The Montreal Convention and International Carriage by Air

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An airline ticket on a scheduled air carrier to an international destination originating or concluding in Michigan will subject a Michigan passenger to the terms and conditions of the Montreal Convention of 1999,[1] the successor treaty to the Warsaw Convention of 1929.[2] Recent events highlight the continued relevance of the Montreal Convention.

On March 8, 2014, a Boeing 777 operated by Malaysia Airlines as Flight MH370 disappeared from radar screens on a regularly scheduled flight from Kuala Lumpur to Beijing. The aircraft carried 227 passengers (including three U.S. citizens) and 12 crew members. Only recently have parts of the aircraft been found and identified.

On March 17, 2014, another Boeing 777 operated by Malaysia Airlines as Flight MH17 disappeared from radar screens over the Ukraine on a regularly scheduled flight from Amsterdam to Kuala Lumpur. The aircraft had 283 passengers (including a U.S.-Dutch citizen) and 15 crew members.

On March 24, 2015, an Airbus A-320 operated by Lufthansa subsidiary Germanwings as Germanwings Flight 9525 disappeared from radar screens on a regularly scheduled flight from Barcelona to Düsseldorf. The aircraft had 144 passengers (including three U.S. citizens) and six crew members. It was located almost immediately, having crashed into a mountain in the French Alps.

Each incident involved the tragic loss of an aircraft in heretofore inconceivable fashion. Although no Michigan residents were reported to be passengers on the aircraft, the events serve as an impetus to revisit the scope of the Montreal Convention, a global compensatory scheme developed by the International Civil Aviation Organization—a United Nations agency that oversees international air transport standards and regulations—to address such unfortunate circumstances. The United States ratified it as a treaty on November 4, 2003. As of May 2015, 112 countries are signatories to the Convention, including all member states of the European Union as well as Malaysia.

The Warsaw Convention established compensation schedules to value damages and loss to passengers and cargo traveling by air. Although the Montreal Convention relies heavily on its predecessor, it "is not an amendment to the Warsaw Convention" but "is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention."[3] In "recogniz[ing] the importance of ensuring protection of the interests of consumers…and the need for equitable compensation based on the principal of restitution,"[4] the Montreal Convention has been described as "a treaty that favors passengers rather than airlines."[5] Though the Montreal Convention replaced the Warsaw Convention, it intentionally "contains provisions which embrace similar language as the Warsaw Convention."[6] This was done in an effort to avoid "a complete upheaval of the common laws surrounding the Warsaw Convention."[7]

Fast Facts

The Montreal Convention applies even to incidents occurring on the domestic leg of an international trip.

The Convention preempts causes of action that allege state-law tort and contractual claims against air carriers.

Practitioners must be aware of the Convention's two-year period of limitations for personal injuries.

Scope

The Montreal Convention states it "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward."[8] Further, Article 17 of the Convention specially encompasses claims related to the injury or death of a passenger:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that *the accident which caused the death or injury* took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[9]

What constitutes an "accident" was expanded by the United States Supreme Court in *Olympic Airways v Husain*,[10] in which the Court, although dealing with a Warsaw Convention case, expanded the definition of "accident" in Article 17 to include an air carrier's operational decision to address an idiosyncratic passenger's request for assistance.

In *Husain*, an asthmatic passenger died after a flight attendant refused to move his seat away from the smoking section on an international flight despite the passenger's pleas and explanation of his health problems. The Supreme Court framed the issue in *Husain* as follows:

> The issue we must decide is whether the "accident" condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin. We conclude that it is.[11]

Specifically, the Supreme Court held that "[t]he relevant accident inquiry under *Saks*[12] is whether there is an unexpected or unusual event or happening. The rejection of an explicit request for assistance would be an 'event' or 'happening' under the ordinary and usual definitions of these terms[]."[13]

In *Yahya v Yemenia-Yemen Airways & Northwest Airlines, Incorporated*,[14] the trial court allowed the plaintiff to file an amended complaint asserting that an "accident" had occurred during international carriage by air, alleging that the plaintiff's decedent had requested an in-flight diversion due to a medical emergency and that the airline failed to offer assistance. As the court opined:

> While Plaintiff's Complaint does not specify exactly what malady Yahya suffered from while en route to the Republic of Yemen, Plaintiff does allege that Yahya made the Yemenia-Yemen crew aware of his condition, and that he needed to land immediately to receive medical attention. Faced with this request, the Yemenia-Yemen flight crew instead told Yahya he would need to wait for an hour and a half while the airplane finished its flight to Sana'a. Plaintiff also alleges that this failure, in part, contributed to the death of Yahya.

> On these facts, under *Husain*, a jury could find the Yemenia-Yemen crew's decision not to land the airplane in Saudi Arabia was an "event or happening" constituting an "accident" under Article 17 of the Montreal Convention. As such, the Court finds that Plaintiff can make a *prima facie* cause of action under the Montreal Convention, and leave to amend Plaintiff's Complaint would therefore not be futile.[15]

The Montreal Convention and preemption of state law claims

The Montreal Convention, like the Warsaw Convention, preempts remedies under domestic law regardless of whether applying the Convention will result in a recovery in a particular case. The United States Supreme Court held in *El Al Israel Airlines, Ltd v Tseng*[16] that recovery for a personal injury suffered on board an aircraft "if not allowed under the Convention, is not available at all."[17]

Numerous federal courts have relied on *Tseng* in preempting state-law causes of action that encompass claims covered by the Montreal Convention. In *Aikpitanhi v Iberia Airlines of Spain*,[18] the plaintiffs (parents of the deceased who died on an international flight) claimed that the Alien Tort Claim Act[19] provided the court with subject-matter jurisdiction outside the boundaries of the Montreal Convention.[20] The trial court relied on *Tseng* and rejected the plaintiffs' arguments:

> [T]he Supreme Court has stated that the Montreal Convention, and its predecessor the Warsaw Convention, affords the exclusive remedy for any personal injury suffered on board an international flight or during any operations of embarking or disembarking. In the present action, Plaintiffs allege the Decedent died as a passenger on board an international flight. Pursuant to *Tseng*, Plaintiff's exclusive remedy lies under the Montreal Convention. As a result, Plaintiffs' arguments that a separate cause of action exists such that subject matter jurisdiction may be independently found are without merit.[21]

Similarly, causes of action against air carriers alleging state-law tort and contractual claims are preempted under the terms of the Montreal Convention. Furthermore, Article 29 of the Montreal Convention specifically prohibits allowing recovery for punitive/exemplary damages:

> In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention… *In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.*[22]

Time to sue

The Montreal Convention retained the same statute of limitations as set forth by the Warsaw Convention and states:

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
2. The method of calculating that period shall be determined by the law of the court seized of the case.[23]

Michigan practitioners should be aware of the Convention's two-year period of limitations because it contrasts with Michigan's three-year period of limitations for personal injury. Thus, even a Michigan citizen injured during an international flight is subject to the two-year limitations period.[24]

Compensation scheme

The Montreal Convention sets monetary limits and parameters for compensation for passenger bodily injury (Article 17), delay (Article 19), lost baggage (Article 17), and lost cargo (Article 18). To address the goal of international uniformity, the drafters determined that the compensation scheme be expressed as units of Special Drawing Rights (SDR), a monetary unit based on multiple international currencies as determined by the International Monetary Fund. As of July 31, 2015 one SDR had a value of $1.39 or €1.27. As originally proposed in 1999, limits for bodily injury (Article 21) were 100,000 SDR. Article 22 valued delay claims at 4,150 SDR per passenger; lost baggage claims at 1,000 SDR per passenger; and cargo claims at 17 SDR per kilogram.

The Convention also contains an automatic review period, which mandates review every five years to assess the adequacy of the monetary limits.[25] Following the initial review in 2009, the International Civil Aviation Organization increased the limits by approximately 13 percent to account for inflationary issues. It left the limits unchanged in the 2014 review. Currently, the maximum amounts set out in the Convention without regard to the air carrier's liability are 113,100 SDR for bodily injury; 1,131 SDR per passenger for destruction, loss, damage, or delay in the carriage of baggage; 4,694 SDR per passenger for damages caused by delay in the carriage of passengers; and 19 SDR per kilogram for destruction, loss, damage, or delay in the carriage of cargo.

With respect to the limit set forth in Article 21 for bodily injury due to an accident, the limit of 113,100

SDR is available for provable damages without any requirement of establishing liability by the air carrier. However, departing from the Warsaw Treaty, Article 21(2) provides that there is no upper limit to damage claims for provable damages above 113,100 SDR, but the air carrier is allowed to assert a defense that the accident was not due to its negligence or was attributable to a third party.

To address the assessment of compensatory and beneficiary damages, Article 29 of the Montreal Convention contains the "pass-through" approach to applicable local law, as initially set forth in Article 24 of the Warsaw Convention and explained in *Zicherman v Korean Airlines, Incorporated*,[26] which evaluates each passenger's injury claims in accordance with the compensation scheme of each passenger's venue. The pass-through approach helps explain the compensation philosophy of foreign air carriers dealing with evaluating the relative compensation values of their own citizens' bodily injury claims. For example, in July 2015, Lufthansa initiated resolution efforts to relatives of those killed on Germanwings 9525 by offering €85,000 ($93,000), far less than an American citizen in a U.S. court might expect to be compensated for loss of life. Contrast this with a U.S. approach in which the General Motors Ignition Compensation Fund issued a press release on August 3, 2015, noting it had completed its review of all fatal claims in the yearlong program, had approved 124 death claims, and would be offering to pay at least $1 million in each death claim.

Places to sue

The Montreal Convention provides that an action arising out of death or injury to a passenger may be brought, at the plaintiff's option, in the courts of a state that is:

1. The carrier's domicile;
2. The carrier's principal place of business;
3. Where the carrier has a place of business through which the contract (passenger ticket) was made;
4. The place of destination; or
5. Where the passenger has his or her principal residence and to or from which the carrier operates services, or has a commercial agreement with another carrier that operates services at that location.[27]

Conclusion

The Montreal Convention's 55 Articles present many interesting issues and deserve a more thorough review than possible here. In light of current events, however, the Montreal Convention remains relevant, and practitioners should be aware of its basics. ■

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ENDNOTES

1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2422 UNTS 309 [Montreal Convention].
2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat 3000, 876 UNTS 11.
3. *Erlich v American Airlines, Inc*, 360 F3d 366, 371 n 4 (CA 2, 2004).
4. *Weiss v El Al Israel Airlines, Ltd*, 433 F Supp 2d 361, 365 (SD NY, 2006).
5. *Erlich*, 360 F3d at 371 n 4.
6. *Watts v American Airlines, Inc*, unpublished opinion of the United States District Court for the Southern District of Indiana, issued October 10, 2007 (Docket No. 1:07-CV-0434).
7. *Id.* at 2.
8. Montreal Convention, ch 1, art 1, § 1.
9. *Id.*, ch III, art 17, § 1 (emphasis added).
10. *Olympic Airways v Husain*, 540 US 644; 124 S Ct 1221; 157 L Ed 2d 1146 (2004).
11. *Id.* at 646.
12. *Air France v Saks*, 470 US 392; 105 S Ct 1338; 84 L Ed 2d 289 (1985).
13. *Husain*, 540 US at 645.
14. *Yahya v Yemenia-Yemen Airways & Northwest Airlines, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 25, 2009 (Docket No. 08-14789).
15. *Id.* at 6.
16. *El Al Israel Airlines, Ltd v Tseng*, 525 US 155, 161; 119 S Ct 662; 142 L Ed 2d 576 (1999).
17. *Id.* at 161.
18. *Aikpitanhi v Iberia Airlines of Spain*, 553 F Supp 2d 872 (ED Mich, 2008).
19. 28 USC 1350.
20. *Aikpitanhi*, 553 F Supp 2d at 874.
21. *Id.* at 879.
22. Montreal Convention, ch III, art 29 (emphasis added).
23. *Id.* at ch III, art 35.
24. *Fazio v Northwest Airlines, Inc*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 15, 2004 (Docket No. 1:03-CV-808).
25. Montreal Convention, ch III, art 24, § 1.
26. *Zicherman v Korean Airlines, Inc*, 516 US 217; 116 S Ct 629; 133 L Ed 2d 596 (1996).
27. Montreal Convention, ch III, art 33.