The regime for international air carrier liability: to what extent has the envisaged uniformity of the 1999 Montreal Convention been achieved?

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6 General Conclusions and Recommendations

6.1 General Conclusions

The purpose of the analysis carried out in this study was to determine whether the regime for international air carrier liability established by the 1999 Montreal Convention could be uniform. Three sub-questions were posed in order to reply to this question.

First, it was necessary to analyse whether uniformity was a predominant aim of the 1999 Montreal Convention. The examination carried out highlighted that the purpose of the treaty was dual. On the one hand, it had ambitions to solve the lack of legal certainty generated by the existence of parallel, and occasionally conflicting, regimes. On the other hand, its negotiators, updating pre-existing treaties, wished to adopt rules that would simultaneously create a level playing field amongst airlines and would reflect a balance between carrier and passenger rights. Such purposes had to be achieved through a unification process. However, unification under a single common text could either have materialized through common rules of conflict of laws, or through uniform rules. As the purposes of the 1999 Montreal Convention and its predecessors could not have been satisfied with rules of conflict of laws only, the choice was therefore made to unify, as far as possible, the contemplated international regime through uniform rules. In this regard, this study has demonstrated that these uniform rules were expected to be uniformly applied in order to ensure the effectiveness of the purposes of the treaty, with the assistance of features such as the principle of exclusivity and the concept of autonomy.

Second, with the assistance of the *Travaux Préparatoires* and judicial decisions, the study examined whether there were any factors that would constitute obstacles to this aim of uniformity. The analysis highlighted that factors both internal and external to the treaty prevented this aim from being achieved, and led to a fragmentation of the 1999 Montreal Convention. Designated as internal factors, that is to say factors that stemmed from the text itself, the analysis demonstrated that several drafting factors contributed to fragmentation. These included:

- the lack of definition of key terms and concepts used;
- the transfer of concepts used in other Uniform Instruments;
- the admissibility of variations in interpretations of the terms and concepts used, to the extent that a certain significance is given to the *Travaux Préparatoires*;

– the unclear division between uniform rules and referrals to domestic rules;
– and finally, the inclusion of a provision that would potentially allow different Courts to be seized with respect to the same event.

All of these internal factors could have however been mitigated, if the treaty had included specific common specific interpretation rules or had created a dedicated Court.

Despite the existence of longstanding warnings, and some of which being raised during the 1999 Montreal Conference, none of these mitigating measures were adopted.

Moreover, external factors to the Conventions have also participated in the fragmentation of the uniform regime. Regulatory changes disturbed the autonomy and exclusivity of the treaty. These include rules adopted at regional and domestic levels that supplement or compete with the uniform regime of the 1999 Montreal Convention. In parallel, Courts have also not always uniformly understood the nature of the autonomy of the terms and of the principle of exclusivity, which has resulted in divergent interpretations of the 1999 Montreal Convention. In addition, linguistic variations of the uniform rules have been seen as a source of fragmentation of the uniform regime. This study also demonstrated that despite being useful tools, the principles of interpretation laid down in the 1969 Vienna Convention were not always helpful for ensuring a uniform application of the uniform rules.

Third, having acknowledged the existence of a fragmentation of the international air carrier liability regime which is in contradiction with its aim of uniformity, the study tried to assess whether certain elements could be developed to improve the uniform application of the 1999 Montreal Convention. To do so, this study examined solutions adopted in other international instruments and discussed the possibilities offered by Artificial Intelligence. The outcome of this analysis was particularly promising.

In light of all these elements, the recommendations that follow appear reasonably useful for further improving the uniformity of the 1999 Montreal Convention.

6.2 Recommendations

6.2.1 Preliminary Remarks

I suggest implementing the recommendations laid out in this study in three phases. The first and second phases could start rapidly.

Certain recommendations do not need a modification to the 1999 Montreal Convention, while others require the political commitment to set up a new diplomatic conference. Although the third phase could be initiated in parallel with the first two, it would only be truly useful once the second phase had been completed.

6.2.2 The First Phase

The choice of the subject matter of this study, along with the conclusions drawn, demonstrate that the aim of uniformity of the 1999 Montreal Convention deserves to be constantly recalled. Therefore, in light of the purposes and object of the 1999 Montreal Convention, *Recommendation No 1* would be that, with immediate effect, whenever one of the terms or concepts thereof needs to be interpreted, the persons in charge of the interpretation give due respect to the principles set out in the 1969 Vienna Convention, together with significant weight to the dominant jurisprudence developed by Courts in other ratifying States.

6.2.3 The Second Phase

The second phase requires little more than mere goodwill, as most of the following recommendations entail amending the 1999 Montreal Convention. On a cosmetic side, given the variations in terminology used regarding the different techniques of approximation of legislations, *Recommendation N° 2* would be to redraft the preamble in order to clearly distinguish harmonization from unification. On this occasion, the wish for a uniform application should be underlined.

Moreover, as the examination carried out also showed that the combination of uniform rules and *renvois* has led to undesirable situations, *Recommendation No 3* would be to proceed with a clear drafting separation between uniform rules and non-uniform rules. The implementation of this would avoid leaving to the Courts the task of determining whether a provision must be regarded as autonomous or subject to domestic law. Such a redrafting would also be of paramount importance to the implementation of the third phase, where an algorithm would have to be commonly developed.

During the redrafting process, discussions should also take place on the exact intended scope of the exclusivity principle. As different views exist on the matter, *Recommendation No 4* would be to consider a redrafting of Article 29 of the 1999 Montreal Convention for further clarity. This discussion should ideally include the possibility of solving any difficulties that arose in connection with the emergence of consumer rights.

In light of this element, *Recommendation No 5* would therefore be to include, in a revised version of the 1999 Montreal Convention, new uniform rules on the matter, which would replace the existing regional and domestic legislations on air passengers' rights. This recommendation is also grounded in the fact that the current situation with respect to consumer

rights shares many similarities with the one that concurred with the adoption of the first uniform rules in 1929.

As the autonomous nature of the uniform rules also generated misunderstandings and conflicting views, *Recommendation No 6* would be to insert a provision into the revised version that would clearly indicate that uniform rules are autonomous, and that the treaty establishes a *sui generis* regime, with the consequence that terms and concepts therein should not be interpreted pursuant to domestic law or other international instruments. This being said, even in the case where autonomy was rightly acknowledged, there stills remains a question of how to validly interpret autonomous terms and concepts in the absence of definitions and/or prior judicial decisions.

Recommendation No 7 would therefore be to add more definitions and to include a dedicated provision in the revised text that would provide that uniform rules should be interpreted pursuant to the principles of interpretation laid down in the 1969 Vienna Convention with, when existing, the necessity to pay due consideration to foreign judicial decisions and to depart from dominant jurisprudence only on reasonable grounds. On this occasion, delegates should also take the opportunity to reformulate the purposes and object of the 1999 Montreal Convention, in order to avoid divergent decisions on this basis. They should also firmly stipulate the value they intend to give to judicial decisions handed down on the grounds of previous instruments.

As a review of foreign decisions would become mandatory, *Recommendation No 8* would be to implement a common database of all related decisions delivered in each ratifying State. Such a database would have to include a description of the judiciary system in place in each State, in order to determine the domestic value of the decisions uploaded in the database, and a translation of the decisions submitted in at least one of the official language of the 1999 Montreal Convention.

All of the above Recommendations do not anticipate solving every potential issue regarding a uniform application of the 1999 Montreal Convention, but they are expressed as means to achieve a less fragmented application. The ideal solution to ensure the full effectiveness of the purposes and object of the treaty would obviously be the establishment of a common Court, endowed with complete jurisdictional competencies.

As one should not be too naive regarding the tensions that such a transfer of competence would generate, *Recommendation No 9* would be to establish a public or private *collegium jurisconsultorum* that could be seized by any domestic Court on a point of law to ensure, through the mechanism of a preliminary ruling, a highly regarded interpretation made by recognized law professionals.

In the situation where the opinions to be handed down by such *collegium jurisconsultorum* would not be binding, Recommendation No 7 should be supplemented in order to guarantee a certain value to these opinions for interpretation purposes.

6.2.4 The Third Phase

The third phase aims to apply Artificial Intelligence software in a coordinated manner to the 1999 Montreal Convention. The recommendations included hereinafter are ready to be be discussed at a political level, as they do not require *per se* a modification of the current version of the 1999 Montreal Convention. However, most of the points raised in the second phase and in section 5.4 would ideally need to be addressed before expecting a useful software that would guarantee a uniform application of the Conventions.

As different software products relying on Artificial Intelligence technology are being developed, *Recommendation No 10* would be to ensure that as many ratifying Parties as possible gather to decide together on a common algorithm that would be used to interpret the 1999 Montreal Convention. To this end, the project should ideally be organized under the auspices of an international organization such as the ICAO, in order to guarantee public access to the algorithm and to avoid unnecessary copyright issues. The international organization would then have to appoint a dedicated team composed of legal experts, computer scientists, Artificial Intelligence scientists and data protection officers to enact this goal. This team would have to make specific suggestions as to who could benefit from the software, and who would potentially be able to amend the algorithm.

6.3 Closing Words

Despite numerous remarks made in the course of this study, the 1999 Montreal Convention is a remarkable achievement and an undisputed success. It is one of the most unique instruments to cover both business and consumer law provisions under a single text. Its application may have resulted in few weaknesses, but also confirms its strength.

As carriage by air grows and improves thanks to the continuing development of new technologies, the uniformity of the 1999 Montreal Convention also profits from the development of technologies such as the internet, which enables judicial decisions and commentaries to easily cross borders. But in this world where technology enables the possibility of a very high degree of predictability and uniformity in Court decisions, now may be the right moment to consider whether such a promise is still desirable. A few years after the adoption of the 1929 Warsaw Convention, Professor Karl Wieland expressed the view that: '[…] the future uniform world law remains a utopia, it is a dream and not even a beautiful one'. [1] Is it really

1 Karl Wieland, "Rechtsquellen und Weltrech", in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, t. 3, 473 (Sirey 1934): 'Allein das künftige einheitliche Weltrecht bleibt eine Utopie, ist ein Traum und nicht einmal ein schöner'.

not a beautiful dream? A certain degree of flexibility is probably a shadow component to what might be considered a right decision. There is little doubt that once Artificial Intelligence software is implemented to assist Courts, the next generation of judges will have to be particularly creative about finding the appropriate balance between uniformity and flexibility.