The Montreal Convention: The scram jet of aviation law
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“The Montreal Convention is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention.\(^1\)

The Warsaw Convention became law during the infancy of inter-continental aviation, and it soon proved itself incapable of adequately regulating liability issues in the burgeoning jet age. Thus, in an effort to raise the amount awardable to injured passengers, supersede the Warsaw Convention’s reliance on the out-dated gold standard, and update the rules with respect to the movement of cargo, the signatory nations were ultimately provided with additional instruments, such as the Hague Protocol (1955); the Guadalajara Convention (1961); the Guatemala City Protocol (1971); the 1975 Additional (Montreal) Protocols, numbers 1-3; and Montreal Protocol Number 4.

Not all states executed all of these additional instruments, which resulted in a hodgepodge of laws that became known collectively as the Warsaw “system.” This system was frustrating for the injured passenger, as well as the courts, because it was frequently difficult to determine which rules applied to a given flight, and what damages were awardable.

As the Court of Appeals for the Second Circuit describes in *Chubb & Son, Inc. v. Asiana Airlines*:

> [t]he Warsaw Convention “system” includes the various laws, treaties and individual contracts governing the international transportation of persons, baggage, and goods by air. No one treaty or contract governs the relationships of one State with other States. A single State might be bound to one version of the Warsaw Convention with one State, another version of the Warsaw Convention with another State, a separate bilateral treaty with another State, and a separate contract with a private party.\(^2\)

The Montreal Convention\(^3\) was ratified by the United States Senate on November 4, 2003 thereby entering into our law.\(^4\) As a ratified Federal Treaty, the Montreal Convention is the “Supreme Law of the Land,” and it preempts all State and Federal law to the contrary.\(^5\)

Prior to the ratification of the Montreal Convention, a controversy involving a party injured on an international flight would most likely result in an application of the Warsaw Convention.\(^6\) Under Warsaw, a passenger who sustained personal injury was limited to recovering a maximum of 125,000 gold francs (which approximates US$10,000), if the accident which caused the injury took place on board the aircraft or while embarking or disembarking.\(^7\)

Given the confusing patchwork of rules established by the Warsaw Convention, it was only a question of time before a new Convention was ratified. Moreover, this new Convention would necessarily reflect the changing goals of the international community vis-à-vis air carriers and their passengers. The Montreal Convention filled this role:

> Whereas the “primary aim of the contracting parties to the [Warsaw] Convention” was to limit “the liability of air carriers in order to foster the growth of the commercial aviation industry, the contracting parties to the Montreal Convention expressly approved that treaty because, among other reasons, they recognized “the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.” Montreal Convention, pmbl. The Senate has similarly recognized that “the new Montreal Convention represents the culmination of decades of efforts by the United States and other countries to establish a regime providing increased protection for international air travelers and shippers.” S. Exec. Rep. No. 108-8, at 2 (2003). Hence, commentators have described the Montreal Convention as a treaty that favors passengers rather than airlines. See, e.g., Thomas J. Whalen, *The New Warsaw Convention: The Montreal
The Montreal Convention supersedes the Warsaw Convention as and between states that are party to both the Montreal and Warsaw Conventions. Consequently, Courts have called the Montreal Convention the “successor” to the Warsaw Convention. However, the Warsaw scheme remains, and governs in cases where a controversy involves States that are signatories to the Warsaw Convention, but not the Montreal Convention. That having been said, the aim of the signatories to the Montreal Convention was to phase out the Warsaw scheme and have the Montreal Convention ratified by all countries engaged in international airline travel and trade.

The Montreal Convention differs from the Warsaw Convention in several respects. For example, under the Warsaw system, the French text controlled over that of the English text. However, under the Montreal Convention, in keeping with its goal of rationalizing international aviation law, the English text of the Montreal Convention is equally authoritative to the French text. As such, when applying the Montreal Convention, American courts will no longer be forced to resolve any ambiguities in the text by referencing French dictionaries.

Similarly, the Montreal Convention finally and authoritatively terminates the Warsaw Convention’s reliance on the antiquated gold franc as a method of compensating injured passengers. The new Convention eliminates the gold standard and utilizes the system of Special Drawing Rights (SDRs), the value of which is to be determined by the International Monetary Fund. Moreover, Chapter III of the new Convention creates a two-tiered damages schema with respect to passenger compensation.

In Article 17, the Convention first establishes the necessary elements for recovery by an injured passenger as follows:

1. 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.

Thus, once the passenger has proven that he sustained bodily injury due to an accident while on board, boarding, or disembarking an aircraft, under Article 20 of the Montreal Convention, the passenger may recover as follows:

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or,

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Thus, under the Montreal Convention, a carrier is strictly liable for bodily injury in the amount of 100,000 SDRs (currently approximately US$150,000). In order to recover an amount up to 100,000 SDRs, all that the passenger need establish is that an injury occurred as discussed above. Under Article 20 of the Convention, however, the carrier is entitled to avail itself of the defense of exoneration, under which it may prove that all or some of the damage was caused by the passenger’s own negligence:
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 carrier shall be wholly or partially exonerated…

Should a carrier be able to establish exoneration, it is entitled to a set off of all or some of the amount otherwise awardable to the plaintiff. A typical example of such a situation would be where the passenger sustains injury due to his or her refusal to wear a seat belt when the seat belt sign is illuminated.

Interestingly, the Warsaw Convention allowed the carrier to avail itself of the “due care” defense. As the U.S. Supreme Court put it while examining the Warsaw Convention:

After a plaintiff has established a prima facie case of liability under Article 17 [of the Warsaw Convention] by showing that the injury was caused by an “accident,” the air carrier has the opportunity to prove under Article 20 that it took “all necessary measures to avoid the damage or that it was impossible for [the airline] to take such measures.”

Under the Montreal Convention, however, this defense is not available to the carrier until the first 100,000 SDR limit is exhausted. After the exhaustion of the 100,000 SDR initial tier of damages, a carrier may plead and prove that it is not responsible for any further damages due to the fact that the accident at issue was caused by the negligence of a third party.

All of the above is a significant departure from the 125,000 gold francs (approximately US$10,000) limitation placed on damages under the Warsaw Convention.

Conclusion

In conclusion, just as the technology in the field of international aviation has changed from internal combustion propeller-driven engines to jet, and possibly some day soon scram-jet engines, so too the law which governs international aviation has changed. Like technology, the Montreal Convention does not necessarily make everyone’s life easier; but like technology, the Montreal Convention is here to stay.

6 Formally known as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929.
9 See, e.g., Hosaka v. United Airlines, 305 F.3d 989 (9th Cir. 2002).
12 See, e.g., Hosaka v. United Airlines, 305 F.3d 989 (9th Cir. 2002), in which the Court is compelled to grapple with a perceived ambiguity in the Warsaw’s Convention’s language by referencing a French dictionary.
13 This paragraph will undoubtedly result in significant litigation with respect to the meaning and application of the various italicized terms. While an analysis of these issues is beyond the scope of the current article, suffice it to say that a Court will most-likely interpret these provisions similarly to the way in which similar Warsaw Convention provisions were interpreted. See, www.state.gov/e/eb/rls/rm/2003, John R. Byerly, Deputy Assistant Secretary for Transportation Affairs, Testimony Before the Senate Foreign Relations Committee, Washington, D.C., June 17, 2003; see also, Wilson Elser Aviation Newsletter, November 2005, Ground Handling Services and the Warsaw and Montreal Conventions, Franklin F. Bass and Adrienne N. Kitchen.

