

Legal Aspects for Iran to Ratify the Montreal Convention for the Unification of Certain Rules for International Carriage by Air

Mansour Jabbari ¹, Ebrahim Shoarian²

Received: 13/6/2009

Accepted: 31/1/2011

Abstract

According to the Iranian law, the International Conventions should be passed by Iranian Parliament (Majlis) and then confirmed by the Guardian Council for ensuring that they are constitutional and in conformity with Islamic rules.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air is a significant advance over the Warsaw system. In this article, we discuss whether the new changes made in Montreal Convention are in compliance with the Iranian laws as well as Islamic regulations. Some important issues for developing countries are introduced with a view to determine the legal aspects for Iran to ratify the Montreal Convention.

By examining the Warsaw Convention, that Iran has been acceded to, and the Montreal Convention, we conclude that the new issues of the Montreal Convention are in compliance with Iranian and Islamic rules and regulations.

Keywords: Montreal Convention; Warsaw System; Liability; Bodily Injury; Fifth Jurisdiction

1. Associate Professor, Faculty of Law, Allameh Tabatabaee University, mansorjabari@gmail.com

2. Associate Professor, Department of Law, Faculty of Humanities & Social Sciences, Tabriz University

Introduction

The Islamic Republic has ratified the Convention for the Unification of Certain Rules Relating to International Carriage by Air (known as the 1929 Warsaw Convention), which established between member states a uniform liability framework for air carriers. This convention was subsequently amended seven times leading to what is known as the Warsaw System, whereby the rules for liability in respect of international carriage depend upon the iteration of the Warsaw Convention adopted by States of destination and departure for the carriage concerned.

Iran has ratified two of the amendments. The Warsaw Convention and the Hague Protocol has also been given effect in the Iranian domestic law through the Act of 1986 (The Official Gazette of the Iran, 1986: 474-475).

The Montreal Convention, as the new private international air law convention, is a significant advance over the existing system. It aims to modernize and consolidate the Warsaw System, to ensure the protection of consumers' interests with respect to compensation and promote the development of international air transport operations.

How Iran is benefitted by ratifying the Montreal Convention? As such, the current paper tries to analyze the need for Iran to ratify the new convention. According to Article 4 of

the Iranian Constitutional Law, which was passed after the Islamic revolution in 1979, all civil, penal, financial, economic, administrative, cultural, military, political, and other codes and regulations must be based on the Islamic criteria. Article 94 of the Constitution states that all legislations (including international treaties) passed by the Islamic Consultative Assembly, must be sent to the Guardian Council in order to review them and ensure their compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review.

In most of the Islamic countries, Islam has been declared as an official religion and it is the main source of law. Parliaments in these countries are charged to make sure that the conventions are in line with Islamic rules. For example In Syria, the Islamic jurisprudence is a main source of legislation (Article 3(2) of the constitution of Syria) and the cabinet has to conclude agreements and treaties in accordance with the provisions of the Constitution. (Article 3(2) of the constitution of Syria) In Algeria, Islam is the religion of the State. (Article 2 of the Constitution of Algeria) The institutions are not allowed to act contrary to the Islamic ethics (Ibid. Article 9). When the Constitutional Council considers that a treaty, an agreement or a convention is not constitutional, its ratification cannot take place (Ibid. Article 168).

In this Article, by studying the new issues and regulations of the Montreal Convention, we examine the question of whether the new changes made in Montreal Convention are in compliance with Iranian laws and Islamic regulations.

1. The Montreal Convention Rules Relating to Air Carriage

The Warsaw Convention applies to international carriage of persons, baggage or goods for reward. It was a major contribution to the unification of law but has been outdated for many years. Attempts were made over the years to update the convention through protocols and private initiatives. These efforts resulted in a dis-unification of law.

In May 1999, an international conference was held in Montreal hosted by ICAO (International Civil Aviation Organization) with the aim to update and replace the Warsaw System. More than 500 delegates representing 121 nations gathered in Montreal. The new Montreal Convention was created and signed by 52 countries. This document has put the Warsaw Convention and all of its protocols into one single document, thus unifying the system of private international air law once again. Article 55 of the Convention provides that it shall prevail over any rule, which apply to international carriage by air between state parties. Then the convention helps to mitigate

the complexity of application resulting from the co-existence of several instruments governing air carriage. It unifies certain aspects of private international air law and most of the important countries in the world are a part to it.

The developing countries were not involved during the process. The "Special Group" assembled by ICAO to prepare the Draft Convention for the Unification of Certain Rules in the international air transport "had hardly any representation from developing countries, much less jurists or practising lawyers in the field of private international air law" (Barta, 2003:112). The developing countries were in favour of protecting their aviation industry while the developed countries wanted the passengers to receive full compensation for the injuries. Therefore, the developing countries supported aviation industry because of a clear paucity of infrastructure facilities such as good airports and modern aircrafts.

The Montreal Convention was adopted by "consensus", without a vote, but there remained deep divisions on the basic concepts, particularly between the developed and developing countries during the preparatory preceding of the Conference. As professor Milde points out, it would be unrealistic to interpret this consensus as unanimity of the international community (Milde, 1999:91).

However, 2009 was different from 1929. "In 1929, the parties were more concerned with

protecting air carriers and fostering a new industry than providing full recovery to injured passengers..." (Lowenfield, 1967:499-500). In the first half of the twentieth century, air travel was viewed as dangerous, and the developing commercial industry required legal protection to ensure growth. But today it is different. Although the developing countries largely depend upon the developed countries for requirements of aviation technology, there is a possibility for all countries to pay attention to their aviation industry and develop it. No country can afford to live in isolation. By not ratifying the Convention, Iran and other developing countries will be considered by the international aviation community outside of the system.

2. Carriage Documents: Passenger Ticket, Luggage Ticket and Air Waybill

The air carriers have to spend greater sum of money in order to meet the documentation requirements under the Warsaw Convention. This cost is added to ticketing and normally, it is the consumer who has to pay the cost (Milde, 1999:177).

The Montreal Convention introduces the possibility for airlines to utilize modern communication techniques in relation to the provision of certain information which, under the Warsaw Convention, had to be given in written form. This will allow the full

development of electronic ticketing that, for those passengers who wish to make use of it, will simplify international air travel. It will also allow airlines to reduce administration costs significantly, not just in relation to what documentation they must provide to passengers but principally in relation to the global system of inter-airline billing.

The Montreal Convention solved this problem by simplifying the formalities of the documents of carriage. For passengers and baggage, the Convention requires only one document to be issued. Article 3(1) requires a delivery of an individual or collective document of carriage that contains only an indication of the places of departure and destination, or in case the two places are situated within the same State party, an indication of one agreed stopping place in another State.

Article 3(2) of the Convention makes it possible for the carrier to substitute this document by any other means that preserve the information required. If such other means is used, the carrier must offer to deliver to the passenger a written statement of the information preserved by such other means. This enables the use of electronic ticketing system popularly used today.

Under Article 3(4) of the Convention, the carrier has an obligation to give written notice to the effect that where this Convention is applicable, it governs and may limit the liability

of carriers to passenger in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay. The convention does not specify the means by which the written notice must be given to the passenger, thus, the notice written on the airline's billboard at the airport, might satisfy the requirement of this provision (Ibid. p. 175).

Article 3(5) provides that "Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability." Thus, even if no ticket was delivered and no other means was used to preserve the information required, the contract of carriage is still valid and the whole convention is applicable. These will greatly benefit the carriers who are now spending a great amount of money on the documents of carriage in order to meet the requirement of the Warsaw Convention. Under the Montreal Convention the cost of ticketing will be lower and therefore the price of tickets could be decreased.

Is issuing ticket for passengers - as a written contract-compulsory in Iranian and Islamic law? Would oral agreement and computerized information of the carrier be enough? Since the Iranian laws principally originated from Roman-German and Islamic systems, we examined this matter by taking into account the

two systems.

2.1. Requirement of Contracts in Iranian law

It is not necessary for the parties to a contract to declare their consent through offering and acceptance in Iranian law. Article 190 of Iranian Civil Code provides that for the validity of a contract, the intention and mutual consent of both parties is essential. According to Article 191 and the subsequent articles, it is not indispensable to use a special form, and contracting parties are authorized to manifest their will by any means they want to complete a transaction. According to the Iranian law, the important point in this regard is the consent of contracting parties, and the form of displaying this consent is not important. Therefore, the parties can make an oral or written contract, whether formal or informal or other acts that reveal their common will.

In the Iranian law, the Principle of "Consent of Parties to Contract" governs all contracts and agreements i.e. a contract is considered legal and effective by wills of parties to contract and there is no limitation for stating one's will. In fact the important question is the actual will and real intention of the parties to the contract, not the external form of the contract.

According to Article 63(7)7 of the proposed Bill of Mercantile Law, a transportation contract can be written on paper, or be in electronic format, and the mere existence of one of them

shows the transportation contract, and non-issuing of ticket has no effect on the validity of transportation contract. The Bill has been approved by the Economic Committee of the Parliament of Iran on December 14, 2008 and it is in the agenda of Parliament. Although this Article has not been passed by the Parliament yet, it shows that electronic format of ticket is not contrary to Iranian laws and possibly will be passed by the Parliament.

Iranian jurists also believe that, to conclude a contract, it is not necessary for the contracting parties to show their intentions in writing, and a contract is considered to be valid and effective only by consent of parties. It is also not necessary to apply special formalities or to use special phrases to conclude a contract. In addition, attendance of witness is not essential to make a contract; in other words, the principal matter in this regard is the mutual agreement of parties (consent of parties) and existence of offer and acceptance (Katouzian, 1992:45-56).

Some jurists by affirming this point and emphasizing that observing a particular form for conclusion of a contract is not compulsory stated that making a contract as verbal, and in any language that parties speak or choose to speak, is permissible. Furthermore, parties of a contract, having the power to speak, are authorized to make a contract by any sign or act which reveals their common will and intention (Emami, 1994:181).

2.2. Islamic Legal Principle

Signs and conducts (acts) that are called *Moaatat* are sufficient for making a contract in the Islamic law. Shia jurists, in fact, have different opinions regarding this matter but majority of them believe that signs and conducts are sufficient for conclusion of a contract, except in cases, such as marriage contract, the condition of considering the contract valid and effective is that the wording of the contract to be uttered in Arabic (Owsia, 1993:257-273). Therefore, in the Islamic legal system, the principle of consent of parties of a contract is important and the parties to a contract have the right to reach an agreement, and conclude a contract by any means they wish.

In the legal code of "Al-Majalla Al Ahkam Al Adliyyah"¹ which was the first organized

1. The **Mecelle** code (also transliterated *Mejelle*, *Majalla*, *Medjelle*, or *Meğelle*) was the civil code of the Ottoman Empire in the late 19th and early 20th centuries. It was the first attempt to codify a part of the Sharia-based law of an Islamic state. The code was prepared by a commission headed by Ahmet Cevdet Pasha, issued in sixteen volumes (containing 1,851 articles) from 1869 to 1876 and entered into force in the year 1877. The substance of the code was based on the Hanafist legal tradition that enjoyed official status in the Empire. After the dissolution of the Ottoman Empire following World War I, the Mecelle remained a lasting influence in most of its successor states i.e. Turkey, Albania, Lebanon, Syria, Iraq, Cyprus, Jordan and Kuwait. Schneider, Irene (2001). "Aḥmad Ğawdat Paša". in Michael Stolleis (ed.) (in German). *Juristen: ein biographisches Lexikon; von der Antike bis zum 20. Jahrhundert* (2nd edition ed.). München:

code of Islamic countries concerning civil affairs and which was drawn up based on Hanafite jurisprudence regulations at the time of the Ottoman Empire, the principle of the freedom of parties to make contract was emphasized. According to Article 2, "A matter is determined according to intention; that is to say, the effect to be given to any particular transaction must conform to the object of such transaction."¹ Article 3 reads as follows: "In contracts effect is given to intention and meaning and not to words and phrases ..." Therefore, the real intention of parties to a contract is concerned and it can be showed by any means.

The Islamic legal principle of "contractual effects follow the intent of the parties to the contract" shows that according to the Islamic law, the form of contract is not important. In fact, from the Islamic point of view, the intention of parties is considered as the principal element of a contract. This legal principle has been followed by some Islamic countries (Markesins 2006:81). Article 90 of the Civil Code of Egypt, Article 90 of the Civil Code of Libya, Article 93 of the Civil Code of

Syria and Article 74 of the Civil Code of Sudan stipulate that in contracts, will of parties materialized with wording, writing and signs are based on customary rules and regulations. It is permissible to conclude a contract by any means showing the real intention of parties (Abdol-Monem, 1974:24-5).

3. Strict Liability

3.1. The Montreal Convention Adopted Strict Liability

Under the Warsaw Convention, an air carrier is presumed to be at fault once the damages occur to a passenger or his/her baggage. The convention limits the air carrier's liability to certain amounts of money. The principle of presumption of fault with reserved burden of proof has been adopted under Iranian law for any type of carriages.

A longstanding problem with the Warsaw Convention has been that it sets limits of liability that are now considered to be far too low. The liability of the carrier for each passenger is limited under the 1955 Hague Protocol to the Warsaw Convention to 250,000 frank.

The Montreal Convention made important changes in this regard. In relation to the carriage of passenger, it eliminates an unfair limit of liability of carrier imposed by the Warsaw Convention. Article 21 of the Montreal Convention calls for strict carrier liability up to

Beck. p. 23. ISBN 3406 45957 9. Encyclopedia of World History, 6th ed., online at bartleby.com, accessed January 2007; Available also at encyclopedia of Wikipedia.

1. Al-Majalla Al AhKam Al Adliyyah (The Ottoman Courts Manual [Hanafite]), available at: http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleintro.html, Visited on March 10, 2009.

100,000 SDR with only available defense being contributory negligence. In claims for more than 100,000 SDR, the carrier may use the defense that the damage was not caused by its negligence or wrongful act, or the accident occurred because of events out of the carrier's control. This Article represents a strong change in the damages a plaintiff can receive, and increases the likelihood that passengers will be adequately compensated for severe injuries or death from accidents. The result is that plaintiffs will finally be able to receive more equitable and just compensation for their damages.

With respect to the limits of liability of the air carrier, it is obvious that the world is now moving toward an unlimited liability regime. In the Iranian law, depending on the subject, both types of liability i.e. fault liability and strict liability has been recognized. For instance, according to the laws passed in 1968 and 2008, the civil liability, arising out of ownership of motor vehicles is strict and the owner of the vehicle under any circumstance should compensate the damages and cannot discharge himself/herself from liabilities incurred as a result of his/her act by proving that he/she is not at fault.

3.2. Strict Liability in Iranian and Islamic Laws

According to general rules (Articles 50, 493, 516,556,577,584 and 640 of Civil Code of

Iran), individuals are bound to compensate losses incurred to others, when they commit a fault, but in exceptional cases, for example, when a contract existed between the parties, they can agree on the kind of responsibility regardless of fault (Article 642 of Civil Code of Iran). Therefore, Iranian law can attest implementing a two-tier liability system for passenger injury and death. According to Article 230 of the Iranian Civil code, if in a contract, the amount of compensation in the event of its non-fulfillment is laid out, the judge cannot condemn the debtor to pay more or less than the sum fixed. This agreement is called "liquidated damage" and is legally binding. It makes no difference whether liquidated damage is financial or physical, and the party who is responsible to compensate damage is not able to decrease the payable damage by proving that the damage incurred is least. Therefore, strict liability has been recognized in Iranian law in various cases and, so, there is no obstacle for Iran to accede to the Montreal Convention.

In Islamic law, in some cases, the strict liability has been emphasized. As a general rule, if a person deposits a property, but for any reason destroys it, the trustee is bound to compensate for the loss, provided that the latter is at fault. However the parties hereinafter agreeing on liability to compensate the loss (Liability Clause) in case of doing

damage to the property, even though it is not resulted from the act of trustee, he/she is obligated to compensate for the loss incurred. This is true even in the cases that the loss is resulted from force major and the trustee is liable to redress the damage done (Katouzian, vol. 3, 1985:90). The validity of liability of trustee is provided for in Article 642 of the Civil Code of Iran. Another example is the damage incurred to the object of lease. The majority of Islamic jurisprudence is consistent with the idea that, if the tenant has accepted the strict liability in case of incurring damage to the object of lease, then he is liable to compensate even though he/she has not committed a fault. The courts of Iran have affirmed this matter by referring to the principle of "Freedom of Contract" and Article 10 of the Civil Code of Iran (Emami, vol. 2, 1994:4; Yazdi, 1997:307).

Strict liability in unintentional destruction of the property of others has also been accepted, i.e. if a person unintentionally and without fault destroys another's property, he/she is bound to compensate for the losses. This rule has been emphasized in Article 328 of the Civil Code of Iran and also is an accepted rule in Islamic law. Therefore, as a general rule, in various cases, both Islamic and Iranian law have accepted strict liability and it can be extended to the carriage of passengers and goods by air.

4. Action when Passenger has Principal and Permanent Residence

Article 28 lists the forums in which cases may be brought under the Warsaw Convention. There are two conditions:

- 1) Before a court in the territory of a High Contracting Party, and
- 2) One of the four following places:
 - a. At the domicile of the carrier, or
 - b. principal place of business of the carrier, or
 - c. A place of business of the carrier through which the contract has been made, or
 - d. At the destination.

The Montreal Convention, by including the fifth jurisdiction, expands the four jurisdictions enumerated under Article 28(1) of the original Warsaw Convention. According to Article 33(2) of the Montreal Convention with respect to damage resulting from death or injury of a passenger, an action may be brought in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence.

As the Warsaw Convention provides, the carrier with convenient jurisdiction to defend itself, a similar treatment should be given to the passenger. The fifth jurisdiction ensures that the victims and their families are treated fairly in light of the circumstances (Etil Serrao, 1999:72).

An additional 'fifth jurisdiction' would be of some benefit to Iran, in enabling its residents to

have a home forum for court action that would be more convenient than pursuing action in a faraway country due to the costs involved. Therefore, the major advantage of the new Convention is that passenger and their families would find it easier to claim compensation in the case of air accidents involving international travel. It should allow for the early settlement for the vast majority of claims, without the need for lengthy and costly litigation.

The fifth jurisdiction is consistent with the domestic law of Iran. According to Article 11 of the Civil Procedure code of Iran, a plaintiff is allowed to sue someone in his/her own home state by the mere fact that a contract existed between the plaintiff and the defendant regardless of where the contract was made. This will allow an Iranian plaintiff to file a suit in a local court gainst a foreign defender. Therefore the concept of the fifth jurisdiction has already been accepted in Iranian law.

5. Carrier Must Maintain Adequate Insurance Coverage

According to Article 50 of the Montreal Convention, State Parties are obliged to require their carrier to maintain adequate insurance covering their liability under the Convention. State parties have the right to require a foreign carrier, operating into their territory to furnish evidence that they maintain such adequate insurance. This requirement of compulsory

insurance is one of the consumer-oriented provisions of the Montreal Convention. This provision ensures that the claimants will receive full compensation which the convention awarded.

Is obliging the air carrier to insure passengers' legal in Iranian law? According to the Compulsory Insurance Act of 1952 of Iran, concerning land, air and marine vehicles, all the owners of the vehicles are bound to insure their vehicles against physical and financial damages, which may incur to individuals.

Even though according to the Warsaw Convention, to which Iran is a party, the insuring of passengers and their baggage is voluntarily, but in practice, the Iranian air companies insure the passengers and their baggage. As a matter of fact, the current rules and regulations of Iranian law are in compliance with the provisions of the Montreal Convention.

Since the Montreal Convention obliges the state parties to require their carriers to maintain "adequate" insurance for passengers and their baggage, the only effect that may be imposed on Iran as a result of acceding to the Montreal Convention is that the level of compensation, payable to passengers will be high and consequently, the level of obligation of insurance companies (insurance premium) and inevitably the costs of air companies will be raised.

Acceding of Iran to the Montreal Convention

has another advantage for the Iranian aviation industry; namely, that Iran will have to renew its aircraft and related facilities. The compensation payable to the passengers will be a notable sum; thus, the insurance companies at the time of making the contract with Iranian air carriers, will claim a huge amount of money in the form of the insurance premium. Since the insurance premium of a worn out aircraft with high risk is principally more than the insurance of a new aircraft, which is in a good condition, in the event of Iran acceding to the Montreal Convention, Iranian air companies inevitably have to accept its consequences. In this case, Iranian air companies shall try to renovate their aircrafts and do their best to increase the safety of flights by purchasing or leasing new aircraft with high safety standard. On the other hand, Iran by becoming a party to the Montreal Convention will enjoy benefits to its tourism industry, because passengers will travel with a strength sense of tranquility and safety and this matter shall bring more profitability to air companies and in the long term will compensate part of insurance costs.

6. Mental Injury

6.1. Mental Injury in Warsaw and Montreal Conventions

According to Article 17 of the Warsaw Convention, the carrier is liable for damage sustained in the event of the death or wounding

of a passenger or any other bodily injury suffered by a passenger.

Since 1929, recovery for accidents suffered on international flights has been limited to "bodily injury". Courts interpreted the "bodily injury" differently. A number of courts found emotional damage to fall within Article 17 of the Warsaw Convention (example: *Husserl v. Swiss Air Transport Co.*, (388 F. Supp. 1238 (S.D.N.Y. 1975)). Some courts required physical injury as a companion requirement to mental suffering, (example: *Rosman v. Trans World Airlines*, 314 N.E.2d 848, 850 (N.Y.1974)) while only a few courts accepted recovery for mental suffering unaccompanied by physical injury (Dempsey & Milde, 2005:125-134).

Recovery for "mental injury in the absence of accompanying physical injury" was a primary objective of the US and was listed as a condition to the United States' participation in the conference of 1999 to replace the Warsaw Convention with a new international treaty. Amending the bodily injury requirement took priority in the 1999 Conference of the Montreal Convention (Cunningham, 2008:1069).

At Montreal, the clear majority of states offered arguments in support of expanding recovery to include mental injury. As Cunningham stated, a strong argument could be made that despite the retention of the "bodily injury" language, the Montreal Convention broadened allowable recovery (Ibid. p. 1077).

Courts must review the negotiation history of the Montreal Convention as well as the policies that inform the Convention. (Article 33 of the 1969 Vienna Convention on the Law of Treaties) Unlike the negotiations from the 1929 Warsaw Convention, (Cunningham, op. cit. p 1047) protection of the nascent airline industry, the great majority of delegates intended in Montreal to protect passengers. Whereas the bodily injury limitation in the 1920s "was deliberately consistent with the primary purpose of the Contracting Parties to the Convention, to limit the liability of air carriers in order to foster the growth of a then fledgling commercial aviation industry," (Cunningham, p.1078) the retention of the bodily injury limitation in 1999 must reflect the "increased sensitivity towards the legitimate interests of the air transport user"(Ibid). Courts must interpret the text of the Convention by taking into account the negotiation history of the Montreal Convention. In contrast to the Warsaw record, the Montreal record is clearly full of delegates' calls to expand "bodily injury" to include recovery for mental injury (Ibid).

6.2. Mental Injury Recoverable Under Iranian and other Islamic Countries' Laws

Mental injury has been accepted in Iranian law by virtue of the Principle 171 of the Constitution as well as Articles 1,8 and 10 of Civil Liability Act. The meaning of "bodily

injury" has been the subject of discussion in several cases. Courts hold that mental injuries are compensable even if they do not flow from a physical injury.

Muslim Jurists have grouped questions of jurisprudence under certain general rules partly taken from Qur'an. It is ordered that the people must honor the moral and private rights of each other. Two of these rules are "Liability lies on the direct author of an act, even though acting unintentionally" and "Injury May Not Be Met by Injury".¹ These two rules have been considered by Islamic countries. They have been mentioned in Articles 19 and 91 of al-Majalla (Ibid) drawn up based on Hanafite jurisprudence. According to these Rules, the damages incurred to parties should be compensated. The latter rule originated from an incident occurred in the advent of Islam. By virtue of this rule, the individuals have no right to impose moral damages to others. Even though this Rule is applied for financial damages, it is originally related to the compensation of moral damages.

Islamic countries have followed this rule. Some examples are: Article 222 of the Civil Code of Egypt, Article 223(1) of the Civil Code of

1. The original Arabic is basically quoted from the text by Mahmasani. The text was translated into English by Farhat J. Ziadeh: available at: http://www.zaharuddin.net/index.php?option=com_content&task=view&id=113, visited on March 10, 2009.

Syria, Article 345 of the Civil Code of Yemen, Article 267 of Jordanian Punishment Act, Article 134 of the Code of Obligations and Contracts of Lebanon, Article 205 of the Civil Code of Iraq, Article 217 of the Civil Code of Kuwait, Articles 82 and 83 of the Civil Code of Tunis and Article 225 of the Libyan Civil Code (Nagibi, 2007:347). In some of Islamic sects, there are opponent opinions in this respect but in general, both lawmakers and judicial precedents have accepted the compensation of moral damages.

In Iranian law, in addition to various rules and regulations regarding recoverability of mental damages, the triple types of damage, i.e. moral, financial and physical damages are recoverable according to Article 72 of the Proposed Bill of Mercantile Law. As mentioned the Bill has been approved by the Economic Committee of the Parliament of Iran on Dec. 14, 2008 and it is in the agenda of the Parliament. The Bill has not been passed by the Parliament yet.

7. Protecting Passengers Will Promote Tourism Industry

Unlike in the past, where only rich people used civil aviation, common people now use it. It promotes business, foreign trade and tourism that are essential for all countries. The pilgrimage related religious tourist in many developing countries, among them, the Islamic

countries, could become a source of revenue if these countries develop their civil aviation industry. Developing countries could have economic benefits by promoting regional tourism.

Whatever may be the current view among Warsaw Convention signatories, in 1929, the parties to the Convention were more concerned with protecting air carriers than providing full recovery to injured passengers. The Montreal Convention substantively changed from protecting the airline industry to protecting the passengers (Cunningham, p. 1043). Some representatives in the 1999 Montreal Conference such as the delegate from the Dominican Republic stated that "passengers' rights had to be protected and there was no legal or ethical reason to deny this (Ibid. p. 1072). Protecting passengers may promote tourism.

International tourism is not only an economic sector, it is one of the most important "living and breathing" forms of inter-cultural dialogue. Iran enjoys enormous potentials for attracting tourists, but due to weak advertising, poor marketing and lack of customer satisfaction in Iran's air business, this is currently a problem. Sustainable tourism is important to Iran's natural and economic wealth. Only a very small percent of global tourists visit Iran every year. Iran is one of those countries whose image is distorted worldwide. In the Third International

Exhibition of Tourism and Related Industries which was opened in Mashhad on August 25, 2004, it was said that over 80 percent of tourists have admitted that Iran and its people were totally different from what they found in propaganda (Iran Daily, August 25, 2004: 5). Some 531 domestic and foreign tour operators from 46 countries attended the conference. Chevalier, who is an advisor to three large tour agencies in America, said in the conference; he has developed an interest in cultural-historical tourism, ecotourism and sports tourism in Iran. He said: "Iran has four seasons and many American people will be interested in visiting Iran for skiing and seeing other attractions," He stressed that American tourists planning to visit Iran should be provided with accurate information about the country.

Aviation plays a great role in developing tourism industry. The air transport brings more economic growth essential for raising the standard of living of people. The goal of service companies, including airlines, is to develop services which attract and keep customers who are satisfied, loyal and speak well of the airline (Gustafsson & Edvardsson, 1999:344). People need to travel by airlines and want to be satisfied with their travel.

There is a severe lack of customer satisfaction in Iran's airline business. The Iranian airlines are suffering from very intense competition on its international market. Iran,

after the Islamic revolution in 1979, has been struggling with the US sanctions and suffering from the embargo on purchasing new aircraft to renew the old fleet (Afshin Chitnis, 2006:10). It should be noted that Iranian airlines staff including flight crew, ground staff, engineers and technicians are challenged to increase their market share (Ibid). It should be noted that Iran has started to develop its aviation industry. Over \$109.6 million has been allocated for renovation and parts purchases for the country's airports, according to the Managing Director of State Airports Company. Approximately \$65.7 million of this figure will be allocated for expansion projects and renovation. Officials say the budget has been mostly allocated to the airports at Isfahan, Mashhad, Tabriz, and especially Tehran's Imam Khomeini International airport. The Managing Director of State Airports Company also noted that 55 airport terminal projects are underway throughout Iran and will become operational gradually.¹

However, these efforts are not enough and Iran has to pay more attention to its aviation industry. One of the contributions of the Montreal convention is that it mostly protects the interests of passengers. Iran has to pay attention to civil aviation as a means of

1. Airport Development News, A service provided by ACI World in co-operation with Momberger Airport Information. Available at: www.momberger.com, visited on March 10, 2009.

promoting domestic as well as international tourism.

Conclusion

The need for unification of law and global dimension of air transport makes it necessary to adhere to a consensus policy on a uniform basis. Developing countries have to use the modern technology in aviation industry in order to be able to compete with the developed countries in equal terms. Using the latest advances by developing countries in aviation industry would be helpful to the development of their economy. The air transport brings more economic growth which is important for removing poverty and raising the standard of living of the common man.

Iran and other developing countries have not yet come up to the level of the developed countries in the field of air transportation. They depend for their requirements of aircraft technology and navigation technique on the developed world. One encouraging way to develop the air transportation is to adhere to new conventions especially those that protect passengers. The implementation of the Montreal Convention will bring benefits additional to the Warsaw Convention. It provides a new jurisdiction that will be of benefit to claimants. It will allow a claim to be made in the country of the passenger concerned, provided that the airline involved, operates services to and conducts business in that

country. This will relieve the claimant, of the need to bring a claim in another country. Moreover, the Convention gives back to the claimant the most logical jurisdiction of all, the place of his or her residency. This should be supported by Iran and other developing countries.

The Montreal Convention updated and simplified the rules governing documents of carriage. It made electronic ticketing possible and enabled airlines to extensively reduce their operation costs. Considering the fact that in Iranian and Islamic law, making a contract is not restricted to a particular written text or form, therefore, it is not necessary to issue a ticket as an independent written text.

This Convention establishes a comprehensive and up-to-date set of rules defining and governing the liability of air carriers in relation to passengers, baggage and cargo. The regime of liability in this Convention overcomes all the problems caused by the limit of liability in the Warsaw Convention. In Iranian law, strict liability in unintentional destruction of others' property has been accepted and Iran should welcome this provision made by the Montreal Convention.

References

Books:

- [1] Abdol-Monem, Farag-al-Sade (1974). *Contract Theory in the law of Arab Countries*, Beirut: Daro-al-Nehzat-al-Arabyya Pub.
- [2] Barta, J.C. (2003). *Air Law (Including Warsaw Convention and Montreal Convention 1999)*; New Delhi: Relianceck.
- [3] Chitnis, Afshin (2006). *Satisfaction Formation Process for Iranian Airline Passengers, Case of Iran Air*, (Master Thesis submitted to the Joint Program to Tarbiat Modares University, Faculty of Engineering & Department of Industrial Engineering Lulea University of Technology.
- [4] Dempsey, Paul S. & Michael Milde (2005). *International Air Carrier Liability: The Montreal Convention of 1999*, Montreal: McGill University.
- [5] Etil Serrao, Jacqueline (1999). *The Montreal Convention of 1999: A "well worn" restructuring of Liability and Jurisdiction*, a thesis submitted to the Institute of Air and Space Law, Montreal: McGill University.
- [6] Emami, Hasan (1994). *Civil Law*, Vol. 1, 8th Edition, Tehran: Islamiyyeh Pub.
- [7] Emami, Hasan (1994). *Civil Law*, Vol. 2, 8th Edition, Tehran: Islamiyyeh Pub.
- [8] Katouzian, Naser (1992). *Elementary Studies in Civil Law; Contracts*, Tehran: Enteshar Publisher.
- [9] Katouzian, Naser (1985), *Nominated Contracts*, Vol. 3, Tehran: Behnashr Publisher.
- [10] Markesins, Basil and Others (2006). *The German Law of Contract*, 2nd ed., USA: Hart Pub Oxford.
- [11] Nagibi, Saïid Aboulgasim (2007). *Moral Damages in Islam, Iranian Law & Other Legal Systems*, Tehran: Amirkabir Pub.
- [12] Owsia, Parviz (1993). *Formation of Contract; A Comparative Study under English, French, Islamic and Iranian Law*, England: Graham & Tortman Publications.
- [13] Yazdi, Mohammad Kazem (1997). *Question and Answer*, 1st ed., Tehran: Islamic Sciences Pub Center.

Articles:

- [1] Cunningham, McKay (2008). "The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?" 41 *Vand. J. Transnat'l L.* October 2008.
- [2] Gustafsson A., Fredrik Ekdahl, Bo Edvardsson (1999). "Customer Focused Service Development in Practice: A Case Study at Scandinavian Airlines System (SAS)". *International Journal of Service Industry Management*, 10(4).
- [3] Lowenfield, Andreas F. & Allan I. Mendelsohn (1967). "The United States and the Warsaw Convention", 80 *Harv.L.Rev.*
- [4] Mahmasani, Questions of Jurisprudence, the

text translated to English by Farhat J. Ziadeh: available at: http://www.zaharuddin.net/index.php?option=com_content&task=view&id=113, visited on March 10, 2009.

[5] Milde, Michael (1999). "International Carriage by Air: History, Merits and Flaws and the New 'non-Warsaw' Convention of 28 May 1999" 24 Air & Sp. L. XXIV.

[6] Milde, M. From Warsaw 1929 to Montreal 1999 (Background for the ISAL/McGill Symposium in Dubai, 13-14 December 2003 hosted by the Department of Civil Aviation, Dubai, in Collaboration with the Asia/Pacific Alumni Association of the IASL/McGill).

Documents:

[1] Al-Majalla Al AhKam Al Adliyyah (The Ottoman Courts Manual [Hanafite]), available at:

http://www.iuu.edu.my/deed/lawbase/al_majalle/al_majalleintro.html. Visited on March 10, 2009.

[2] Airport Development Information, A Service Provided by ACI World in Co-Operation with Momberger Airport Information. Available at: www.momberger.com, visited on March 10, 2009.

[3] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 ICAO Doc. 7838 (Warsaw Convention).

[4] Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (Montreal Convention).

[5] International Civil Aviation Organization, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal (May 10-28, 1999), Minutes, Doc. 9775- DC/2, at 44 (2001).

[6] Official Gazette of the I.R.Iran, 1986 474 & 475.

بررسی حقوقی پیوستن ایران به کنوانسیون مونترال در خصوص یکسان کردن برخی مقررات حمل و نقل بین‌المللی هوایی

منصور جبّاری^۱، ابراهیم شعاریان^۲

تاریخ دریافت: ۸۸/۴/۲۲

تاریخ پذیرش: ۸۹/۱۱/۱۱

کنوانسیون ورشو مربوط به یکسان کردن برخی از مقررات حمل و نقل هوایی بین‌المللی در سال ۱۹۲۹ به تصویب رسیده است. این کنوانسیون در طول تاریخ هفت مرتبه اصلاح شده است که به همراه اصلاحات انجام شده به سیستم ورشو شناخته شده است. ایران سه سند از اسناد مزبور که شامل کنوانسیون ورشو و دو پروتکل آن (لاسه و گواتمالا) است را تصویب کرده است.

کنوانسیون مونترال تغییرات مهمی در حقوق حمل و نقل هوایی و در اسنادی که تا آن تاریخ وجود داشته ایجاد نموده است. این کنوانسیون بدین منظور تصویب شد تا حقوق مسافران را در پروازهای هوایی تضمین کند. بر اساس قانون اساسی ایران، معاهدات بین‌المللی بایستی به تصویب مجلس شورای اسلامی برسد و سپس در شورای نگهبان از جهت عدم مغایرت با مقررات شرعی و قانون اساسی مورد تأیید قرار گیرد. در این تحقیق بررسی شده است آیا مواد کنوانسیون مونترال با قوانین جمهوری اسلامی ایران مطابقت دارد یا نه و نتیجه گرفته شده است که کنوانسیون مونترال با مقررات اسلام و قوانین جمهوری اسلامی ایران قابل تطبیق است.

واژگان کلیدی: کنوانسیون ورشو، کنوانسیون مونترال، مسئولیت مطلق، خسارت بدنی، صلاحیت پنجم، گردشگری

۱. دانشیار دانشکده حقوق دانشگاه علامه طباطبائی

۲. دانشیار گروه حقوق دانشکده علوم انسانی دانشگاه تبریز