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In This Issue

Michael J. Holland, a Partner in Condon & Forsyth LLP and a former Articles' Editor for the Aviation and Space Law Section, discusses the Montreal Convention, a new multilateral treaty which regulates the liability of carrier in international air transportation. Mr. Holland is a member of the Firm of Condon & Forsyth LLP in New York City and specializes in the defense of airlines.

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Montreal Convention To Take Effect On November 4, 2003

By: Michael J. Holland

The 1999 Montreal Convention,¹ created and signed by representatives of 52 countries at an international conference convened by the International Civil Aviation Organization (ICAO) in Montreal on May 28, 1999, will come into effect on November 4, 2003. Representatives of 30 countries have now formally ratified the Convention under their respective national procedures and the ratification of the United States, which was the 30th country to ratify, took place on September 5, 2003. Under Article 53.6 of the Montreal Convention, it enters into force on the 60th day following the deposit of the 30th instrument of ratification or acceptance. The United States' ratification was deposited with ICAO on September 5, 2003.

The Montreal Convention prevails over any other rules which have applied to International Carriage by Air, which have traditionally been the Warsaw Convention of 1929 and the amendments thereto including the Hague Protocol, Montreal Protocols Nos. 1, 2, 3 and 4, the Guadalajara Convention and the IATA Inter-carrier Agreements². The Montreal Convention, which applies to all "international transportation" of passengers, baggage and cargo, replaces the various air carrier liability regimes in effect around the world today with a new uniform set of rules. While a major portion of the Montreal Convention follows the language of the Warsaw Convention, the Montreal Convention makes significant changes to the scope and extent of the carrier's liability, expands the jurisdictions where the carrier can be sued, and recognizes the effect of code sharing on air carrier liability.

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Removal of Limits of Liability in Death and Bodily Injury Cases

Perhaps the most important article of the Montreal Agreement is Article 21.1, which removes the limits of liability contained in Article 22 of the Warsaw Convention with respect to carrier liability for death or bodily injury of passengers in international air transportation. Article 21.1 of the Montreal Convention provides that the carrier (an undefined term in the Montreal Convention, as it was in the Warsaw Convention) is liable without proof of fault, in the event of death or bodily injury of a passenger caused by an accident on board the aircraft or in the course of any of the operations of embarking or disembarking, for 100,000 Special Drawing Rights (SDRs) (approximately \$137,000 U.S. at today's conversion rates). See Montreal Convention, Article 21(1); Article 17. With respect to damages not exceeding 100,000 SDRs, the carrier will not be able to exclude or limit its liability for any cause. Where damages are sought in excess of that amount, which is typical in serious personal injury claims and all wrongful death actions, the carrier is liable for unlimited damages unless it can prove that the damages were not due to the negligence of the carrier or its agents or that the damage was solely due to the negligence of another party³. No punitive, exemplary or other non-compensatory damages will be recoverable, and the Montreal Convention is the sole basis upon which an action for damages sustained in international transportation can be brought⁴. While the Montreal Convention eliminates the language of Article 20(1) of the Warsaw Convention that the carrier is not liable if it took "all necessary measures" to prevent the loss, the new language in Article 21.2 of the Montreal Convention effectively provides for absolute liability on the part of the carrier, at least in the event of an aircraft accident, since it will be virtually impossible for a carrier to prove that the damage was not due to any negligence, wrongful act or omission on the part of the carrier or its agent, or that the accident was caused solely by the negligence, wrongful action or omission of

some other party. The Montreal Convention does not purport to prohibit the carrier from seeking recourse against any other person who it believes is responsible for the damage⁵. However, this right may be unenforceable under the laws of various countries where an indemnity or contribution action is precluded where the carrier's liability is based on contractual rather than tort liability.

In the case of airline accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments as required by national law to those persons entitled to claim compensation. The Convention provides that such advance payments do not constitute recognition of liability and may be offset against any amount subsequently paid as damages by the carrier or, more likely, its insurer⁶.

The Montreal Convention does preserve some of the language of the Warsaw Convention: in order to recover compensation under Article 21 of the Montreal Convention for an accident under Article 17 of the Montreal Convention, the passenger must have sustained a "bodily injury", a requirement that should preclude recovery, based on numerous decisions interpreting the "bodily injury" language of Article 17 of the Warsaw Convention, for those passengers who have sustained only mental distress or emotional injury as a result of an accident⁷. The Montreal Convention also maintains the protections afforded to the agents or servants of the carrier, assuming they are acting within the scope of their employment,⁸ and preserves the two year statute of limitations contained in the Warsaw Convention.⁹

The "Fifth Jurisdiction" for Suits against Carriers

In addition to the essentially unlimited damages now recoverable as the result of an accident resulting in bodily injury or death of a passenger, the Montreal Convention provides the passenger with an additional jurisdiction in which to bring suit. The Montreal Convention expands upon the four jurisdictions in which the carrier

could be sued¹⁰ by adding a fifth jurisdiction, i.e., a passenger can bring suit in a country in which he or she has their permanent and principal residence and in which the carrier provides services for the carriage of passengers by air either on its own aircraft or through a commercial arrangement, i.e., a code share agreement with another airline. In previous jurisprudence in Warsaw Convention cases, some United States citizens who purchased their tickets abroad for flights which did not depart from or arrive in the United States were prohibiting from suing in the United States courts. Article 33 of the Montreal Convention, adding this “fifth jurisdiction”, seeks to resolve that problem.

Liability of Operating and Contracting Carriers

Another principal feature of the Montreal Convention is its recognition of code sharing. It is an unsettled legal issue under current case law as to whether a passenger injured in international transportation on a flight operated by one carrier is limited to suing only the operating carrier, or whether a separate action against the airline who sold him the ticket, i.e., the contracting carrier, could be brought. Chapter 5 of the Montreal Convention, Articles 39 through 48, deals with this issue and provides that a passenger injured or killed in international air transportation can bring suit against both the contracting carrier, the carrier that issued the ticket and the actual carrier, i.e., the carrier who performed the transportation. While a passenger or his representative is only entitled to one recovery as a result of injuries or death sustained in an accident, the suit may be brought against either the operating carrier or the contracting carrier.

Baggage, Cargo and Delay Claims

The Montreal Convention also amends, to a lesser extent, the Warsaw Convention provisions concerning claims for delay, loss of baggage and cargo claims.

With respect to delay of passengers or baggage, the airline remains liable under Article

19 of the Montreal Convention. However, the liability limit of \$8,300 under the Warsaw Convention for delay of passengers has been reduced to 4,150 SDRs (approximately \$5,685). The “all necessary measures” defense remains viable for delay claims, whether for delay in the transportation of passengers, their baggage, or delay of cargo.

With respect to baggage, the airline’s liability for lost, damaged or destroyed baggage, whether the baggage be checked or unchecked, is limited to the sum of 1,000 SDRs per passenger (approximately \$1,370 U.S.) unless the passenger has made a special declaration at the time the baggage was handed over to the carrier and paid a supplementary sum. This limit of liability is a change from the previous baggage liability scheme imposed by the Warsaw Convention, where the liability of the carrier was premised on the weight of the checked baggage.

Article 31 retains notice of claim requirements which were present in the Warsaw Convention; claims for damage to baggage must be made within seven days from the receipt of the baggage and claims for delay must be made within 21 days after the baggage has been placed at the disposal of the baggage.

The Montreal Convention also makes significant changes, which had been largely implemented by Montreal Protocol Nos. 3 and 4, with respect to cargo. Article 4 recognizes the electronic age in the handling of cargo and simplifies the required paperwork. A formal air waybill is no longer required and any means which preserves a record of the carriage may be substituted for a paper air waybill.¹¹ The air waybill or other document indicating the record of carriage must indicate only the place of departure, the place of destination and an indication of the weight of the consignment¹². The carrier’s liability for lost or damaged of cargo is limited to 17 SDRs per kilo (approximately \$21.00 U.S.) and these limits, as they are under Montreal Protocol No. 4, are unbreakable. Thus, there will be no litigation with respect to wilful

misconduct in cargo cases. The carrier is exonerated from liability if it proves that the damage to the cargo resulted from the cargo's inherent defect, defective packing, act of war, or act of public authority carrier out in connection with the entry, exit or transit of the cargo¹³. As with baggage, timeframes are required for timely notice of complaint. 14 day notice of claim is required in cases of damage to cargo and 21 day notice is required in the event of delay in cargo.

Article 22 of the Montreal Convention also provides for pro-rata with respect to loss, damage, destruction or delay of cargo. The weight to be taken into consideration in determining the amount of the carrier's liability is limited by the total weight of the packages concerned. However, if the damage, destruction, loss or delay affects the whole cargo, then the liability is based on the weight of the total consignment rather than the individual package.

Wilful Misconduct Exception is still Applicable in Limited Circumstances

While the wilful misconduct exception for limited liability is dropped for cargo, and there is unlimited liability for damages sustained by passengers as a result of accident or death in international transportation, the only vestige of the old Warsaw Convention "wilful misconduct" requirement remains in cases involving delay (Article 19 of the Montreal Convention) and baggage (Article 22.2 of the Montreal Convention). The limitation on liability for damages caused by delay and for loss, destruction, damage or delay of baggage is not applicable if it is proven that the damage was sustained resulting from an act or omission of the carrier or its agents "done with intent to cause damage or recklessly and with knowledge that the damage would probably result"¹⁴. While these factual situations may be quite rare, it does offer a glimmer of possibility for avoidance of the limitations on liability for delay of passengers and baggage and for the destruction, loss, damage or delay of baggage.

Observations on the New Liability Regime of the Montreal Convention

We are advised by the International Air Transportation Association (IATA) that they are in the process of reviewing standard conditions of carriage and the requisite notices that must be given to the passenger as to the scope of application of the Montreal Convention pursuant to Article 3¹⁵. We also understand that IATA is in the process of revising the standard air waybills issued by carriers for cargo. While it is obviously too early to see what the practical effect of the Montreal Convention will be, since it has not yet entered into effect, several observations are in order:

- (1) The Montreal Convention is the most sweeping revision in 75 years to the international air transportation liability regime. The Montreal Convention is a comprehensive and extensive overhaul of the Warsaw Convention. Its primary features are that it eliminates the limitation on liability for passenger death and personal injury claims, gives the carrier virtually no defenses to passenger claims which arise as a result of an "accident" and allows the passenger additional jurisdictions within which to sue the carrier.
- (2) The Montreal Convention also realizes the commercial realities of code sharing in that it allows suits against both the contracting carrier and the operating carrier as a result of claims for bodily injuries or death sustained by passengers.
- (3) The Montreal Convention modernizes the procedures with respect to transportation of cargo.

- (4) The Convention recognizes legislation in several countries, primarily in Europe, which require advance payments in the event of aircraft accidents.
- (5) The Convention also realizes the effect of inflation and allows the limits of liability described in Articles 21 (compensation in death or injury of passengers), 22 (limits of liability in relation to delay, baggage and cargo) and 23 (conversion of monetary units into the SDRs) to be reviewed every five years following the date of entry into the force of the Convention.

Conclusion

The Montreal Convention heralds the single biggest change in the international aviation liability regime since the diplomatic efforts in the mid-1920's which resulted in the enactment of the Warsaw Convention in 1929. While it will take several years for judicial decisions interpreting the Montreal Convention to wind their way through the courts, and while the aviation industry may grapple with interpretation of some of the language in the Montreal Convention, there can be no doubt that there are big changes ahead in the field of aviation law.

Endnotes

1. Official Title: Convention for the Unification of Certain Rules for International Carriage by Air, *reprinted in CCH Av.L. Rep.* ¶ 27,400, p. 24, 201 *et seq.*
2. Montreal Convention, Article 55.
3. Montreal Convention, Articles 21.2 (a) and (b).
4. Montreal Convention, Article 29.
5. Montreal Convention, Article 37.
6. Montreal Convention, Article 28.
7. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).
8. Montreal Convention, Article 35.
9. Montreal Convention, Article 35.
10. "In the territory of one of the States parties, either before the court of the domicile of the carrier, or its principal place of business, or where it has a place of business through which the contract of carrier was made or at the place of destination". Montreal Convention, Article 33.
11. Montreal Convention, Article 4.2.
12. Montreal Convention, Article 5.
13. Montreal Convention, Article 18.2(a)-(d).
14. Montreal Convention, Article 22.5.
15. "The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay". Montreal Convention, Article 3.4.