The Malaise Affecting the Global Uniform Effectiveness of the Montreal Convention, 1999 (MC99)

George N. Tompkins Jr.*

John Balfour has, throughout his career, been a sage counsel and a staunch advocate for strict liability and for no arbitrary limit on recoverable damages for passenger death or bodily injury caused by accidents during the course of international carriage by air, from his first introduction to the subject by his mentor Peter Martin at the Lloyds of London Press Air Law Conference in Alvor Portugal in 1987. He has supported unqualifiedly uniformity and exclusivity in the interpretation and application of the liability rules of MC99 by all States Party thereto. It is to be hoped that his retirement from “active duty” in this vital area of the development of private international air law will not result in his absence from the “battle front” as the fight for global application, uniformity in interpretation and exclusivity continues and intensifies in the years ahead.

1. The goal of global uniformity

The Montreal Convention of 1999, hereinafter referred to as MC99, conceived and created to “modernize and consolidate the [fragmented] Warsaw Convention” liability system, which since 1929 had governed the liability of air carriers for passenger death and bodily injury, and in the carriage of baggage and cargo, came into force on November 4, 2003. On that date there were 30 States Party to MC99. Today, 10 years later, there are only 102 States Party to MC99, a very disappointing growth history.

Of even greater disappointment is that 16 of the States present at the Montreal Conference in May 1999 and which signed MC99 on May 28, 1999, have yet to ratify MC99. Included among these signatory non-ratifying States is Mauritius, the home State at that time of the Rapporteur of the Montreal Conference. Although representatives of the significant aviation States of Iran, Philippines, Russia and Thailand attended the Montreal Conference, none signed MC99 and to date none of these States have joined the family of States Party to MC99.

* Attorney at Law, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, USA.
The official title of MC99 is the “CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR”, in clear recognition and acceptance of the principle that “UNIFICATION” of such rules is the very essence of MC99, as it was with the original 1929 Warsaw Convention. And yet today, 10 years after MC99 came into effect, the global air transport industry is saddled with yet another international non-universal instrument applicable to international carriage by air, to be added to the hodge podge of international legal instruments and inter-carrier agreements that, as of May 28, 1999, comprised the ‘Warsaw Liability System’ and which the drafters of MC99 intended to be supplanted by one uniform international legal instrument—MC99.

Added to the present non-universality acceptance of MC99 is the growing trend of courts in significant air transport jurisdictions to interpret and apply the liability rules of MC99 contrary to the clearly expressed intent of the drafters of MC99 and
1) the ‘consumer rights obsession’ of some regulatory bodies, having regulatory jurisdiction over air carriers headquartered in or operating to, from, or through MC99 States, to adopt and apply “passenger protection rules” to situations and claims clearly governed and preempted by the liability rules of MC99.

If the MC99 State Party family does not become universal in membership and if the Courts and regulatory bodies in MC99 State Parties do not recognize and give effect to the clearly expressed intent of the States Party to MC99 and, further, recognize that, where applicable to the transportation, the MC99 liability rules are designed and intended to preempt any otherwise applicable national consumer “rights” protective regulations, the present malaise affecting the global “UNIFICATION” of the MC99 liability rules may very well prove fatal.

2. The malaise caused by the absence of significant aviation States from the MC99 family of States

There are literally hundreds of flights operating regularly between non-MC99 States Party and MC99 States Party. The identity of the operating carrier is irrelevant to the application or not of MC99 to the transportation of each passenger on such flights. The sole determining factor as to the application or not of MC99 is the individual contract of carriage of each passenger on the flight. Thus, there can be passengers on each flight who are governed by the liability rules of MC99, or the 1929 Warsaw Convention [WC29], or WC29 as amended by the 1955 Hague Protocol [HP55], or as supplemented by the 1961 Guadalajara Supplementary Convention [GSC61], or as amended by Montreal Protocol No. 4 [MP4], and as supplemented by any of the existing inter-carrier agreements formulated by the air carriers to augment certain of the Convention liability rules, such as the 1966 Montreal Agreement [MA66], the 1992 Japanese Initiative [JI], the IATA Agreements of 1995 [IIA] and 1996 [MIA], the 1996 ATA Agreement [IPA] Inter-carrier, or no international Convention or inter-carrier agreement.