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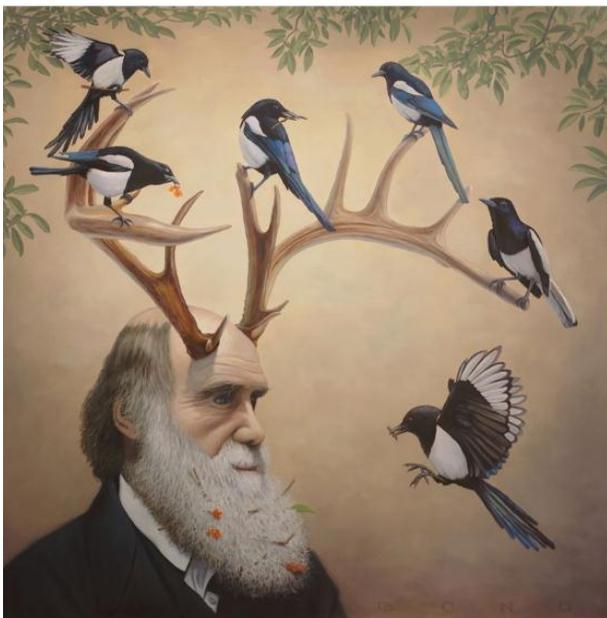
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Benefits accruing to Iraq and its national carrier upon ratification

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Abstract

This study provides an overview of the new changes made in the Montreal Convention which led to significant benefits for consumers in the civil aviation sector. For this purpose, the analytical method is used in this study by analyzing the provisions of the Montreal Convention. The study found that the liability regime of this convention overcomes the problems resulting from the liability limits in the Warsaw Convention. And the researchers conclude that it is necessary for the Iraqi government to ratify the Montreal Convention which guarantees better protection for consumers of air transport service.

Keywords: Air, Carrier, Consumer, Montreal, Convention.

Beneficios acumulados para Iraq y su transportista nacional en el momento de la ratificación

Resumen

Este estudio proporciona una visión general de los nuevos cambios realizados en el Convenio de Montreal que generaron

importantes beneficios para los consumidores en el sector de la aviación civil. Para este propósito, el método analítico se utiliza en este estudio al analizar las disposiciones del Convenio de Montreal. El estudio encontró que el régimen de responsabilidad de esta convención supera los problemas resultantes de los límites de responsabilidad en la Convención de Varsovia. Y los investigadores concluyen que es necesario que el gobierno iraquí ratifique el Convenio de Montreal que garantiza una mejor protección para los consumidores del servicio de transporte aéreo.

Palabras clave: Aéreo, Transportista, Consumidor, Montreal, Convención.

1. INTRODUCTION

In Iraq, the air transport of persons and goods is governed by the provisions of the Warsaw Convention of 1929 and its amendments Warsaw System. The Warsaw Convention was designed to avoid costly and long litigation, to protect the rights of passengers and consignors, and to limit the air carrier liability if death, bodily injury of passenger or damage to baggage and goods occurred following an accident or event during air transport. Moreover, this convention sought to achieve a unified international code to be applied by the courts of the States Parties to the Convention instead of applying their national laws.

However, the major features of the Warsaw System, namely the liability limits and the documents requirements of carriage as a trigger to the liability provisions, had become too restrictive and inappropriate due to advancements in technology and global economic conditions. As a result, it was important and beneficial to both providers and users

of international air transport services that some action should be taken to remedy the situation. The modernization and consolidation of the Warsaw System were long overdue especially since its underlying rationale, namely the protection of air carriers from excessive awards of damages, had ceased to be relevant over the years.

It was against this background that the Montreal Convention was concluded in 1999. The Montreal Convention was intended as an appropriate instrument for the 21st century which focuses on the protection of the consumer instead of the protection of the air carrier. It also has several advantages for states that become a party to it. This study provides a practical example of these merits by surveying the benefits that will accrue to Iraq and its flag carrier, Iraqi Airways upon ratification of the Montreal Convention. For this purpose, the analytical method is used in this study by analyzing the provisions of the Montreal Convention to identify these benefits in the case of ratification this convention by Iraqi government (MOAWAD, 2013).

2. THE BENEFITS TO THE IRAQ

The benefits to Iraq upon ratification of the Montreal Convention can be summarized as follows:

1- To regulate the relationship between air carriers and consumers

Since the Iraqi Civil Aviation Act No. 148 of 1974 did not regulate the relationship between the air carrier and the consumers, there were no rules on the subject in existence before the advent of the Montreal Convention. If the Convention is ratified by the Iraqi government, the provisions thereof will be the applicable law in all cases before the courts concerning air transportation whether domestic or international. This is because the Convention permitted the States parties to apply the provisions of the Convention on the situations beyond the scope of article 1 (DWEDAR, 2002).

2- To narrow the conflict existing between the liability regime and the rules of the Islamic Law

According to the Iraqi Constitution, Islam is one of the basic sources of laws in Iraq. This means that the provisions of Iraqi laws must not contradict with the provisions of Islamic Sharia. The liability limits contained in the Montreal Convention for death or bodily injury are higher than those prescribed under Islamic Law. This is because the Montreal Convention amended the maximum compensation for passenger's death or physical injury resulting from air accidents, and it decided the principle of unlimited liability so that the air carrier is responsible for compensating the damage of passengers without financial limits.

Thus, if Iraq ratifies the Montreal Convention, the application of the provisions of this convention by Iraqi courts does not create any difficulty because there are no conflicts between the Montreal

Convention and Islamic Laws in this respect. According to Islamic Law, the recovery of damages consists of two parts. The first part is stated in the Sharia and it includes recovery for death or bodily injury. The second part is not stated in the Sharia but is left to the judge's discretion to determine it either by himself or in accordance with the opinion of experts. This second part, for example, includes the authority to decide the value of damages that have not been stated in the Sharia, or the value of the financial damages caused to personal property such as goods or baggage (CHENG, 2004).

However, the regime of limited liability regarding baggage and cargo does not conform to the rules of Islamic Law. The rules of Islamic Law do not allow the carrier to avail himself of limited liability as long as the damages were resulting from his negligence while the baggage or goods were under his control even though the compensation for damage had been agreed upon and stated in the contract of carriage.

3- To unify the Warsaw Convention and its Numerous Amendments under one Instrument.

The most important objective that the Montreal Convention has achieved is the unification of all the private international air law instruments relating to international carriage by air under one treaty. Thus, instead of being subject to many different regimes i.e. Warsaw System, the rules regarding the air carrier customer relationship are unified under one international Convention. In the future, if all states

ratify or accede to the Montreal Convention, this would ensure that there is only one regime applicable to all passengers on flights originating from Iraq, irrespective of their destinations.

4- To eliminate the fear of unlimited liability.

The Montreal Convention may remove the fear of unlimited liability especially there are many international airlines around the world that are flying without limited liability and they still fly. The liability regime prescribed by the Montreal Convention of 1999 is actually not against the interest of the airlines. In fact, the liability under this convention provides an equal balance between the interests of both parties to the air carriage contract in the 21st century. This liability regime is based on the real damage, and the claimant must prove the damage. It also provides fair defense for the air carrier to exonerate itself wholly or partially from its liability (FAKHRI, 2003).

It should also to mention here that the second tier of liability does not necessarily translate into excessive awards of damages against the carrier in situations where the damages claimed exceed 100,000 SDR. The claimant has to prove that the amounts claimed were indeed damage sustained and he cannot base his claim on exemplary and punitive compensations. In spite of the foregoing, it should be expected that some jurisdictions around the world award non-compensatory damages under heads such as loss of enjoyment of life, suffering and pain, loss of companionship, and loss of parental guidance (COTTER, 2012).

5- To enhance the protection of the interest of Iraqi citizens

The Convention provides passengers equitable compensation in the case of bodily injury or death of passengers, destruction, damage or delay of cargo and baggage occurring during international transportation by air. Thus, whenever Iraqi passengers use international air services, their rights to reasonable compensation will be assured. For damages up to 100,000 SDR, the liability of air carrier is strict so that it cannot limit or exclude its liability except under article 20. Above that sum, the air carrier liability is based on the presumed fault with reversing the burden of proof, and the air carrier is not liable if it proves that the passenger's damage was not resulting from its omission or negligence or that of its agents or servants.

Also, article 22 (2) raises the liability limit for destruction, damage or loss of baggage. The limit for each passenger is 1,000 SDR unless a supplementary sum has been paid by the passenger and he has made a special declaration of the value of his baggage. The total weight of this package should be taken into account in determining the liability limit. In respect of delay, the convention adopts a special limit (4,150 SDR) per passenger. This maximum amount of compensation is subject to the claimant's proof of the actual loss incurred (FAKI, 2008).

Most significant is the introduction of the concept of advance payments to provide immediate financial assistance to the families of victims of aircraft accidents. Thus, in the event of bodily injury or

death of a passenger, the air carrier is obliged without delay to provide the natural persons entitled to claim compensation with advance payments to meet the immediate economic needs of such persons. This innovative provision evidences the implementation of a shift in focus from the protection of air carriers to the protection of consumers and is justified by humanitarian considerations. In effect, the Montreal Convention extends protection far beyond airline passengers to their families (GALLAGHER & VETRO, 2004).

Also, Iraqi citizens will be able to bring an action in the event of bodily injury or death of a passenger before the courts of a state party to the Convention in which the passenger had his permanent and principal residence, and from or to which the air carrier operates services. This is known as the fifth jurisdiction.

One other significant benefit lies in the fact that the Montreal Convention requires the air carrier to present evidence of providing adequate insurance ensuring the availability of financial resources for compensations in the event of an air accident. This will assure the Government that the air carrier is financially fit and able to bear the required compensation in the event of an accident occurring in the territory of Iraq.

In addition, the Montreal convention adopts a modern and stable yardstick of value. Compensation is indexed in Special Drawing Rights (SDR) instead of gold due to the latter's unstable value. Moreover, to avoid the incidence of frequent amendments, the new

Convention provides a built-in system for periodic review of the monetary limits of liability. This will provide flexibility to review the limits of liability every five years in order to keep them abreast with the rate of inflation.

6- To enhance the organized development of operations of international air transport

Iraq, as one of the states that pay attention to the orderly development and improvement of civil aviation, considers the Montreal Convention to be most appropriate. The Montreal Convention has modernized and consolidated the Warsaw Convention and achieved smooth flow of passengers, cargo, and baggage according to the objectives and principles of the Convention on International Civil Aviation, signed at Chicago on 7th of December 1944 (MILDE, 2008).

7- Wider scope and more flexibility

The Montreal Convention extends its applicability to cover air transport implemented by states or by its legally public bodies, but the states have the right to announce that the provisions of the Convention shall not apply to such carriage. The government of Iraq, therefore, has the discretion to make reservations in respect of those provisions that will not be of benefit to Iraqi carriers.

8- Language of the Convention

The authentic version of the Convention was adopted in five international languages: Arabic, English, French, Spanish and Chinese. Thus, judges and lawyers in Iraq do not have to translate the Convention into Arabic in order to read, understand and apply its provisions. This is a great advancement.

3. THE BENEFITS TO IRAQI AIRLINES

The benefits accruing to Iraqi Airlines upon ratification of the Montreal Convention can be summarized as follows:

1- The scope of applicability

Even though the Convention does not apply to postal items, but the air carrier will be responsible only toward the pertinent postal administration according to the rules applicable to the relationship between this postal administration and air carrier. In situations where the carriage is implemented by an actual carrier other than the contracting carrier, the Montreal Convention extends the application of the contract of carriage by air concluded between the passenger and the contractual carrier to this actual carrier.

2- Reduced and simplified requirements of documentation and enhanced electronic ticketing

The convention consolidates the efforts at modernization and simplification of documents both for passengers and cargo, initiated in the Guatemala City Protocol of 1971 with regard to passengers and the Montreal Protocol of 1975 with regard to cargo. For example, the Convention requires only a single document for passengers and their luggage, and it further requires the delivery of a collective or individual document of air carriage. Articles 3 and 4 of the Convention emphasize on using so-called electronic ticketing for cargo and passengers. It reduces the extensive information that was previously required for air waybills under the Warsaw System (KASATKINA, 2015).

3- Removal of penalties for non-compliance with the requirement written the notice

The Montreal Convention does not provide any penalty in the case of the air carrier non-compliance with the requirement to issue written notice to passengers about its limited liability. The Convention affirms that non-compliance with its provisions in articles 1 and 2 concerning the delivery of documents of carriage does not affect the validity or existence of the contract of air carriage and also does not exclude the applicability of the liability limits of the air carrier. Thus, there is no longer any link between the issuance of tickets and the system of liability and therefore failure to issue documents of carriage may no longer be used by passengers as a basis for breaking the limits of liability of the Montreal Convention.

4- Liability regime

The Montreal Convention raised the limits of liability to the levels proposed in the private agreements on air carrier liability, such as the Japanese Initiative and IATA Inter-carrier Agreement. This convention grants the air carrier the right, even in the first tier of liability under 100,000 SDR, to exonerate itself partially or wholly from liability if it successfully proves that the claimant's damage was caused by the omission or negligence or other wrongful act of the claimant.

The other significant element of exoneration is that the air carrier does not oblige to compensate the affected passenger beyond 100,000 SDR if it submits a proof that the damage of the claimant was solely caused by the omission or negligence or another wrongful act of a third party. However, this defense of the carrier is narrowed by the word solely because the mere contributory negligence of a third party does not amount to a defense.

Moreover, punitive damages have no place under the unified system because article 17 talks about damages caused meaning thereby that its scope is only limited to compensation for real damage sustained. The Montreal convention 1999 in its article 29 puts the matter beyond doubt by prohibiting the recovery of non-compensatory damages such as exemplary and punitive damages. Iraqi Airlines may thus benefit from reduced insurance premiums as a result of the certainty in the maximum compensation in the event of an accident.

5- Inducement of the settlement of claims

As it is always desirable to settle claims out of court and reach a compromise between the parties, the Montreal Convention contains a settlement inducement clause in article 22 (6). This will enable the claimant to avoid court costs and the other costs of litigation. The Convention also introduces the possibility of arbitration for disputes in cargo matters.

4. CONCLUSION

Even though the Montreal Convention implements a shift in focus from the protection of the carrier to the protection of consumers, it still retains some sort of protection for the carrier. The liability regime provides protection for the carrier by limiting its liability in the first tier to 100,000 SDR. Also, the consumer is able to claim only for compensatory damages, and the Convention obviously does not allow any claim for punitive damages or non-compensatory damages. However, the new liability regime has a negative impact on the air carrier in the form of an increase in the insurance premiums.

The most significant impact of the Montreal convention is that it is an international treaty concluded under the auspices of ICAO that changes the rules of the previous Convention and Agreements. Furthermore, the Montreal Convention established new rules that none of the previous protocols or agreements had adopted such as the fifth

jurisdiction, advance payment, compulsory insurance which ensures quick and adequate recovery for passengers and protects air carriers from the risk of huge compensation. These new provisions are in the interest of the passenger and they reflect the new trend of providing fair protection to consumers. There are some other new provisions that distinguish the Convention from other previous instruments. These include the arbitration provision, the settlement inducement provision, and modernized and reduced documentary requirements. Additionally, the Convention adopts a process to review the limits of liability periodically. This element prevents frequent amendments to the convention in order to increase the limits of liability.

Based on the above, it is clear that the Montreal Convention is a significant advance in comparison with the Warsaw System and it achieved the balance between the interests of different parties in the civil aviation sector. Thus, this study recommends the Iraqi government to ratify this convention which guarantees better protection for consumers of air transport service.

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