SELECTED ISSUES OF APPLYING INTERNATIONAL AVIATION LAW BY THE RUSSIAN COURTS

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"(…) since aviation was obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity[1]"

I. INTRODUCTION

Despite the technical and technological development of the aviation industry, there are accidents that generate the problem of repairing the personal injury or material damage incurred by passengers or third parties. One can observe, among others, the following types of cases concerning compensation claims in relationships between the passenger and the airline:

– cases related to death, personal injury or health disorder,
– flight delay or cancellation,
– delay of luggage delivery, destruction, loss or damage of luggage,
– denied boarding,
– others, including cases brought before the court by national supervisory entities for the purpose of protecting consumer rights.

In the case of such occurrences, there arises a complex network of legal relationships connected to damages and compensation. In the case of international transport services provided by a foreign carrier, the court must apply international law.

As noted by Professor Marek Żylicz, aviation law constitutes a multidimensional system. The multidimensionality of this system lies in the fact that it is composed of multiple international treaties, bilateral agreements, secondary laws and national laws[2].

[1] Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 *Harvard Law Review* 497, 498 (1967).

[2] M. Żylicz, *Prawo lotnicze międzynarodowe, europejskie i krajowe [International, European and domestic aviation law]*, Warszawa 2011, p. 21.

Currently there are two systems at work in the international private aviation law with respect to personal injury, baggage and cargo claims and delay in transportation: the Warsaw system and the Warsaw-Montreal system[3].

The Warsaw Convention was the first international convention governing international air travel (officially referred to as the Convention for the Unification of Certain Rules Relating to International Transportation by Air[4]), which was the result of two international conferences (in Paris in 1925 and in Warsaw in 1929) and of work done by the Comité International Technique d'Experts Juridiques Aériens (CITEJA) created by the Paris conference[5]. The first idea came from a Polish proposal made on the general session of Commission Internationale de Navigation Aérienne (CINA) in Stockholm in 1924[6]. However, the official proposal was submitted by France at the 1925 Paris Conference. Today, 155 ICAO member States are part of the Warsaw System. The Convention sought uniformity among the various customs and legal systems and established a uniform set of rules for international air travel[7].

Since aviation develops very fast, the 1929 rules and regulations needed to be modernized. It has been revised and amended multiple times:

- The Hague Protocol of 1955,
- the Guadalajara Supplementary Convention of 1961,
- the Guatemala City Protocol of 1971,
- Montreal Protocols 1, 2, 3 and 4 of 1975.

Theses acts together with the Convention create the Warsaw System *sensu stricto*. There were also a great number of unilateral initiatives, and national and private law measures:

- the Montreal Agreement of 1966,
- the Malta Agreement of 1974,
- the decision of the Constitutional Court in Italy 1985 and the Italian Law 274 of July 7, 1988,
- the Japanese Initiative of 1992,
- New Zealand proposal of 1995,
- the IATA Inter Carrier Agreement on Passenger Liability ("IIA") of 1995,
- the Agreement on Measures to Implement the IATA Inter Carrier Agreement (MIA) of 1996,

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[3] See more A. Konert, *Odpowiedzialność cywilna przewoźnika lotniczego,* Warszawa 2010; P.S. Dempsey, M. Milde, *International air carrier liability: The Montreal Convention of 1999*, Montreal 2005; E. Giemulla, R. Schmid, *Montreal Convention*, Kluwer Law International, The Hague 2006.

[4] Signed at Warsaw on 12 October 1929.

[5] *Ibid*., at 498.

[6] L. Babiński (Polish delegate on the Warsaw conference in 1929), Miedzynarodowa unifikacja prawa przewozu lotniczego na tle Konwencji Warszawskiej [International unification of air carriage in the light of the Warsaw Convention], *Studia Prawnicze* 1968/18.

[7] A. Konert, International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law*, vol. 5/2012.

- the EC Regulation 2027/97 on air carrier liability in the event of accidents amended by Regulation (EC) 889/2002,
- various national laws,

which all create the Warsaw System *sensu lato*[8].

Since the ratification of all these acts is not mandatory, "a single State might be bound to one version of the Warsaw Convention with one State, another version of the Warsaw Convention with another State, a separate bilateral treaty with another State, and a separate contract with a private party[9]." This created a situation where passengers on the same flight are often subject to vastly different liability schemes, depending on each individual's destination, departure point, the home State's ratification of various treaties, and the nation where suit is brought[10].

Since the Warsaw System did not meet the requirements of a modern air transport system, it had to be updated and modernized by creating a new treaty – Convention for the Unification of Certain Rules Relating to International Carriage by Air on 28 May 1999. Today, more than a decade after MC99 came into force (2003), 103 (54%) of ICAO Member States have ratified it.

Warsaw–Montreal system applies to all international carriage of persons, baggage or cargo performed by aircraft for reward[11]. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking (Article 1 § 1). This system creates a set of rules governing airline liability towards passengers and shippers on international flights, which should be applied by national courts.

With respect to the question of denied boarding, cancelled and delayed flights, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91[12], applies. As it was mentioned, claims regarding delayed flights can be made under Warsaw-Montreal system. However denied boarding and cancellation of the flights are not regulated by this system. Under this system, air carrier liability is limited to the sums indicated in the conventions. There is no possibility of obtaining compensation only for moral damage[13].

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[8] *Ibid*.

[9] The U.S. Second Circuit Court, *Chubb & Son*, 214 F.3d at 306.

[10] Jennifer McKay, The Refinement of The Warsaw System: Why the 1999 Montreal Convention Represents The Best Hope For Uniformity, 34 Case W. Res. J. Int'l L. 73. Cited in A. Konert, International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law* no. 5/2012.

[11] The expression „international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention (Article 1 § 2).

[12] Official Journal of the European Union, L46, pp. 1–7 (17-2-2004).

[13] See more A. Konert, *European Vision for Air Passengers,* Warszawa 2014, K. Arnold, EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment to

Regulation 261/2004 establishes minimum rights for passengers when they are denied boarding against their will (overbooking) and when their flight is cancelled or delayed and it applies:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

In case of denied boarding, cancelled or delayed flight, the air carrier is required to provide passengers with meals, accommodation etc. and also pay compensation (250, 400 or 600 euros). There is no compensation if the flight has been delayed or cancelled due to "extraordinary circumstances". There is no compensation for moral damage.

II. INTERPRETATION OF INTERNATIONAL AND EUROPEAN AVIATION LAW BY RUSSIAN COURTS

In the case of improper performance of the air carriage agreement, a complex network of legal relationships connected to damages and compensation arises. In the case of international transport services provided by a foreign carrier, the court must apply international law. This rule also arises from international private law of the Russian Federation. This law specifies that the law of the country of the carrier shall be applicable[14].

Russia only ratified: the Warsaw Convention of 1929, The Hague Protocol of 1955 and the Guadalajara Convention of 1961 and did not ratify: the Montreal Protocols of 1975, the Guatemala Protocol of 1971 (which did not enter into force) and the Montreal Convention of 1999.

As a result, there are certain divergences between the Russian legal system and the system of the foreign carrier's country, with regard to the carrier's liability.

Russian courts commit typical mistakes in the application of international law. Often they justify judgements with the norms of Russian substantive law and international treaties ratified by the Russian Federation, and interpret them according to the doctrine and judicial decisions of the Russian system. This concerns, in particular, the provisions of the Warsaw Convention, as amended in The Hague, the Russian Act on the protection

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Regulation (EC) 261/2004 and to Regulation (EC) 2027/97' (2013) 38, *Air and Space Law*, Issue 6, K. Arnold, Application of Regulation (EC) No. 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights, *Air and Space Law* (2007): 93, J. Balfour, Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004' (2010) 35 *Air and Space Law*, Issue 1., M. Broberg, Air Passengers' Rights in the European Union: The Air Carriers' Obligations vis-a-vis Their Passengers under Regulation 261/2004, *The Journal of Business Law* (2009), V. Correia, The evolution of air passengers' rights in European Union law, The Aviation & Space Journal, April/June 2011, n°2.

[14] The Federal Law No. 146-FZ of 26 November 2001 – Civil Code of the Russian Federation, part 3, Articles 1186, 1191, 1210,1211,1212 (Collected Legislation of the Russian Federation, 03 December 2001, No. 49, Article 4552.

of consumer rights[15], the Russian Civil Code[16], the Russian Aviation Code[17] and other documents.

For instance, in a case in 2014, a flight was cancelled due to a technical failure. In the claim, a passenger demanded damages and compensation. The Lenin District Court in Krasnodar ruled in favour of the claimant and ordered the airline to pay damages and compensation.

The court decided that a legal relationship arose out of the carriage agreement, which is regulated by the Warsaw Convention of 1929, as amended in The Hague in 1955, and the Russian Civil Code, and that to the extent to which they are not in conflict with the Convention, the Russian legal provisions regarding the protection of consumer rights also apply.

The airline appealed to the Court of Appeal and submitted, among other evidence, the argument of the improper application of substantive law. The Court of Appeal ruled in the appellant's favour, changed the judgement of the District Court and dismissed the claim in its entirety, ruling that the carrier's national law must be applied in the case of international carriage by air conducted by a foreign carrier.

The application of Russian law is a fundamental mistake in such cases.

Many claims demand compensation for moral loss caused by the delay or cancellation of a flight, the delayed delivery, destruction, loss or damage of luggage, denied boarding or other events unrelated to personal injury. Ruling in favour of such demands often constitutes an error with regard to the substantive law of the carrier's country.

The ruling of the District Court for the district of Timoszew-Krasnodar in a case in 2009 can serve as an example. The flight was cancelled due to weather conditions. The Court of First Instance dismissed the claim, but the Court of Second Instance changed the judgement of the Court of First Instance and ruled that the claimant must receive pecuniary compensation for moral loss. The Court of Second Instance stated that, despite justification of the flight cancellation, the airline failed to provide the passengers with meals and hotel accommodation. Consequently, it failed to perform its duty, which constituted the factual basis of the decision to order the compensation.

From our point of view, the stand presented by the Court of Second Instance is highly controversial and in contradiction with the law of the carrier's country, judicial decisions and the commonly adopted doctrine.

The Russian international private law excludes the application of Russian law to cases of international carriage if the court determined the content of the law of the carrier's country. Pursuant to Article 29 of the Montreal Convention, punitive, exemplary or any other non-compensatory damages shall not be recoverable. In view of the above, damages for moral losses and punitive damages are illegal.

The courts' mistake is that they interpret the Warsaw Convention in the light of Russian doctrine and judicial decisions. In the judgement of the Supreme Court of

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15 Law of the Russian Federation on the protection of the consumers' rights No. 2300-1 of 07 February 1992 (Gazette of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation, 09 April 1992, No. 15).

16 The Federal Law No. 51-F3 of 30 Nov. 1994 – Civil Code of the Russian Federation (Collected Legislation of the Russian Federation, 05 Dec. 1994, No. 32).

17 English version is available on: http://www.aviaru.net/english/code/

the Russian Federation of 28 August 1998 in the case of G. vs. the Russian airline Sachalinskie Awiatrassy[18] concerning compensation and damages for a delayed flight, the Supreme Court noted that in similar cases it was ruled that the wronged party was entitled to compensation. From the point of view of the court, the Warsaw Convention is only a small set of rules which do not regulate all relationships between the carrier and the receiver of transport services, including matters related to compensation, and it is possible to apply the provisions of the Russian Act on the protection of consumers' rights with regard to compensation, and the provisions of this Act are not in conflict with international law, but supplement it.

However, one can observe a change in the judicial decisions recently: the courts are more likely to observe the provisions of the Montreal Convention, the doctrine and the judicial decisions of the carrier's country.

For instance, in a case in 2009, the Court of First Instance of Sochi applied Russian law and ignored the law of the carrier's country. The National Court of Krasnodar reviewed the appeal against the legally binding decision in the extraordinary mode and ruled that the decision of the Court of First Instance was invalid due to the improper application of substantive law.

The District Court of Zamoskvoretski in Moscow dismissed the claim of G. and A. against Qatar Airways concerning luggage delay in 2008[19] and citing the Montreal Convention, stated that damages for moral loss and punitive damages are illegal. The Court of Second Instance (for the Capital City of Moscow) agreed with the view of the Court of First Instance and dismissed the appeal as groundless. A similar view was adopted by the District Court of Taganski in Moscow in the case of Z. vs. Qatar Airways (2011/2012)[20], concerning denied boarding, which dismissed the claim for compensation and damages, citing the Montreal Convention. The Court of Second Instance for the Capital City of Moscow dismissed the claimant's appeal and agreed with the Court of First Instance.

Problems with the resolution of similar cases continue to arise because the Montreal Convention does not regulate all matters, for instance the matter of flight cancellation.

Articles 19 and 20 of the Convention regulate only matters related to delays. Moreover, the Convention fails to define a delay. It is not clear whether Article 19 applies to cases of the failure to perform the carriage agreement, for instance in the case of overbooking.

With regard to carriers in EU states, the matter of flight cancellation is partly regulated by the Regulation (EC) No. 261/2004. The judicial decisions of the Court of Justice of the European Union are also helpful.

Russian courts often use analogies in the case of flight cancellation and resolve matters pursuant to Articles 19 and 20 of the Montreal Convention.

Another problem stems from the fact that the courts apply non-uniform interpretations of crucial terms concerning the evaluation of claims related to the amount of damages

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18 http://www.sudbiblioteka.ru/vs/text_big1/verhsud_big_2060.htm

19 The decision is not published.

20 http://tagansky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&H_date=06.12.2012

in the case of death, personal injury or health disorder or of the term of extraordinary circumstances releasing the carrier from responsibility in the case of flight cancellation.

For instance, in the case of C. and G. vs. Qatar Airways in 2011[21] concerning flight delay, the District Court of Taganski in Moscow ruled that the flight delay due to technical failure was caused by circumstances that cannot be deemed as extraordinary. In a similar case in 2014[22] the District Court of Pervomaiski in Rostov-on-Don accepted the presented evidence and statements of the airline and ruled that the technical failure was caused by extraordinary circumstances, dismissing the claim.

The overly general wording of the norms of international aviation law causes discrepancies in its interpretation.

In the above-mentioned case of 2014[23] concerning flight cancellation due to technical failure, the District Court of Lenin in Krasnodar stated: "the flight delay was caused by circumstances which cannot be deemed extraordinary and are the consequence of a low level of service and the failure to prepare the airplane for flight". The Court of Appeal did not agree with the decision of the District Court and revoked it in its entirety and dismissed the claim.

In the determination of similar cases, it is very important that when applying international law, the courts familiarize themselves with the international judicial decisions and doctrine, instead of basing their interpretation solely on Russian law.

III. CONCLUDING REMARKS

As it is indicated by the International Air Transport Association, the Montreal Convention of 1999 (MC99) established a modern, fair and effective regime to govern airline liability to passengers and shippers on international flights. It was envisaged as the single universal liability regime for international carriage by air, replacing the earlier Warsaw Convention system that had developed haphazardly since 1929. Universal ratification of MC99 would provide many benefits:

- Passengers would enjoy better protection irrespective of the route or ticket type;
- Airlines would enjoy certainty about the rules governing their liability across their international route networks;
- Shippers would be able to use electronic documents of carriage in air cargo, enabling the removal of paper[24].

Regulation 261/2004 has been vehemently opposed by the aviation industry before it was enacted and viciously attacked ever since – like every other 'law' and 'regulation'. The fact that it is attacked attests to its success. The timeliness of flights has substantially improved and the care of passengers has been considerably enhanced.

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[21] http://tagansky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=166880809&delo_id=1540005&new=&text_number=1

[22] http://pervomajsky.ros.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=16961004&delo_id=1540005&new=&text_number=1

[23] http://kraevoi.krd.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=4314241&delo_id=5&new=5&text_number=1&case_id=4064639

[24] http://www.iata.org/policy/icao-assembly/Pages/icao-montreal-convention.aspx

One cannot forget that transportation (air, ground, sea) is an essential public service that has to be provided irrespective of whether it is profitable or not. In fact, all transportation is more or less heavily subsidised.

The transportation industry is almost brutally competitive and widely fragmented. So, regulation – laws, treaties and conventions are needed to unify/codify the system – one rule for (almost) all. An example of the carriers› complaints is that the fines for delays are uniform instead of being related to the ticket price.

The air carrier liability in respect of passengers and their baggage/cargo is governed either by all provisions of the Warsaw/Montreal Convention or by all provisions of the EU Regulations, relevant to such liability. National courts should therefore apply these rules as a priority. Only if a question is not regulated by these acts, it will be possible to apply a national law in addition (which cannot be contrary to the International law).

The court systems in most EU countries being of considerable quality, over long-running disputes and the regulation's interpretations, are in the process of being straightened out by experienced and independent judges.

Russian court system is different. Russian judges cannot 'forget' about the Russian law even when applying international law or European law (Regulation 261/2004). The courts should familiarize themselves with the international judicial decisions and doctrine instead of basing their interpretation solely on Russian law. Russian courts make typical mistakes in the application of international law justifying judgements with the norms of Russian substantive law and international treaties ratified by the Russian Federation, and interpreting them according to the doctrine and judicial decisions of the Russian system.

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PRIMARY AND SECONDARY LEGISLATION

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

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http://www.iata.org/policy/icao-assembly/Pages/icao-montreal-convention.aspx

SELECTED ISSUES OF APPLYING INTERNATIONAL AVIATION LAW BY THE RUSSIAN COURTS

Summary

In the case of improper performance of the contract of air carriage, there arises a complex network of legal relationships connected to damages and compensation. In the case of international transport services provided by a foreign carrier, the court must apply international law. The aim of the article is to show the application of international aviation law by the Russian courts with respect to the rules of air carrier liability.

Key words: *aviation*, *law*, *passenger*, *case*, *courts*, *convention*, *compensation*, *damage*

NIEKTÓRE PROBLEMY MIĘDZYNARODOWEGO PRAWA LOTNICZEGO W PRAKTYCE ROSYJSKICH SĄDÓW

Streszczenie

Artykuł dotyczy kwestii odpowiedzialności przewoźnika lotniczego w stosunku do pasażerów uregulowanej w prawie międzynarodowym (Konwencja Montrealska z 1999 r.) oraz europejskim (rozporządzenie 261/2004) z punktu widzenia rosyjskich sądów. Konwencja montrealska dotyczy

odpowiedzialności przewoźnika za wypadek lotniczy. Stworzyła ona nowoczesny, sprawiedliwy i skuteczny system odpowiedzialności względem pasażerów i spedytorów w międzynarodowych przewozach. Rozporządzenie 261/2004 dotyczy kwestii niewpuszczenia pasażerów na pokład, opóźnienia lub odwołania lotu. Jest to najbardziej kontrowersyjne rozporządzenie europejskie z zakresu prawa lotniczego. Sądy krajowe powinny stosować zasady wynikające z powyższych aktów w sposób priorytetowy. Tylko jeżeli kwestia nie jest uregulowana w tych aktach, byłoby możliwe zastosowanie posiłkowo prawa krajowego (które nie może być sprzeczne z prawem międzynarodowym). Rosyjscy sędziowie nie omijają jednak nigdy prawa rosyjskiego, nawet przy stosowaniu prawa międzynarodowego lub prawa europejskiego. Celem artykułu jest analiza wyroków tychże sądów w kontekście ochrony praw pasażerów.

Słowa kluczowe: *lotnictwo*, *prawo lotnicze*, *pasażer lotniczy*, *rozporządzenie 261/2004*, *prawo rosyjskie*, *konwencja montrealska z 1999 r.*, *odszkodowanie za wypadek lotniczy*, *ochrona praw pasażerów lotniczych*