convention: to prioritize the safety of passengers of commercial airlines.

Conclusion

For years, there has been a debate regarding the interpretation of the terms in the relevant articles of the Montreal Convention of 1999 concerning incidents arising from threats associated with international civil aviation; for example, whether the definition of 'incident' should stem from 'risks related to civil aviation' or from events arising from malfunctions or unusual circumstances during the operation of an aircraft. A consensus on this issue is necessary because it is unfair to hold airlines responsible in situations where an accident occurs due to the passenger's actions.

[1] Ibid

[2] Karin Paulsson, Passenger Liability, according to the Montreal Convention, University of Lund, 2009, pg.30; See also: Shawcross, Beaumont, Air Law, volume 1, 2008, pg. 655 (VII)

[3] ICAO Doc. Doc.9775-EN International Conference on Air Law Volume II – Documents, p. 154.

[4] Air France v. Saks, 470 U.S. 392, (1985), p. 405.

[5] Moore v. British Airways PLC, 32 F.4th 110 (1st Cir. 2022)

[6] Barclay v British Airways QB 187 (2010)

As indicated above, the concept of 'incident' under the Montreal Convention has been examined at both international and domestic levels by the highest courts of various contracting states. It is noteworthy that the outcome of each case depended on the specific facts and circumstances involved. In each instance, it was thoroughly investigated whether the event constituted an 'incident' under Article 17 of the Montreal Convention.

The decisions of the majority of courts highlighted the significance of the so-called externality requirement—an event would fall under Article 17 if it occurred independently of the passenger. Furthermore, it was clear that there was disagreement among courts and, in some cases, among judges within the same case, who held differing opinions. This is understandable given that the interpretative possibilities of the term were quite broad. The element of fault for the term 'incident' in the 1999 Montreal Convention is not relevant. The carrier is liable in any case, and the only way to avoid responsibility, according to Article 20, is if it can prove that the damage was caused by or contributed to by the negligence or other wrongful acts or omissions of the claimant. The ambiguity surrounding the term 'incident' in Article 17 of the Montreal Convention underscores the critical necessity for a universally accepted interpretation. A clear and standardized understanding is essential for the proper administration of legal processes across different jurisdictions, which will subsequently ensure fairer outcomes, assist airlines in assessing their obligations, and enable passengers to fully comprehend their rights.

In the evolving prism of international civil aviation, achieving consensus on such issues not only strengthens the legislative framework but also promotes international cooperation, enhancing safety and fairness for all stakeholders involved.

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