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Flying with Animals: Examining Air Carrier Liability under the Montreal Convention of 1999.

By María Pardo

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PRONUNCIATION:

'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

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Boarding an aircraft and encountering animals in the cabin is something that the drafters of the Montreal Convention of 1999 (“MC99”) likely did not anticipate or consider. However, today, flying with animals in the cabin on domestic and international flights has become both a reality and a common practice.

Undoubtedly, animals play a significant role in the lives of many, whether by providing comfort and emotional support or offering essential assistance to individuals with disabilities. This influence has prompted various stakeholders across numerous industries to adopt flexible policies that accommodate and facilitate interactions with animals.

So, what does all of this have to do with the aviation industry? The answer is clear: it is increasingly common for passengers to travel – both domestic and international- with their animals, whether as regular pets, emotional support animals, or service animals for individuals with disabilities. This growing trend presents a significant challenge for stakeholders in the aviation industry, who must adapt to this new reality and respond to the demands and needs of these passengers and their animal companions, while maintaining a balance with the principles of uniformity, safety and security.

The purpose of this article is to review three categories of animals allowed in international commercial flights- namely, regular pets, emotional support animals and service animals¹ - and to analyze the liability of the air carrier in relation to these categories to determine if the contractual liability under MC99 for the carriage of baggage is applicable to these animals during international transport.

While it is widely known that it is possible to fly with animals, certain restrictions and requirements must be met, primarily due to safety and security reasons. With this in mind, the three categories will be briefly explained to further analyze their legal status and their corresponding liability regime.

Pets:

A regular pet is defined as “an animal, a bird, etc. that you have at home for pleasure, rather than one that is kept for work or food”². The main characteristics of a regular pet are that they (i) live in the same house as their owner and (ii) are not intended for research purposes or commercial activities.

According to the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA), for travelling purposes, a regular pet is defined as “a privately-owned companion animal not intended for research or resale and includes the following animal groups”³ including dogs, cats, ferrets, rabbits, rodents, reptiles, amphibians and certain types of birds.

Although the list of animal species that are considered as regular pets is extensive, this does not imply that all such animals are allowed in commercial flights. The conditions, special requirements and restrictions of international carriage will depend entirely on each airline’s policy. Additionally, due to sanitary measures and safety reasons, airlines may impose further restrictions on the types of animals permitted onboard.

Emotional Support Animals:

Although there is no standard definition, emotional support animals can be understood as “animals that provide

1.- This list of categories of animals is not exhaustive.

2.- Oxford Learner’s Dictionaries. Definition of Pet. Webpage: https://www.oxfordlearnersdictionaries.com/definition/english/pet_1?q=pet (last visited on October 29, 2024).

3.- Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA), webpage: <https://www.aphis.usda.gov/pet-travel> (last visited on October 29, 2024).

comfort just by being with a person”⁴. Reviewing this category is essential due to the changes implemented by the Department of Transportation of the United States (“DOT”) in its Final Rule issued on December 10, 2020, which entered into force as of January 11, 2021, amending the Department’s Air Carrier Access Act regulation regarding the transport of service animals by air. Prior to these changes, emotional support animals—regardless of type—were commonly treated as service animals, granting passengers the same treatment as individuals with disabilities traveling with service animals. However, following the Final Rule, emotional support animals are treated as regular pets for the purposes of international air transport.

Service animals:

The DOT’s Final Rule defines a service animal as “a dog, regardless of the breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability”⁵. According to the DOT, the purpose of adopting this definition was to “reduce confusion among airlines, passengers, airports, and other stakeholders by more closely aligning the Departments’ definition of a service animal with the Department of Justice definition of a service animal”⁶.

It is important to clarify that, although service dogs are allowed to travel free of charge, certain requirements must be met, and some restrictions may apply. For instance, carriers may request specific forms as a condition of transport⁷.

Contractual Liability under the MC99:

After explaining three different categories of animals, it is essential to examine the contractual liability regime under MC99. As noted, MC99 does not contain any specific provisions regarding animals. Despite this, animals are considered either baggage or cargo, depending on whether they are transported in the cabin or in the cargo hold, regardless of category.

As Kovudhikulrungsri states, “neither the Warsaw Convention of 1929 nor MC99 contain any specific provisions on mobility aids and service animals, and therefore, they can be considered as baggage”⁸. Mendes de Leon also explains that “animals are considered as cargo. Liability for damages caused to an animal depends on whether the animal was carried in the cabin or whether it was placed in the cargo belly of the aircraft” and further states that “although there is no case law yet on this point, animals may be treated as ‘unchecked baggage’, which implies that the carrier’s liability is based on fault, whereas the carrier’s liability is strict if the animal is carried as cargo”⁹.

Considering the above, the liability regime applicable to unchecked baggage and cargo under MC99 must be reviewed to determine if it applies to the international transport of animals.

As Scott and Trimarchi note, “Article 17(2) of MC99 provides the carrier’s liability for damage sustained in the event of destruction, loss or damage to checked baggage if the event occurred while on board the aircraft of while the baggage was in the carriers control”¹⁰. They further state that “the regime for unchecked baggage, which includes hand-luggage, encompassed in Article 17(2) of the Montreal Convention 1999 differs, as the carrier is liable only should the damage result “*from its fault or that of its servants or agents*”¹¹ and that “a passenger

4.- U.S. Department of Justice, Civil Rights Division, Disability rights section, webpage: https://www.ada.gov/regs2010/service_animal_qa.html (last visited on October 29, 2024).

5.- Department of Transportation, Federal Registry, Vol. 85, No. 238, Office of the Secretary, Travelling by Air With Service Animals <https://www.transportation.gov/sites/dot.gov/files/2020-12/Final%20Service%20Animal%20Rule%20%28FR%20Version%29.pdf>, page 2.

6.- *Idem*, page 4.

7.- For instance, the Service Animal Air Transportation Form and the Relief Attestation Form.

8.- Kovudhikulrungsri, *The Right to Travel by Air of Persons with Disabilities*, 2017, page 166.

9.- Mendes de Leon, *Introduction to Air Law*, eleventh edition, online version, page 169.

10.- Scott and Trimarchi, *Fundamentals of International Aviation Law and Policy*, 2020, online edition, page 173.

11. *Ibidem*.

can recover damage suffered from destruction, loss or damage to a hand luggage if he is able to prove that the carrier inflicted the damage with the element of fault"¹². According to Article 17(4), the term baggage includes unchecked baggage; therefore, the provisions set forth in Article 17(2) apply to animals carried in the cabin.

According to article 22(2) of MC99, the liability of the air carrier for destruction, loss, damage, or delay of baggage is limited to 1,288¹³ Special Drawing Rights ("SDRs") per passenger. However, it is possible to break such limit in accordance with Article 22(5) of MC99 if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment¹⁴.

Regarding the carrier's liability for cargo, Article 18 of MC99 states that the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air¹⁵ unless the carrier proves that the destruction, or loss of, or damage to the cargo resulted from inherent defect, quality or vice of that cargo, defective packing of the cargo performed by a person other than the carrier or its servants or agents, or an act of war or armed conflict¹⁶. Per Article 22(3) of MC99, the liability limit for cargo is 22 SDRs per kilogram¹⁷.

After reviewing the three categories of animals permitted in international air transport and the applicable liability regime under MC99, it can be concluded that the contractual liability provisions of MC99 for the carriage of baggage and cargo apply to animals. Regardless of whether an animal is a regular pet, emotional support animal, or service animal for a person with disabilities, it is classified as unchecked baggage if transported in the cabin or as cargo if placed in the cargo hold.

In light of the above, it is essential to recognize the significance of service animals for people with disabilities, as they are integral to their lives and well-being. Classifying a service animal as unchecked baggage for liability purposes can be problematic. As Kovudhikulrungsri explains, "for persons with disabilities, damaged or lost mobility aids amount to a loss of independence and dignity. The same holds true for service animals since PWDs rely on their assistance"¹⁸.

Although various initiatives seek to prevent animals from being treated as objects- for example, in Colombia, they are legally recognized as sentient beings with special protections- it will be necessary to assess the impact these initiatives could have in the aviation industry to achieve a balance between the interest of the different stakeholders of the industry.

12.- *Ibidem*.

13.- 2019 Revised Limits of Liability under the Montreal Convention of 1999, ICAO, Secretariat, Legal Affairs and External Relations Bureau, https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx

14.- Article 22 MC99.

15.- This means that the carrier will be liable if the event of destruction, loss, or damage to the cargo, took place on board the aircraft or during any period in which the cargo was in the carrier's charge.

16.- Article 18(2) MC99.

17.- 2019 Revised Limits of Liability under the Montreal Convention of 1999, ICAO, Secretariat, Legal Affairs and External Relations Bureau, https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx

18.- Kovudhikulrungsri. *The Right to Travel by Air of Persons with Disabilities*, 2017, page 172.

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