Introduction

Much has been written about the New Montreal Convention since the adoption of the text in May 28, 1999. However, these analyses have neglected to consider the effects and consequences which the New Convention entails for the international passenger. This article intends to shed some light on the negative –and perhaps even catastrophic– implications of the New Convention for the international passenger with the view toward providing an arena for further discussion.

This article first describes very briefly the main aspects of the existing Warsaw Convention system from the unification of law perspective, stressing on those issues which are of special importance to the international passenger. Then we deal with those aspects of the New Convention which are most relevant for the international passenger.

Unification of law: Subsidies at the expense of the international passenger

The Warsaw Convention (“WC”), conceived to protect the aviation industry during its infancy, succeeded in unifying private international air law in the following areas:

(i) Liability:
One of the two main purposes of the WC was to limit the liability of the air carrier\(^1\). The WC thus established a fault liability regime for sustained damages in case of the death, wounding or any other bodily injury of the passenger, for the destruction or loss of or damage to baggage and cargo and for delay. However, as a quid pro quo for the limitation of liability, the WC shifted the burden of proof so that the air carrier is presumed liable unless it can meet the necessary measures standard.

The WC System\(^2\) ("WCS") allocated the major risks arising from international carriage to the passenger and consignor by imposing absurdly low limits of liability. These were not only expressed in terms of monetary caps, but they were also “artfully camouflaged in a thicket of convention articles”. In effect, apart from the limitations contained in article 22, the WC limits recovery only to sustained damages. So, punitive and other non-compensatory damages may not be awarded\(^3\). The lack of compensation for non-bodily injuries also entails a significant limitation of liability, as well as the concept of accident in article 17.

(ii) Documentation:

The second purpose of the WC was to achieve a certain degree of uniformity in documents of carriage, i.e., passenger tickets, baggage checks and air waybills\(^4\). The WCS engineered an unreasonably formalistic regime which unified the format and the legal significance of the documents. Even if somewhat simplified by subsequent instruments of the WCS, it unnecessarily increases the air carriers' costs, which are ultimately transferred to the passenger. The link between formalities and liability afforded the international passenger with a possibility to escape the limits of liability. This, however, led to costly litigation and sometimes even arbitrary decisions.

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1 II Conférence Internationale de Droit Privé Aérien, 4-12 oct, 1929, Varsovie, at 9,15, 220.
2 WCS refers to the instruments adopted to amend, supplement or modify the WC. Unless otherwise expressly mentioned, WCS herein refers to texts in force. Where context permits, both WC and WCS are used interchangeably.
3 The question of punitive damages is not exclusive of the US and other Common Law jurisdictions. Countries like Argentina have recently introduced acts to adopt these types of damages, which will thus be available for all activities, except for accidents arising from international air transportation.
4 II Conférence Internationale de Droit Privé Aérien, at 4-12 oct, 1929, Varsovie, 9, 220.
(iii) Jurisdiction:
This is perhaps the greatest achievement of the WC, which reduced to four the possible fora where a plaintiff, at its option, may bring a claim. However, the WC drafters unfairly deprived the international passenger of the possibility of resorting to the jurisdiction of its personal law.

New Montreal Convention: Progress toward unification

The WC underwent substantive modifications throughout its history, which almost eroded the unified system achieved in 1929, especially in the areas of liability and documentation. The main modifications arose as an industry response to the lengthy and costly litigation battled by the international passenger’s profound distaste with the WCS’ ridiculously inadequate limits of liability.

Furthermore, these modifications were embodied in a series of different instruments, and thus, for example, a protocol, authentic in English, French and Spanish amended the WC, which is authentic in French only. Furthermore, the WC was also “modified” by domestic and regional legislation and by a series of initiatives taken by

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5 In 1955 The Hague Protocol amended the WC to double the damage cap in incidents involving the death, wounding or other physical injuries of passengers. In 1961 the Guadalajara Convention introduced the concept of actual carrier. In 1966, as a consequence of the United States’ denunciation of the WC, IATA airlines adopted the Montreal Agreement of 1966, whereby airlines accepted strict liability and the limit was raised to US$75,000 for any carriage to, from, or via the US. In 1971, a major change was intended through the adoption of the Guatemala City Protocol, which never entered into force. Apart from simplifying the documents of carriage, it introduced an unbreakable limit of liability in the amount of US$100,000. In 1975 four additional protocols were adopted. The first three ones simply replaced the gold clauses by SDR while Protocol No.4 simplified cargo documents and introduced a system of strict liability for damage or loss of cargo.

6 Both documentation and willful misconduct were tools used by claimants to overcome the liability limits, which inevitably led to lengthy and costly processes.

7 The limits of the WC were always difficult to reconcile with varying socio-economic factors throughout the world. Additionally, these limits were soon destroyed by world inflation.

8 Then a Supplementary Convention also modified the WC both as amended by the Hague Protocol and as unamended. Also a series of protocols introduced changes to the WC and other instruments of the WCS.

9 Italy enacted in 1988 Law No. 274 of July 7, 1988 which raised the limit to SDR 100,000 in the case of damages to passengers in Italian carriers and all other carriers operating from, to or via Italy.

10 In 1997 the European Union adopted Council Regulation No. 2027/97 whereby domestic and international flights of European carriers faced a two-tiered liability regime, where the air carriers are
the industry. While these industry initiatives offered a partial solution to the limitation of liability problem, the legal nature of these agreements is rather precarious, since they are merely private contracts.

The New Convention (“NC”) incorporated most of the relevant norms contained in these scattered instruments—especially the two-tiered liability system of the Japanese Initiative and the IATA Intercarrier Agreement, the most useful norms of the Guatemala Protocol, the Guadalajara Convention and MPs Nos. 3 and 4—into a single cohesive agreement, equally authentic in five languages. While maintaining the basic structure of the WC, the NC thus succeeded in reestablishing the unification of private international air law.

**Missed opportunities in the New Convention: More of the same**

The NC failed in three main areas. First, it still embodies significant limits of liability. Second, it fails to achieve one of its major purposes: the reduction of litigation. Finally, it lacks the required vision to govern the most important aspects of international air transportation in the next years. By failing to provide a solution to these three issues, the Diplomatic Conference missed a valuable opportunity to achieve a balanced agreement and to shift the allocation of risks away from the passengers toward the carriers.

**(i) Unlimited liability: Still a subsidy?**

strictly liable up to SDR 100,000 for passengers’ death, wounding or bodily injury, and their liability is based on presumed fault with a reversed burden of proof for claims exceeding SDR 100,000.

11 In 1992 all Japanese airlines adopted a two-tier system of liability known as the “Japanese Initiative”, where (i) the airlines are strictly liable—without the art 20 (1) defense—up to SDR 100,000, and (ii) for claims exceeding SDR 100,000 the airlines accept liability based on presumed fault with a reversed burden of proof, i.e., the art 20 (1) defense is available. Approximately, three years later, and modeled after the Japanese Initiative, IATA adopted the Intercarrier Agreement on Passenger liability and subsequently the Measures to Implement the Intercarrier Agreement.

12 Additionally, other legal elements which were considered to be necessary for leveling the playing field, such as the fifth jurisdiction, could only be introduced by treaty law. The same applies to the simplification of documents.

13 We do not follow Milde’s view, who seems to believe that the only missed opportunities are merely the lack of adoption of alternative dispute resolutions for passenger claims, and the failure to introduce the concepts of event and personal injury to replace accident and bodily injury. Milde, “The Warsaw System of
The NC still includes important limitations of liability. Even for passengers, the amount of compensation will be limited to proven recoverable damages and thus punitive and other non-compensatory damages will not be recoverable. Compensation is still significantly limited by the retention of the concepts of bodily injury and accident.

Cargo liability limits remain at the 1929 levels. Even if, as expressed by the members of the Secretariat Working Group (SGMW)\textsuperscript{14}, cargo consignors are in a more equal commercial relationship with air carriers than passengers, the airlines’ liability is extremely low. Similarly, the liability relating to checked baggage is limited to SDR 1000, which, as pointed out by Milde, may hardly cover the cost of the actual baggage\textsuperscript{15}. The damage caused by delay is limited to SDR 4150, provided the carrier cannot prove the reasonable measures standard contained in article 19.

(ii) Reduction of litigation: a childish illusion?

One of the major concerns of both the aviation industry and the international passenger was the excessive litigation that the WCS entailed. In our opinion, the NC may not solve this issue. On the contrary, highly lengthy and costly lawsuits are likely to continue, for the NC presents several flaws. For example, despite the consensus reached in the SGMW, article 17 still refers to bodily injury instead of personal damages. According to the discussions in the Diplomatic Conference, this issue was left to future judicial interpretation, which does nothing but encourage litigation.

With respect to the carrier’s defenses for liability beyond SDR 100,000, the NC makes reference to the activities and omissions of third parties. Although at first sight the concept of third party might seem self-explanatory, its definition has created


\textsuperscript{15} Milde, note 13, at 21.
immense problems in the regulation of claims in the US space launch industry\textsuperscript{16}. These issues might be brought by plaintiffs in future NC litigation. Furthermore, some delegations expressed their concern for the difficulties which claimants would face in legal proceedings where the third party does not appear as a joint defendant and will possibly not be held liable\textsuperscript{17}. In many jurisdictions, the term wrongful act does not have a clear definition and negligence is subject to several qualifications, which the NC does not take into account. The wording of the fifth jurisdiction also presents probable sources of future litigation. The concept of principal and permanent residence is not known in certain jurisdictions. For example, as expressed by Professor Folchi, the term domicile is a more frequently used word throughout Latin America\textsuperscript{18}. All these ambiguities are susceptible to create conflicts.

Article 17 insists with the requirement of an accident instead of event for the air carrier’s liability with respect to passengers, which is a term susceptible to varying interpretations\textsuperscript{19}. Furthermore, the willful misconduct standard still applies for breaking the limitations of liability for delay and baggage.

The requirement to make advance payments, if mandated by national law, does not appropriately take into account the diversity of facts of each case. For instance, it is not always possible for the air carrier to easily determine the beneficiary or recipient\textsuperscript{20}. It is true that this is already a common practice among the airlines, but this approach is consistent with the current regime of the WC, but not with that established in the NC.


\textsuperscript{17} Special Group on the Modernization and Consolidation of the Warsaw System First Meeting, 2.92.

\textsuperscript{18} Ibid. at 2.50. The definition provided in paragraph (b) of article 33 may lead to conflicts in countries where an individual may not necessarily have only one residence and where there is no defined criteria for establishing which residence is the principal one.

\textsuperscript{19} Air France v. Saks. John De Marines v. KLM, Abramson v. Japan Airlines. Lack of understanding of the concept of accident has had important consequences in the jurisprudence. For example, the Abramson court wrongly confused accident, which is undoubtedly a condition for liability, with a requirement for the applicability of the Convention.

Lack of vision: New sources for future amendments?

The NC established the obligation of the carrier to maintain adequate insurance. This makes the airline industry a captive market for insurers, as it does not contemplate alternative risk management techniques for the airlines, such as loss control, risk transfer guarantees, and risk retention, among others. Any increase in insurance will ultimately be passed on to the passengers.

The NC does not specifically address the issues related to liability arising from code sharing, franchising and other forms of airline cooperation. While these issues were discussed in the SGMW, it was understood that they did not require high priority and were not included in the belief that they were resolved by the introduction of the actual carrier concept.21

It would have been useful to define the term “delay” to discourage the airlines from continuing their practice of stating in their contracts of carriage that their schedule as set out in the timetables is not guaranteed. Even if some countries do not permit the resolution of a dispute involving the death of a person through arbitration, the NC could have introduced this possibility for those jurisdictions which do allow it.

Conclusions

The New Convention, which will presumably enter into force in the next four to five years, implies very negative consequences for the international passenger, especially since it still contains unreasonable limits of liability. Additionally, far from reducing litigation, the New Convention is destined to create excessive litigation, thus failing to achieve one of the major purposes for its adoption.

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21 Ibid. at 6.35.