

Air Carrier's Liability in Cases of Delay

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1. Introduction

In comparison with other forms of transportation, aviation has contributed the most towards the shortening of travel time. The single most important reason for choosing an airplane as a means of transportation, regardless whether it is for the carriage of passengers or cargo, is to save time. Given the fact that time is a decisive factor in the choice of air transport, the delay of a flight can result in considerable amount of damage. Thus, uniform rules to govern this important area have become indispensable.

Both the Warsaw and the Montreal Conventions address the liability of carriers for delay, however, due to Article 19's equivocal character; the application of the article has proved to be far from unproblematic in practice. This contribution focuses on the carrier's liability in cases of delay and highlights the challenges of the unification of Private International Air Law taking into account the jurisprudence that has interpreted Article 19's ambiguous terms such as 'delay', 'carriage by air' and 'damage'.

2. Examples of possible causes of 'delay' in air transport

Prior to the analyses of the rules governing delay in air transport, it is important to consider the possible causes of delays.

Air travel is heavily affected by the meteorological conditions which can result in the closing of an airport to air traffic or diversion of a flight to an alternative airport with improved weather conditions¹. Other important causes can be attributed to equipment failure, which normally results in an overhaul or a check-up, air traffic congestion as well as correction of defects in the administrative process of flight i.e.: check-in of luggage and check-in of persons². Another example could be when a carrier has to wait for another flight with which it must connect and receive a certain number of passengers. The author shares the view of *Mapelli*³ in that any systematizing attempt as to the possible causes of delay is deemed to be unsuccessful given the unique characteristics of each individual case of delay.

¹ Enrique Mapelli Y Lopez, *Air Carrier's Liability in Cases of Delay*, McGill Annals of Air and Space Law (1976) p.112

² *Ibid.* p. 113-114

³ *Ibid.* p. 115

3. The distinction between denied boarding and delay

In order to highlight the importance of delay it is vital to establish the relationship between delay and denied boarding. The conventional system exclusively deals with *misfeasance* which indicates the faulty and inadequate performance of the carriage.

In the case of denied boarding, the flight is performed but the passenger who is denied boarding is not transported. Thus, denied boarding amounts to non-performance (*non-feasance*) of the contract of carriage by the carrier which is not dealt with in the Conventions⁴. Delay in the performance of a flight on the other hand is a misfeasance and it is covered by the Conventions of Warsaw and Montreal, namely by Art. 19⁵. It is important to mention that, according to the text of the Warsaw and Montreal Conventions, they exclusively deal with delay upon arrival and not with delay upon departure.

4. Defining 'delay' in the 'carriage by air'

Article 19 of the Warsaw/Montreal Convention states: “*The carrier is liable for **damage** occasioned by **delay** in the **carriage by air** of passengers, baggage or cargo*”⁶. Interestingly, this clause has not been amended in subsequent treaties such as The Hague Protocol of 1955 and the Montreal Protocols of 1975. The Montreal Convention of 1999⁷, however, incorporates a second sentence into Art. 19 which used to be under Art. 20. of the WC/HG. The second sentence refers to the proof of exoneration by the carrier: “*Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures*”⁸. This sentence will be examined later in connection to the exoneration of the carrier.

The key terms of Article 19: damage, delay and carriage by air require one by one analysis.

⁴ P.P.C. Haanappel: *The EU Denied Boarding Compensation Regulation of 2004*, 54(1) Zeitschrift für Luft- und Weltraumsrecht p. 26, (2005)

⁵ P.P.C. Haanappel: *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, The Hague Kluwer Law International, p. 83 (2003)

⁶ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as amended by The Hague Protocol of 1955 (hereinafter referred to as WC/HG)

⁷ Convention for the Unification of Certain Rules for International Carriage by Air Montreal, 28 May 1999 (hereinafter referred to as MC)

⁸ Art. 19 MC

4.1. 'Delay'

As mentioned earlier, under Art. 19 of the Warsaw Conventional System and the Montreal Convention the carrier is liable for damage occasioned by delay in the carriage by air of passengers. However, neither WC/HG nor MC defines the term delay. Attempts to incorporate a definition of delay into the MC were ruled out leaving the term subject to interpretation by the courts on a case by case basis. From the author's point of view introducing a definition of delay would have led to even more confusion because the definition would have resulted in even more ambiguous terms.

Shawcross and Beaumont suggests the following interpretation: "*It is submitted that the answer is to be found in the common law rule that, in the absence of any express contract, a carrier is only bound to perform the carriage within a reasonable time(...); accordingly, delay means failure to complete the carriage in a reasonable time*"⁹. According to the Beaumont interpretation, which attempts to define delay based on the common law rule, an express contract is a pre-requisite for establishing liability of air carriers for delay. The common law rule was applied to carriage by air in *Panalpina International Transport Ltd v Densil Underwear Ltd*¹⁰. In this case the court held that in the late delivery of cargo, which led to the loss of Christmas trade, was in the circumstances an unreasonable delay.

It must be stressed, however, that the common law position is not identical with the position set out in Arts. 19 and 20 WC/HG (Art 19 MC). The reason for this is because at common law, the carrier is not liable for delays not due to any breach of duty on his part¹¹. The best illustration of the difference between the common law rule and the relevant articles of the convention is the case of *Jean-Baptiste v Air Inter*¹². In this case the court examined each instances of delay and found that all causes of delay, which the airline had listed, were sufficiently justifiable. In *Abnett v British Airways plc*¹³ the flight London-Kuwait-Kuala Lumpur was detained by the Iraqi troops and as a result the claimant could not reach her intended destination, but had to return to London. She based her claim on Art 19 but it was dismissed because there was nothing in the facts of the case which would have suggested that a 'delay' took place.

⁹ Shawcross and Beaumont: Air Law VII [1002]

¹⁰ [1981] 1 Lloyd's Rep 187 (QBD)

¹¹ Shawcross and Beaumont: Air Law VII [1002]

¹² [1990] 44 RFDA 219.

¹³ [1994] 1 ASLR 1 (Outer House)

Shawcross and Beaumont's view on what constitutes a delay has influenced the drafting of point 9 of IATA Conditions of Carriage. The drafters of the IATA document took advantage of the fact that under common law, the carrier is not liable for delays not due to any breach of duty on his part. Point 9 of the IATA document reads: "*Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract*". Accordingly, carriers are not bound by any indication of time they have provided for the completion of carriage. IATA simply removes the time element from the contract depriving the passenger the right to expect the performance of the carriage at a particular time. Clearly, the IATA provision contradicts Art. 19 as well as Art. 23 WC/HG and Art 26MC¹⁴ because it intends to relieve the carrier of liability for delay which is prohibited by the conventional system. National courts are free to determine if the contractual clause is valid or contrary to the relevant articles¹⁵. The German Bundesgerichtshof has, for instance, declared the invalidity of point 9 of the IATA Conditions of Carriage.

At this stage it is important to examine the criteria of the existence of an express contract determined by the definition of Shawcross and Beaumont. Since the commercial (or Warsaw) carriage is governed by a contractual relationship one must always take a close look at the terms of the contract of carriage –the documents of transportation- to determine if it indicates the fixed time of departure and arrival. In passenger transport, paper or e-tickets constitute the existence of an express contract. The departure and arrival times shown on the e-tickets indicate the start and finish of the carriage. According to the express contract of carriage the airline has agreed to perform the carriage on time (between the times indicated on the ticket). Therefore, any unreasonable alteration from the arrival and departure times shown in that contract (the ticket) can be regarded as delay.

From the point of view of the author the carrier, by simply stating a time on the contract of carriage, (i.e.: ticket) agrees to perform the carriage at the set time. By indicating a set time frame the carrier creates certain expectations by the passenger with regards to the timely (punctual) performance of carriage. By failing to confirm with the agreed time (unreasonable alteration from the set time) the carrier can automatically be held liable for delay.

¹⁴ Art 23 WC/HG: Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

¹⁵ Syllabus (Adv.) L.L.M Programme in International Air and Space Law p. 123, Institute of International Air and Space Law, University of Leiden

4.2. `in the carriage by air`

Art. 19 WC/HG, MC clearly states that the carrier can only be held liable for losses due to delay `in the carriage by air`. The term refers to the period of time during which a carrier can be held liable under the conventional system. The following three principle theories have been developed.

4.2.1 *The first `narrow` theory*

The narrowest interpretation was suggested by *Goedhuis*¹⁶, who concluded that the above phrase refers only to delay which takes place while the passengers, baggage are actually airborne. Goedhuis based his reasoning on the fact that Art.19 does not establish any limits on period of liability. According to this interpretation the only cases which would be covered are those in which an aircraft has to fly to an alternative airport due to bad weather conditions. Cases in which delay occurs before take-off would be excluded. To illustrate the problem, the case of *Bart v British West Indian Airways Ltd*¹⁷ needs to be mentioned. In this case delay was due to the fact that the cargo was not loaded into the aircraft on time. Another example is the case of *Sté Nationale Air France v Sté Arlab*¹⁸ where there was a three weeks delay in loading the cargo.

It is submitted that if the above theory would be applied in practice carriers would not be liable in most cases. It could be argued that even proposing that the period of carrier liability is limited to the time between embarkation and disembarkation – which would also amount to an absurdly narrow interpretation of the phrase- could be considered as broadening the scope of the term `in the carriage by air` in comparison with the theory advanced by Goedhuis. It is of little surprise that when in the case of *Russell Jones v Britannia Airways Ltd*¹⁹ an argument was formulated in accordance with the above theory, it was almost automatically rejected by the court. It is submitted that the `narrow` theory cannot be considered as due to its unacceptable reduction of the scope of carrier liability.

¹⁶ D. Goedhuis: *La Convention de Varsovie*, La Haye, (1933), pp. 166, 170-171

¹⁷ [1967] 1 Lloyd's Rep 239 (Guyana CA)

¹⁸ [1983] Aix-en-Provence CA, 29 November, 39 RFDA 478

¹⁹ Case No.CH 714259

4.2.2. *The second theory*

The second theory developed in this area needs to be briefly mentioned as well.

According to *Georgette Miller's* argument liability exists in cases of cancellation or postponement of flights even if the process of embarkation has not begun²⁰. In *Robert-Houdin v Panair do Brasil*²¹ this theory was accepted. The case concerned a passenger who due to a delay could not appear in a show for which he was to be paid. According to the court's decision he was reimbursed for all expenses which occurred while he was waiting for the next flight and he could also recover the fee he would have received for taking part in the show. The theory seems to suggest the need to distinguish between cases in which a passenger is advised of a delay prior to leaving for the airport and those in which the delay is announced in the departure lounge at the airport. It is submitted that this theory is somewhat ambiguous in nature and seems to be in direct contradiction with the view that carriage by air starts when the passenger is checked-in²². This is of course one of the reasons why it has not been widely supported and why the third theory which is about to be examined gained more significance.

4.2.3. *The third theory*

The third theory supports the proposition that Art. 19 WC/HG, MC which deals with liability for delay should be read together with Arts. 17, 18, 22 and 24 WC/HG. In the case of registered cargo, Art. 18 (4) (5) WC/HG [Art 18 (3) (4) MC] gives the following definition to the period of carriage by air: "*the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever, but the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome.*" The above article expressly defines the period of carriage by air. According to the quoted provision, carriage by air includes time after the arrival of cargo to the airport providing a more extensive and therefore more acceptable time frame than the second theory. Pursuant to the third theory in the case of registered baggage or cargo 'delay in the carriage by air' in Art. 19 means delay during the period quoted in Art 18 WC/HG, MC²³.

²⁰ Miller, Georgette: *Liability in international air transport* Deventer : Kluwer Law International, 1977 pp. 159 - 160

²¹ (Paris, 9 July 1960), (1961) 24 RGA 285

²² Check-in is the time when the carrier accepts the passenger for carriage.

²³ Shawcross and Beaumont: *Air Law VII* [1007]

Art 17 WC/HG [Art.17 (1) MC] deals with delay in the case of passengers. The article does not give an express definition as to the period of `carriage by air` like Art 18 does in the case of cargo. The article refers to accidents which take place “*on board the aircraft or in the course of any of the operations of embarking or disembarking*”. Accordingly, in the case of passengers delay `in the carriage by air` in Art. 19 means delay during the period mentioned in Art. 17. Shawcross and Beaumont argue that that the above theory is supported by Art 24 WC which applies the limitations set out in Art. 22 to cases covered by Arts. 17, 18 and 19 without suggesting that the period of carriage by air in the case of Art 19 is different from that specified for the claim under one of the other articles²⁴.

The view that Art. 18 WC which concerns baggage and cargo could be applied in a passenger context was adopted by a US court in *Brunwasser v Trans World Airlines Inc*²⁵. In this case the plaintiff was notified about a flight schedule change (which resulted in the cancellation of the flight) months before his departure date but nonetheless claimed damages relying on Art. 19. The U.S. court held that even in a passenger context the definition given to the `carriage by air` in Art. 18 could be equally applied to Art. 19.

However, as mentioned earlier the basis of the `Warsaw carriage` is a contractual relationship between the passenger and the carrier. It can be argued that if the fact that the basis of a commercial carriage is an express contract is taken into consideration, then one could come to the conclusion that the dates and times stated in the contract refers to the precise time when the carriage is due. As discussed earlier in air transport the ticket or the itinerary serves as contracts, hence the times indicated in these documents can be viewed as the period of carriage by air, during which the carrier can be held liable for delay.

It is submitted that the times indicated in the travel documents (i.e.: itinerary or flight ticket), in other words, the contract of carriage, refers to the time frame during which the carrier is expected to carry out its duties and responsibilities. Therefore, the author of this article disagrees with the third theory suggesting that `carriage by air` can be defined in lines with the above discussed corresponding articles (Art. 18, Art.17) of the WC/HG and Montreal conventions.

²⁴ Shawcross and Beaumont: Air Law VII [1007]

²⁵ 541 F.Supp. 1338, 1982 U.S. Dist; 17 Av. Cas. (CCH) P17, 723

5. `damage`

Since the conventions are silent regarding the measure of damages for delay, the matter is left to be decided by the competent court to which the case is referred to. The *lex fori* determines the conditions under which damage due to delay may be compensated²⁶. The first requirement is the establishment of a compensable damage. A good example for damage could be the cost of hotel accommodation, transportation to and from the airport and food which would not have been necessary if the delay would not have taken place and the connecting flight would have been caught. The fact of loss needs to be proved by the claimant²⁷. Once it was proved and established that the damage occurred was due to delay, there is a presumed liability for the air carrier on the basis of Art. 19²⁸.

It is clearly indicated in Art 19 WC/HG, MC that recovery is more likely for consequential loss. Consequential loss is the direct consequence of delay. It is therefore crucial to establish causality between delay and damage. The claimant must prove that the damage he suffered is directly linked to the delay. In *Saiyed v. Transmediterranean Airways*²⁹ the court has held the carrier liable because the loss suffered by the claimant led to the loss of Christmas trade. In *Herpalani v Air India*³⁰ it was established that even in cases where wilful misconduct is established Art 19 permits only compensatory and no punitive damages. In the case of *Barrett v United Airlines*³¹ it was also established that Art. 19. does not create a cause of action for psychological or emotional injury to a passenger caused by delay. In *Lee v American Airlines Inc*³² the U. S. Circuit Court of Appeals concluded that a claim for damage for inconvenience and loss of a vacation was merely a claim for mental distress, not recoverable under the conventional system.

The above cases demonstrate the strict interpretation of `damage` under Art. 19 of the courts. It can be concluded that in most cases only those will succeed who can prove that their damage is a direct consequence of delay. For non-consequential damages Art. 19 does not seem to apply. Therefore proving the causal link between delay and damage is inevitable.

²⁶ Miller, Georgette: *Liability in international air transport* Deventer : Kluwer Law International, 1977 p. 160

²⁷ Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (analyses of the liability of delay p. 2 - Art. 19)

²⁸ Miller, Georgette: *Liability in international air transport* Deventer : Kluwer Law International, 1977 p. 160

²⁹ 509 F Supp 1167 (WD Mich, 1981), 16 Avi 17,835.

³⁰ 634 F Supp 797 (ND Ill, 1986), 19 Avi 18,526

³¹ No 92 C 5578 (ND, Ill, 1994) 1994, WL 419637

³² 355 F 3d 386 (5th Circuit, 2004), 29 Avi 18,426

6. The parties entitled to claim

The question of who shall have the right of action needs to be elaborated upon. Neither Art. 19 nor any other provision of the Conventions states who may be entitled to claim for damages caused by delay.

6.1. *The plaintiff*

In principle the contractual partner (either the passenger or the consignor) of the air carrier has *locus standi* to bring a claim. In *X v Air Europa*³³ it was held that it is irrelevant who have paid for the ticket, it is the passenger himself who has the right to bring an action against the air carrier. With respect to cases where the air ticket was purchased by a person, other than the passenger itself, with an interest in the passenger's punctual arrival the following rule has been established in the case of *Pakistan Arts and Entertainment Corporation v Pakistan International Airlines Corporation*³⁴. The case concerned a company which has organised entertainment events. For one of its events, the company has engaged performers who were passengers on tickets purchased by the company which had an interest in the timely arrival of the performers. The court held that the company organising the event was entitled to sue as a party to the contract of carriage due to its interest in the timely arrival of its business partners.

Shawcross and Beaumont argues that, as a result of the general terms of Art 19 as to the person of the claimant, virtually any person who can prove that he has suffered damage as a result of delay caused to a passenger or baggage or cargo, may claim under the Convention even if the damage was not foreseeable by the defendant or was a remote consequence of the delay³⁵. The above was clearly not intended by the drafters of the Convention since it would create an unreasonable number of potential claimants. The decision in *Vasallo and Clare Trans Canada Airlines*³⁶ supports the view that third parties whose damage as a result of delay could not possibly have been within the contemplation of the parties to the contract of carriage do not have the option to recover.

³³ (Cour de Cass, 27 June 2006) (2006) 60 FRDA 426.

³⁴ 660 NYS 2d 741 (App Div, 1997) 25 Avi 18, 464

³⁵ Shawcross and Beaumont: Air Law VII [1009]

³⁶ (1963) 38 DLR (2d) 383.

6.2. *The Defendant*

The wording of Art. 19 states specifically that the claim for damages is directed against the carrier. According to Article 30 WC/HG (Art.36 MC) the succeeding air carrier can also be considered as defendant, if he accepts passengers, cargo or baggage³⁷.

The problem which might arise with respect of defendants in a claim is the issue of servants and agents of the air carrier. According to the universally accepted principle, the term servants and agents is exclusively in respect of those persons who are employed by the principal on the basis of a contract of employment. According to Art. 30 MC (Art. 25A WC/HG) the most important criteria which has to be fulfilled is that the servants and agents of the carrier have acted in the execution of a task assigned to the by the air carrier. This principle was reflected in the case of *Crespo v Eastern Airlines*³⁸ where the court did not held the air carrier liable for the physical attacks of a police officer against a passenger because the officer did not act for the purpose of fulfilling the contract for air carriage. Accordingly, the police officer did not act directly for the carrier. It is very important stress that the execution of the tasks assigned to the `servants and agents` serves the performance of the contract for carriage by air³⁹. This view was adopted from other areas of international transport law.

The absence of these restrictive conditions would create a significant amount of ambiguity as to the person of the defendant in complex agent-carrier cases. It is submitted that the application of the above outlined conditions and requirements, serves the purpose of restricting the `circle` of potential defendants with regards to the servants and agents of the air carrier. The absence of these restrictive conditions would create a significant amount of ambiguity as to the person of the defendant in complex agent-carrier cases.

The following section will examine the defenses that a carrier might use to exonerate himself from liability. The relevant articles which will be analyzed provide a substantive defense for the carrier since they rebut the presumption of liability for damage sustained during the carriage by air.

³⁷ Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (analyses of the liability of delay p.2 - Art. 19)

³⁸ Superior Court of Puerto Rico, 1981, 16 Avi 18,059

³⁹ Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (analyses of the liability of delay p.27 - Art. 19)

7. The Proof of Exoneration

The carrier cannot be held liable for all delays. Under the wording of Art 19 (second sentence) and Art 20 MC (Art 20 and 21 WC/HG) if he is able to prove the conditions contained in the respective provisions he is able to exonerate himself from liability.

The emphasis of this part of this article will be on Art 19 (second sentence) which states that if the carrier is able to prove that all the *reasonable measures* for the prevention of the loss had been taken or that it had been impossible for him to take those measures, the carrier shall be not be held liable. In most cases carriers are held liable because their task to prove that they did everything necessary to avoid the likelihood of delay is a challenging one. In all cases the difficult task of providing proof of exoneration remains on the side of the air carrier.

It is necessary to note that this proof of exoneration used to be applicable to all liability provisions⁴⁰ however under the Montreal Convention the proof of exoneration no longer applies in the case of loss to passenger (Art. 17 paragraph 1 MC) and in the case of baggage loss (Art 17 paragraph 2 MC). Under the Montreal Convention proof of exoneration (as set out in Art 19, second sentence) can only be used in the case of losses which are due to delay during the carriage of passengers and baggage⁴¹.

A significant change introduced by the Montreal Convention is that the carrier is no longer required to prove that he has taken all `necessary measures` but now he only has to prove that he had taken all `reasonably necessary measures`. In *Chisholm v British European Airways*⁴² the carrier was not liable for personal injury suffered by a passenger when she left her seat during turbulence. The carrier's employees have warned the passengers not to leave their seats and fasten their seatbelts, thus reasonable care had been taken. By contrast, in *Goldman v Thai Airways International Ltd*⁴³. it was held that `all necessary measures` mean `all reasonably necessary measures. The same interpretation has been adopted in Canada, Germany and the U.S.

⁴⁰ Article 17, 18, 19 WC/HG

⁴¹ Elmar Gjemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (analyses of the liability of delay p.12 - Art. 19)

⁴² [1963] 1 Lloyd's Rep 626

⁴³ [1983] 1 WLR 1186, CA

Due to Art. 19's ambiguous wording Establishing what 'reasonable measures' are, is not straightforward. It is a generally accepted view that the air operator must meet the highest possible standards when it comes to public safety and order. According to Giemulla/Schmid this means that the air carrier is obliged to comply with all statutory and regulatory provisions such as ICAO- and EU regulations and those air carriers who fail to comply with these regulatory provisions are not entitled to exonerate themselves under Art. 19 sentence 2 MC⁴⁴.

There are only very few instances where the carrier can exonerate himself without considerable amount of difficulties. A good example for these unproblematic circumstances would be the scenario where delay is attributed to an unruly passenger with whom the air carrier has to deal with (i.e.: prevent him from boarding the aircraft). In the event of an act of God/*force majeure* the avoidance of the occurrence of loss is not possible. In those cases even if the carrier would have taken all reasonable measures he would not have been able to avoid the loss⁴⁵. A good example for this would be an unexpected bird strike.

Article 19 second sentence MC also provides that if the carrier cannot show all reasonably necessary measures, he may still succeed if he manages to prove that it was impossible for him to take such measures. The case of *Barboni v Cie Air France*⁴⁶ concerned passenger's injury while sliding down an escape chute during the evacuation of an aircraft. AS it was impossible for the carrier to take preventive measures to avoid the injury the carrier was not held liable.

It is submitted that the change in wording in Art. 19 introduced by the MC had helped the carriers tremendously even though the requirements set by Art. 19 second sentence are still strict. This is due to the fact that the carrier still has to prove that everything was in order with regards to the operation of the aircraft and related matters. More specifically the carrier needs to prove compliance with all international regulatory safety and security standards. I believe that changing the wording of the article has made a significant contribution towards making the life of the carrier a little easier when it comes to providing evidence of exoneration. The word 'reasonable' gives much more space to argue than the word 'necessary'. By changing it, the air carriers will at least be in a better situation to prove that they have in fact taken all

⁴⁴Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (analyses of the liability of delay p.14 –Art.19)

⁴⁵Ibid. (analyses of the liability of delay p.15 - Art. 19)

⁴⁶(Paris, 12 May 1982) (1982) 36 RFDA 355

measures to avoid the likelihood of delay. The situation would of course be completely different if it would be sufficient for the carrier to prove that he did everything he could to mitigate the loss upon occurrence of the delay. In that case a strict wording like the word 'necessary' would be justifiable.

Lastly a brief look needs to be taken at the amount and extent of the claim for damages.

8. Amount and Extent of Damages

Art. 19 do not specify what damages are available for delay. Damages can be divided into the following two categories: damages in the event of delay of persons and damages caused in the carriage of baggage.

8.1. Damages in the event of delay of persons

Article 22 paragraph 1 MC establishes a 4,150 SDR liability limit per passenger. In certain situations, however, this amount might not be satisfactory. Article 22 paragraph 5 MC provides that in case a passenger can prove that damage was done intentionally or recklessly by the carrier the maximum liability limit set out in Art 22 paragraph 1 MC can be overcome. In reality however, in most cases it is almost impossible for the passenger to prove willful misconduct on the part of the carrier to avoid the liability limit. The passenger is just not in the situation (or not in possession of sufficient information) to be able to prove willful misconduct. The case of *Cohen v Varig*⁴⁷ could serve as a good example to show that despite its willful misconduct the carrier was not liable for the passenger's mental distress for delayed baggage.

Article 25 MC provides an alternative way of overcoming the above mentioned liability limit. According to this provision a corresponding agreement in the contract of carriage can make it easier for the traveler to overcome the liability limitations. From my point of view this might be the only possible way for the passenger to break the liability limits.

⁴⁷ 405 N.Y.S. 2d 44 (App Div.1978)

8.2. *Damage Caused in the Carriage of Baggage*

Article 22 paragraph 2, first sentence MC states that in the case of carriage of baggage, the air carrier is only liable for destruction, loss, damage) up to 1,000 SDRs per passenger.

There are three situations when in which the above limitation can be overcome:

First, in lines with Art 25 MC there can be a stipulation in the contract of carriage which can indicate higher liability limits than set out in the convention. Second, in case of checked baggage a declaration of value (and payment of surcharges accordingly) is possible. In this case the carrier is obliged to compensate the passenger up to the declared value. The third and last way of overcoming the limitations on liability in the carriage of baggage is by proving that the carrier has acted intentionally (or recklessly) to cause damage⁴⁸. This is however, as discussed earlier, very troublesome for the passenger.

It appears that, in the case of damage caused in the carriage of baggage, there are more possibilities of overcoming the set liability limits than in the case of persons. From my point of view it would be needed to provide more options for overcoming the liability limits in the case of persons.

9. Conclusion

This article attempted to highlight some of the challenges of unifying Private International Air Law in the context of air carrier's liability for delay. Unlike the Warsaw Convention, the Montreal Convention was written in six different languages. From the point of view of the author, uniformity of law cannot be achieved by applying multiple authentic languages. Perhaps reaching an agreement on one single authentic language would have been a little more rational. Relevant jurisprudence shows that, due to the numerous ambiguous terms in the provision in question; courts had to face some serious trouble when interpreting Article 19. Giving a definition to the term 'delay' would not have solved the problem, but would have led to even more confusion. By deciding to leave the matter to be determined by the relevant courts would have possibly been the best solution.

⁴⁸ Elmar Gjemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 (p.3 - Art. 25)

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