The Montreal Convention: Airline Liability for International Carriage by Air (October 2011)

In the early days of aviation, as commercial aircraft began carrying passengers across international borders, governments around the world recognized that a consistent set of standards was needed to govern an air carrier's liability in the event that a passenger were killed or injured, as well as if baggage or cargo were lost or damaged during international carriage. The result was the 1929 treaty commonly known as the "Warsaw Convention."[1] As aviation continued to evolve, various provisions of the treaty required updates; several revisions were proposed, but were not uniformly adopted.[2]

Eventually, the International Civil Aviation Organization (ICAO) – which since the end of World War II has been the international body responsible for developing standards for air navigation – launched an initiative to draft a new treaty to replace the Warsaw Convention; the result was the "Montreal Convention," which was completed in 1999 and entered into force in 2003.[3] To date, the treaty has been ratified by 97 countries, in addition to the European Union.[4]

Generally, the Montreal Convention supersedes any liability standards set by national or local law. The key provisions of the treaty include that:

- In the event of a passenger's death or bodily injury, the carrier, is under most circumstances liable for up to 113,100 Special Drawing Rights (SDRs),[5] with additional liability possible based on proven damages above this amount and carrier negligence.
- In the event of delay, a carrier is liable to a passenger for up to 4,694 SDRs.
- In the event of destruction or loss of, damage to, or delay in the delivery of, a passenger's baggage, a carrier is liable for up to 1,131 SDRs.[6]

The firm's practice encompasses virtually every aspect of aviation law, including advising airlines on compliance with the treaties and other standards governing liability for international flights.

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- In the event of destruction or loss of, damage to, or delay in the delivery of cargo, a carrier is liable for up to 19 SDRs per kilogram.[7]

In most cases, the Montreal Convention provides more generous recovery for passengers than that provided for under the Warsaw Convention.[8] However, the application of the Montreal Convention is not always a straightforward matter. The following are just some examples of the practical challenges when international liability issues arise for air carriers.

Which treaty applies?

Not all countries have ratified the Montreal Convention; notable exceptions include Indonesia, Thailand, and Venezuela.[9] For passengers traveling to/from these countries, the Warsaw Convention (and various protocols) may govern air carriers' liability for accidents and other incidents in international carriage. But the applicable treaty is determined based on the most advanced regime that is in effect in both the origin and destination of each passenger and not that of the flight – i.e., if a specific passenger transits a country that has not ratified Montreal Convention on a journey between two countries that have ratified the treaty, Montreal will apply throughout the journey. Moreover, U.S. courts typically interpret both treaties such that if a passenger is "traveling on a round-trip ticket" that starts and ends in the U.S., "the country both of her departure and of her destination would be the United States."[10] This standard can have counter-intuitive results; for example, the treaty applicable to a passenger traveling JFK-BKK-JFK would be Montreal, but the treaty applicable to a passenger traveling BKK-JFK-BKK would be Warsaw.

What is an "accident"?

For bodily injury and death, air carriers are liable only if it was caused by an "accident."[11] The meaning of this term accordingly has been the subject of considerable litigation – i.e., if the injury or death occurred on board an aircraft but was not caused by an accident, the passenger would be without a remedy, since the treaty would preempt any claim under national or local law. The Supreme Court has defined an accident for treaty purposes to be "an unexpected or unusual event or happening that is external to the passenger";[12] based on this definition, courts have rejected claims seeking to hold air carriers liable for deep vein thrombosis or other medical conditions aggravated by in-flight conditions, but it does not resolve all disputes. In a case in which a passenger bumped her head on a television monitor, the court held that while further review was necessary to determine if it was an "accident," whether the air carrier had complied with FAA standards when installing and operating the television monitor on the aircraft was not dispositive on the issue of carrier liability.[13] In contrast, in the case of a passenger who slipped on a discarded blanket bag on the floor of the aircraft, the court held that it was neither unexpected nor unusual for refuse to be on the floor during flight, and thus no "accident" had occurred.[14]

What is "embarking or disembarking"?

The Montreal Convention governs an air carrier's liability for accidents that occur on board an aircraft, or within the course of embarking or disembarking.[15] This standard has been interpreted to include accidents that occur in a jetway or terminal, depending on factors such as the restrictions on passenger movement, the imminence of actual enplaning/deplaning, and physical proximity to the aircraft. The analysis often is highly fact dependent – and which outcome is more favorable to the passenger may vary based on whether more or less damages can be recovered under national/local law. For example, a passenger recently was allowed to pursue a treaty-based claim for injuries caused by a fall that occurred

in a gate area while waiting for a connecting flight,[16] but a claim based on injuries caused by a fall from a wheelchair while being transported between gates was held to arise under local law.[17]

What is a "delay"?

While the potential compensation due to a passenger based on a delay typically is much less than that due for an injury or death, a delay claim may be subject to either the Montreal Convention or national/local law, depending on the facts of the case. Typically, courts have found that the treaty limits do not apply in the event of a carrier's outright non-performance, in contrast to a delay.[18] There is no definitive guidance as to how much time must elapse – i.e., if a flight is re-scheduled or a passenger re-booked on another flight – before a delay becomes so severe that Montreal no longer applies. But a passenger cannot convert a delay into non-performance by immediately procuring substitute transportation; a carrier must be given a reasonable opportunity to perform.[19] Again, a fact-specific analysis may be required.

When must carriers provide reimbursement for lost/damaged baggage?

Historically, many carriers have sought to limit their liability for lost baggage, by stating in their contracts of carriage that liability does not extend to valuable or fragile items contained in checked baggage. However, the U.S. Department of Transportation (DOT) has warned air carriers that it considers many such liability exclusions to be inconsistent with the Montreal Convention.[20] For flights to/from the U.S., if valuable items are lost or damaged, or fragile items lost, air carriers must provide compensation consistent with the terms of the treaty.[21] (However, DOT does appear to allow carriers to discourage passengers from actually including such items in checked baggage, and from refusing to pay compensation for fragile items that are damaged.)

Where should a Montreal Convention-based lawsuit be filed?

Generally, the Montreal Convention provides that a claim for damages can be pursued in a court of a signatory to the treaty that has jurisdiction over (i) the carrier's principal place of business/incorproation, (ii) a place at which the carrier does business and through which the contract with the passenger was made, or (iii) a passenger's destination. Claims grounded in bodily injury or death also may be brought in a court at a passenger's "principal and permanent" residence, if the carrier operates services there, either with its own aircraft or through a code-share, wet-lease, or similar arrangement.[22] But the treaty does not bar a court from applying the doctrine of *forum non conveniens* – i.e., finding that even if a case had been filed in a proper jurisdiction, it should be litigated in another treaty-compliant forum for the convenience of the parties.[23] Disputes also can arise as to whether carrier- and/or passenger-related jurisdictional predicates have been met – for example, where an injured passenger actually resided at the time of her flight.[24]

When must a Montreal Convention-based lawsuit be filed?

The Montreal Convention generally requires that claims be filed within 2 years after a passenger arrived at her destination.[25] U.S. courts have interpreted this requirement to be a statute of repose rather than a statute of limitations, meaning that the 2-year deadline is inflexible, even if a national or state law would allow it to be tolled for various reasons, such as the pendency of a class action; a discovery-of-damages rule; or a plaintiff's infancy.[26]

Because numerous issues can arise in determining how or if the Montreal Convention is applicable to incidents on international flights, air carriers are advised to consult with counsel to determine how best to take proactive steps to limit their liability, as well as to determine how to respond to specific passenger "accidents" and other incidents that can implicate the liability regime of the Montreal Convention.

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[1] Convention for the Unification of Certain Rules Relating to International Carriage by Air (Oct. 12, 1929).

[2] Notably, the 1955 "Hague Protocol," the 1971 "Guatemala Protocol," and the 1975 "Montreal Protocols."

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

[4] http://www.icao.int/icao/en/leb/mtl99.pdf.

[5] Special Drawing Rights are based on a basket of foreign currencies, specifically the U.S. Dollar, British Pound, Euro, and Yen. As of October 3, 2011, the exchange rate is US$1 = 0.6431 SDR.

[6] For baggage – as well as for cargo – a passenger can declare a higher value than the default treaty limit, and the air carrier can require an additional payment by the passenger as a form of insurance.

[7] The liability figures were adjusted for inflation, effective December 30, 2009. Inflation Adjustments to Liability Limits Governed by the Montreal Convention, 74 Fed. Reg. 59017 (Nov. 16, 2009).

[8] But not always. In the U.S., the Warsaw Convention has been interpreted to limit a carrier's liability for lost baggage to $20 per kilogram. See 14 C.F.R. § 221.106. In contrast, the Montreal Convention imposes a per-passenger cap on liability. Conceivably, a passenger who lost multiple bags might be owed more reimbursement under Warsaw than under Montreal.

[9] Although almost every country has ratified at least the original Warsaw Convention, U.S. courts have found that Taiwan is not a party to the treaty by virtue of mainland China's adherence thereto. Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Service, 177 F.3d 1142 (9th Cir. 1998).

[10] See, e.g., Shah v. Kuwait Airways Corp., 653 F.Supp.2d 499, 503 (S.D.N.Y. 2009), vacated and remanded on other grounds, 387 Fed.Appx. 13 (2d Cir. 2010).

[11] Article 17.

[12] Air France v. Saks, 470 U.S. 392 (1985) (based on equivalent provisions in Article 17 of the Warsaw Convention)..

[13] Phifer v. Icelandair, ___ F.3d ___, 2011 WL 3076393 (9th Cir. 2011).

[14] Rafailov v. El Al Israel Airlines, Ltd., 2008 WL 1047610 (S.D.N.Y. May 13, 2008).

[15] Article 17.

[16] Walsh v. Koninklijke Luchtvaart Maatschappij N.V., 2011 WL 4344158 (S.D.N.Y. Sep. 12, 2011).

[17] Pacitti v. Delta Air Lines, Inc. 2008 WL 919634 (E.D.N.Y. April 3, 2008) (based on equivalent provisions in Article 17 of the Warsaw Convention).

[18] See, e.g., In re Nigeria Charter Flights Contract Litigation, 520 F.Supp.2d 447 (E.D.N.Y. 2007).

[19] See, e.g., Paradis v. Ghana Airways Ltd., 348 F.Supp.2d 106 (S.D.N.Y. 2004).

[20] Providing Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries, 74 Fed. Reg. 14837 (April 1, 2009).

[21] To date, several air carriers have been sanctioned for violations of this requirement, pursuant to DOT's authority under 49 U.S.C. § 41712 to prohibit unfair and deceptive practices. See, e.g., In re Spirit Airlines, Inc., DOT Order 2009-9-8 (Sept. 17, 2009).

[22] Article 33.

[23] Pierre-Louis v. Newvac Corp., 584 F.3d 1032 (11th Cir. 2009).

[24] Hornsby v. Lufthansa German Airlines, 593 F.Supp.2d 1132 (C.D.Cal.,2009).

[25] Article 35.

[26] See, e.g., Dickson v. American Airlines, Inc., 685 F.Supp.2d 623 (N.D.Tex. 2010).

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