



NALSAR UNIVERSITY OF LAW HYDERABAD

Presentation

On

MONTREAL CONVENTION 1999

by:

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INNOVATIONS

- ❑ The Montreal convention has been created to modernize the rules on passenger liability and to replace the Warsaw Convention to try to once again create uniformity among states' rules.
- ❑ The most significant achievements of the Montreal Convention in comparison with the former convention and its amendments **are the following:**

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- **It embodies a two-tier liability system**, without any maximum limit, for death or wounding of the passenger with strict liability up to 100 000 SDR **(an on today 09-02-2020 INR is 98,44,289.91)** and above the amount a presumptive liability.
 - **The Convention is a separate and new instrument, which consolidates the substance of the Warsaw system and comprising all of the former instruments into one uniform.** The Montreal Convention will replace the patchwork of different conventions and protocols and prevail over it, which will exclude conflicts of law.

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- **There are six official languages**, so the Convention is authentic in French, Arabic, Chinese, English, Spanish and Russian.
 - **The Convention removes the formalities of documents and permit electronic data documents** and there is no longer any relation between the form of the document and the liability regime.

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- **A fifth jurisdiction is introduced** which allow claims in the jurisdiction where the passenger had his permanent residence and to or from which the carrier operates service for the carriage of passenger by air.
 - **There is a requirement for adequate insurance** and that the air carrier shall be able to furnish evidence of such insurance.
 - **In case of an accident the carrier shall supply advance payment of compensation** to the passenger or their surviving family **to meet their immediate economical need.**⁴⁸

SCOPE

- ❑ This Convention **applies to all international carriage** of persons, baggage or cargo performed by aircraft for **reward**.
- ❑ It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

INTERNATIONAL CARRIAGE

- ❑ **Meaning**
- ❑ **Place of departure and** means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

APPLICABILITY

- ❑ The Montreal Convention is applicable to all international flights carrying passenger, baggage or cargo. The expression international flights means any carriage with the place of departure and the place of destination within two different State Parties, whether or not there is a break in the carriage, or within one State Party if there is a agreed stopping place within another state even if the last state is not a State Party.

UNDIVIDED CARRIAGE

- ❑ A carriage, which is performed by several successive carriers, is to be seen as one undivided carriage if the parties regarded it as a single operation. It does not lose its international character even if one or several of the transports are to be performed entirely within one state. Under these circumstances, action can only be brought against the carrier who performed the carriage at the time of the accident.

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- ❑ The Montreal Convention embraced the provision in the Guadalajara Convention with a separation between the **contracting carrier** and the **actual carrier**. The Convention still applies for both carriers and **the liability shall be divided** according to the Convention.

 - ❖ **NOTE:** A “**contracting carrier**” is a **carrier** which, as a principal, makes a **contract for** international carriage by air **with a** passenger, whilst another **carrier** (the “**actual carrier**”) performs the whole or part **of** the carriage by virtue **of** authority from the **contracting carrier**.

DOCUMENTATION

- ❑ Regarding passenger flight there has to be an **individual or collective document of carriage**. This document must contain an indication of the place of departure and destination or an agreed stopping place. The passenger shall also be given written notice about that where this Convention is applicable it governs. Non-compliance with the rules shall not affect the contract of carriage and it shall however, be subject to the rules of the Montreal Convention of 1999.

LIABILITY

ARTICLE 17- DEATH AND INJURY OF PASSENGERS

- ❑ Passenger liability is regulated in article 17 and it reads as follows:
- *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.*

REQUIREMENTS OF ARTICLE 17

- There must have been an accident which caused
- death or bodily injury,
- while the passenger was on board the air craft or in the course of embarking or disembarking

OBSCURITY CONCERNING ARTICLE 17

- ❖ **There has always been obscurity concerning the article when it comes to:**
 - ❑ what constitutes an accident,
 - ❑ what types of injuries are contemplated by the term bodily injury and
 - ❑ what is the meaning of embarking and disembarking?

INTERPRETATION BY COURTS

- ❑ **To find a solution to each problem the courts have to interpret the terms.** An interpretation of a treaty shall be made according to article 31 in the Vienna Convention. The interpretation shall be made by examining the ordinary meaning of the treaty in its context and in the light of the object and purpose.

PRESUMED FAULT-BASED LIABILITY OF THE CARRIER

- ❑ **Article 17** in the Montreal Convention is dealing with the carrier's responsibility stating that *the carrier is liable*.
- ❑ The **liability is based on a two-tier liability**, inspired by the Japanese Agreement.
- ❑ According to article 21 **strict liability** is applied for damage not exceeding 100 000 SDRs. Strict liability imply that **the carrier is liable for damage irrespective of negligence**.
- ❑ **The carrier should not be able to exclude or to limit his liability.**

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- ❑ Consequently, it is enough for the claimant to **prove** that there has been an **accident, which caused death or injury, regardless of fault**. Concerning damages that exceed the 100 000 SDR limit the Convention applies presumed fault-based liability of the carrier. **This implies that the carrier is responsible for his negligence but the plaintiff does not have to prove negligence. Instead, negligence is already presumed**

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- ❑ **The carrier is though entitled to exonerate himself “if” he can prove that:**
the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents, or that the damage was solely due to the negligence or other wrongful act or omission of a third party. This second tier, for damages exceeding 100 000, SDRs is unlimited.

ESCALATOR CLAUSE

- ❑ **The Convention includes an escalator clause concerning the limit liability.**
Every fifth year the limits shall be **reviewed**, by reference to an inflation factor, which corresponds to the accumulated rate of inflation since the last review. If the inflation factor exceeds 10% there shall be made a revision of the limits of liability. All states shall be notified and if the majority does not disapprove, it shall be affective six month after the notification.

DAMAGE SUSTAINED

- ❑ The expression *damage sustained* indicates that it refers to compensatory damage and therefore excludes punitive or exemplary damages. **The article refers to passengers**, which mean a person who has entered into an agreement for international carriage with the carrier

NO LIMITING THE LIABILITY BY CONTRACT

- ❑ The provisions of the Montreal Convention are mandatory and the carrier cannot limit its liability by a contract, but after the accident has occurred the carrier has the possibility to negotiate a settlement with the claimant.

CARRIER CAN BE WHOLLY OR PARTLY EXONERATED IF PROVED

- ❑ The carrier can be wholly or partly exonerated if he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.**
- ❑ If another person than the passenger claims compensation for death or injury of the passenger the carrier shall likewise be exonerated to the extent that it is proved that the passenger caused or contributed to the damage by negligence or other wrongful act or omission.**

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- ❑ It is important to note that this provision apply even when it concerns the strict liability, within the first tier, of the carrier according to article 21. The burden of proof is on the carrier.
 - ❑ **There are only a few cases** in which negligence has been recognised to partly or complete exonerate the carrier.
 - ❑ **CASES:** Among those are cases when a passenger was walking around even though the **fasten seat belt sign** was on, when a **passenger was killed by a propeller** when using the wrong exit, and when a **passenger fell from the boarding ramp when waving to a family member.**

OTHER PROVISION EXCLUSIVE REMEDY

- ❑ In carriage of passenger, all actions for damage, however founded, shall only be brought subject to the conditions and limits of liability under the Montreal Convention.
- ❑ The effect of this provision has been a matter of some controversy and widely discussed and **it raises two issues**. If the **carrier is liable** under the Convention must such claim be based on the terms of the Convention or is it approved to take action under local law instead?

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- **The other issue is whether or not the rules in the Convention is exclusive concerning all carrier's liability in international carriage which would consequently not allow a claim under local law even if it the damage sustained does not meet with the requirements to constitute an article 17 accident or injury?** Cases have been solved by examining the provisions and the purpose of the Convention. Both the Supreme Court and the House of Lords have solved the issue.

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- ❑ **In the American case, El Al Israel Airline v. Tseng** the Supreme Court concluded that a passenger is precluded from maintaining an action for personal injury damage under local law when the claim does not satisfy the conditions for liability under the Convention.
 - ❑ **The effect is that if the injury occurred on board an aircraft or during embarking or disembarking, the passenger is without remedy against the carrier unless it can be established that an article 17 accident occurred and resulted in death or bodily injury.**

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- ❑ **Thus, the only time the carrier is responsible for compensation** of an injury caused to a passenger on an international flight **is when it constitute an article 17 claim.** Whether or not it is a claim under article 17, **the claimant is not allowed to maintain an action under local law against the carrier.**

INSURANCE

- ❑ **State Parties shall require their carriers to maintain an adequate insurance covering the liability under this Convention.** The carrier can be asked to furnish evidence of the adequate insurance by the State Party into which it operates.
- ❑ **Due to the carrier's unlimited liability, it is essential to get an unlimited insurance as well,** which the airline can afford. This might be a problem for the carriers.

JURISDICTION

- ❑ The Montreal convention has extended the available forums for litigation.
It created a fifth forum for death or injury of a passenger.
- ❖ **An action for damage must be brought**
 - before court in the territory of one of the State Parties,
 - either before the court of the domicile of the carrier or
 - of its principle place of business, or
 - where it has a place of business and where the contract also has been made or before the court at the place of destination.
- ❑ **The new approved jurisdiction is that an action can be brought before a court in the territory of a State Party where the passenger has his permanent resident**

LIMITATION PERIOD TO CLAIM COMPENSATION

- ❑ A claim shall be made **within two years** from the time when the aircraft **arrived** at the destination, or from the date when the aircraft **ought to have arrived**, or from the date on which the carriage stopped

EMBARKING & DISEMBARKING

- ❑ The Montreal Convention **applies for all** international air transport. However, to have a cause of action against the carrier in case of an injury the accident must take place on board the aircraft or in the course of embarking or disembarking.
- ❑ A passenger can have an international ticket but until he embarks the aircraft and after he disembarks, **his claim will not be under the Montreal Convention but instead under other laws.**

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- ❑ **It is not a problem to determine if the accident took place on board the aircraft.** As long as the passenger was located inside the aircraft when the accident occurred, it is enough. The issue is whether it took place in the course of embarking or disembarking. There is nothing in the Convention that defines the **terms and it is a question to be solved by the court on the facts of each case.**
 - ❑ **It is most difficult to formulate a clear rule of what is embarking and disembarking in** the modern condition of air travelling. Airports are of very varied size and even the procedures differs both over time and between airports.

CASE LAW

- ❑ **There have been several civil law cases solved by determining the place of location.** The case law seem to be consistent.
- ❑ It has been taken into consideration if the passengers were still in the zone exposed to the risk inherent in aviation operations. Other aspects has also been considered, as whether the passenger was under the charge or control of the carrier or his AGENT.

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- ❑ A passenger **injured inside the terminal** before the announcement of boarding **was considered to be outside article 17** as well as a passenger that had reached the baggage claiming area.
 - ❑ **Whilst article 17 applied when a passenger injured himself on the steps of the terminal building** on the way to board the aircraft and as well when a passenger was injured on the apron by a baggage transport.

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- ❑ **EXAMPLE:** A passenger in a wheel chair was injured while an agent transported him up an escalator in the terminal. **This was held to be in the process of embarking** as the boarding had already begun.
 - ❑ **EXAMPLE:** In another occurrence, a passenger was hurt on a walk band in the terminal after landing and **this was held not to be in the course of disembarking.** There are though circumstances that can broaden the interpretation, as if a minor travels alone and is escorted by the carrier.

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- ❑ **The rich case law from the United States** suggests that reliance on only one or two factors alone is unwise. A case, Day v. Trans World Airlines, solved by the United States Court of Appeal has been seminal on what constitutes embarking and disembarking **and used by courts in other states as well.**
 - ❑ **CASE LAW:** In 1973 at an airport in Athens, Greece, **two terrorists hurled three grenades and fired a small-arm into** a line of passenger who were preparing to board a Trans World Airline to New York. Three persons were killed and many others were injured. Several of the injured claimed compensation from Trans World Airlines **under the Warsaw Convention.**

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- ❑ **The court had to decide** if Trans World Airlines should provide indemnification for the death and injuries. **It was undisputed that the terrorist attack was considered an accident** and the problem to be solved was if the injuries were sustained in the course of embarking or disembarking.
 - ❑ **The Appeal Court later reformulated the test in to a quartet. (Refer: Next Slide)**

TEST

- ❑ The Appeal Court later reformulated the test in to a quartet:
- ❑ 1. **What was the activity of the passenger** at the time of the accident;
- ❑ 2. **What control or restrictions did the carrier** place on the passenger's movement;
- ❑ 3. What was the **imminence of their actual boarding**; and
- ❑ 4. **What was the physical position of the passenger** to the terminal gate?

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- ❑ **CASE:** In another case, **concerning a terrorist attack** at Rome Airport, **article 17 was not held to apply**. This case differed from Day in that the **passengers had only checked in but not gone through the security checkpoint but was still in the public areas of the airport**. The court walked through the tests applied in Day. Thus, the closer the passenger was physically to the aircraft and in time to departure or arrival and the more the passenger was acting under the direction of the carrier the more likely it is that the accident shall fall under the Convention.

ACCIDENT

- ❑ **PROBLEM:** According to article 17, in the Montreal Convention of 1999, the damage sustained by a passenger has to be caused by an *accident* for the carrier to be liable.
- ❑ **There is no definition to the term *accident* and the Conventions give no further explanation when it comes to what would constitute an accident.**
The lack of an unequivocal term has been a problem for **courts to solve** and judgements regarding what constitutes an accidents differs widely.

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- ❑ **GENERAL MEANING OF 'ACCIDENT':** “something which happens unexpectedly and unintentionally, and which often damages something or injures someone.
 - ❑ In a case from United Kingdom, *Fenton v J. Thorley*, one of the judges, Lord Lindley, expressed his opinion on the meaning of the term accident. He said: *“the term accident is not a technical term with a clear defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or the hurt itself would certainly be called an accident. The word accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.*

WHAT MONTREAL CONVENTION SAYS?

- ❑ The term accident in the Montreal Convention **gives fault no relevance. It does not matter who was to blame for the accident. Regardless, the carrier is liable in all circumstances. The only way for the carrier to exonerate himself is, in accordance with article 20,** if he is able to prove that the damage was caused or contributed to by negligence or other wrongful act or omission of the person claiming compensation.

THE RULING OF AIR FRANCE V. SAKS

- ❑ The term accident has been a major problem and been widely discussed by courts. The interpretation has shifted over the years. Saks, the leading case on the subject, solved by the US Supreme Court in 1985, has given some clarity as to what is required to constitute an article 17 accident.

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- ❑ **Before the ruling of Saks** there had been two similar cases where the court had struggled to define the term accident. Those ruling later lead to Saks.
 - ❑ **In Warshaw v. Trans World** the injured was **denied compensation** on the ground that the injury was caused during normal operations of a properly functioning aircraft on an uneventful and ordinary flight.
 - ❑ In the other case, **Desmarines v. KLM**, the court stated that an accident was an unusual or unexpected event or happening that took place **not according to the usual course of things.**

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- ❑ *In Air France v. Saks* it was a female passenger flying from Paris to Los Angeles. The flight went smoothly in all respects, but during landing the female passenger **felt severe pressure and pain in her left ear**. Shortly after the flight, when the pain remained, she contacted a doctor who concluded that she **had become permanent deaf in her left ear**. She filed a suit against the airline company, under article 17 Warsaw Convention and the Montreal Agreement, alleging that her hearing loss was caused by negligent maintenance and operation of the pressurization system. **The claimant had to prove that the injury was caused by an accident within the meaning of article 17. Evidence indicated that the pressurization system had functioned properly.**

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- ❑ The US Supreme court concluded that **liability arises under article 17 if the injury is caused by an unexpected or unusual event or happening that is external to the passenger.**
 - ❑ The court concluded that **no accident had occurred** in this case because the **female's injury had resulted from her on internal reaction to normal operation.**

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- ❑ **CASE: A passenger flying with Olympic Airways had requested for a seat away from the smoking area because the passenger suffered from asthma and was sensitive to second hand smoke.** The seat he got was only three rows away from the smoking section. When the smoking increased during the flight the passenger requested a flight attendant to be moved, but he was denied. **The passenger died on the aircraft and his wife filed a suit.**

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- ❑ **The court had to determine if the flight attendant's failure to move the passenger, which was inaction, could be equalized with an accident in article 17.**

Furthermore, they had to determine if the passenger's death resulted only from his own internal reaction to the normal operation of an aircraft and consequently not be regarded as an accident.

- ❑ The relevant inquiry under Saks is whether there is an unusual or unexpected event or happening. The rejection of an explicit request for assistance is enough to meet with the requirement of an event of happening, under the ordinary definition of those terms as something that happens or takes place, **thus it is enough to constitute an accident under**

Saks.

AVIATION RELATED RISK (PASSENGER TO PASSENGER)

- ❑ In **Brandi Wallace v. Korean Air** a female passenger was sexually assaulted by another passenger during a flight with Korean Airlines. The female was seated in a window seat with two male passengers beside her. She had fallen asleep during the flight and woke up because the male passenger next to her had unbuckled her pants, unzipped and unbuttoned her shorts and placed his hand inside her underpants and fondled her. She complained about the assault to a flight attendant and was reassigned another seat. Later the female brought action against Korean Airlines alleging that they were liable under the Warsaw convention.
- ❑ **HELD: Taking into Sak's Ruling "unexpected" unusual event" or happening external to passenger" constitutes 'Accident' and was liable.**

TERRORIST ATTACKS

- ❑ Terrorist attacks are other sources of accidents which **the carrier can be held liable for.**
- ❑ It is clear that acts of terrorism and hijacking are events which are unusual and unexpected and external to the passenger, **consequently these events will meet with the requirements in Saks.**

BODILY INJURY

- ❑ Article 17 as we have seen states that the “*carrier is liable for damage sustained in case of death or bodily injury of a passenger*”. This differs slightly from the original text in the Warsaw Convention, which stated that “*the carrier is liable for the damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger*”. There is no problem when it is a case of death but instead the main problem is to determine what type of injuries are contemplated by the term *bodily injury*. This term has stayed the same through the development on passenger liability. There is nothing in the Convention to clarify the term.

❑ **CASE:** *Burnett v. Trans World Airlines and Rosman v. Trans World Airlines*

represented the first camp. Both cases involved the same hijacking of a Trans World Airline aircraft by the Popular Front for the Liberation of Palestine. The aircraft was on the way from Athens to New York when it was hijacked and taken to the dessert of Amman, Jordan. The passengers were held hostages for six days in a cramped quarter where they also were exposed to extreme temperature and without regular food and drinks. **Claim was: Emotional Injury resulting from Bodily Injury. Liable.**

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- ❑ **CASE:** *Eastern Airlines v. Floyd*, solved by the Supreme Court of the United States, was seminal on determining recovery for damage. In 1983 an aircraft from Easter Airlines departed from Miami bound for Bahamas. Shortly after the take off, one of the engines lost oil pressure and was shut down by the staff. The pilot turned the aircraft around to go back to the Miami Airport. Soon thereafter, the other two engines failed due to loss of oil pressure. The aircraft rapidly began to lose altitude and the passengers were informed that they had to make a forced landing in the Atlantic Ocean. Fortunately, the crew manage to start one of the engine and they were able to land safely on the Miami airport.
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- ❑ A group of passengers filed a lawsuit against the Eastern Airlines each claiming damages solely for mental distress. The airline conceded that the event constituted an accident but that there was a lack of physical injury, which was also a condition for liability. **However, the Court never expressed their view as to whether passengers can recover for mentally injury that is accompanied by physical injuries.**

FINAL RULING

- ☐ No recovery allowed for emotional distress
- ☐ Recovery allowed for all emotional distress, as long as bodily injury occurs
- ☐ Emotional distress allowed as damages for bodily injury, but distress may include distress about the accident; and
- ☐ Only emotional distress flowing from the bodily injury is recoverable.

THANK YOU

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