

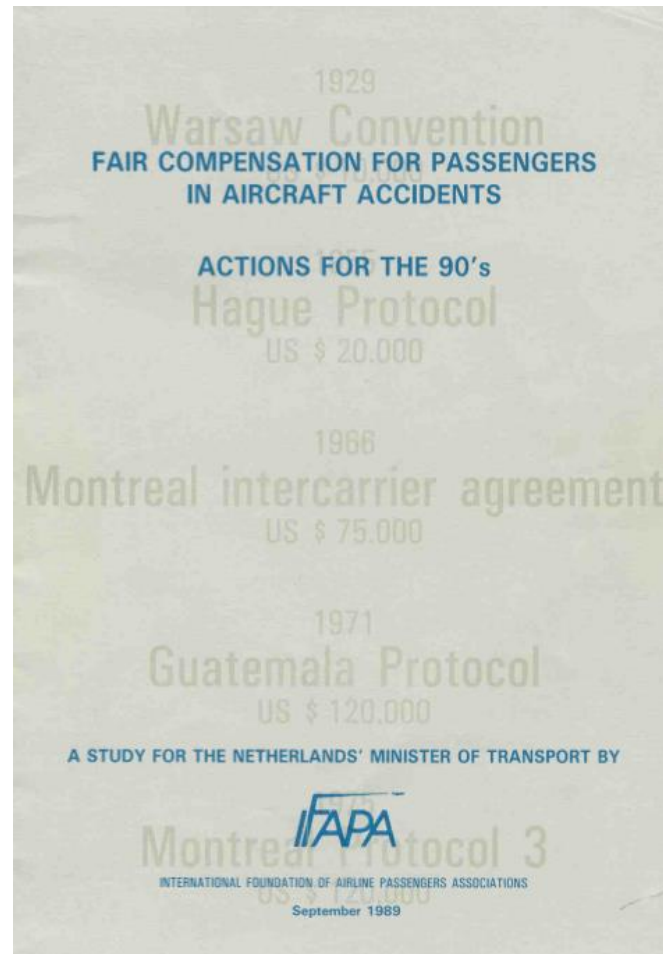


# **The Montreal Convention 20 years on: the Global Perspective**

Aviation Law Afternoon Workshop 2019

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# Preamble to the Warsaw Convention 1929



- Having recognized the advantage of **regulating in a uniform manner** the conditions of international transportation by air in respect of documents used for such transportation and of **the liability of the carrier**.

# Preamble to the Montreal Convention 1999



- RECOGNIZING the significant contribution of the Convention for the **Unification of Certain Rules** Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the “Warsaw Convention”, and other related instruments to the harmonization of private international air law;
- RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;
- RECOGNIZING **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;**

## The Intervening 20 years

- Deregulation & Privitisation
- Consolidation
- Rise of Low Cost Carriers & Democratisation
- Dependency of airlines on IT platforms
- Civilian aircraft used as weapons of destruction
- Growth of consumer protection for airline passengers
- Emergence of the globalised plainitiffs' bar
- Power of social media

## Jurisdiction – Article 33

- Montreal Convention retains Warsaw Convention Article 28 Jurisdictional alternatives i.e. (1) the domicile of the carrier; (2) the principal place of business of the carrier; (3) a place of business of the carrier where the contract was made; or (4) the place of destination (of the passenger).
- Article 33 (2) of the Montreal Convention adds a **fifth** jurisdiction based on «**principal and permanent residence of the passenger**» subject to carrier operating to that jurisdiction (e.g. by contract with another carrier under a commercial agreement or carrier conducting its business from premises in that jurisdiction).

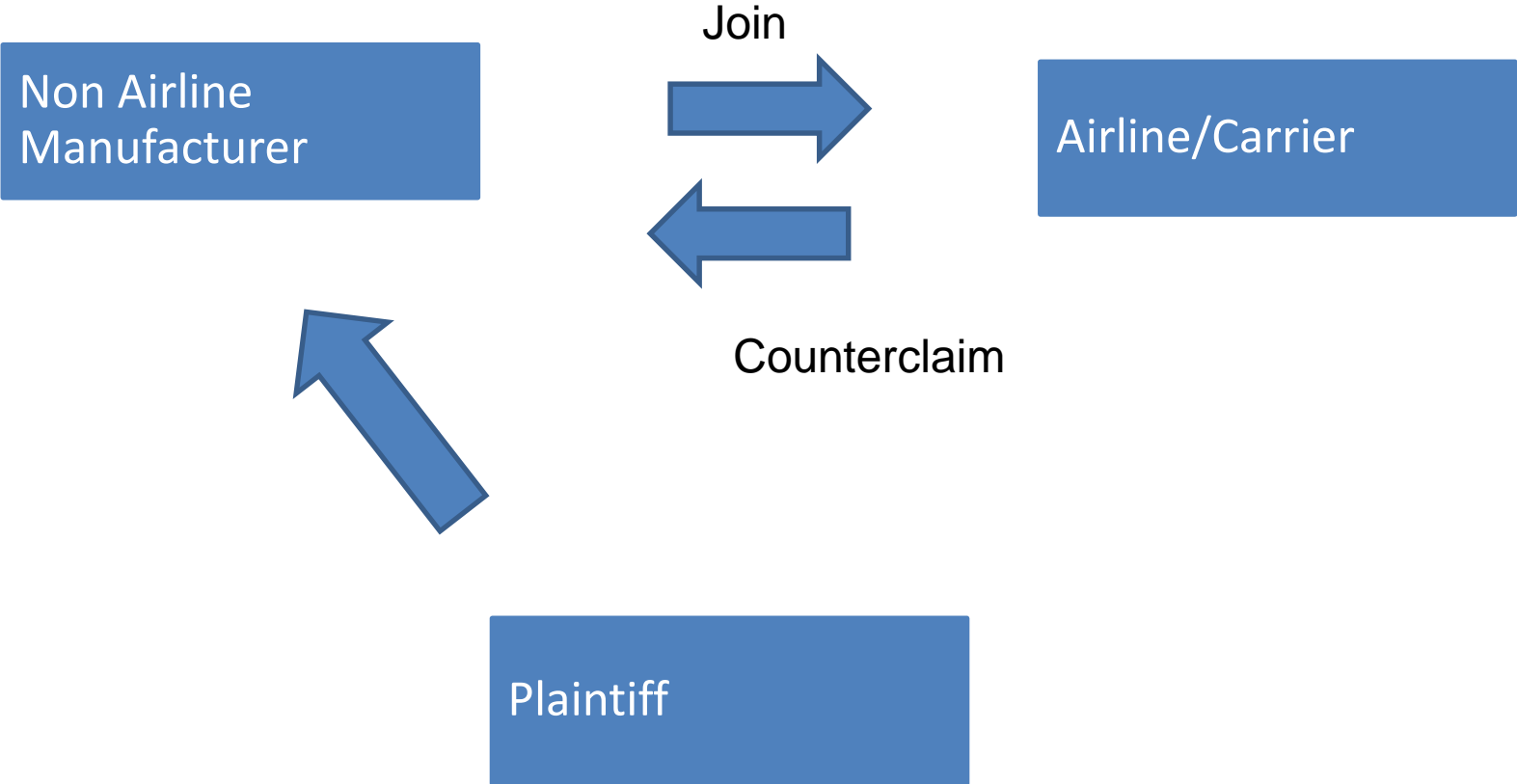
# Jurisdiction and circumventing the Convention



- Non airline defendants used to circumvent jurisdiction and potentially enhance quantum of damages – defeating the “purpose” of the Montreal Convention?
- Article 37 Recourse Against Third-Parties
- Article 29 Contrary to doctrine of Exclusivity as against airlines/carriers
- Doctrine of Forum Non Conveniens



# Circumventing the Montreal Convention- Airline named in non Article 33 Jurisdiction



# Jurisdiction and circumventing the Convention



- Non airline defendants used to circumvent jurisdiction and potentially enhance quantum of damages – defeating the “purpose” of the Montreal Convention?
- Article 29 Contrary to Exclusivity of application of Convention as against airlines
- Ultimately disregarding the appropriate application of a multilateral international legal convention
- Effective Counter? – the doctrine of Forum Non Conveniens

## Other issues

- A highly successful convention in terms of number of State parties – 136 (including the EU)
- Strict liability limits previous point of commencement of claims settlement negotiations – now the floor (Article 21)
- or considered undisputed/automatic payment (Kerala High Court re: Air India Express loss 22.05.2010)
- Up-front payment – becoming essentially the strict liability limits? (Article 28)
- Ease of recovery against airlines – liability not contested due to weakness of airlines defences?
- Only quantum of damages to be considered – results in settlement of most claims as opposed to litigation

## Other issues

- Bodily Injury – Mental Anguish PTSD Article 17 definition of “bodily injury”, appears be “holding” as a defence - with more medical research in this area will this change, opening the floodgates?
- Inconsistency between application of Montreal Convention and domestic legislation (e.g. Brazil and Consumer Code Protection) – challenges exclusivity and uniformity doctrine.
- US - little substantive precedent at senior court level concerning the requirements of “principal or permanent residence”. Recent opportunities lost?

## Other issues

- Credible defences for airlines under Article 21 or a legal fiction?
- Successfully adapted to Code Sharing - Article 40
- Facilitated transition to E ticketing – Article 3(2)
- Insurance Article 50 – contracting states require their air carriers to maintain “adequate insurance” covering their liability
- Exaggerated concern, as insurers have been providing coverage well above settlements/awards to date - Perhaps post 9/11 3<sup>rd</sup> party was an example of only concern expressed to date?

## Other issues

- Cargo – Caps unbreakable – demise of cargo litigation naming airlines/air cargo carriers - Article 22 (3)
- Cargo Documentation simplified - Article 4 (2)

## Periodic increase in limits – Article 24



SDRs	Original Limit	Revised & Current Limit 30.12.2009	Revised & Expected Limit 30.12.2019
Injury / Death	100,000	113,100	128,828
Delay	4,150	4,694	5,346
Baggage	1,000	1,131	1,288
Cargo	17	19	22

## Finally.....

- Responsive to Consumer Claims?





## Verdict?

- Incredibly successful in term of number of states signing/ratifying
- Concern that plaintiffs' counsel will increasingly ignore Article 33 Jurisdictional Alternatives and «circumvent them»
- Ultimately, objective of Plaintiffs' bar is to seek parity in terms of compensation for all passengers
- Is this consistent with the objectives of the Montreal Convention? i.e. «equitable compensation».
- A direct challenge to multilaterism and international law?
- Success in other areas but relevant for the adjudication of small claims/attritional losses?
- The triumph of consumerism

Thank You

gbf

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