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The Montreal Convention 20 years on: the Swiss Perspective

Aviation Law Afternoon Workshop 2019

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The Swiss experience with the MC99: little to say…

- Entered into force in Switzerland in September 2005
- No major accident since 2002
- Few passenger claims; out-of-court settlements
- Conditions of liability undisputed; discussion of the quantum of claims
- Only one court decision published: Federal Supreme Court, 28.09.2018, 4A_385/2017

The interpretation of the MC99 in Switzerland

- Uniform law treaties (such as the MC99) shall be interpreted as per Art 31-32 of the Vienna Convention on the law of treaties:
  - treaty's text, in good faith, ordinary meaning
  - in the light of its purpose
  - in its context (including subsequent practice)
  - Reliance on preparatory works only secondary means (Art 32)

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- For uniform law treaties, subsequent practice means careful consideration of foreign precedents

  Federal Supreme Court, BGE 113 II 359, par 3 (Warsaw Convention); BGE 138 II 798, par 3.1 (CMR)

- Moreover, as the purpose of treaties such as the MC99 is to unify the law, courts should favour an interpretation which is consistent with decisions in other contracting states

=> The Swiss approach to the MC99 would carefully take into consideration the interpretation in other jurisdictions

So, how would a Swiss court apply Art 17 MC?

Art 17 par 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.’

4 aspects/conditions

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- Accident
- Bodily injury
- Exclusivity
- The ‘no fault’ defence

The accident

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- Worldwide a very consistent interpretation of that concept
- '**unexpected or unusual event or happening that is external to the passenger**, and not to the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.'

  Air France v Saks, 470 S Ct 392 (1985); *Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72; Cass. 1re civ., 08.10.2014, n° 13-24346; OLG Frankfurt am Main, 06.11.2002, ASDA-Bulletin 2002 46
- In the US, an omission of the carrier can constitute an accident

  Olympic Airways v Husain, 540 S Ct 644 (2004)
- Swiss courts are likely to follow the consistent interpretation of 'accident' given by foreign courts

Bodily injury (vs psychic injury)

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- In Common-Law jurisdictions, ‘bodily injury’ has generally been understood, since the Warsaw Convention, as excluding purely psychic harm

  Eastern Airlines v Floyd, 111 S Ct 1489 (1991); *King v Bristow Helicopters Ltd; Morris v KLM Royal Dutch Airlines*, [2002] UKHL 7

- Psychic injuries are only to be compensated if flowing from some physical harm…

  Ehrlich v American Airlines, Inc, 360 F 3d 366 (2nd Cir, 2004)

- … or at least concurrent with physical harm

  Doe v Etihad Airways, PJSC, 870 F3d 406 (6th Cir, 2017)

- If not under the Convention, there is no compensation at all (Art 29 MC / 24 WC: Convention is exclusive remedy)

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- In Civil-Law jurisdictions, ‘bodily injury’ is usually understood as including psychic harm

‘Bodily injury’ in the MC99

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- No agreement could be found on whether/to what extent psychological harm should be recoverable under the MC99
- Delegates at Montreal adopted the following statement:

  "THE CONFERENCE STATES AS FOLLOWS:

  1. with reference Article 16 [read: 17], *paragraph 1, of the Convention, the expression ‘bodily injury’ is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air;*

  2. […]"
- An express acknowledgement of the dual interpretation of an uniform instrument…

Psychic injuries in Swiss courts

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- Would a Swiss court award compensation for a mere psychic harm (such as PTSD)?
- Under Swiss law, psychic integrity is deemed part of physical integrity
- Science shows that mental illnesses are linked to alterations of the brain (they are not 'purely psychic'); distinction is artificial
- In the light of the Statement adopted at Montreal, it is likely that a Swiss court would consider a medically established psychic harm as a 'bodily injury', entitling the passenger to compensation

How about moral damages (*Genugtuung / tort moral*)?

- ‘Bodily injury’ – a type of harm – is a condition precedent for compensation under Art 17 MC, which, if met, should not prevent the award of moral damages
- Moral damages are a compensation mode; the only condition set by the MC99 in that respect is that damages shall be ‘compensatory’ (Art 29 MC)
- For instance, in the UK, damages for bereavement (a type of moral damages) may be claimed based on the MC99 (see Shawcross & Beaumont, VII 731)

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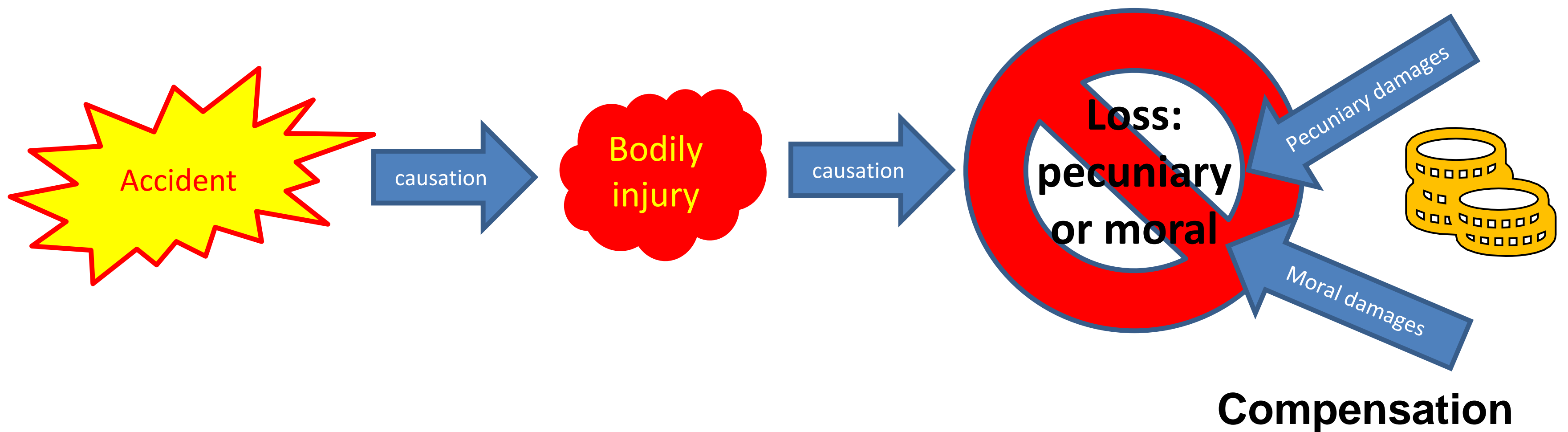
The Art 17 MC 'chain':



Exclusivity (Art 29 MC)

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'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

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- Consistent body of case law worldwide: Convention is exclusive remedy
- If its conditions are not met (in particular those of Art 17 MC), the carrier incurs no liability whatsoever

  El Al Israel Airlines Ltd v Tseng, 119 S Ct 662 (1999); *Sidhu v British Airways plc, Abnett v British Airways plc*, [1996] UKHL 5; *Hook v British Airways plc, Stott v Thomas Cook Tour Operators Ltd*, [2014] UKSC 15; *Thibodeau v Air Canada*, 2014 SCC 67; Cass. 1re civ., 14.06.2007, n° 05-17.248, *Rozenberg et Gillet c/ Cie aérienne Air Canada*
- Claims based on domestic law are precluded
- It is likely that Swiss courts would follow that line of decisions

The ‘no fault’ defence (Art 21 MC)

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Art 21 par 2 MC: ‘The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 113 100 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.’

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- Art 20 WC provided for exoneration, if the carrier proved that he and his servants or agents took all necessary measures to avoid the damage or that it was impossible to take such measures.
- It is a very strict test.
- Art 21 MC seems more lenient to the carrier.
- Indeed, the ‘no negligence nor other wrongful act’ defence was adopted to ‘lower the standard of proof’, as a *quid pro quo* for the unlimited and partly strict liability introduced by the MC99

  See International Conference on Air Law, Montreal, 10 – 28 May 1999, Vol I Minutes, Doc 9775-DC/2, p 202

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- Still, the Art 21 MC defence remains a difficult avenue, when the cause of the accident is unknown (eg MH370)
- The carrier can then hardly prove that the damage was not due to its fault
- It is not sufficient establish that the crew/the carrier acted in accordance with all applicable rules; the uncertainty as to what caused the accident benefits the victims

How would a Swiss court interpret Art 21 MC?

- So far, very few published cases on Art 21 MC
  - In the US, cases have granted exoneration to the carrier for overhead bin incidents
- ‘negligence or other wrongful act or omission’
  - According to Black’s Law Dictionary, ‘wrongful’ means ‘contrary to law’
  - Negligence is just a case of wrongful act or omission
  - WAO also covers intentional harm and light or gross negligence
- It is likely that a Swiss court would give to that concept the same meaning as to fault under Swiss law (*Verschulden*; *faute*)

Conclusion

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- The application of the MC99 has not given rise to any debate in Switzerland
- Worldwide, the MC99 has led to a decrease in litigation
- Sign that the MC99 has achieved its goal of simplifying the handling of carriage by air claims

Thank you for your attention!

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