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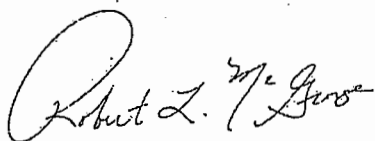
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Foreword

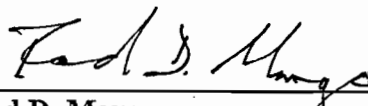
We are pleased to present the Thirteenth Edition of *The Liability Reporter*, which considers several issues of interest to IATA Members.

The last twelve months have seen numerous developments of interest to the international airline industry. There is a growing body of jurisprudence, primarily in the United States, interpreting the Montreal Convention of 1999 and its application to passenger and cargo claims. We also report on the ongoing litigation arising from the events of the September 11 terrorist attacks in New York City, ongoing antitrust and competition litigation in the United States and other jurisdictions, efforts by governments to protect the interests of passengers in cases of delay and denied boarding, the recently signed conventions on surface damage that are intended to replace the Rome Convention of 1952, aviation related developments in environmental protection and, of course, developments in the all important area of climate change and the response of the international airline industry.

We are grateful to the numerous individuals who have assisted us in the preparation of this edition of *The Liability Reporter*, and look forward to hearing from Members with respect to any issues which they would like to see covered in future editions.



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I.

The Montreal Convention and the Courts

The Montreal Convention of 1999¹ entered into force on November 4, 2003, 60 days after the United States became the thirtieth party to ratify the Convention.² The Montreal Convention is the successor to the Warsaw Convention³ and unifies and replaces the system of liability that derives from the Warsaw Convention.⁴ The Montreal Convention is applicable to all “international carriage of persons, baggage or goods performed by aircraft for reward.”⁵ There are currently 94 parties to the Montreal Convention, including Australia, Chile, India, Jamaica, the Republic of Moldova, and Ukraine, whose ratifications became effective in 2009, and Argentina, where it entered into force on February 14, 2010, and Montenegro, which acceded to the Convention on January 15, 2010, and where it will enter into force on March 16, 2010.⁶

For the most part, the cases that have discussed the Montreal Convention have referenced its predecessor, the Warsaw Convention, to which over 120 states are parties. Most of the cases discussing the Montreal Convention have relied upon similar provisions contained in the Warsaw Convention, and tend to focus upon the preemptive effect of the treaty over state law rights and remedies. In cases involving carriage between state parties that have not yet ratified the Montreal Convention, courts continue to apply the applicable version of the Warsaw Convention.

Under Article 24 of the Montreal Convention, the limits of liability set forth in Article 21 (compensation for death or injury of passengers), Article 22 (limits of liability for lost or delayed baggage and cargo), and Article 23 (conversion of monetary units into Special Drawing Rights) “shall be reviewed by the depository at five year intervals” taking into account the rate of inflation since, in the case of the initial review, the date of entry into force of the Convention, and thereafter since the previous revision. If the rate of inflation exceeds 10%, then the limits of liability are to be increased accordingly.

Since the Montreal Convention took effect on November 4, 2003, the first review of the liability limits was duly conducted by the International Civil Aviation Organization (ICAO), which concluded that the rate of inflation since November 4, 2003, had reached 13.1%. Consequently, ICAO concluded that the liability limits under the Convention should be revised upwards by 13.1% effective December 30, 2009. Based on the conversion rate of 1 SDR = USD\$1.57 as of December 31, 2009, the recommended revised limits of liability are: (1) Cargo – 19 SDRs per kilo (USD\$29.83); (2) Baggage – 1,131 SDRs (USD\$1,775.67); (3) Passenger Delay – 4,694 SDRs (USD\$7,369.58); and (4) Death or Personal Injury – 113,100 SDRs (USD\$177,567.00).

¹ Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature on May 28, 1999, *reprinted in* S. Treaty Doc. 106-45, 1999 WL 333292734 (“Montreal Convention”).

² *See id.*, Article 53(6).

³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C.A. § 40105 (1997)(“Warsaw Convention”).

⁴ *See Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 371 (2d Cir. 2004).

⁵ Montreal Convention, Art. 1(1).

⁶ For a complete list of the parties to the Montreal Convention, please *see* Appendix A.

a. Preemption under the Montreal Convention

In *Schaefer-Condulmari v. US Airways Group, Inc.*,⁷ the U.S. district court for the Eastern District of Pennsylvania addressed the split of authority in the federal circuits as to whether the Montreal Convention completely preempts state law claims.

On a 2008 international flight from Rome, Italy, to Philadelphia, Pennsylvania, the plaintiff ordered a gluten-free in-flight meal to accommodate her severe food allergy to wheat, flour and gluten. Instead of the meal requested, the plaintiff was served a meal which was not gluten-free, and as a result, she suffered a severe allergic reaction. Plaintiff brought a Pennsylvania state law negligence suit to recover for her injuries.⁸

The airline removed the case to federal court, asserting both diversity and federal question jurisdiction. Plaintiff then filed a motion to remand the case to state court, and US Airways moved to dismiss the case in its entirety on the grounds that the plaintiff's state law claims were completely preempted by the Montreal Convention.⁹

The court first addressed the plaintiff's motion to remand based on lack of subject matter jurisdiction. US Airways argued that there was subject matter jurisdiction over the case in federal court based on both diversity and federal question jurisdiction.¹⁰ The court rejected US Airways' assertion of diversity jurisdiction because the plaintiff was a United States citizen domiciled in Rome, and as such, was a "stateless" person who could not satisfy the requirements for diversity jurisdiction.¹¹

In evaluating US Airways' assertion of federal question jurisdiction, the district court addressed a split that has arisen in the circuits as to whether the Montreal Convention completely preempts state law causes of action.¹²

One line of cases holds that the Montreal Convention does not completely preempt state laws.¹³ In so holding, these courts have relied on the language of Article 29 of the Montreal Convention, which provides that "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 forth in this Convention." Courts holding that the Montreal Convention does not completely preempt state law causes of action interpret this language to mean that the Convention recognizes that claims involving the "carriage of passengers, baggage, and cargo" can be brought either under the terms of the Convention or under state "contract or tort" law and that therefore not all damages actions

⁷ 2009 WL 4729882 (E.D.Pa. Dec. 8, 2009).

⁸ *Id.* at *1.

⁹ *Id.*

¹⁰ *Id.* at *3.

¹¹ *Id.* at *4.

¹² *Id.* at *8.

¹³ *See, Narkiewicz-Laine v. Scandinavian Airlines Sys.*, 587 F.Supp.2d 888 (N.D.Ill. 2008); *Serrano v. Am. Airlines, Inc.*, 2008 WL 2117239 (C.D.Cal. 2008); *Jones v. USA 3000 Airlines*, 2009 WL 330596 (E.D.Mo. 2009); and *Knowlton v. American Airlines, Inc.* 2007 WL 27394 (D.Md. 2007).

involving passengers or baggage “arise under” the Convention, as required for complete preemption.¹⁴

However, in *Schaefer-Condulmari*, the district court held that the Montreal Convention does completely preempt state law causes of action, in keeping with the other line of cases which have addressed the issue.¹⁵ In reaching its conclusion, the district court noted the tension between those circuits that have not found complete preemption and the Explanatory Notes to the Montreal Convention, specifically Article 37, which provides that “the Convention and its limits shall be applicable to all actions for damages arising in the carriage of passengers, baggage, and cargo, however such claims may be founded.”¹⁶ The court reasoned that consistency between Article 37 of the Explanatory Notes and Article 29 of the Montreal Convention required interpreting the Convention to completely preempt state law claims,¹⁷ and accordingly denied the plaintiff’s motion to remand the case to state court.¹⁸

The court next addressed US Airways’ motion to dismiss on the grounds that the plaintiff had failed to state a claim under the Montreal Convention. The court granted the motion, holding that the Montreal Convention provides the exclusive means to impose liability upon an airline for bodily injury suffered by a passenger while on board an aircraft on an international flight. The plaintiff’s state law claims for the allergic reaction she suffered on her flight from Rome to Philadelphia were therefore covered by the Convention and had to be brought under its terms, not under state law.¹⁹

In *Mullaney v. Delta Airlines, Inc.*,²⁰ the plaintiff purchased a round-trip ticket for travel between New York and Europe with stops in Rome, Italy, and Paris, France.²¹ When the plaintiff was ready for his return flight from Paris to New York, he was advised by the defendant carrier that it was unable to provide plaintiff with transportation to New York due to a strike at Charles De Gaulle airport.²² As a result, plaintiff was required to utilize another airline for his return trip to New York.²³

The plaintiff subsequently sued the carrier, alleging that it had reneged on a promise to reimburse him if he rebooked on another carrier, and for the carrier’s refusal to refund the plaintiff for his unused ticket.²⁴ The plaintiff also sought to recover the additional expenses he incurred as a result of having to stay in Paris for an extra three days.²⁵

¹⁴ *Id.* at *9.

¹⁵ *See, e.g., Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151 (8th Cir. 1999); *Schoeffler-Miller v. N.W. Airlines, Inc.*, 2008 WL 4936737 (C.D.Ill. 2008); and *Nipponkos Ins. Co. v. Globeground Services, Inc.*, 2006 WL 2861126 (N.D.Ill. 2006).

¹⁶ S. Treaty Doc. No. 106-45, 1999 WL 33292734 at *22.

¹⁷ *Schaefer-Condulmari, supra*, at *9.

¹⁸ *Id.* at *10.

¹⁹ *Id.*

²⁰ Civ. No. 7324, 2009 WL 1584899 (S.D.N.Y. June 3, 2009).

²¹ *Id.* at 1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Defendant filed a motion to dismiss the complaint on the ground that the state law causes of action for violation of New York general business law, promissory estoppel, and unjust enrichment, were preempted by the Montreal Convention.²⁶ Specifically, the defendant contended that plaintiff's claim fell within the preemptive scope of Article 19 of the Convention, which makes the carrier liable for "damages occasioned by delay in the carriage by air of passengers, baggage or cargo."²⁷

The court disagreed, noting that, in recent years, a number of courts had concluded that where the facts pleaded in the complaint added up to non-performance, rather than delay, the Convention does not preempt other claims.²⁸ In this instance, the court found that the defendant failed to perform its obligation to provide transportation for the plaintiff from Paris to New York.²⁹ Accordingly, the court concluded that plaintiff's lawsuit was for a failure to provide transportation pursuant to the airline ticket defendant had sold to plaintiff and not for a delay,³⁰ and that plaintiff's state law causes of action were not preempted by Article 19 of the Convention.³¹

In *Smith v. American Airlines, Inc.*,³² the court was asked to decide whether plaintiff's claim for negligence against defendant for injuries she sustained when a bottle of liquid hit her on the head during an international flight was preempted under the Montreal Convention.³³ Defendant further sought to have the action dismissed on the ground that plaintiff's injuries were not the result of an "accident" under Article 17 of the Montreal Convention.³⁴

In determining whether the Montreal Convention preempted plaintiff's state law causes of action, the court applied the Ninth Circuit Court of Appeals decision in *Carey v. United Airlines*.³⁵ In *Carey*, the Ninth Circuit interpreted the Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*³⁶ to hold that all state tort law claims that fall within the Convention's "substantive scope" are preempted.³⁷ Specifically, the Ninth Circuit noted that "the *Tseng* court framed the issue before it as whether the Warsaw Convention 'provides the exclusive cause of action for injuries sustained during international air transportation.' At the outset, the [*Tseng*] court stated that 'we therefore hold that recovery for a personal injury suffered on board [an] aircraft or in the course of any of the operations of embarking or disembarking, if not allowed under the Convention, is not available at all. That holding is all encompassing.... Because the Warsaw Convention does apply to such [personal injury] claims, [plaintiff] has a remedy. Under *Tseng*, it is his only one."³⁸

²⁶ *Id.*

²⁷ *Id.* at *2.

²⁸ *Id.* at *2 citing *In re Nigeria Charter Flights Contract Litig.*, 520 F.Supp.2d 447, 453 (E.D.N.Y. 2007).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *3.

³² Civ No. C 09-02903, 2009 WL 3072449 (N.D. Cal. Sept. 22, 2009).

³³ *Id.* at *1.

³⁴ *Id.*

³⁵ 255 F.3d 1044 (9th Cir. 2001).

³⁶ 525 U.S. 155 (1999).

³⁷ *Id.* at *3.

³⁸ *Carey*, 255 F.3d at 1051.

Applying the *Carey* court's decision to the plaintiff's claim, the court held that the plaintiff's state law claims for negligence fell within the Montreal Convention's "substantive scope" and were preempted pursuant to *Tseng* and *Carey*.³⁹

The court further held that being hit on the head by a bottle of liquid which fell from an overhead bin was an "accident" under Article 17 of the Montreal Convention.⁴⁰ The court explained that a bottle falling from above was both "unexpected and unusual," it was an event external to the plaintiff's "body," and it caused the plaintiff bodily harm.⁴¹

In *Nobre v. American Airlines*,⁴² the plaintiffs, including Mr. Nobre, his wife, and a business associate of Mr. Nobre, brought an action in the U.S. district court for the Southern District of Florida against the air carrier, alleging that the airline's flight attendants had subjected the plaintiffs to racially motivated verbal and physical abuse on their flight from New York to Sao Paulo, Brazil.⁴³

The plaintiffs, who were all dark-skinned, alleged that the flight attendants "directed monkey-like sounds and gestures" at them, and told the plaintiffs that they were not allowed to stand up and stretch as were the other passengers.⁴⁴ Mr. Nobre alleged that a flight attendant made a rude and insulting comment to Mrs. Nobre, and that when Mr. Nobre confronted the flight attendant concerning his remarks to Mrs. Nobre, all of the flight attendants began to call the plaintiffs "monkeys" and threatened them with physical harm.⁴⁵ The plaintiffs alleged that one of the flight attendants assumed a boxing stance and asked Mr. Nobre "do you want to fight, monkey?" Mr. Nobre's business associate then placed himself between Mr. Nobre and the flight attendant, at which time, the pilot and co-pilot restrained Mr. Nobre and his business associate, and it was further alleged that one of the flight attendants stabbed Mr. Nobre's associate with a pen, puncturing the skin on his arm.

The air carrier moved to dismiss on the basis that the plaintiffs' claims for discrimination and assault were preempted by the Montreal Convention.⁴⁶

The plaintiffs argued that the Convention did not preempt their claims, firstly because the acts complained of were not incidental to or otherwise related to any aspect of the carrier's provision of international carriage to the plaintiffs.⁴⁷ The court rejected this argument, reasoning that under the plain language of Article 29, the Montreal Convention is the exclusive remedy for all claims, "however founded," and that there is no "service" limitation contained in the Convention. The court also noted that, in interpreting the Montreal Convention, courts have not looked to the

³⁹ 2009 WL 3072449 at *4.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² 2009 WL 5125976, (S.D. Fla. Dec. 21, 2009).

⁴³ *Id.* at *1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *2.

services provided by the air carrier, but instead have looked to the location of the passenger at the time the injury occurred.⁴⁸

The plaintiffs then made a broad public policy based argument, in which they submitted that the court should decline to apply the Montreal Convention because allowing the air carrier to “hide behind” the Convention for racially motivated actions for which it would be liable under local laws would create an absurd result. The court found this argument unpersuasive also, noting that the purpose of the Montreal Convention was to create uniformity in the rules governing claims arising from international air travel, and that it was not for the court to re-write the terms of a treaty reached between sovereign nations.⁴⁹

The court rejected the plaintiffs’ arguments, and granted the air carrier’s motion to dismiss.⁵⁰

In *Edem v. Ethiopian Airlines Enterprises*,⁵¹ plaintiff sued Ethiopian Airlines Enterprises (“EAE”), the Ethiopian Insurance Company (“EIC”) which insured the airline, and the Federal Democratic Republic of Ethiopia for several causes of action relating to a flight from the U.S. to Nigeria, with a stopover in Ethiopia. Plaintiff claimed that while in Ethiopia, he was illegally detained for 40 days, and had thousands of dollars in cash confiscated by Ethiopian customs officials. Plaintiff further alleged that the airline lost his baggage.

The U.S. district court for the Eastern District of New York ruled that plaintiff’s causes of action against Ethiopia and EIC were barred because the court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act⁵² (“FSIA”).⁵³ However, the plaintiff’s claims against EAE, a corporation wholly-owned by the Ethiopian government, survived under the commercial exception to the FSIA.⁵⁴

The court then ruled that all of plaintiff’s claims against EAE were preempted by the Montreal Convention.⁵⁵

The court noted that, under the Montreal Convention, plaintiff had failed to allege a cause of action for bodily injury under Article 17(1), or damage to his checked baggage under Article 17(2).⁵⁶ Plaintiff did however allege a claim for lost baggage under Article 17(2) based on a

⁴⁸ *Id.* at *2, citing *Ugaz v. American Airlines, Inc.*, 576 F.Supp.2d 1354 (S.D.Fla. 2008) (finding that plaintiff’s claims for injuries sustained on an inoperable escalator were preempted because plaintiff was disembarking the aircraft); *Elnajjar v. Northwest Airlines, Inc.*, 2005 WL 1949545 (S.D.Tex. 2005) (finding that plaintiffs’ claims arising from harassing racial remarks were preempted because the incidents occurred on board the aircraft and in the course of disembarking).

⁴⁹ *Id.*, at 3, citing *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999), and *King v. American Airlines, Inc.*, 284 F.3d 352, 362 (2d Cir. 2002).

⁵⁰ *Id.* at *3.

⁵¹ 2009 WL 4639393 (E.D.N.Y. Sept. 30, 2009).

⁵² 28 U.S.C. § § 1330, *et seq.* and 1602-1611.

⁵³ *Id.* at **3-4.

⁵⁴ *Id.*, citing 28 U.S.C. § 1605(a)(2).

⁵⁵ *Id.* at *5, citing *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927, at *2 (E.D.N.Y. May 8, 2007) (“the Montreal Convention has been construed as having a complete preemptive effect over all claims within its scope.”).

⁵⁶ *Id.* at *5.

liberal construction of his *pro se* complaint.⁵⁷ The court found that the plaintiff's damages for lost baggage were limited to 1,000 Special Drawing Rights because, under Article 22(2) of the Convention, plaintiff had failed to make a special declaration of interest regarding the bag, and had also failed to allege that EAE, or its agents, acted with an intent to cause damage or recklessly and with knowledge that damage would probably result.

Finally, the court ruled that the plaintiff could not make a claim for passenger delay under Article 19 of the Montreal Convention, because the alleged 40-day delay was not the fault of the airline, but that of the Ethiopian Immigration Department which had detained the plaintiff.⁵⁸

b. The Definition of International Carriage

In *Gustafson v. American Airlines, Inc.*,⁵⁹ the plaintiff argued that her round-trip travel between Boston, Massachusetts, and Puerto Vallarta, Mexico, via Los Angeles did not qualify as "international carriage" under Article 1(2) of the Montreal Convention.

The plaintiff's layover in Los Angeles on the outbound portion of her trip lasted approximately two hours. When she arrived in Los Angeles on the flight from Boston, plaintiff apparently fell during disembarkation and sustained personal injuries. Plaintiff was treated for her injuries at LAX but continued on her trip.

Plaintiff argued that her travel from Boston to Los Angeles was a domestic flight, not part of an international carriage, based on the language in the last sentence of Article 1(2) of the Montreal Convention, which provides: "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 purpose of this Convention."⁶⁰ Plaintiff argued that because this sentence differs "sharply" from the corresponding sentence in Article 1(2) of the Warsaw Convention, case law interpreting the Warsaw Convention on this point was not binding, and that a different result was required. The corresponding sentence in Article 1(2) of the Warsaw Convention provides: "Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this Convention."⁶¹

The U.S. district court in Massachusetts ruled that the language in each Convention was substantially similar, since each sentence notes that "transportation between two points in the same state without the 'agreed stopping place in the territory of another State' is not international carriage,"⁶² and that therefore, case law interpreting Article 1(2) of the Warsaw Convention was instructive.

⁵⁷ *Id.* at **5-6.

⁵⁸ *Id.* at *6.

⁵⁹ 658 F.Supp.2d 276 (D. Mass. 2009).

⁶⁰ Montreal Convention, Art. 1(2).

⁶¹ Warsaw Convention Art. 1(2).

⁶² *Id.* at 283-284.

Based on such case law and the objective evidence in the subject action, the court held that the Boston-to-Los Angeles flight constituted international carriage under the Montreal Convention.⁶³ The tickets for the outbound flights from Boston to Los Angeles to Puerto Vallarta, and the corresponding returns flights, were booked at the same time through the same ticketing agency; plaintiff used her passport during the check-in process in Boston thereby evidencing international travel; baggage checked in at Boston was not claimed in Los Angeles but continued to Puerto Vallarta; and the hours between plaintiff's arrival in Los Angeles and her departure to Puerto Vallarta were few in number.⁶⁴ Accordingly, the court found that plaintiff's trip constituted international carriage, with Boston as both the place of departure and destination, and Puerto Vallarta as an agreed stopping place in the territory of another state.

The court also ruled that the airline's failure to provide notice that the Montreal Convention applied under Article 3(4) did not constitute a waiver of the statute of limitations defense under Article 35 of the Convention because, as noted in Article 3(5), non-compliance with the provision of Article 3(4) does not affect the existence of the contract of carriage or the application of the Montreal Convention to limit liability.⁶⁵

Further, the court found that since plaintiff filed her lawsuit more than two years after the completion of carriage, the action was barred under the Convention's two-year statute of limitations.⁶⁶

c. Article 17 Accidents and Bodily Injury

In *Aziz v. Air India*,⁶⁷ the U.S. district court for the Central District of California granted summary judgment in favor of the air carrier, holding that the carrier's failure to equip its flight with an Automated External Defibrillator did not constitute an accident under the Montreal Convention.

Plaintiffs' decedent, Ramazan Aziz, was a passenger on board an Air India flight from Frankfurt, Germany, to Los Angeles, California, on the return portion of a round-trip ticket which originated in Los Angeles. When the aircraft landed in Los Angeles, a passenger seated next to Mr. Aziz noticed that he had collapsed and did not appear to be breathing. A flight attendant was alerted, who immediately notified a doctor seated nearby. The doctor determined that Mr. Aziz had no pulse, was not breathing, and was very pale. The doctor then administered CPR and oxygen, but was unable to revive Mr. Aziz. A team of paramedics boarded the aircraft after it arrived at the gate. The paramedics were able to resume Mr. Aziz's heart activity for a brief moment, using a defibrillator and intravenous drugs. However, they were unable to completely revive Mr. Aziz, and he was pronounced dead on board the aircraft.

The Aziz family filed suit, alleging that Mr. Aziz would have survived if the aircraft had been equipped with a defibrillator. Air India moved for summary judgment on the grounds that the

⁶³ *Id.* at 285-286.

⁶⁴ *Id.* at 286-287.

⁶⁵ *Id.* at 287.

⁶⁶ *Id.* at 288, *citing* Montreal Convention Article 35.

⁶⁷ 658 F. Supp. 2d 1144 (C.D. Cal. 2009).

Montreal Convention exclusively governed plaintiffs' claims and that plaintiffs could not recover under the Convention because Mr. Aziz's death was not the result of an Article 17 "accident."

In addressing Air India's summary judgment motion, the court agreed that the plaintiffs' state law claims were completely preempted by the Montreal Convention, and analyzed two issues relevant to the "accident" inquiry: (1) whether there was an "event or occurrence," and (2) whether the occurrence was "unexpected or unusual."

The court held that lack of a defibrillator did not constitute an event for purposes of the Montreal Convention because neither Mr. Aziz nor the onboard doctor made any explicit request for a defibrillator, and there was no law or regulation in effect at the time of the flight requiring Air India to equip its aircraft with defibrillators.⁶⁸

The court briefly discussed whether lack of an on-board defibrillator was unexpected or unusual under the circumstances. The court noted its disapproval of the Fifth Circuit's approach to this issue in *Blansett v. Continental Airlines*,⁶⁹ a deep vein thrombosis (DVT) case which held that an airline's decision to merely cleave to the requirements of a public agency (as opposed to conforming to industry standards) was not an unusual or unexpected occurrence.⁷⁰ However, the *Aziz* court did not resolve this question because plaintiffs failed to meet their burden of presenting evidence to establish that there was an industry standard for carriers to provide defibrillators on board international flights.⁷¹

In *Katin v. Air France-KLM, S.A.*,⁷² plaintiff, who was traveling from Dallas, Texas, to Amsterdam, Netherlands, on vacation, cracked a tooth while eating a lobster salad on the flight.⁷³ Plaintiff sued defendant to recover the cost of replacing the crown on his tooth and for mental anguish.⁷⁴ Defendant brought a motion for summary judgment to exclude plaintiff from recovering damages for his alleged mental anguish,⁷⁵ arguing that plaintiff's emotional injuries did not flow from his bodily injury, and that therefore Article 17 of the Montreal Convention precluded plaintiff from recovering emotional distress damages.⁷⁶

Under Article 17 of the Montreal Convention, a plaintiff is entitled to recover damages for emotional injuries only if they are caused by a bodily injury.⁷⁷ Plaintiff claimed that until his tooth was repaired, he was constantly worried about the condition of his tooth.⁷⁸ Plaintiff further argued that he was concerned about the types of food and liquids he could consume and was anxious about the prospect of visiting a medical facility in a foreign country.⁷⁹ For these

⁶⁸ *Id.* at 1150–52.

⁶⁹ 379 F.3d 177, 180 (5th Cir.2004).

⁷⁰ *Id.* at 1154.

⁷¹ *Id.* at 1154–55. The decision in the case is currently on appeal before the Ninth Circuit Court of Appeals.

⁷² Civ. No. 4:08-CV-348, 2009 WL 1940363 (E.D. Tex. July 2, 2009).

⁷³ *Id.* at *1.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *3.

⁷⁷ *Id.*

⁷⁸ *Id.* at *4.

⁷⁹ *Id.*

reasons, the court concluded that plaintiff's alleged mental anguish could have been caused by his cracked tooth, and denied defendant's motion for summary judgment.⁸⁰

In *Wright v. American Airlines, Inc.*,⁸¹ plaintiff brought suit against American Airlines and another passenger for injuries sustained on an international flight when the other passenger dropped his computer bag on plaintiff's head. The plaintiff testified at deposition that the other passenger got out of his seat shortly after takeoff, while the "fasten seat belt" sign was still illuminated, and after taking his computer bag out of the overhead bin, dropped it on the plaintiff's head.

Plaintiff asserted a cause of action against American Airlines for personal injury under Articles 17 and 21 of the Montreal Convention. Plaintiff claimed damages in excess of the limits of the Montreal Convention, alleging that the airline failed to take necessary precautions to anticipate the situation that caused the hazardous condition that led to his injury. Plaintiff claimed that the carrier was at fault solely because the flight crew did not prevent the other passenger from leaving his seat and opening the overhead compartment at a time when he should have been seated.⁸²

American Airlines brought a motion for partial summary judgment on the grounds that it was not liable for any of the plaintiff's alleged damages in excess of 100,000 SDRs. Article 21 of the Montreal Convention only allows a plaintiff to recover in excess of 100,000 SDRs in the event of the carrier's negligence. American Airlines argued that it was not negligent as a matter of law and therefore plaintiff's damages should be limited to 100,000 SDRs.

The U.S. district court for the Northern District of Texas noted that, although an air carrier is strictly liable up to 100,000 SDRs for any damages caused by an "accident" under Article 17 of the Montreal Convention, the carrier may avoid liability for any damages exceeding 100,000 SDRs by proving that the plaintiff's damages were not caused by the carrier's own negligence or omission, or by the other wrongful act of a third party.⁸³

The court held that American Airlines had adduced evidence sufficient to prove that the plaintiff's injuries were not caused by any negligence, omission, or other wrongful act on the part of the carrier. The court reasoned that the undisputed evidence showed that the flight crew did all that it could to prevent the other passenger from getting up. The court further held that the airline had satisfied its duty to the passengers by instructing them not to get up while the seat belt sign was on,⁸⁴ and accordingly granted partial summary judgment in favor of American Airlines.

On December 24, 2009, a Superior Court in Ontario, Canada, approved the partial settlement of a class action for injuries arising from an Air France accident in Toronto on August 2, 2005. The

⁸⁰ *Id.*

⁸¹ 2010 WL 446077 (N.D.Tex. Feb. 8 2010).

⁸² *Id.* at *1.

⁸³ *Id.* at *3.

⁸⁴ *Id.*

accident occurred when an Air France flight overshot the runway; although no passengers were killed, some were seriously injured.⁸⁵

Members of the passenger class reside primarily in Canada and France and class counsel identified 436 family class members residing worldwide. Of the 297 passengers on board, 45 opted out of the class action, and another 68 had already settled their claims with Air France prior to certification of the class action.

Under the proposed settlement, Air France would pay CAD\$10 million plus accrued interest into a settlement fund in exchange for a release of all claims arising from the incident.

The majority of the class members' claims were governed by the Montreal Convention. The proposed settlement drew a distinction between Warsaw and Montreal Convention damages and damages under domestic law, the effect of which made Air France solely responsible for the payment of the Convention damages. The plaintiffs acknowledged that a significant legal issue for class members was the ability to recover from Air France damages for purely psychological injury under Article 17 of the Warsaw and Montreal Conventions. Under the proposed settlement, an administrator would manage and distribute the settlement fund with assistance from a management committee of counsel and in accordance with the individual damages assessments that were done at an earlier stage in the proceedings. The maximum assessment for a passenger claiming Post Traumatic Stress Syndrome or similar injury will not exceed CAD\$100,000 unless accompanied by evidence of other significant permanent personal injury, in which event, the maximum assessment of non-pecuniary damages will not exceed CAD\$175,000.

In *Yahya v. Yemenia-Yemen Airways*,⁸⁶ plaintiff brought suit for the death of his father on a flight from Frankfurt, Germany, to the Republic of Yemen. Plaintiff alleged that the flight attendants failed to heed his father's requests for assistance, and specifically that the airline willfully failed to divert the aircraft after becoming aware of the passenger's physical distress.

The plaintiff alleged state law causes of action for negligence, false imprisonment, intentional infliction of emotional distress, breach of warranty, *respondeat superior*, and punitive damages based on the airline's alleged failure to assist his father.

The U.S. district court for the Eastern District of Michigan dismissed the plaintiff's state law claims, holding that "the Montreal Convention preempts the remedies of domestic law, whether or not the application of the Montreal Convention will result in a particular case,"⁸⁷ but allowed the plaintiff leave to amend his complaint, reasoning that plaintiffs could allege an accident under Article 17 of the Convention. Citing *Air France v. Saks*, the court noted that where an Article 17 injury indisputably results from the passenger's own internal reaction to the usual,

⁸⁵ Bersenas Jacobsen Chouest Thomson and Blackburn, LLP, "Air France Class Action Settlement Approved," Transportation Notes: Legal Decisions and Developments Affecting the Transportation Industry in Canada, Volume 6, Issue 1, January 2010.

⁸⁶ 2009 WL 3424192 (E.D.Mich. Oct. 20, 2009).

⁸⁷ *Id.* at *4, citing *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999); *Best v. BWIA West Indies Airways Ltd.*, 581 F.Supp.2d 359 (E.D.N.Y. 2008); *Baah v. Virgin Atlantic Airways Ltd.*, 473 F.Supp.2d 591 (S.D.N.Y. 2007).

normal, and expected operation of the aircraft, it is not caused by an accident.⁸⁸ However, citing *Olympic Airways v. Husain*⁸⁹ and *Fulop v. Malev Hungarian Airlines*,⁹⁰ the court acknowledged that a failure to assist an ailing passenger could constitute an accident under *Saks*.⁹¹

In so holding, the court declined to dismiss Arabian Horizons Travel and Tourism, the travel agent which had booked the decedent's flight, noting that a travel agent could be liable for an accident occurring on an international flight and citing *In re West Caribbean Airways, S.A. et al.*⁹²

In *Meilan v. Air China*,⁹³ the court in Busto Arsizio Lombardy found in favor of a carrier in what may be the first DVT case to reach the Italian courts under Article 17 of the Montreal Convention. In so deciding, the Italian court followed now well-established appellate court decisions in the USA, Australia, Canada, and the UK.

Mrs. Hu Meilan died at the Malpensa airport in Milan, Italy, shortly after arrival from Shanghai on an Air China flight. She traveled in economy class. While being processed at the immigration checkpoint, Mrs. Hu showed signs of difficulty in breathing. She was taken to the airport emergency medical center where, despite attempts to revive her, she was pronounced dead. No pre-existing medical issues were reported. The cause of Mrs. Hu's death was determined to be a massive pulmonary thrombosis embolism, or deep vein thrombosis (DVT).

Mrs. Hu's husband alleged that, while his wife's death occurred following physical disembarkation from the aircraft, it was as a consequence of the flight itself. The Italian court acknowledged that the claimant might well be correct in asserting a causal link between the flight and the death of his wife from DVT, but nevertheless such a link does not of itself found liability on the part of the carrier under Article 17 of the Montreal Convention: the claimant must establish that the death was as a result of an "accident" (an unexpected or unusual event or happening) occurring during the course of carriage by air.

On the issue of "accident," the Italian court was mindful of existing international jurisprudence and the need for uniform legal interpretation of the Convention. The court considered decisions from the U.S., Australia, and England and Wales.⁹⁴

The Italian court found that pressurization and/or depressurization in the aircraft cabin and prolonged periods of passenger immobility during the course of long distance flights generally did not of themselves constitute "unexpected or unusual events." Further, there was no evidence that the seat accommodation in the cabin was inadequate, or that during the flight, Air China

⁸⁸ *Id.* at *5, citing *Air France v. Saks*, 470 U.S. 392, 406 (1985).

⁸⁹ 540 U.S. 644, 124 S.Ct.

⁹⁰ 175 F.Supp.2d 651 (S.D.N.Y. 2001).

⁹¹ For a similar holding in the same matter in the context of another motion to dismiss by defendant Northwest Airlines, see *Yahya v. Yemenia-Yemen Airways*, 2009 WL 2711955 (E.D.Mich. Aug. 25, 2009).

⁹² 619 F.Supp.2d 1299 (S.D.Fla. 2007) (holding that a travel agency could be found liable under the Montreal Convention for the death of a passenger).

⁹³ January 7, 2009 (Busto Arsizio Lombardy).

⁹⁴ See, e.g., *Air France v. Saks*, 470 U.S. 392, 406 (1985); *Povey v. Qantas Airways Limited*, (2005) HCA 170; *The Group Travel Litigation*, (UKHL 72 [2005]); and *In re Deep Vein Thrombosis Litigation*, 2007 WL 3010564, at *1.

failed to advise passengers on precautions to take so as to avoid the risk of developing a DVT. In any event, information given to passengers is no more than advice, and there was no evidence as to what in fact Mrs. Hu actually did in the course of the flight.

d. Embarking and Disembarking

In *Seales v. Panamanian Aviation Co., Ltd.*,⁹⁵ the plaintiff sought to transport a firearm from Panama to Jamaica on the defendant's aircraft.⁹⁶ Prior to his flight, the plaintiff contacted the carrier to learn the procedure for transporting his firearm to Jamaica.⁹⁷

On October 3, 2005, plaintiff boarded a flight to Jamaica from Panama on defendant airline and followed defendant's protocol for transporting firearms by handing over his firearm to the pilot.⁹⁸ The pilot advised plaintiff that he would be able to reclaim his firearm from Jamaica's Customs Officers on arrival in Jamaica.⁹⁹ Everything went well on the flight to Jamaica.¹⁰⁰ However, when plaintiff went to retrieve his checked baggage he noticed his gun case lying on the conveyor belt unattended.¹⁰¹ Plaintiff went to the Jamaican Customs Officers to obtain a permit to bring the firearm into Jamaica.¹⁰² Unfortunately, the Jamaican Customs Officers were unable to corroborate plaintiff's story because the pilot to whom plaintiff had handed his firearm had started his return flight to Panama.¹⁰³ As a result, plaintiff was arrested for illegally attempting to illegally bring a firearm into Jamaica, which carried a penalty of life imprisonment.¹⁰⁴

Because plaintiff was unable to obtain an exculpatory statement from defendant's pilot, plaintiff was held in prison for 18 days and thereafter was prohibited from leaving Jamaica for several months.¹⁰⁵ Eventually, defendant provided a statement exculpating plaintiff, and the charges were dropped.¹⁰⁶

Plaintiff filed a lawsuit against defendant for willful and/or negligent misrepresentation, gross negligence, willful misconduct, and intentional infliction of emotional distress.¹⁰⁷

Defendant moved to have the action dismissed on the grounds that the Montreal Convention did not govern the action because plaintiff's injuries did not occur during the flight or while he was embarking or disembarking from the defendant's aircraft. The court referred to the Second Circuit decision in *Buronocore v. Trans World Airlines, Inc.*,¹⁰⁸ which articulated four factors to

⁹⁵ Case No. 07-CV-2901, 2009 WL 395821 (E.D.N.Y. Feb. 18, 2009).

⁹⁶ *Id.* at *3.

⁹⁷ *Id.*

⁹⁸ *Id.* at *4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *1.

¹⁰⁸ 900 F.2d 8, 10 (2d Cir. 1990).

be considered in determining whether events occurred “in the course of any of the operations of embarking or disembarking,” namely: (1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on his movement; (3) the imminence of actual boarding or disembarking; and (4) the physical proximity of the passenger to the gate.¹⁰⁹

Plaintiff claimed that his injuries were caused by (1) defendant’s assurances prior to plaintiff’s travel from Panama to Jamaica that he could transport his firearm to Jamaica if he followed certain procedures; (2) defendant’s delivery of the firearm and ammunition to the luggage carousel rather than to Jamaican authorities; and (3) defendant’s refusal to provide an exculpatory statement to the Jamaican Criminal Court.¹¹⁰

The court found that the first and third events did not occur on board the aircraft, and did not qualify as events occurring “in the course of any of the operations of embarking or disembarking,” as they did not take place on the day of plaintiff’s flight to Jamaica and were therefore too far removed in time from his embarking and disembarking.¹¹¹ Accordingly, plaintiff’s state law claims for willful and/or negligent misrepresentation, willful misconduct, and intentional infliction of emotional distress were not governed by the Montreal Convention.¹¹²

The court did find that the second event did occur during the disembarkation process because when defendant delivered plaintiff’s firearm to the baggage claim area, passengers were either in the process of traveling from the aircraft to the baggage claim or waiting at the baggage claim itself.¹¹³ In addition, plaintiff had not cleared Customs when he noticed his firearm on the conveyor belt, and therefore it was reasonable to assume he was in a secured location.¹¹⁴ There was also no indication that an unusually long period of time had elapsed between the passengers’ disembarking from the aircraft and the placement of passenger luggage in the baggage claim area.¹¹⁵ The court further noted that the unloading of passenger items from the aircraft and transporting them to the baggage claim area is a routine and necessary function attendant to passenger disembarking and is easily understood to be part of “the operations of embarking and disembarking.”¹¹⁶ Therefore, the court held that the Montreal Convention applied, and that plaintiff’s state law claim for gross negligence was preempted.

e. Baggage

In *Nastych v. British Airways*,¹¹⁷ the plaintiff alleged that British Airways lost her luggage on her flight from New York to Budapest, Hungary, and due to this loss, she missed her connecting flight and had to take a train to her destination. British Airways apparently found and returned plaintiff’s luggage between her first flight and her return flight to New York. However, as

¹⁰⁹ *Id.* at *9.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 2010 WL 363400 (S.D.N.Y. Feb. 2, 2010).

plaintiff alleged, British Airways again lost her luggage on her return flight. Plaintiff sought \$25,000 in damages for her delay, train ticket, and the loss of her luggage. Defendant British Airways moved for partial summary judgment under the Montreal Convention to limit plaintiff's damages to a maximum of 1,000 SDRs.

The court first took note of the language of Article 19 of the Montreal Convention, which provides that the carrier is liable for damages caused by delay. The court then cited Article 22 of the Convention, which limits the carrier's liability for baggage loss to 1,000 SDRs.¹¹⁸ The court held there could be no doubt that the Montreal Convention, particularly its limits on liability, applied to plaintiff's claims of delay and loss of baggage. However, the court noted that British Airways' motion to limit plaintiff's damages to 1000 SDRs could only be granted in part because it did not address the plaintiff's claims for delay. The court noted that while Article 29 of the Montreal Convention prevented plaintiff from recovery for emotional distress or other non-compensatory damages, plaintiff could recover her out-of-pocket costs for train travel, up to a maximum of 1000 SDRs, for both her initial delay and for the later loss of her baggage. Accordingly, the court limited the plaintiff's recovery to \$1,554.19 for her luggage delay claim, and \$1,554.19 for her lost baggage claim stemming from her return flight.¹¹⁹

In *Molefe v. KLM Royal Dutch Airlines*,¹²⁰ the plaintiff filed claims against KLM and its code-share partner, Northwest Airlines, Inc., for damage and delay to baggage, and discrimination arising out of his travel from South Africa to New York City. While checking in at the airport in South Africa, plaintiff was issued a boarding pass with the wrong name on it, and was not issued baggage tickets for the luggage which he checked.

When the plaintiff arrived in New York on April 3, 2005, he discovered his luggage was not on the aircraft. The plaintiff claimed that he faxed a letter to KLM the same week identifying the contents of the luggage, but he was unable to produce a copy of the letter in response to KLM's motion to dismiss.

On April 11, 2005, nine days after entrusting his luggage to KLM in South Africa, plaintiff's luggage was returned to him. Plaintiff alleged the luggage bags were torn, and that his clothes were protruding from the bag.

The U.S. district court for the Southern District of New York addressed the issues of: (1) whether plaintiff could maintain a cause of action for discrimination against KLM based on their willful misconduct and recklessness toward him; (2) whether KLM's failure to issue the correct boarding pass, and KLM's failure to issue baggage tickets precluded application of the Montreal Convention; (3) whether plaintiff had provided timely notice of a claim to KLM under Article 31 of the Montreal Convention; and (4) if not, whether plaintiff could be entitled to equitable relief for his untimely notice.

Regarding the discrimination claim, the court ruled that plaintiff could not maintain a cause of action for discrimination under the Montreal Convention regardless of whether the conduct

¹¹⁸ *Id.* at *1.

¹¹⁹ *Id.* at *2.

¹²⁰ 602 F.Supp.2d 485 (S.D.N.Y. 2009).

amounted to an act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result under Article 22(5) of the Convention.¹²¹ The court noted that Article 22(5) “does not independently create a cause of action for damages for any alleged injury borne out of willful or reckless misconduct.” Rather, “the Montreal Convention only permits a damages remedy in the event of death, bodily injury, damage to baggage or cargo, or delay; any other injury allegedly suffered as a result of a carrier’s willful conduct is not actionable.”¹²²

The court further ruled that KLM’s issuance of a boarding pass to plaintiff without his name on it, and KLM’s failure to issue baggage tags, did not remove the case from the purview of the Montreal Convention.¹²³ The court looked to Article 3(5) of the Convention, which provides: “Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.”

Finally, the court dismissed plaintiff’s delayed baggage claims, since the plaintiff had received his baggage well within the 21-day time limit after his flight as required by Article 17(3) of the Convention.¹²⁴

In *Muoneke v. Compagnie Nationale Air France*,¹²⁵ plaintiff sought to recover damages for items that were stolen from her carry-on luggage during an international flight.¹²⁶ The district court entered judgment in favor of plaintiff and defendant appealed.¹²⁷ During the appeal, the defendant argued that it was not liable because, according to the terms of its contract of carriage, it had disclaimed any liability for the items at issue.¹²⁸

In addressing defendant’s argument, the Court of Appeals noted that Article 17 of the Montreal Convention provides for strict liability in the case of damage to or loss of baggage.¹²⁹ Therefore, if the defendant could simply contract out of liability under Article 27 of the Montreal Convention, as it claimed it had, the Court of Appeals concluded that Articles 17 and 26¹³⁰ would be meaningless.¹³¹

The Court of Appeals went on to state that under defendant’s proffered reading, a contract of carriage providing that “no items in checked baggage are covered” could effectively eliminate all

¹²¹ *Id.* at 488.

¹²² *Id.*, citing Montreal Convention, Arts. 17-22, and *In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001*, No. 02 Civ. 6746, 2003 WL 21032034, at *2-5 (S.D.N.Y. May 5, 2003).

¹²³ *Id.* at 489 and 495-496.

¹²⁴ *Id.* at 496.

¹²⁵ 330 Fed.Appx. 457 (5th Cir. 2009).

¹²⁶ *Id.* at 458.

¹²⁷ *Id.*

¹²⁸ *Id.* at 460.

¹²⁹ *Id.* at 461.

¹³⁰ Article 26 of the Montreal Convention provides as follows: “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void.” Montreal Convention, Article 26.

¹³¹ *Id.*

carrier liability for damage to baggage.¹³² Finding this outcome unacceptable, the Court ruled that defendant was liable for the items stolen from plaintiff's carry-on luggage and awarded her 1,000 Special Drawing Rights pursuant to Article 22(2) of the Montreal Convention.¹³³

In *Walz v. Clickair S.A.*,¹³⁴ a dispute on baggage liability limits under the Montreal Convention was considered by the European Court of Justice. The case concerned the type of damages covered by Convention liability limits and reinforced the position that the Convention is now part of European Community law and construed as such.

In *Walz*, the referral to the European Court of Justice (ECJ) concerned the question of what type of loss and damage is covered by the 1000 SDR limit of liability for loss, damage or delayed baggage in claims covered by the Montreal Convention. Mr. Walz's suitcase was lost during a flight from Barcelona, Spain, to Oporto, Portugal, operated by Clickair. He claimed damages of €2,200: €700 for the value of his luggage and €500 for non-material damage. Clickair challenged the claim, as it exceeded the 1000 SDR limit provided for in Article 22.2 of the Convention.

The Spanish court noted the lack of specificity in the Convention as to what type of damage is covered by the limit of liability for baggage, as well as a previous case in July 2008 heard by the Provincial Court in Barcelona, in which the court held that the limit of liability under the Convention did not include both material and non-material damage, and that each such head of claim had the benefit of its own separate limit of 1000 SDRs. In need of guidance, the Spanish court referred the question to the ECJ for a preliminary ruling.

In the view of the Advocate General, the 1000 SDR limit specified in the Montreal Convention is a financial limit on the carrier's liability, not a limit or description of what the liability actually covers. The Convention uses only the general concept of "damage" in fixing the carrier's liability relating to baggage claims at 1000 SDRs and, in the opinion of the Advocate General, there is nothing in the Convention to indicate any intention on the part of the Contracting States to limit liability to material damage or, as the case may be, to non-material damage. Accordingly, it is up to national law in any given case to decide what types of damage will be compensable under the Montreal Convention, subject always to the Convention limit of 1000 SDRs.

In *Journet – SARL Agence Nimoise de tourisme et de voyages v. SA Air France*,¹³⁵ a recovery action was brought against a carrier by a travel agency following delay in the delivery of passengers' luggage. The passengers first sued the travel agency, and the agency in turn brought an action against the carrier under the domestic laws of France relating to the sale and terms and conditions of holiday travel and tourism. On appeal, the French Court of Appeal confirmed that the agency's claim could only be brought subject to the limits of liability and other provisions of the Montreal Convention.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Opinion of Advocate General, Case C-63/09, January 26, 2010, E.C.J.

¹³⁵ CA Nimes March 10, 2009, No. 08/00461.

f. Jurisdiction

In *Biscone v. JetBlue Airways Corporation*,¹³⁶ plaintiff filed a lawsuit in New York state court, alleging several causes of action arising under both state law and the Montreal Convention. The plaintiff brought suit on behalf of herself and a proposed class of similarly situated individuals for damages arising out of an incident in which JetBlue passengers were detained on the tarmac for up to 11 hours. JetBlue removed the case to the U.S. district court for the Eastern District of New York on the basis of federal question jurisdiction, and the plaintiff moved to remand.

The court first noted that there was undoubtedly federal question jurisdiction over the claim because the plaintiff's Montreal Convention claims appeared on the face of the complaint,¹³⁷ and ruled that therefore the court could properly exercise supplemental jurisdiction over the remaining state law claims.

However, the court held that because the class action had not yet been certified, and because there were no identifiable plaintiffs yet invoking the Montreal Convention, Biscone lacked standing to raise Montreal Convention claims and invoke the jurisdiction of the federal courts. The court concluded that, without the presence of plaintiffs invoking the federal claims, it lacked subject matter jurisdiction, and accordingly granted plaintiff's motion to remand.¹³⁸

In *Jones v. USA 3000 Airlines*,¹³⁹ the plaintiff alleged that a flight attendant had intentionally pushed a beverage cart into her, causing injuries, on her round-trip flight from St. Louis, Missouri, to Montego Bay, Jamaica.¹⁴⁰ After the air carrier removed the matter to federal court under the Montreal Convention, the plaintiff moved to remand.¹⁴¹

The plaintiff argued that the Montreal Convention did not govern her claim because her place of destination was Jamaica and Jamaica was not a party to the Montreal Convention.¹⁴² In support of this position, the plaintiff cited to the dissenting opinion in *Rinck v. Deutsche Lufthansa A.G.*¹⁴³ The plaintiff also asserted that the drafters of the Convention could not have intended for the same place to serve as a departure point and a destination.¹⁴⁴

The court first noted that relevant case law interpreting the phrase "place of destination" as used in the Montreal Convention overwhelmingly supported the air carrier's contention that, for round-trip international travel, the place of destination is the same as the place of departure.¹⁴⁵

¹³⁶ 2010 WL 391331 (E.D.N.Y. Feb. 4, 2010).

¹³⁷ *Id.* at *2.

¹³⁸ *Id.* at *4.

¹³⁹ 2009 WL 330596 (E.D.Miss. Feb. 9, 2009).

¹⁴⁰ *Id.* at *1.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 57 A.D. 2d 370, 395 N.Y.S.2d 7, 10 (1977) (Silverman, J. dissenting).

¹⁴⁴ *Jones* at *2.

¹⁴⁵ *Id.* at *2, citing *Campbell v. Air Jamaica Ltd.*, 863 F.2d 1, 2 (2d Cir. 1988); *Blake v. American Airlines, Inc.*, 245 F.3d 1213, 1215 (11th Cir. 2001); *Swaminathan v. Swiss Air Transport Co., Ltd.*, 962 F.2d 387, 3 89 (5th Cir. 1992).

The court then held that there was no legal support for plaintiff's second contention that the drafters of the Montreal Convention could not have intended for the same place to serve as a departure point and a destination. The court reasoned:

“There is strong evidence that the drafters intended plaintiff's situation to fall within the scope of the Convention. The drafters of the Montreal Convention very closely copied the language of the Warsaw Convention. Had the drafters intended a different meaning for the phrase ‘place of destination’ than had already been interpreted under the Warsaw Convention, they could easily have clarified the issue. Instead, they chose to copy the ‘place of destination’ language from the Warsaw Convention knowing that such language had been interpreted to mean that, with round-trip tickets, the place of destination and the place of departure are the same.”¹⁴⁶

The court also found that the Montreal Convention completely preempted plaintiff's state law claims. Because the Convention completely preempted plaintiff's cause of action, federal subject matter jurisdiction existed and remand was inappropriate.¹⁴⁷

In *Sabatino v. Boeing Corp.*,¹⁴⁸ a group of passengers traveling from the United Kingdom to Orlando, Florida, on XL Airlines experienced aerotoxic poisoning from fumes released into the passenger compartment. The plaintiffs, all citizens of the UK, filed an action in Illinois state court against the aircraft manufacturer, several parts manufacturers, and XL Airlines. Three of the defendants, Boeing and two parts manufacturers, were corporate citizens of Illinois. XL Airlines was a corporation based in the UK.

Defendant XL removed the case to the U.S. district court for the Northern District of Illinois on the basis of federal question jurisdiction because the claims against it were governed by the Montreal Convention.¹⁴⁹

Following removal, plaintiffs voluntarily dismissed their claims against the airline and filed a motion to remand the case to state court based on lack of jurisdiction. In response, the remaining defendants argued that while federal question jurisdiction was now lacking, diversity jurisdiction existed because all of the plaintiffs were citizens of the UK and the only non-diverse defendant, XL, had been dismissed.

The court granted the motion to remand based on the forum defendant rule,¹⁵⁰ which prevents removal of an action based on diversity if one of the defendants is a citizen of the state where the action is brought. The court ruled that because Boeing and two of the parts manufacturers were citizens of Illinois, diversity jurisdiction was lacking under the forum defendant rule, and the case should be remanded.¹⁵¹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *4.

¹⁴⁸ 2009 WL 1635670 (N.D. Ill. June 5, 2009).

¹⁴⁹ *Id.* at *1; *see also* 28 U.S.C. § 1331.

¹⁵⁰ *Id.* at *3, *citing* 28 U.S.C. § 1441(b).

¹⁵¹ *Id.* at *3.

In *Kamanou-Goune v. Swiss International Airlines*,¹⁵² plaintiff brought several state law claims against the carrier for its refusal to let her daughter board a flight from Cameroon to New York. Apparently, when the passenger's daughter presented her passport to airline officials prior to boarding, the carrier's agents did not believe that the child in the passport photo was plaintiff's daughter. After the carrier refused to allow plaintiff's daughter to board the aircraft, the plaintiff spent several days attempting to secure the appropriate documentation in Cameroon. Plaintiff alleged that even after she had procured what airline officials told her were the proper documents, the carrier still refused to let plaintiff's daughter board the aircraft. Subsequently, the plaintiff purchased tickets from another airline for carriage back to the United States and brought several state law claims against Swiss International Airlines, including a claim for non-performance of its contractual obligations.¹⁵³

The air carrier removed the case to federal court, and plaintiff moved to remand the matter to the state court. The air carrier then moved to dismiss the action on the grounds that the Montreal Convention preempted plaintiff's claim for delay.

First addressing the plaintiff's motion to remand, the U.S. district court for the Southern District of New York noted that the plaintiff's motion had been made on the ground that the Warsaw Convention did not apply to her claims because her claim was for contractual non-performance, not delay. The carrier opposed the remand on the ground that the plaintiff's motion was not filed within 30 days of removal and thus, it was untimely under 28 U.S.C. section 1447(c). The court noted that a motion to remand for lack of subject matter jurisdiction can be made at any time, and allowed plaintiff's motion to remand to go forward.¹⁵⁴

The court then addressed the defendant's argument that the Warsaw Convention applied to plaintiff's claim. After noting the ratification and applicability of the Montreal Convention, the court held that removal under the Montreal Convention was improper because the plaintiff had alleged non-performance of the contract of carriage, rather than delay. Accordingly, the court remanded the case to the state court, reasoning that although Article 19 would govern plaintiff's claim if she alleged delay of her flight, Article 19 did not extend to claims of non-performance such as the plaintiff's.¹⁵⁵

In *Nankin v. Continental Airlines, Inc.*,¹⁵⁶ plaintiffs brought suit for damages arising from air travel from Acapulco to Los Angeles. Plaintiffs had a layover in Houston, and only had one hour to clear Immigration and Customs to make their connecting flight. Plaintiffs allegedly asked Continental employees to help them move quickly through Customs. One employee told the Nankins that Continental had no obligation to help them get through Customs quickly because Continental had other flights going to Los Angeles. Mr. Nankin spoke with a supervisor, who also refused to help plaintiffs. When Nankin asked the supervisor for his name, the supervisor allegedly seized Mr. Nankin's boarding pass and insisted that Immigration officers intervene. Once Immigration officers became involved, the Nankins were cleared

¹⁵² 2009 WL 8746000 (S.D.N.Y. Mar. 27, 2009).

¹⁵³ *Id.* at *2-3.

¹⁵⁴ *Id.* at *3.

¹⁵⁵ *Id.* at *5.

¹⁵⁶ 2010 WL 342632 (C.D.Cal. Jan. 29, 2010).

through Customs, but Continental allegedly informed the plaintiffs that Mr. Nankin could not fly on a Continental flight. Plaintiffs further alleged that they were forced to forfeit their tickets and fly on American Airlines at their own expense, with an added stop in Dallas.¹⁵⁷

The defendant sought to remove the case to federal court on the grounds that the Montreal Convention completely preempted plaintiffs' claims. After removal, the district court issued an order to show cause as to why the action should not be remanded to state court for lack of subject matter jurisdiction.

In its decision, the court first noted that if at any time it appeared the district court lacked subject matter jurisdiction, the case was to be remanded. The court also stated that the Ninth Circuit strictly construes the removal statute against removal jurisdiction.¹⁵⁸

The court then noted the split in authority as to whether the Montreal Convention completely preempts state law, discussed the split at length, and ultimately concluded that it had found persuasive those cases holding that the Montreal Convention does not completely preempt state law.¹⁵⁹

Despite the extensive discussion of preemption under the Montreal Convention, the *Nankin* court did not base its holding on preemption. Rather, the court, citing *In re Nigeria Charter Flights Contract Litigation*,¹⁶⁰ held that the Nankins' claims sounded in non-performance of the contract of carriage, and were therefore not covered by the Montreal Convention. Continental argued that the plaintiffs had essentially completed most of their international transportation and were on their way home when the subject incident occurred. However, the court pointed out that several of the passengers in *Nigeria Charter* were also stranded on the second leg of their trip. The court held that the fact "that the airline provided one flight according to contract does not necessarily render the failure to provide carriage on another flight a mere delay rather than a total failure to perform."¹⁶¹ Accordingly, because the court found this claim to fall outside the purview of the Montreal Convention, the court remanded the case to state court.

In *Seales v. Panamanian Aviation Co., Ltd. a.k.a. COPA Airline, et al.*,¹⁶² having found that the Montreal Convention governed the action, the court next addressed whether the court had jurisdiction over the claim under the Montreal Convention.¹⁶³ Articles 33(1) and 33(2) of the Montreal Convention provide five designated jurisdictions where a plaintiff may file a lawsuit. These jurisdictions are: (1) the domicile of the carrier; (2) the "principal place of business" of the carrier; (3) the place where the carrier has a "place of business through which the contract has been made"; (4) "the place of destination"; or (5) the "principal and permanent residence" of the passenger.¹⁶⁴

¹⁵⁷ *Id.* at *1.

¹⁵⁸ *Id.* at *2.

¹⁵⁹ *Id.* at *6.

¹⁶⁰ 520 F.Supp. 2d 447, 452-453 (E.D.N.Y. 2007).

¹⁶¹ *Nankin* at *8, citing *Nigeria Charter* at 455.

¹⁶² 2009 WL 395821 (E.D.N.Y. Feb. 18, 2009), *supra*, at pg. 12.

¹⁶³ *Id.* at *10.

¹⁶⁴ *Id.*

Plaintiff argued that New York was a proper jurisdiction because he was residing in New York at the time he filed his lawsuit and had lived in New York prior to moving to Panama.¹⁶⁵ Furthermore, while he was living in Panama, he had his government benefits deposited into a New York bank account, and was a registered voter in New York.¹⁶⁶ Plaintiff also declared that he never intended to abandon, and had not abandoned, his residence and domicile in the State of New York.¹⁶⁷

However, the court disagreed with plaintiff's position and found that at the time of the incident, plaintiff's principal and permanent residence was Panama. The court noted that at the time of the incident, plaintiff told Jamaican authorities that he was residing in Jamaica.¹⁶⁸ Plaintiff also testified that he maintained a residence in Panama at the time of the incident.¹⁶⁹ Furthermore, in 2007, plaintiff spent nine months of the year in Jamaica, and in 2006, he spent eight months of the year in Panama.¹⁷⁰ Considering these facts, the court stated that, although defendant had not established that plaintiff's domicile changed from the United States to either Panama or Jamaica after 1999, it did not follow that plaintiff, who bore the burden of establishing jurisdiction, had established that New York was his "principal and permanent residence" in October of 2005.¹⁷¹ For this reason, the court concluded it did not have jurisdiction over the lawsuit.

g. Air Cargo

In *Eli Lilly and Company v. Air Express International USA, Inc.*,¹⁷² plaintiff brought state law claims for damages against Lufthansa and DHL stemming from the spoliation of a shipment of temperature-sensitive insulin products being transported from France to Indiana. The insulin shipment was picked up at Eli Lilly's plant in Fegersheim, France, by heated trucks contracted for by Lufthansa. The cargo was then weighed at the airport in Strasbourg, France, and subsequently transported to the airport in Munich, Germany, in Lufthansa's hired heated trucks. At the Munich airport, the insulin shipments were left outside in freezing temperatures prior to being loaded, in violation of Eli Lilly's contract with DHL and Lufthansa. Although testing is necessary to determine whether insulin has actually been rendered unsafe by its exposure to freezing temperatures, such testing can only be done through the destruction of the insulin. Accordingly, plaintiff brought suit for those temperature-controlled containers which had registered exposure to freezing temperatures.

The U.S. district court for the Southern District of Florida first held that plaintiff's state law breach of contract claims against the carrier under plaintiff's service agreement with DHL and Lufthansa were preempted by the Montreal Convention. The court cited Article 18(1) of the Montreal Convention, which provides 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 air." Pursuant to Article 18(3),

¹⁶⁵ *Id.* at *2.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *10.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *2.

¹⁷¹ *Id.* at *10.

¹⁷² 602 F.Supp.2d 1260 (S.D.Fla. Mar. 10, 2009).

“carriage by air ... comprises the period during which the cargo is in the charge of the carrier.” Because it was undisputed by the parties that any damage to the cargo took place while the containers were in the charge of Lufthansa in the course of international transportation, the court held that the Montreal Convention completely preempted plaintiff’s state law claims, dismissing one of plaintiff’s state law claims at the outset.¹⁷³

The carriers then argued that plaintiff’s claims were precluded under the Article 31 requirement of timely notice to the carriers of damage to cargo. Defendants argued that plaintiff’s claims were precluded because Eli Lilly’s parent company, and not Eli Lilly itself, filed the notice of claim. Defendants also argued that plaintiff’s claims were precluded because the notice filed was “contingent and preliminary” in nature. The court rejected both arguments because Eli Lilly adequately informed the carrier of the nature of the damages against it, as required by Article 31 of the Montreal Convention.¹⁷⁴

The court then held that the plaintiffs had provided sufficient evidence that the cargo was delivered to the carrier in good condition, and received in damaged condition, which rendered the carriers presumptively liable for the loss of the insulin.¹⁷⁵

The court then turned to defenses under the Montreal Convention, noting that although Article 18 provided several defenses for the loss of cargo (such as inherent defect, defective packing, an act of war, or an act of public authority), the defendants had not proffered evidence that any of the Article 18 defenses applied.

The court then explained that Article 20 of the Montreal Convention provides the defense of exoneration, meaning that the carrier could avoid liability to the extent that the damage was caused or contributed to by the negligence of the plaintiff.¹⁷⁶ Defendants suggested that plaintiff was negligent, first by routing the shipment through Munich instead of its usual route through Frankfurt, and then by marking the shipment as “consolidated,” rather than as temperature sensitive. The court rejected the carrier’s first argument because the plaintiff had no reason to know that shipping the products via Munich might cause them to be exposed to freezing temperatures, and also because Lufthansa had suggested shipping the products through Munich. The court next rejected the defendants’ argument that plaintiff was negligent in marking the cargo “consolidated” instead of “temperature sensitive” because the carriers were clearly informed of the nature of the cargo.¹⁷⁷

The court finally turned to the issue of damages. Plaintiffs conceded that under Article 22(3) of the Montreal Convention and absent a contractual stipulation, Lufthansa’s liability was limited to 17 Special Drawing Rights (SDRs) per kilogram. In the case of co-defendant DHL, however, the court held that the parties had validly stipulated to a higher limit of liability contractually, as allowed by Article 25 of the Montreal Convention.¹⁷⁸

¹⁷³ *Id.* at 1269.

¹⁷⁴ *Id.* at 1270.

¹⁷⁵ *Id.* at 1271-1272.

¹⁷⁶ *Id.* at 1275.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1276.

In *UPS Supply Chain Solutions, Inc. v. American Airlines, Inc.*,¹⁷⁹ plaintiff sued American Airlines for damage to a shipment of fish oil transported from Tokyo, Japan, to Chicago, Illinois. The parties agreed that plaintiff's claim was exclusively governed by the Montreal Convention. The parties further stipulated that the air waybill issued by UPS to American Airlines contained instructions to keep the cargo in a cooler upon arrival, and that American Airlines stamped the air waybill with the phrase "**Customer agrees that refrigeration is not guaranteed.**"

The cargo arrived in Chicago on April 7, 2006, and was not refrigerated on arrival. On April 18, 2006, a trucking company contracted by plaintiff attempted to pick up the cargo from American Airlines. According to plaintiff, the trucking company refused to accept delivery due to spoilage. American Airlines disputed plaintiff's claim, contending that delivery failed because the trucking company could not load the shipment onto its truck. On May 1, 2006, plaintiff sent a letter to American Airlines, advising that delivery would not be accepted due to the spoilage of the cargo from lack of refrigeration.

Both parties cross-moved for summary judgment. Plaintiff argued that American Airlines breached its agreement that the shipment would be kept refrigerated upon arrival. American Airlines argued that it specifically disclaimed any refrigeration of the shipment by its stamp on the air waybill. The court denied both motions and held that summary judgment was inappropriate because the language of the air waybill stamp supported a reasonable inference that UPS had notice of American Airlines' disclaimer regarding refrigeration and that a guarantee of refrigeration was not part of the shipping contract.

American Airlines also argued that UPS was barred from pursuing its claim because it had failed to give adequate notice of the claim as required under Article 31 of the Montreal Convention. American Airlines asserted that UPS' claim letter of May 1, 2006, was insufficient because it did not state an intention to hold American Airlines liable for the loss, in reliance on *Denby v. Seaboard World Airlines*.¹⁸⁰ In *Denby*, a federal court in New York held that the notice requirement contemplated by the Warsaw Convention requires an express and definite statement of the shipper's intention to hold the carrier liable.

The court disagreed with American Airlines' position, noting that *Denby* was decided before the Montreal Convention was drafted, and that the language in *Denby* cited by American Airlines was not necessary to the ultimate holding in that case. The court instead referred to *Pesquera Navimar, S.A. v. Ecuatoriana De Aviacion*,¹⁸¹ which held that "the purpose of the requirement of written notice is to adequately inform the carrier of the nature of damages claimed against it."¹⁸²

The court agreed with *Pesquera* and held that the Montreal Convention does not require the claimant to specifically state that it intends to hold the carrier liable.¹⁸³ The court found that UPS' letter to American Airlines of May 1, 2006, was sufficient to notify the carrier that the shipment had been damaged, and under the terms of the Montreal Convention, that was all that

¹⁷⁹ 646 F. Supp. 2d 1011 (N.D. Ill. 2009).

¹⁸⁰ 575 F. Supp. 1134 (E.D.N.Y. 1983).

¹⁸¹ 680 F. Supp. 1526 (S.D. Fla 1988).

¹⁸² 646 F. Supp. 2d 1011, 1015 (N.D. Ill. 2009).

¹⁸³ *Id.* at 1014–15.

was required.¹⁸⁴ Accordingly, the court denied American Airlines' motion for summary judgment on the issue of notice.

In *Meteor AG v. Federal Express Corporation*,¹⁸⁵ plaintiff sued Federal Express for alleged water damage to a coil-winding machine which was shipped from Basel, Switzerland, to El Paso, Texas. Plaintiff's claims were governed by the Montreal Convention, and defendant moved for summary judgment on the grounds that plaintiff failed to provide timely notice of its claim under Article 31.

The primary issue in this case was the method of submission of a claim, which is not specified by the Montreal Convention. Federal Express argued that the parties may agree on a specific method, and that the air waybill incorporated by reference Federal Express' U.S. Service Guide, which provided that claims must be submitted to Federal Express' claims department in Pittsburgh, Pennsylvania. Federal Express contended that it was entitled to summary judgment because Meteor sent its claim to a Federal Express address at the Dallas-Fort Worth airport in Texas, and by e-mail to a Federal Express sales employee, and not to its Pittsburgh claims department.

At the time of the original hearing on defendant's motion, Meteor did not contest Federal Express' assertion that the U.S. Service Guide was referred to in the air waybill. On these facts, the U.S. district court for the Southern District of New York granted Federal Express' motion for summary judgment, finding that the parties agreed by contract that claims were to be mailed to Pittsburgh because the terms and conditions of the Service Guide were incorporated into the air waybill's language referencing Federal Express' "conditions of carriage."¹⁸⁶

After the court's ruling, Meteor moved for reconsideration and requested the court to vacate the summary judgment, on the grounds that the court overlooked evidence that Meteor also mailed notice of its claim to the freight forwarder TNT Freight Management and the carrier Land Air Express. Meteor argued that mailing notice of the claim to TNT and to Land Air Express was sufficient notice pursuant to the air waybill, which provided that a complaint may be made to "the first Carrier or to the last Carrier or to the Carrier which performed the carriage during which the loss, damage or delay took place."¹⁸⁷

Meteor further introduced new evidence that it also mailed notice of its claim to Federal Express at an address in Switzerland. Meteor urged the Court to find such notice proper, because Federal Express maintained multiple sets of Service Guides, which contained different mailing instructions for submitting claims related to international shipments from European countries. Meteor claimed that it discovered these additional terms and conditions after the oral argument on Federal Express' motion for summary judgment, and therefore, wished to withdraw its admission that the air waybill unambiguously referred to the U.S. Service Guide which was provided to Meteor by Federal Express.

¹⁸⁴ *Id.*

¹⁸⁵ 2009 WL 222329 (S.D.N.Y. 2009) vacated and superseded by 2009 WL 3853802 (S.D.N.Y. 2009).

¹⁸⁶ 2009 WL 222329 at *6 (S.D.N.Y. 2009).

¹⁸⁷ 2009 WL 3853802 at *2 (S.D.N.Y. 2009).

The court held that Meteor’s argument that it provided notice to TNT Freight Management and Land Air Express was an insufficient basis for reconsideration of its decision to grant summary judgment.¹⁸⁸ The court found that evidence which was available to a party but never raised at argument did not constitute “newly discovered evidence” for purposes of a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure. The court was also unpersuaded by Meteor’s argument that its late discovery of the new Federal Express Service Guide, which was available on Federal Express’ Swiss website, provided a basis for relief from summary judgment. The court held that such evidence could have been discovered with due diligence, and therefore did not qualify as “newly discovered evidence” for purposes of relief from summary judgment under Rule 60(b) of the Federal Rules of Civil Procedure.¹⁸⁹

However, the court responded to a new argument by Federal Express that the Service Guide it provided to Meteor directed shippers of International Airport-to-Airport (ATA) shipments to “the applicable Service Guide, terms and conditions, and/or tariffs for these services.” Federal Express argued that because there was no particular Service Guide for ATA shipments at the time, the terms and conditions of Meteor’s air waybill applied. These terms and conditions, in turn, referred to the “Carrier’s conditions of carriage and related rules,” which Federal Express argued was its Service Guide in the U.S. The court found this circular argument unavailing, holding that a contract’s incorporation of additional terms by reference must be sufficiently clear to allow the referenced document to be ascertained beyond doubt.

In the interests of preventing a miscarriage of justice, the court struck Meteor’s earlier concession that the U.S. Service Guide was unambiguously referenced in the air waybill, and held that the circular logic advanced by Federal Express was not sufficient to support summary judgment.¹⁹⁰ The court, therefore, vacated its previous summary judgment order in favor of Federal Express, and ordered the matter set for trial.¹⁹¹

In *American Home Assurance Company v. Kuehne & Nagel*,¹⁹² plaintiff, a subrogated insurer, sued defendant, Kuehne & Nagel, to recover the cost of the claim it paid out to Caterpillar, Inc. for 12 cartons containing a printer and its accessories that were damaged during carriage from Munich, Germany, to Caterpillar, Inc. in Illinois.¹⁹³ Defendant, Kuehne & Nagel, a freight forwarder, brought a motion to dismiss plaintiff’s complaint based on Caterpillar, Inc.’s failure to provide Kuehne & Nagel with notice of the damaged cargo within 14 days of its receipt, as required under Article 31 of the Montreal Convention.¹⁹⁴

The subject cargo arrived at O’Hare International Airport in Chicago, Illinois, on August 9, 2004, and was later transported to Kuehne & Nagel’s warehouse on August 12, 2004.¹⁹⁵ The driver of the transportation company hired by Caterpillar, Inc. to transport the cartons from Kuehne & Nagel’s warehouse to the Caterpillar facility noted on Kuehne & Nagel’s delivery

¹⁸⁸ *Id.* at *3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *4.

¹⁹¹ *Id.* at *5.

¹⁹² No. Civ. 6389, 2009 WL 3109839 (S.D.N.Y. Sept. 29, 2009).

¹⁹³ *Id.* at *1.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

order and an inventory form that the cartons were damaged, and that the skid shock watch was activated, but he did not inspect the printer and its accessories.¹⁹⁶ The driver handed the delivery order and inventory form to a Kuehne & Nagel warehouse employee and transported the cargo to Caterpillar, Inc.¹⁹⁷

Caterpillar, Inc. received the 12 cartons on September 16, 2004.¹⁹⁸ On that date, or soon thereafter, Caterpillar opened the cartons and noticed that some of the printer accessories were damaged.¹⁹⁹ However, Kuehne & Nagel did not receive notice of the damage from Caterpillar until some time between October 6, 2004, and November 16, 2004.²⁰⁰

Plaintiff argued that defendant's motion to dismiss should be denied because defendant had received notice of the damage to the printer and its accessories when the truck driver gave defendant's warehouse worker the delivery order and inventory form, which indicated that the cartons had been damaged.²⁰¹

The court, however, held that the trucker driver's notations on Kuehne & Nagel's delivery order and an inventory form that the cartons were damaged did not provide notice to Kuehne & Nagel that the printer and its accessories were damaged,²⁰² since the truck driver had made clear that he did not open the cartons, and that the cargo was to be "subject to inspection at later date."²⁰³ Accordingly, the truck driver did not know whether the contents inside the cartons were in fact damaged.²⁰⁴

The court further held that Caterpillar, Inc. received the subject cargo on September 16, 2004, and it was therefore incumbent on Caterpillar, Inc. to provide defendant written notice of the damaged cargo within 14 days of that date.²⁰⁵ Because Caterpillar had failed to timely provide defendant with written notice of the damaged cargo, the court granted defendant's motion to dismiss.

h. Limitations Period

In *Dickson v. American Airlines*,²⁰⁶ the plaintiff brought a putative class action on behalf of 2,000 to 33,000 airline passengers, on up to 1,000 American Airlines flights, who were delayed on the tarmac for periods in excess of three hours on December 29, 2006. Plaintiff filed suit on December 17, 2009, and alleged causes of action under the Montreal Convention. Plaintiff requested that he be appointed as the named representative of a class of all passengers similarly

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at *2.

¹⁹⁸ *Id.* at *3.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at *5.

²⁰² *Id.* at 7.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ 2010 WL 331809 (N.D.Tex. Jan. 28, 2010).

situated. The defendant moved to dismiss on the grounds that the claim was not commenced within two years of the occurrence of the accident as required by the Montreal Convention.²⁰⁷

The court first noted that because the action was not instituted until the lapse of almost three years after the accident, plaintiff had clearly exceeded the two-year limitation period contained in the Montreal Convention. The court held that if any part of the action were to survive the expiry of the limitation period, it would have to be on the basis that the statute of limitations was tolled.²⁰⁸

Plaintiff maintained that the Montreal Convention's two-year limitation period did not bar his action because the statute of limitations was tolled from December 29, 2008, until December 16, 2009, a period in which three prior plaintiffs had brought class actions arising from the same incident.²⁰⁹

Defendant maintained that class action tolling principles established by the U.S. Supreme Court in *American Pipe & Construction*²¹⁰ v. *Utah* and *Crown, Cork & Seal Co. v. Utah*²¹¹ did not apply to this case, citing case authority for the proposition that the repose language in the Montreal Convention created a condition precedent to the bringing by a plaintiff of a damages action under the Convention, with the consequence that the tolling concept discussed in the Supreme Court opinions in the context of statutes of limitations simply did not apply.²¹²

The court concluded that the defendant's arguments supported its position that class action tolling is not applicable to the limitation period under the Montreal Convention. In so holding, the court reasoned:

The bringing of an action within two years was, by the express language of the Convention, a condition precedent... This language of the Convention could not make any plainer that one of the conditions for the existence of an action under the Convention for damages is that it be brought within a period of two years... The time element expressed in the Convention is not a limitation provision but is a part of the definition of the right to recover damages based on the provisions of the Convention.²¹³

The court then addressed the plaintiff's claim that the statute of limitations was tolled when the three prior class actions were instituted. The court held that even if plaintiff's claim was not time

²⁰⁷ *Id.* at *1.

²⁰⁸ *Id.* at *2.

²⁰⁹ *Id.*

²¹⁰ 414 U.S. 538, 561 (1974).

²¹¹ 462 U.S. 345, 345-354 (1983).

²¹² *Dickson* at *3, citing *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1154 (8th Cir. 1999); *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 143-44 (2d Cir. 1998); *McCaskey v. Continental Airlines, Inc.*, 159 F.Supp.2d 562, 580-581 (S.D.Tex. 2001); *Sanchez Morrabal v. Omni Air Services Co.*, 497 F.Supp.2d 280, 285 (D.P.R. 2007); *Magnus Electronics, Inc. v. Royal Bank of Canada*, 611 F.Supp.436, 443 (N.D.Ill. 1985).

²¹³ *Dickson* at *4.

barred, the statute of limitations would not be tolled by the filing of several prior class action suits based on the same set of facts.²¹⁴

The court reasoned that because two of the prior class action suits that were filed involved only domestic travelers, and did not raise claims under the Montreal Convention, the plaintiff could not base a claim for tolling on these actions.

The court then turned to a third previously filed class action arising from the same set of facts but based on the Montreal Convention. The court held that even if there were a tolling that could benefit an individual plaintiff based on a class action filed previously, the tolling would salvage no more than the plaintiff's individual claim. Further, even if this particular prior class action provided plaintiff with the benefit of tolling while it was still a putative class action, plaintiff's claim would still be time barred. The court concluded that any right plaintiff otherwise had to bring the action was extinguished by his failure to bring the action within a period of two years reckoned from the date on which defendant's carriage of plaintiff stopped.²¹⁵

In *Hall v. Heart of England Balloons Limited*,²¹⁶ in an application to strike out, a first instance court ruled that once the right to damages under the Montreal Convention is extinguished, it cannot be resurrected by the application of a Civil Procedural Rule.

On September 17, 2006, claimant Catherine Hall was injured during a balloon ride organized for her 21st birthday. The balloon was operated by a Mr. Gabb, who was then doing business as "Heart of England Balloons." It was not disputed by the parties that Ms. Hall's claim was governed by Schedule 1 to the Carriage by Air Act (Application of Provisions) Order 2004 ("the 2004 Order"), which applies a version of the Montreal Convention to domestic carriage by air. In particular, it provides for a limitation period of two years.

In proceedings issued just before the limitation period expired, the defendant was named as "Heart of England Balloons Limited." This company was incorporated after Ms. Hall sustained her accident. Therefore, the defendant argued that it could not be liable, and applied for the proceedings to be struck out. On October 13, 2009, Ms. Hall applied for permission to amend the claim to name "Mr. Gabb trading as Heart of England Balloons" as defendant in place of the limited company. However, by this time the limitation period under the Montreal Convention had expired.

The Civil Procedure Rules in England and Wales provide for circumstances where an amendment to a party's statement of case or a change of name of a party may be allowed after a limitation period has expired.²¹⁷ The court observed that the limitation defense under the Montreal Convention was substantive, and that procedural rules cannot normally be used to remove substantive rights. The court concluded that the claimant's cause of action had already expired when she sought to amend the parties to the claim, and that to allow a procedural

²¹⁴ *Id.*

²¹⁵ *Id.* at *6.

²¹⁶ Case No: 8BM10813, Birmingham County Court, November 17, 2009.

²¹⁷ *See*, CPR Part 17.4(3) and CPR 19.5.

amendment would be in conflict with the express provision of the Montreal Convention. The claimant's challenge to the application to strike out was therefore defeated.

i. Effective Carrier vs. Contracting Carrier

Article 35 of the Montreal Convention provides that any action for indemnity may be brought against either the 'contractual' carrier or the 'effective' carrier. Article 39 addresses the situation where one carrier contracts with a passenger for international carriage (the contractual carrier), and another carrier actually performs the passenger's contract of carriage (the actual or effective carrier), while Article 45 preserves the right of both the contractual carrier and the actual carrier to seek indemnification from the other should a plaintiff only bring suit against one of them.

If an action is brought against the sole 'contractual' carrier, that carrier may in turn proceed against the 'effective' carrier, such action then being ruled by the *lex fori*. Article 35 of the Montreal Convention also states as a general principle that the right to damages in an action for indemnity is extinguished if it is not brought within a period of two years. This may complicate a contractual carrier's indemnity claim where the *lex fori* provides for a different time limit - as is the case under French law, where the action must be brought within one year.

In a decision where the 'contractual' carrier, whose liability had been triggered under Article 35 of the Convention, had initiated third-party proceedings against the 'effective' carrier later than the one-year limit provided by article L133-6 of the French Commercial Code, the French Supreme Court (Cour de Cassation) ruled on October 29, 2009, that third-party proceedings against the 'effective' carrier were subject to the two-year time limit provided by Article 35 of the Montreal Convention, and not by local French law.²¹⁸

j. Willful Misconduct

In *Hutchinson v. British Airways, PLC*,²¹⁹ the U.S. district court for the Eastern District of New York addressed the issue of what conduct must be alleged and proved in order to remove the limits of liability under Article 22(5) of the Montreal Convention relating to lost, destroyed, damaged or delayed baggage. The relevant language of Article 22(5) provides that a carrier's liability for lost, destroyed, damaged or delayed baggage will not be limited if a plaintiff can "prove[] that the damage resulted from an act or omission of the carrier, its servants or agents, done...recklessly and with knowledge that damage would probably result."

The plaintiffs were a class of passengers whose baggage had been damaged, lost, destroyed or delayed while traveling on British Airways. The plaintiffs alleged that British Airways was aware of the fact that its baggage handling system was inadequate and not "up to an acceptable standard." The plaintiffs further alleged that the carrier had a 20,000-bag backlog of mishandled passenger luggage, that British Airways' conduct placed it 60% above the industry average for misplaced baggage, that the carrier "knowingly operated its baggage handling system at 25%

²¹⁸ Barthelemy Cousin and Jefferson Larue, "Short Update on Use of the Montreal Convention," Association of Corporate Counsel, Lexology, February 2, 2010.

²¹⁹ 2009 WL 959542 (E.D.N.Y. April 6, 2009).

above its operating capacity,” and that BA was aware of the increased likelihood of damage to the bags of its passengers on account of its “reckless conduct.”

The court ruled that the foregoing allegations were sufficient to state a claim for damages greater than the limits of liability under Article 22(2) based on subjective knowledge of recklessness under Article 22(5).²²⁰ The court held that these allegations, coupled with statements by the carrier’s own personnel that indicated an awareness of a heightened degree of risk of damage to bags, “plausibly suggest recklessness on the part of BA.” Accordingly, British Airways’ motion to dismiss was denied.

k. Delay

In *Lukács v. United Airlines, Inc.*,²²¹ the plaintiff brought suit in the Manitoba Court of Queen’s Bench, Canada, for United Airlines’ alleged failure to honor the contract of carriage. Plaintiff was a tenured assistant professor at the University of Manitoba who booked his flight with United in anticipation of attending an academic conference at Ohio University in Athens, Ohio. This conference was of particular interest to the plaintiff due to its inclusion of a workshop on the first day on the topic of “Countable Borel Equivalence Relations.”²²²

Plaintiff received a call from United Airlines on the date of his planned departure advising that his flight had been cancelled due to a mechanical failure. The next available United flight would not permit the plaintiff to arrive in time to attend the workshop on the first day of the conference. While plaintiff remained on the telephone, the United agent checked flights on other carriers and informed the plaintiff that he could make a Northwest flight if he rushed to the airport. The United agent informed the plaintiff that another United agent at the airport would endorse his ticket so that he could fly on the Northwest flight at no additional charge. Plaintiff hurried to the airport, but the United agent plaintiff encountered at the airport refused to endorse plaintiff’s ticket, claiming both that she did not know how to endorse it, and that the airline did not allow the practice of endorsing a ticket from one carrier to another. Plaintiff declined to pay for passage on the Northwest flight and opted not to fly to Ohio to attend the remainder of the conference.²²³

Plaintiff sought special damages in the amount of the costs of his planned flight and \$5,000 in general damages for the loss of “academic opportunity.” Plaintiff alleged that the workshop he had planned to attend presented a unique opportunity to hear an expert speak on an obscure topic that was now lost to him because of United’s failure to honor his contract of carriage.

Both parties agreed that the Montreal Convention governed the claim, particularly the provisions of Article 19.²²⁴ Article 19 provides that the carrier is liable for damage occasioned by delay unless the carrier proves that its agents took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures. Although the court agreed that the Montreal Convention governed plaintiff’s claim, presumably because neither plaintiff nor defendant alleged otherwise, this holding is contrary to American precedent, which holds that a complete

²²⁰ *Id.* at *8.

²²¹ 2009 CarswellMan 54, 2009 MBQB 29, [2009] 4 W.W.R. 512, 237 Man. R. (2d) 75, 73 C.P.C. (6th) 385.

²²² *Id.* at 6.

²²³ *Id.* at 7.

²²⁴ *Id.* at 11.

failure to perform the contract of carriage on the part of the airline is governed by common law, and not by the Convention.²²⁵

The plaintiff took the position that defendant had not taken all necessary measures to avoid his delay because (1) the carrier should have had other flights available, and (2) the carrier failed to timely endorse his ticket so that he could travel on the alternate Northwest flight.

In addressing the plaintiff's first contention, the court reasoned that an airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the services contracted for with the public in order to fulfill its obligations under Article 19.²²⁶ The carrier argued that its employees and agents took all measures that could reasonably be required to avoid the damage because there was no alternate United aircraft available. The court noted that the carrier did not address the issue of aircraft maintenance and whether the mechanical failure of the aircraft which resulted in the cancellation of plaintiff's original flight was something which could have been avoided. The court accordingly held that defendants had not established that they had taken all measures which could reasonably be required to avoid the damage sustained by plaintiff arising from delay.²²⁷

With respect to the plaintiff's second allegation, that the carrier failed to timely endorse his ticket so that he could travel on the Northwest flight, the court reasoned that there was a slight possibility that the plaintiff could have flown on Northwest Airlines, but the failure of United Airlines to have properly trained staff available to arrange a quick transfer of the ticket made it impossible because United Airlines personnel made no attempt at the relevant time to assist him.²²⁸

On the issue of what damages plaintiff was entitled to recover, counsel for the carrier argued that the plaintiff's claim for loss of academic research and learning opportunities was speculative. Defendant also argued that the plaintiff failed to mitigate his damages by taking a later flight to the conference.

With respect to the mitigation of damages issue, the court reasoned that it is not the responsibility of the passenger to purchase a ticket on an alternate airline at much greater expense in the hope that he may be reimbursed by the airline which caused the delay. Accordingly, the court held that the plaintiff did not fail to mitigate his damages when he elected not to attend the conference late, as there was no point in the plaintiff's attending the conference at all after the particular workshop he desired to attend had concluded.²²⁹

In addressing the carrier's argument that plaintiff was not entitled to recover general damages stemming from loss of learning opportunity, the court held that the Montreal Convention does not permit a plaintiff to recover for emotional or psychological injuries in the case of delay, citing two American cases.²³⁰ The court determined that plaintiff's claim for missed academic and learning

²²⁵ See, *Mullaney v. Delta Airlines, Inc.*, *supra*; see also *In re Nigeria Charger Flights Contract Litig.*, 520 F.Supp.2d 447, 453 (E.D.N.Y. 2007).

²²⁶ *Lukács* at 14.

²²⁷ *Id.* at 17.

²²⁸ *Id.* at 17.

²²⁹ *Id.* at 18.

²³⁰ *Id.* at 15, citing *Lee v. American Airlines Inc.*, 355 F.3d 386 (5th Cir. 2004); *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991).

opportunities constituted a claim for such general damages and accordingly denied this portion of plaintiff's claim.²³¹

The court held that the plaintiff was entitled to compensation for his special damages, including the cost of the ticket, his travel agent's fee, and the costs of ground transportation to the airport.

Finally, the court rejected plaintiff's arguments based on the Consumer Protection Act of Manitoba on the grounds that the Montreal Convention applies to all international carriage of persons and preempts all state law. The court noted that recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention is designed to foster.²³²

II.

The Warsaw Convention and the Courts

a. Preemption under the Warsaw Convention

In *Dosso v. British Airways, plc*,²³³ the plaintiff, Maurice Dosso, filed a district court lawsuit against British Airways in the Eastern District of New York alleging various tort claims under the Warsaw Convention. Mr. Dosso was traveling between Virginia and Bordeaux, France, with a stop in London, pursuant to a ticket he purchased from AirValues.com, an airline ticket wholesaler. According to plaintiff, he did not realize that he would need to transfer between airports in London, although his ticket specified his arrival airport as London Heathrow ("LHR") and his departure airport as Gatwick ("LGW"). Plaintiff attempted to board a shuttle from Heathrow to Gatwick, but was unable to pay the fare because he did not have time to exchange any U.S. currency into U.K. Pounds Sterling, whereupon he returned to the British Airways ticket counter at Heathrow for assistance.

Plaintiff alleged that he was discussing his request with a British Airways agent when another British Airways agent interrupted him, mocked him, referred to him as a "stupid black man," and struck him repeatedly as he turned to leave. As a result, plaintiff filed a criminal complaint with the London Heathrow Terminal Police. British Airways marked plaintiff as a security risk and refused to allow him to continue his travel that day. Plaintiff found overnight accommodations in London, and British Airways transported him from his hotel to the Gatwick airport the next day.

Plaintiff's suit against British Airways alleged various tort claims under the Warsaw Convention, including defamation, false light, assault, battery, tortious interference with contractual relations, misrepresentation, intentional infliction of emotional distress, and a claim under 42 U.S.C. § 1981 for discrimination in the making or enforcement of contracts based on race. Plaintiff's misrepresentation claim rested on his allegation that British Airways provided him with a ticket that did not indicate that he would have to transfer airports in London. Plaintiff's complaint also

²³¹ *Lukács* at 17.

²³² *Id.* at 21.

²³³ 2010 WL 64922 (D. Md. 2010).

contained a jurisdictional statement, alleging that the court had exclusive jurisdiction over his claims under the Warsaw Convention.

British Airways moved to dismiss the case on the grounds that plaintiff's claims were preempted by the Warsaw Convention, which did not provide a remedy to plaintiff because (1) the events described by plaintiff did not constitute an "accident" under the Warsaw Convention, and (2) plaintiff did not sustain any bodily injuries.

The court began its inquiry into whether the Warsaw Convention preempted plaintiff's claims by analyzing whether plaintiff was in the course of any of the operations of embarking or disembarking. Guided by the decisions in *Maugnie v. Compagnie Nationale Air France*²³⁴ and *Day v. Trans World Airlines, Inc.*,²³⁵ the court in *Dosso* found that plaintiff's injuries did not occur in the course of embarking or disembarking, because plaintiff experienced an interruption in his travel, had not arrived at his departure airport, was free to go where he wanted, and was not under the control of the carrier.²³⁶

Despite this conclusion, the court referred to the jurisdictional statement in plaintiff's complaint, which stated that all of plaintiff's claims, except the claims for discrimination under 42 U.S.C. § 1981, were brought under the "exclusive jurisdiction" of the court under the Warsaw Convention. Accordingly, the court elected to treat all of these claims as having been brought under the Warsaw Convention, and ordered their dismissal. The court also noted that plaintiff's claim for misrepresentation was baseless, because his itinerary clearly provided that he would arrive in London at Heathrow International Airport and depart from Gatwick.

However, the court denied British Airways' motion to dismiss with respect to plaintiff's claim under 42 U.S.C. § 1981. The court held that plaintiff's complaint plausibly stated a cause of action under section 1981, because plaintiff properly alleged that British Airways' decision to exclude him from the flight was motivated by race, and that British Airways, through its agents' racially-motivated conduct, deprived plaintiff of his right to enforce his contract.²³⁷ The court permitted plaintiff to seek punitive damages associated with his § 1981 claim, and ordered the matter set for trial.

The *Liability Reporter* in both 2008²³⁸ and 2009²³⁹ reported on *Ong v. Malaysian Airline System Berhad*,²⁴⁰ a case involving injuries sustained by a minor who fell and hit his head when approaching the immigration counter at Hong Kong Airport upon arrival from Melbourne on a return ticket. The Hong Kong Court of Appeal held that the operation of disembarkation had concluded by the time the unaccompanied minor reached the immigration counter and therefore damages were not recoverable under Article 17 of the Warsaw Convention. However, the Court of Appeal also held that the Plaintiff's claim in contract, which was based on the Airline's obligations under the contract of carriage to an unaccompanied minor, was excluded by Article 24, which provides in relevant part that "...any action for damages, however founded, can only be brought subject to the conditions and

²³⁴ 549 F.2d 1256, 1262 (9th Cir. 1977).

²³⁵ 528 F.2d 31, 33-34 (2d Cir. 1975).

²³⁶ 2010 WL 64922 at *5 (D. Md. 2010).

²³⁷ *Id.* at *7.

²³⁸ 2008 *IATA Liability Reporter*, pg. 20.

²³⁹ 2009 *IATA Liability Reporter*, pg. 21.

²⁴⁰ *Ong v. Malaysian Airline System Berhad*, (2007) HKCU 1141 and, on appeal, (2008) HKCA 88.

limits set out in this Convention....” Accordingly, any claim which arises out of international carriage by air must, in the case of death or injury, be brought under Article 17 of the Warsaw Convention or is otherwise preempted.

On March 27, 2009, the Court of Final Appeal of Hong Kong granted special leave to appeal to determine the questions involving the scope of the Convention and in particular whether it extends beyond disembarkation to exclude any remedy for incidents occurring after disembarkation and whether it is co-terminus with the contractual obligations of the carrier. The appeal is currently pending.

b. Jurisdiction

In *Bernardin v. American Airlines*,²⁴¹ plaintiff brought suit for personal injuries he suffered at a security checkpoint in Haiti. Plaintiff alleged that he was traveling through a security checkpoint operated by the air carrier on his way to board a flight to New York City. Plaintiff alleged that because there were no plastic tubs, he put his belongings directly on the machine’s conveyer belt. At the end of the belt, his possessions fell to the floor, and he got down on his hands and knees to collect them. As he was gathering his belongings, an American Airlines employee allegedly stepped on his hand, causing severe injury.²⁴²

The plaintiff filed suit in New York state court, and the airline removed the action to federal court on the basis of diversity jurisdiction. The defendant’s notice of removal did not raise federal question jurisdiction under either the Montreal or Warsaw Convention. The plaintiff moved to remand the case to state court, acknowledging that his damages amounted to \$10,000, so as to no longer satisfy the amount in controversy requirement for the invocation of diversity jurisdiction. Only at this point did the air carrier invoke federal question jurisdiction, arguing that federal jurisdiction could be based upon the Warsaw Convention claim.²⁴³

The U.S. district court for the Eastern District of New York held it to be unquestionable that plaintiff’s Warsaw Convention claim created a question of federal law, because a claim under a United States treaty is a quintessential federal claim.²⁴⁴ However, the court also noted that other courts in the circuit have uniformly held that “a notice of removal may not be untimely amended to add a ‘new avenue of jurisdiction.’”²⁴⁵ Reasoning that the air carrier had made a strategic decision not to rely on federal question jurisdiction at the time of filing its notice of removal, the court held that the defendant could not later rely on federal question jurisdiction as the basis for removing the action to federal court, and granted the plaintiff’s motion to remand.²⁴⁶

In *Ashad v. Lufthansa*,²⁴⁷ plaintiff brought suit in the Ontario Superior Court of Justice, Canada, for injuries allegedly sustained when he swallowed pieces of shredded glass in a fruit bowl served to him

²⁴¹ 2009 WL 1910964 (E.D.N.Y. Jul. 1, 2009).

²⁴² *Id.* at *1.

²⁴³ *Id.*

²⁴⁴ *Id.* at *2.

²⁴⁵ *Id.* at *3, citing *Arancio v. Prudential Ins. Co. of America*, 247 F.Supp.2d 333, 337 (S.D.N.Y. 2002); *Funeral Fin. Sys., Ltd. v. Solex Express, Inc.*, 2002 WL 598530 at *6 (E.D.N.Y. 2002).

²⁴⁶ *Id.*

²⁴⁷ 2009 CarswellOnt 7251.

on board a Lufthansa flight from Sao Paulo, Brazil, to Frankfurt, Germany. Lufthansa moved to dismiss the action on the grounds that a Canadian court had no jurisdiction over the claim under Article 28 of the Warsaw Convention.²⁴⁸

The court held that the Warsaw Convention applied to plaintiff's claim because plaintiff was engaged in international carriage at the time of the alleged incident.²⁴⁹

The court cited the language of Article 28 of the Warsaw Convention, which provides that the lawsuit must be brought either where the carrier is ordinarily resident, where the carrier has its principal place of business, where the carrier has an establishment by which the contract of carriage has been made, or the place of destination of the plaintiff's flight.²⁵⁰

The court took note of the fact that Lufthansa is incorporated under the laws of the Federal Republic of Germany, with its corporate headquarters in Cologne, Germany. The court also noted that the plaintiff purchased his ticket from Lufthansa's office in Tripoli, Libya. Plaintiff's return flight to Tripoli was rerouted, however, with the result that a new ticket was issued to the plaintiff in Sao Paulo which routed him to Tripoli via Frankfurt and Geneva. The court noted that although it was possible that plaintiff's contract of carriage was made in either Libya or Sao Paolo, plaintiff's contract of carriage was certainly not made in Canada.²⁵¹

Plaintiff first argued that Article 28 did not bar his suit, because the Warsaw Convention did not apply to his claim. Plaintiff argued that the Convention did not apply because he was not injured in an "accident" under Article 17 of the Warsaw Convention. The Court quickly dismissed this argument, holding that "the incident or event in which the plaintiff unknowingly ingested pieces of shredded glass was clearly unexpected and unusual and external to the passenger" as required by *Air France v. Saks*.²⁵² The court took the position that the remedy created by the treaty was the sole remedy available to the plaintiff.

Plaintiff next argued that Lufthansa could not properly challenge jurisdiction because it had submitted to the jurisdiction of the court by serving and filing a statement of defense. In making this argument, plaintiff cited a line of Canadian cases holding that a defendant may submit to the jurisdiction of a court by making a general appearance where it would not ordinarily be subject to jurisdiction. The court rejected this argument on the grounds that the Ontario courts unquestionably had jurisdiction over Lufthansa because Lufthansa conducts business in Canada. Therefore, Lufthansa was legally obligated to respond to plaintiff's complaint and by doing so, did not waive its rights to assert an Article 28 defense.²⁵³

Plaintiff finally argued that jurisdiction was proper in Canada under the Montreal Convention. The Montreal Convention provides an additional forum besides the four contained in Article 28 of the Warsaw Convention. Under the Montreal Convention, a passenger may also bring suit in the place of his principal and permanent residence. The court rejected this argument, however, on the grounds

²⁴⁸ *Id.* at 3.

²⁴⁹ *Id.* at 6.

²⁵⁰ *Id.* at 6-7.

²⁵¹ *Id.* at 4.

²⁵² *Id.*, citing *Air France v. Saks*, 470 U.S. 392 (1985).

²⁵³ *Ashad* at 10-11.

that Brazil was not a State Party to the Montreal Convention at the date of the accident. Accordingly, the plaintiff's suit was governed by the Warsaw Convention.²⁵⁴

After rejecting all three of plaintiff's arguments, the court granted Lufthansa's motion to dismiss under Article 28 of the Warsaw Convention.²⁵⁵

c. Definition of "Accident"

The meaning of the term "accident" was considered by the New South Wales Court of Appeal in *Air Link Pty Limited v. Paterson*.²⁵⁶ The case involved domestic carriage within the scope of Part IV of the Australian *Civil Aviation (Carriers' Liability) Act 1959*, which established a liability regime for domestic carriage based upon the Warsaw Convention. Under section 28 of the Act, the carrier is liable for the death or injury of a passenger "resulting from an accident which took place on board an aircraft or in the course of any of the operations of embarking or disembarking." Accordingly, the term "accident" in section 28 is accepted as having the same meaning it does in Article 17 of the Warsaw Convention.

In this case, Mr. Paterson was in the course of disembarking from a commuter aircraft from which a staircase folded down almost to the ground, and accordingly, a lightweight aluminium step was placed below the staircase in order to allow passengers to step onto the tarmac. Mr. Paterson, carrying a laptop computer slung over his shoulder as well as a clothing bag, descended the stairs and fell forward when he reached the aluminium step, falling onto his knees on the tarmac. Although it was agreed that the step had moved when Mr. Paterson stepped onto it, the trial judge was unable to determine the cause of the movement. The aluminium step had been used for a number of years, and was of a type similar to that used throughout the industry for disembarking from commuter aircraft.

Mr. Paterson was a large man, approximately 88 lbs. in excess of the healthy weight range for his height, with a history of left knee restriction. On alighting from the aircraft, he was carrying at least two pieces of luggage, had difficulty getting through the doorway of the aircraft as he attempted to leave, and was hurrying for a connecting flight. The other passengers from the aircraft alighted successfully, and there was no evidence that the step was damaged or defective in any way, nor that the step was resting on the surface in an unstable manner.

The New South Wales Court of Appeal held that the plaintiff's injury was the result of an accident as that term has been explained in *Air France v. Saks*.²⁵⁷ The airline argued that the passenger's injury must be proven to have been caused by an unusual event external to the passenger and not the result of the usual, normal and expected operation of the aircraft. There was no evidence that there was anything unusual about the operation of the staircase or the step, other than the unexplained movement of the step.

The principle on which the airline relied was restated recently by the English Court of Appeal in *Barclay v. British Airways Plc*²⁵⁸ as "...a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the

²⁵⁴ *Id.* at 13-14.

²⁵⁵ *Id.* at 14.

²⁵⁶ (2009) NSWCA 251.

²⁵⁷ 470 US 395 (1985).

²⁵⁸ (2009) 1 All ER 871.

passenger.”²⁵⁹ On the face of it, there was no evidence that anything had occurred other than the usual, normal and expected operation of the aircraft.

Notwithstanding the apparent lack of any evidence of an unusual or unexpected event or occurrence, the Court of Appeal held that, while the precise cause of the movement of the step could not be identified, it was the result of an external factor, stating: “There was an event: the sudden movement of the step. That sudden movement of the step was physically external to the passenger. That sudden movement of the step was unexpected and abnormal.”²⁶⁰ In the absence of some explanation for the movement of the step, the passenger’s fall may have been entirely the result of his own action and he himself may have caused the step to move in his fall. Nonetheless, the Court of Appeal was satisfied that the step gave way as a result of an external factor and therefore was an unusual event or happening external to the passenger which caused his fall. Accordingly, the Court found that an accident had occurred in accordance with the terms of the decision of the High Court in *Povey v. Qantas Airways Limited*,²⁶¹ where the majority had focused on the questions of what had happened to cause the injury and whether or not what had happened was unusual and unexpected.

The Court of Appeal reserved its position on the correctness of the approach of the English Court of Appeal in *Barclay v. British Airways Plc*,²⁶² and observed that the reasoning in that case went beyond what was said in *Povey* as to the meaning of “accident,” because the English decision required the event to be outside the usual operation of the aircraft and independent of anything done or omitted by the passenger. The decision leaves open the possibility of the adoption of a broader concept of “accident” in Australia than in the United Kingdom, where the reasoning of the English Court of Appeal follows more closely the principles enunciated in *Air France v. Saks*.²⁶³

d. Air Cargo

In *Oriental Insurance Co. Ltd. v. BAX Global, Inc.*,²⁶⁴ the U.S. district court for the Northern District of Illinois ruled that written notice of damage to cargo was required under Article 26(2) of the Warsaw Convention, notwithstanding actual or constructive notice to the carrier.

The plaintiff, Oriental Insurance Co. Ltd. (“OICL”), was the subrogee of Orchid HealthCare (“Orchid”), a corporation which manufactured pharmaceuticals. Orchid entered into a contract with BAX Global, Inc. (“BAX”), an indirect carrier, for the shipment of 955 boxes of pharmaceuticals from Chennai International Airport in India, to O’Hare International Airport in Chicago, Illinois. BAX, in turn, entered into a contract with Korean Airlines (“KAL”) for the transportation of the shipment.

The cargo arrived at O’Hare on September 1, 2006. When KAL released the shipment to BAX in Chicago, a BAX agent noted that there was damage to five of the boxes on the Notification of Transfer. On September 3, 2006, BAX submitted a Preliminary Notice of Loss to KAL

²⁵⁹ *Id.* at 35.

²⁶⁰ (2009) NSWCA 251 at 42.

²⁶¹ (2005) 223 CLR 189, and in particular at 28 to 44.

²⁶² (2009) 1 All ER 871, *supra*.

²⁶³ “*The Meaning of ‘Accident’ in the Air*” by Jonathan Chambers in the Lloyd’s Maritime and Commercial Law Quarterly, February 2010, *citing Air France v. Saks*, 470 U.S. 392, 406 (1985), *supra*.

²⁶⁴ 2009 WL 229668 (N.D. Ill Jan. 28, 2009).

regarding the cargo. The letter stated that in the event of a claim of damage, BAX would look to KAL for subrogation.

On September 11, 2006, the ultimate consignee rejected the delivery of the cargo and the entire shipment had to be destroyed.

OICL, as the subrogee of Orchid, sued KAL for damage to cargo under Article 26(2) of the Warsaw Convention. KAL filed a motion to dismiss arguing that OICL had failed to provide written notice of the claim within 14 days of receipt of the cargo as required by Article 26(2) of the Convention. KAL argued that because the plaintiff failed to comply with Article 26(2), the claim was precluded under Article 26(4). OICL argued in response that: (1) the subrogation letter from BAX to KAL constituted sufficient notice under Article 26(2) because BAX was the “person entitled to delivery” as far as KAL was concerned; and (2) KAL’s actual notice of the claim via the BAX subrogation letter satisfied the requirements of 26(2) in place of written notice.

In support of its position, OICL relied upon *Mashinenfarkik Kern, A.G. v. Northwest Airlines, Inc.*,²⁶⁵ which had held that timely notice of a claim to one carrier in a chain of unitary transportation is in effect notice to all.²⁶⁶ The *Kern* court had further held that written notice was not required under Article 26(2) because the carrier “had actual notice of at least possible damage” to the cargo.²⁶⁷

The *Oriental* court disagreed with the reasoning in *Kern* and refused to follow it. The *Oriental* court ruled that *Kern* disregarded the express language of Article 25(2) requiring the notice to come from the person entitled to delivery.²⁶⁸ The *Oriental* court further held that *Kern* “effectively obviates the entire requirement of written notice if the carrier had actual notice of the possibility of damage.”²⁶⁹ Because of *Kern*’s departure from the actual text of Article 26(2), the *Oriental* court disregarded the case.

The *Oriental* court instead ruled that “the person entitled to delivery is the person to whom the cargo should ultimately be delivered, not the next company in the chain of carriers.”²⁷⁰ Furthermore, the *Oriental* court ruled that the subrogation letter from BAX did not constitute notice of the claim because the letter “does not specify the nature or amount of damages or even whether the claim was for loss or for damage.”²⁷¹ Accordingly, KAL’s motion to dismiss was granted.

In *Olaya v. American Airlines, Inc.*,²⁷² the plaintiff asserted various claims under New York state law against American Airlines, Thomas and Kathleen Deriso, and the Deriso Funeral Home, Inc., arising out of the handling and international shipping of the remains of his deceased wife. Both

²⁶⁵ 562 F.Supp. 232 (N.D. Ill. 1983).

²⁶⁶ See *Kern*, 562 F.Supp. at 236.

²⁶⁷ *Id.* at 237.

²⁶⁸ See *Oriental*, *supra*, at p. 3.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² 2009 WL 3242116 (E.D.N.Y. 2009).

American Airlines and the Derisos filed cross-claims against each other for indemnification and contribution.

Plaintiff Miguel Olaya claimed that he hired Thomas and Kathleen Deriso to transport the remains by air from Brooklyn, New York, to Guayaquil, Ecuador. However, the air waybill issued by American Airlines and signed by Thomas Deriso specified the cargo's destination as Guatemala City, Guatemala. Upon arrival of the shipment in Guatemala on April 1, 2008, American Airlines became aware that the cargo was intended to arrive in Ecuador. After re-exporting the remains to Miami, Florida, American Airlines delivered them to Guayaquil on the evening of April 4, 2008. None of the parties complained to American Airlines regarding the delay or any damage to the remains prior to the filing of plaintiff's lawsuit on November 3, 2008.

American Airlines removed the case to the U.S. district court for the Eastern District of New York on the grounds that plaintiff's claims arose under the Warsaw Convention. American Airlines then moved for summary judgment on the grounds that no timely notice of claim had been provided to American Airlines. The court granted summary judgment in favor of American Airlines, finding that no questions of fact existed concerning the failure of plaintiff and the Derisos to meet the strict notice requirements of Article 31 of the Montreal Convention.²⁷³

In *Nissan Fire and Marine Insurance Co. Ltd., et al. v. Bax Global Inc., et al.*,²⁷⁴ plaintiff Hitachi Data Systems shipped 18 cartons of cargo from Indiana to Hong Kong. One of the cartons, which weighed 481 kilograms and contained a disk controller unit, was damaged during shipment.

The Ninth Circuit Court of Appeals had previously held that the amount of damages in this case was governed by the Warsaw Convention as modified by the Hague Protocol, and that California choice of law rules would determine the substantive law on the issue of attorneys' fees. The action was then remanded to the trial court for determination of these two issues.

According to plaintiff, the entire shipment consisted of pieces that were built, configured and tested to perform a single operating function as a storage unit for computerized data. Plaintiff submitted stipulated testimony that damage to the single disk controller prevented plaintiff from assembling the entire system, which remained in storage in Hong Kong until a replacement disk controller unit was received. This evidence was not disputed by any of the defendants.

Based on evidence submitted by Hitachi, the U.S. district court for the Northern District of California found that the damage to the disk controller unit affected the value of the entire shipment.²⁷⁵ Accordingly, the court calculated plaintiffs' damages based on the weight of the entire shipment, which was 4,400 kilograms, and ordered defendant BAX Global to pay plaintiffs \$88,800 in damages.²⁷⁶

²⁷³ *Id.* at *3.

²⁷⁴ 2009 WL 1364870 (N.D. Cal. 2009).

²⁷⁵ *Id.* at *1.

²⁷⁶ *Id.*

The parties agreed that under California law, the prevailing party is entitled to attorneys' fees. Defendants, however, disputed that plaintiffs in this case qualified as the prevailing party, arguing that plaintiffs were not awarded damages at the trial, but rather following an appeal and a remand. The court disagreed, finding that although BAX succeeded in limiting the amount of plaintiffs' damages, plaintiffs' overall success on their litigation objectives was not sufficiently undermined and plaintiffs were entitled to attorneys' fees.²⁷⁷

The court declined to rule on whether BAX was entitled to a set-off in the sum of \$15,000, the amount of the settlement paid by co-defendant Cathay Pacific to plaintiffs.²⁷⁸ The court cited the "rule of mandate" doctrine, holding that it was precluded from addressing the set-off issue on remand because plaintiffs had not appealed this issue to the Ninth Circuit.²⁷⁹

In Germany, the Higher Regional Court in Stuttgart held²⁸⁰ that both the shipper and the consignee have the necessary right of action, but that the right of those parties is joint and several, as there cannot be double recovery against the carrier.

A shipper had consigned two pieces of cargo by air from Oberkochen, Germany, to Istanbul, Turkey. The combined value of the cargo was approximately €71,000. After arrival in Istanbul, the goods were held by the carrier's handling agent at its warehouse. However, a fire swept through the warehouse and the consignment was destroyed.

Subsequently, the shipper's insurers brought a claim against the carrier under the amended Warsaw Convention. The carrier argued that under Article 13 (3) of the Convention, only the consignee has a right of action against the carrier, although the Higher Regional Court ruled otherwise.

e. Baggage

In *Shah v. Kuwait Airways Corporation*,²⁸¹ plaintiff commenced a pro se action against the air carrier to recover for the alleged theft of items from her luggage as she traveled from India to New York. The carrier moved for partial summary judgment to limit its liability to \$460, the maximum amount recoverable under the Warsaw Convention.

Plaintiff alleged that as she passed through a security checkpoint in Kuwait City, a stopping point on her itinerary, an employee of the carrier saw that her carry-on bag contained valuable jewelry. She alleged that this employee then conspired with a flight attendant on plaintiff's flight to steal the contents of the bag.²⁸² As plaintiff was boarding her second flight from Kuwait City to New York, the flight attendant took her bag over her objection, checked it, and provided plaintiff with a baggage check. When plaintiff arrived in New York, she alleged that her bag was ripped and her valuables were missing.²⁸³

²⁷⁷ *Id.* at *2.

²⁷⁸ *Id.* at *2.

²⁷⁹ *Id.* at *2–3.

²⁸⁰ Judgment of June 10, 2009 (Court Ref. 3 U 12/09).

²⁸¹ 653 F.Supp.2d 499 (S.D.N.Y. Sept. 9, 2009).

²⁸² *Id.* at 502.

²⁸³ *Id.*

The first issue that the court addressed was whether the Montreal Convention or the Warsaw Convention applied to plaintiff's claim. India was not then a party to the Montreal Convention, although it was a party to the Warsaw Convention. The court held that neither party had produced sufficient evidence to prove whether the plaintiff had flown on a round-trip ticket from New York to India and back, or whether she flew on a one-way ticket from India to New York.²⁸⁴ The court noted that because the limits of the Montreal and Warsaw Conventions are affirmative defenses, the air carrier asserting the limits of liability bears the burden of proof.²⁸⁵ Holding that the carrier had not met its burden of proof, the court only granted summary judgment limiting damages to the higher liability limit of the two Conventions, or 1,000 SDRs under the Montreal Convention.²⁸⁶

Plaintiff made two arguments as to why the liability limitations of the Montreal or Warsaw Conventions should not apply in her case. First, she argued that her bag was not truly checked. The court quickly dismissed this argument on the grounds that the Montreal Convention does not distinguish between checked and unchecked baggage, and that the Warsaw Convention would only not apply if the air carrier failed to issue a baggage check.²⁸⁷

Plaintiff next argued that the carrier had a business practice of stealing its passengers' belongings. Both the Montreal Convention and the Warsaw Convention void all liability limitations if the plaintiff can prove intentional conduct on the part of the air carrier, although the court also noted that theft by an individual employee is not enough to pierce the liability limitations of the Conventions.²⁸⁸ The court held that if plaintiff could show an airline policy of deliberately stealing from its passengers, this would likely constitute willful misconduct under both the Montreal and Warsaw Conventions and void their respective liability limits, although the court ruled that plaintiff's unsworn declaration in support of this assertion, without more, contained no evidence to support her claim concerning the carrier's practices.²⁸⁹ After rejecting both of plaintiff's arguments, the court granted the carrier's motion for partial summary judgment, although subject to the caveat that the carrier would have to prove that the lower limits of the Warsaw Convention applied to the claim.

In *Avena Christian v. Aerolíneas Argentinas S.A.*,²⁹⁰ the plaintiff brought an action against the airline in Argentina, alleging that the carrier had lost one piece of his checked luggage during his flight from Buenos Aires, Argentina, to Madrid, Spain. The plaintiff's complaint sought both material and moral damages. The defendant admitted lack of fulfillment of its obligation to deliver the luggage in a proper and timely manner.

The main issue for the court was that of assessment of the value of the missing piece of luggage in order to properly compensate the plaintiff. The fact of the damage had been duly proved, as defendant admitted, but the value of the luggage and its contents had not (the evidence furnished

²⁸⁴ *Id.* at 504.

²⁸⁵ *Id.* at 505.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 506.

²⁸⁹ *Id.* at 506.

²⁹⁰ Lexis N°70052492, March 3, 2009.

by plaintiff was weak in that it was solely based on his own statements and the deposition testimony of witnesses). Accordingly, in reliance on the powers granted in the last part of Article 165²⁹¹ of the Code of Civil and Commercial Procedure, the trial court awarded plaintiff the amount of US\$1,000 in material damages, and moral damages in the amount of US\$500. Both parties appealed.

The Federal Civil and Commercial Court of Appeals of Argentina, Chamber I, upheld the decision of the trial court, stating that the lower justice duly acted with prudence while presumptively fixing the amount awarded on material damages. Furthermore, the Court of Appeals went on to state that the type and size of the suitcase, its overall weight, as well as the nature of the trip and similar factors, are “useful indicium elements” to be taken into account by the judge when arriving at his conclusion on the extent of the damage.

f. Damages for Passenger Deaths – South Korea

In 2002, Air China Flight 129, en route from Beijing, China, to Pusan, South Korea, crashed into a hill near Gimhae International Airport. Of the 166 persons on board, 129 were killed. In 2009, the Supreme Court of Korea considered four appeals²⁹² from the Seoul high court and the Pusan high court over the correct amounts of damages in relation to 30 claims arising from the 2002 crash.

Claims for damages resulting from the crash were filed in the high court in both Seoul and Pusan. At first instance, these courts awarded what is described as ‘consolation award’ compensation to the dependants of the deceased passengers. This form of compensation is to provide consolation for the emotional distress caused by tort, and is separate from compensation relating to loss of financial support. The appropriate quantum was determined by the Seoul high court to be South Korean Won (KRW) 80,000,000.00 (US\$69,000.00) per decedent, with an additional KRW 20,000,000.00 (US\$17,000.00) per dependent. The Pusan high court awarded KRW 150,000,000.00 (US\$130,000.00) to each decedent as a consolation award.

The Supreme Court held that damages in cases arising from aircraft accidents should be higher than those normally awarded in instances of death resulting from other types of accident such as motor vehicle accidents. The Court reasoned that the higher levels of compensation were justified on several grounds:

- Passengers on board the aircraft suffer ‘extreme fear and pain’ during the process leading up to the collision;
- Bodies of the deceased are seriously disfigured, causing greater distress, and often do not survive the crash intact, making funeral arrangements difficult for surviving family members;
- Payment of damages tends to be delayed because of the time it takes to deal with an aircraft accident;

²⁹¹ Art. 165 provides: “The amount awarded on damages [...] must be fixed by the court in its decision, even if they were not justified, as long as their existence was legally proved.”

²⁹² *Nam v. Air China*, 2008 Da 3527; *Kwon & Ors v. Air China*, 2008 Da 3619; *Hee & Ors v. Air China*, 2008 Da 3640; and *Gyo & Ors v. Air China*, 2007 Da 77149. Except for *Nam*, each appeal involved multiple plaintiffs/appellants.

- Due to the lengthy investigations and court proceedings which follow such disasters, dependents often suffer emotional distress in dealing with such proceedings a great deal longer;
- In the instance of an air crash, there is generally no contributory negligence on the part of the deceased or their dependents – the negligence often solely rests with the airline and its employees;
- Airline operators have extensive insurance coverage for such occurrences;
- Finally, punitive damages have a deterrent role in preventing future accidents by motivating operators to adhere to safety standards better and take further steps to improve safety systems.

The Supreme Court held that the quantum of KRW 150,000,000.00 (US\$130,000.00) awarded by the Pusan high court was the appropriate level of compensation to be paid to the dependents of each decedent as consolation damages, and appeals by relatives of the deceased passengers from the Pusan high court decision were accordingly dismissed.²⁹³

On the other hand, the Supreme Court held that the awards made by the Seoul high court were unacceptable because they did not adequately allow for the special circumstances of an aircraft accident identified above. Accordingly, the Supreme Court canceled the consolation awards of the Seoul high court, and referred the cases back for rehearing and reassessment.

In the three appeals from the Seoul high court,²⁹⁴ other grounds of appeal relating to the assessment of damages for loss of financial support were dismissed by the Supreme Court. The courts in South Korea award damages based on the loss to the dependants of the deceased's income following the death caused by the accident. The damages are assessed by reference to the annual income of the deceased before the accident and the number of years during which the deceased would have continued to work before retirement, taking into account the amount of the deceased's income expended on his own living costs. In the case of a deceased dentist²⁹⁵ and a deceased pharmacist,²⁹⁶ the Seoul high court had determined the damages on the basis that the deceased would have continued working until the age of 65. The Supreme Court rejected appeals against these findings, on the basis that the assertion the deceased would have retired later was not sufficiently supported and there had been no misinterpretation of legal principle.

In another appeal, the Supreme Court upheld the calculation of the Seoul high court, which based its assessment on the monthly income of the deceased for the eight months preceding the accident to establish an average monthly income, because the income of the deceased, who was an insurance broker, was likely to fluctuate widely depending upon performance.²⁹⁷ The Supreme Court also

²⁹³ *Kim Hyun Gyo & Ors v. Air China*, 2007 Da 77149. The Third Civil Division of the Supreme Court also rejected other grounds of appeal based on the rejection of claims for specific alleged losses in three individual cases.

²⁹⁴ *Hee & Ors v. Air China*, 2008 Da 3640; *Kwon & Ors v. Air China*, 2008 Da 3619; and *Nam v. Air China*, 2008 Da 3527.

²⁹⁵ *Nam v. Air China*, 2008 Da 3527.

²⁹⁶ *Kwon & Ors v. China Airlines*, 2008 Da 3619.

²⁹⁷ Reported in *Hee & Ors v. Air China*, 2008 Da 3640.

rejected an appeal in a case involving a decedent whose wages had increased by 6.96% in the three months preceding the accident, which the high court had refused to use as the basis for the computation of the loss of future earnings on the ground that the decedent's wages might not increase at that annual rate in the following years.²⁹⁸ In all further appeals, the Supreme Court held there had been no error in legal principle.

g. Limitation of Liability

In *Pemberton v. Executive Airlines, Inc.*,²⁹⁹ passenger Monica Pemberton sued air carrier Executive Airlines in the U.S. district court for the Southern District of Florida, seeking to recover damages for a personal injury she allegedly sustained on board a flight from Nevis Island to San Juan, Puerto Rico. Plaintiff initially filed her complaint against American Airlines, but later substituted Executive Airlines for American Airlines as the sole defendant.

The parties filed cross-motions for partial summary judgment. Defendant argued that its liability should be limited to \$75,000 under the Warsaw Convention as amended at The Hague in 1955, and plaintiff argued that the limit of liability should be 100,000 Special Drawing Rights under the IATA Inter-carrier Agreement on Passenger Liability (the IIA). Plaintiff contended that although Executive Airlines did not sign the IIA, it was nonetheless bound by its provisions because American Airlines, an IIA signatory, acted as Executive Airlines' agent in the sale of plaintiff's ticket.

The court found plaintiff's argument unavailing and declined to bind Executive Airlines to the IIA.³⁰⁰ The court held that evidence of an agency relationship between Executive Airlines and another carrier that was a party to the IIA was insufficient to bind Executive Airlines to the terms of the IIA.³⁰¹ The court further held that any waiver of liability limitation under the IIA must be accomplished through a contract between the passenger and the carrier, and found no evidence of such a contract between plaintiff and Executive Airlines.³⁰²

The court also declined Executive Airlines' invitation to cap plaintiff's damages. Executive Airlines argued that plaintiff could not demonstrate willful misconduct on the part of Executive Airlines, and therefore, plaintiff's recovery should be limited to \$75,000. Although plaintiff's complaint lacked any allegations of willful misconduct, the court agreed with plaintiff that discovery was ongoing and Executive Airlines' motion was premature.³⁰³ Accordingly, the court denied Executive Airlines' motion for partial summary judgment without prejudice, permitting Executive Airlines to re-file the motion at the close of discovery.³⁰⁴

In *Bucich, Norberto G., et al. v. Aerolíneas Argentinas*,³⁰⁵ plaintiffs filed a lawsuit seeking damages for the loss of their baggage during a flight from Buenos Aires, Argentina, to Rome,

²⁹⁸ Reported in *Hee & Ors v. Air China*, 2008 Da 3640.

²⁹⁹ 628 F. Supp. 2d 1355 (S.D. Fl. 2009).

³⁰⁰ *Id.* at 1359–60.

³⁰¹ *Id.*

³⁰² *Id.* at 1360.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Lexis N°35031785, May 21, 2009.

Italy. The trial court granted their claim establishing that the exact amount on damages, always bound by the limits imposed by the 1929 Warsaw Convention (as amended at the Hague and by MP4), like accrued interest, had to be determined during the subsequent stage of execution of the judgment. On appeal, the defendant objected to the yet-to-be-determined principal amount upon which interest also had to be calculated, arguing that the same was beyond the limits of the Warsaw Convention. The Federal Civil and Commercial Court of Appeals of Argentina, Chamber III, upheld the decision of the lower court, stating that defendant's construction of the judgment was wrong, because if accepted, it would be in flagrant opposition to the logical standards long applied by the court. This decision, therefore, not only confirms the applicability of the limits of the Warsaw Convention, as amended, but also that whatever amount is determined as accrued interest is not to fall within those limits because of its supplemental nature.

h. Warsaw Convention/Guadalajara Convention

In *Air Tahiti Nui Pty Limited v. McKenzie*,³⁰⁶ the New South Wales Court of Appeal considered the meaning of the term "contracting carrier" in Article 1 of the Guadalajara Convention, in which the definitions of "contracting carrier" and "actual carrier" are substantially similar to the definitions of those terms provided in Article 39 of the Montreal Convention.

The case arose as a result of turbulence which occurred during the plaintiffs' return journey from New York to Sydney, Australia, via Papeete, Tahiti. The carriage was subject to the Warsaw Convention as Amended at the Hague and by Montreal Protocol No. 4, as well as the Guadalajara Convention.

The passengers had commenced proceedings pursuant to the Warsaw Convention immediately prior to the expiration of two years from the date of the incident, but had sued an Australian company 'Air Tahiti Nui Pty Limited' which, as the plaintiffs' lawyer alleged in the statement of claim, was a wholly owned subsidiary of Air Tahiti Nui SA of Papeete, Tahiti, which operated the airline's aircraft, employed the crews and held all the licenses and authorizations necessary in Australia to conduct international airline operations. The defendant, Air Tahiti Nui Pty Limited, was an Australian company set up to provide administrative and sales support for the airline and employed only three staff. Air Tahiti Nui SA was a member of IATA and was allocated the IATA designator "TN" and prefix code "244," which appeared on the passengers' tickets.

The trial judge had found that Air Tahiti Nui Pty Limited, with a small office in Sydney, Australia, three employees, and no aircraft was the "carrier" within the meaning of Article 17 of the Warsaw Convention, and was therefore liable to the plaintiffs for the injuries allegedly suffered as a result of the turbulence. No reliance was placed on the Guadalajara Convention by the plaintiffs or by the trial judge.

On appeal by the airline, the New South Wales Court of Appeal raised the possibility that Air Tahiti Nui Pty Limited, the defendant, was a "contracting carrier" within the meaning of the Guadalajara Convention and therefore liable to the plaintiffs for their injuries. In Article 1(b), the Guadalajara Convention defines "contracting carrier" as "...a person who as a principal makes an agreement for carriage governed by the Warsaw Convention...." Article 1(c) defines "actual carrier" as "...a

³⁰⁶ (2009) NSWCA 429.

person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs a whole or part of the carriage....” The term “actual carrier” does not embrace a “successive carrier” within the meaning of the Convention and the “authority” of the actual carrier is presumed in the absence of proof to the contrary.

The ticket issued to the plaintiffs named the carrier as “Air Tahiti Nui” which, the Court of Appeal held, left open the possibility that, at least from the plaintiffs’ point of view, could point to a contract for carriage between the plaintiffs and the Australian defendant company which bore that name. However, the ticket also displayed the IATA designator “TN,” and prefix code “244.” The ticket also referred to the carrier’s usual terms and conditions and the evidence was that Air Tahiti Nui SA had a website on which its terms and conditions were available. There was no evidence that the Australian company purported to have any terms and conditions of carriage. Despite the objective circumstances, and acknowledging that the parties to the contract had to be determined objectively from surrounding circumstances, the Court of Appeal held there was no evidence that the plaintiffs knew or should have known of these circumstances, and that the Australian defendant company had contracted as a principal with the plaintiffs to provide international air carriage.

The Court of Appeal placed great importance on an agreement between the defendant and an Australian travel agency group which had issued the tickets to the plaintiffs. The agreement was in respect of marketing activities between the travel agent and the defendant and provided for an incentive commission on certain levels of ticket sales by the travel agency. The Court of Appeal took the view that the defendant, by virtue of the agreement with the travel agent, conferred authority on the travel agent to issue tickets on its behalf. However, the Court overlooked the evidence that the tickets issued to the plaintiffs were on neutral or generic ticket stock issued to IATA accredited agents participating in the BSP system, and that the authority conferred upon the travel agency to issue the tickets was conferred by its participation as an accredited IATA agent in the BSP system. The commission payable on the tickets issued to the plaintiffs was payable under that system and not pursuant to the sales and marketing agreement between the travel agent and the defendant.

The Court of Appeal rejected the submission that the definition of “contracting carrier” has to be read in conjunction with the definition of “actual carrier” and that a contracting carrier would be expected to be party to an agreement or an arrangement by which “authority” was conferred to the actual carrier for the carriage of the passengers on behalf of the contracting carrier. Although authority is presumed in the absence of evidence, the evidence in this case was that the defendant was the creature of Air Tahiti Nui SA, brought into existence to provide sales and administrative support, and the true nature of the relationship meant that the only authority conferred was that conferred by Air Tahiti Nui to the Australian company to act on its behalf in limited circumstances.

The decision is likely to be confined to the special circumstances of this case, but it does allow the term “contracting carrier” to expand beyond the conventional notions of a party which has a charter agreement with an actual carrier for use of an aircraft or has a code share agreement which permits it to sell carriage on another airline’s aircraft.

The Court of Appeal also held that, by the application of domestic law, the defendant was estopped from denying that it was the carrier because in correspondence and preliminary discovery neither the airline nor its lawyers had pointed out that the defendant was not the carrier. This alternative basis for finding that the defendant was the carrier was despite the fact that the plaintiffs’ lawyer was aware and pleaded the relationship of the defendant to Air Tahiti Nui SA at the time the proceeding was commenced and should have recognized that the overseas company was the carrier, and that the

application of domestic law in this way had the potential to impose liability on a party, which, on the ordinary meaning of the language of the Convention, could not be the carrier.

The plaintiffs were awarded \$95,000 in damages. They originally claimed damages exceeding Australian \$ 1 million (US\$890,000) but subsequently proceeded on the basis that damages were limited under the Montreal Agreement of 1966 to \$57,000 plus costs, and failed to make the argument, available in New South Wales, that the limit of damages under the Warsaw Convention calculated on the basis of the current market price of gold would have been \$445,000 per passenger.

i. Delay

In *De la Barrera Lucio J., et al., v. Alitalia Líneas Aéreas Italianas S.A.*,³⁰⁷ plaintiffs filed an action against the airline in Argentina for compensation arising out of a delay in transportation.

Originally, plaintiffs were supposed to travel from Bologna, Italy, to Buenos Aires, Argentina, with a stopover in Rome, but arrived in Buenos Aires 26 hours after the agreed arrival time, on a flight operated by another air carrier, following a completely different itinerary. The trial court awarded moral damages in the amount of US\$800 to each plaintiff on the grounds of defective fulfilment of the contract of carriage as a result of delay. Defendant appealed. The Federal Civil and Commercial Court of Appeals of Argentina, Chamber I, upheld the trial court's decision.

This case is interesting because it is in line with similar decisions rendered on the subject matter by the same Court of Appeals (e.g. *Ortuño Dora , et al. vs. Iberia Líneas Aéreas de España*³⁰⁸ and *B., N. J., et al. v. Cubana de Aviación.S.A.*³⁰⁹), where moral damages due to delay have been regularly awarded in the exact same amount. In other words, US\$800 appears to be some sort of benchmark ceiling for this Court to award in cases involving passenger delay during international carriage.

j. Standing to Sue

In *St. Paul Fire & Marine Insurance Co. v. American Airlines, Inc.*,³¹⁰ the plaintiff brought an action in the U.S. district court for the Southern District of New York against American Airlines, Inc. for damage to a shipment of goods transported from Sri Lanka to the United States. The parties did not dispute that the action was governed by the Warsaw Convention. Plaintiff alleged that it had the right to bring the claim as the subrogated insurer of Kanan Fashions, Inc., the owner of the shipment. American Airlines filed a motion for summary judgment, claiming that plaintiff lacked standing under Article 30(3) of the Warsaw Convention, because the master air waybill did not designate plaintiff or its insured as the consignor or consignee.

The court held that the determination of standing under Article 30(3) must be made upon a full factual record before the court.³¹¹ In doing so, the court referred to the Second Circuit's decision

³⁰⁷ Lexis N°70053490, April 7, 2009.

³⁰⁸ MJJ51024, September 24, 2009.

³⁰⁹ MJJ25936, February 19, 2008.

³¹⁰ 2009 WL 691259 (S.D.N.Y. 2009).

³¹¹ *Id.* at *2.

in *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*,³¹² which noted uncertainty among scholars that the Warsaw Convention imposes any restrictions on standing at all.

Ultimately, the court did not make any determination regarding standing under Article 30(3). Rather, the court denied American Airlines' motion on the grounds that it was premature because it was filed prior to the close of discovery in a case where an issue of fact existed regarding the identity of the true party of interest in the shipment.³¹³

k. Actions Brought Subject to Article 24

Two French family victims' associations, the Fédération Nationale des Victimes d'accident collectifs (FENVAC) and the Association et Défense des Victimes et Familles du Crash de Saint-Barthelemy (ADFV), brought an action before the criminal court seeking damages against the carrier to cover costs incurred in assisting the victims' families.³¹⁴ At first instance, FENVAC was awarded €10,000 and ADFV was awarded €20,000.

On appeal, the Court of Appeal quashed the lower decision on the ground that the actions of the victims' associations are subject to Article 24 of the Warsaw Convention, which, according to French case law, means that actions for damages can only be brought before the civil court and not before the criminal court.

FENVAC and ADFV appealed this decision to the French Supreme Court on the ground that the Warsaw Convention is only applicable to the rights of actions of passengers or their assigns and not to the rights of an association claiming distinct damages relating to costs incurred in assisting the victims' families. The French Supreme Court confirmed the Court of Appeal decision: pursuant to Article 24 of the Warsaw Convention any action against an air carrier is subject to the conditions of the Convention, whether the claimant is a passenger or a third party.

III.

Forum Non Conveniens

There are occasions when a U.S. court has jurisdiction over an action and the parties, but the action could more appropriately and conveniently be litigated in another forum. In such a case, the court may invoke the doctrine of *forum non conveniens* and dismiss the action from the forum in which it was initially filed, with a view to having the plaintiff refile the action in the more convenient forum. Guided by principles enunciated in the landmark U.S. Supreme Court decision in *Piper Aircraft Co. v. Reyno*,³¹⁵ a U.S. court may, in its discretion, dismiss an action when: (1) there is an available, adequate alternative forum in which to litigate the action, and (2)

³¹² 347 F.3d 448 (2d Cir. 2003).

³¹³ 2009 WL 691259 at *2 (S.D.N.Y. 2009).

³¹⁴ *Association et Défense des Victimes et Familles du Crash de Saint-Barthelemy (ADFV) – Fédération Nationale des Victimes d'accident collectifs (FENVAC) vs. Air Caraïbes*, French Supreme Court, June 3, 2009, Criminal Chamber No. 08-83946.

³¹⁵ 454 U.S. 235 (1981).

the balance between private interest factors³¹⁶ and public interest factors³¹⁷ favors dismissal. A court should afford plaintiff's choice of forum substantial deference, though the U.S. courts afford less deference to a foreign plaintiff's choice of forum. In recent years, U.S. courts have exhibited an increasing willingness to use the doctrine of *forum non conveniens* to dismiss cases relating to air disasters with little or no connection to the United States.³¹⁸

U.S. courts are frequently presented with motions to dismiss on *forum non conveniens* grounds. In 2009, the courts ruled on more than a dozen such motions in aviation-related cases.³¹⁹

A trial court's decision to grant a *forum non conveniens* motion will be reversed on appeal only in the event the court has abused its discretion.³²⁰ The Liability Reporter for 2009 reported on *Vivas v. Boeing Co.*,³²¹ in which a state court in Cook County, Illinois, denied defendants' motions to dismiss on *forum non conveniens* grounds. The Court of Appeals affirmed the decision, holding that the trial court did not abuse its discretion in finding that the balance of private and public interest factors did not favor dismissal.³²² The Court also noted that the defendants sought dismissal only in favor of recommencing the action in Peru, where the accident occurred, and "did not seek to transfer this case either to Connecticut or Washington where the aircraft and its engines were designed, manufactured and assembled. That motion would have posed a different question, and may have received a different answer."³²³

In a subsequent Cook County case concerning a crash that occurred in Australia, *Thornton v. Hamilton Sundstrand Corp.*,³²⁴ Australian plaintiffs brought an action against U.S. designers, manufacturers, and sellers of the subject aircraft and its parts. Like the defendants in *Vivas*, the *Thornton* defendants sought dismissal on *forum non conveniens* grounds in favor of a foreign alternative forum. Holding that the trial court did not abuse its discretion in denying defendants' motion, the Illinois Court of Appeals commented, as it had in *Vivas*, that: "the defendants' only proposed alternative forum is Australia, not Washington, Colorado, or Texas, where the aircraft

³¹⁶ Private interest factors include: the parties' access to evidence, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, and other practical issues that make a trial easier and inexpensive. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

³¹⁷ Public interest factors include: each country's interests in adjudicating the dispute; the administrative burdens a trial would place on a U.S. forum; and the need to apply foreign law. See *Gilbert*, 330 U.S. at 508-509.

³¹⁸ Allan I. Mendelsohn, "International Litigation: The U.S. Jurisdiction to Prescribe and the Doctrine of Forum Non Conveniens," Federal Lawyer, October 2008.

³¹⁹ These cases include *King v. Cessna Aircraft Co.*, 562 F.3d 1374 (11th Cir. 2009) (*per curiam*); *Vorbiev v. McDonnell Douglas Helicopters, Inc.*, No. C 08-05539, 2009 WL 1765675 (N.D. Cal. June 18, 2009); *Melgares v. Sikorsky Aircraft Corp.*, 613 F. Supp. 2d 231 (D. Conn. 2009); *Fredriksson v. Sikorsky Aircraft Corp. Inc.*, No. 3:08CV450, 2009 WL 2952225 (D. Conn. Sept. 2, 2009); *Tazoe v. Aereas*, No. 07-21941-CIV, 2009 WL 3232908 (S.D. Fla. Aug. 24, 2009); *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 07-2120-KHV, 2009 WL 229796 (D. Kan. Jan. 30, 2009); *Navarrete De Pedrero v. Schweizer Aircraft Corp.*, 635 F. Supp. 2d 251 (W.D.N.Y. 2009); *Sewer v. Liat (1974) Ltd.*, No. 2004/76, 2009 WL 1010484 (D.V.I. Apr. 9, 2009); and *Guimei v. Gen. Elec. Co.*, 172 Cal. App. 4th 689 (Ct. App. 2009).

³²⁰ See *Lleras v. Excelaire Servs. Inc.*, No. 08-3823-cv., 2009 WL 4282112 (2d Cir. Dec. 2, 2009) (affirming the trial court's dismissal on *forum non conveniens* grounds); see also *Vivas v. Boeing Co.*, 911 N.E.2d 1057 (Ill. App. Ct. 1st Dist. 2009) (affirming the trial court's denial of a motion to dismiss on *forum non conveniens* grounds). We reported on these trial court decisions in the 2009 Liability Reporter.

³²¹ No. 06 L 005613 (Ill. Ct. Sept. 5, 2008).

³²² *Vivas v. Boeing Co.*, 911 N.E.2d 1057 (Ill. App. Ct. 1st Dist. 2009).

³²³ *Id.* at 1072.

³²⁴ No. 1-08-2734, slip op. (Ill. App. Ct. 1st Dist. Aug. 31, 2009).

components were designed, manufactured and sold.”³²⁵ The *Vivas* and *Thornton* decisions suggest that Cook County will continue to be the forum of choice for foreign plaintiffs seeking to pursue litigation in the U.S. pertaining to aviation-related accidents which occur abroad involving manufacturers which have potential exposure to liability.

In *Seales v. Panamanian Aviation Co., Ltd.*,³²⁶ plaintiff, a dual U.S. and Panamanian citizen, was arrested in Jamaica for illegally carrying a firearm and ammunition on his flight from Panama, despite allegedly following the proper procedure for transporting firearms. Plaintiff commenced an action in the U.S. district court for the Southern District of New York, alleging that the defendant, a Panamanian corporation, had: (1) assured him days prior to the flight that he could transport the firearm if he followed certain procedures; (2) improperly delivered the firearm to the baggage claim area rather than to the Jamaican Customs Officers, resulting in plaintiff’s arrest; and (3) failed to promptly provide an exculpatory statement to Jamaican authorities after he was arrested, resulting in prolonged incarceration.

The defendant moved to dismiss the action on *forum non conveniens* grounds. The district court, in denying the motion, afforded substantial deference to plaintiff’s choice of forum because defendant had failed to prove that plaintiff did not reside in New York, as alleged, at the time the action was filed.³²⁷

Following discovery, the defendant again moved to dismiss for lack of subject matter jurisdiction, arguing that plaintiff had not established: (1) federal diversity jurisdiction, or (2) a basis for subject matter jurisdiction under Article 33 of the Montreal Convention. Defendant also moved to dismiss any remaining claims on *forum non conveniens* grounds, as newly discovered evidence demonstrated that plaintiff was not a resident of New York at the time the action was filed. The uncontested evidence showed that: plaintiff spent only one week in 2006 and two weeks in 2007 in the U.S.; he was abroad at the time the action was commenced; on several occasions he represented to Jamaican officials that he no longer lived in the U.S. or was in the process of moving to Jamaica; and his wife and children lived in Jamaica, where he received mail, maintained a bank account, and was treated by a doctor.

After addressing diversity jurisdiction and jurisdiction under the Montreal Convention, the court reconsidered its earlier *forum non conveniens* ruling and dismissed the remaining claims on *forum non conveniens* grounds.

On appeal,³²⁸ the Second Circuit Court of Appeals, in a summary order, addressed only the district court’s *forum non conveniens* analysis. First, the Court of Appeals agreed with the district court’s holding that plaintiff’s choice of a U.S. forum was not entitled to substantial deference because plaintiff was not a resident of any U.S. state. The Court held that the district court permissibly reconsidered its earlier ruling because the newly discovered evidence altered the balance of the “convenience factors.”

³²⁵ *Id.* at 14-15.

³²⁶ No. 07-CV-2901, 2009 WL 395821 (E.D.N.Y. Feb. 18, 2009), *supra*, at pg 13 and pg 21.

³²⁷ *See Seales v. Panamanian Aviation Co.*, No. CV-07-2901, 2008 WL 544705 (E.D.N.Y. Feb. 26, 2008), *supra*.

³²⁸ *Seales v. Panamanian Aviation Co., Ltd.*, No. 09-1173-cv, 2009 WL 4730428 (2d Cir. Dec. 11, 2009).

The deference issue highlights an interesting aspect of federal civil procedure: *viz.*, a plaintiff may be a U.S. domiciliary while simultaneously lacking residence in any U.S. state, meaning that the plaintiff's principal, permanent home is in the U.S. but he does not actually live in any U.S. state. As a result, a plaintiff may be able to establish federal diversity jurisdiction because he is a U.S. domiciliary, only to be at a disadvantage in a *forum non conveniens* analysis.

Next, the Court of Appeals assessed whether Jamaica was an adequate alternative forum. The Second Circuit recognized that an alternative forum is adequate if defendants are subject to service of process in that forum and litigation of the subject matter of the dispute is permitted. Plaintiff argued that the district court should have made express findings as to whether a statute of limitations precluded him from recommencing the action in Jamaica, which would render Jamaica an inadequate forum. The Court of Appeals held that the district court did not abuse its discretion in failing to do so because the plaintiff did not raise the issue before the district court. In any event, there was no evidence that any statute of limitations would preclude the plaintiff from litigating the action in Jamaica.³²⁹

Finally, the Second Circuit upheld the district court's balancing of the private and public interest factors. The presence of most of the key witnesses in Jamaica favored dismissal, even though some witnesses were in Panama. The public interest factors also supported dismissal because plaintiff spent a significant amount of time in Jamaica, the underlying events occurred there, and the action involved aspects of the Jamaican legal system.

In *Pierre-Louis v. Newvac Corp.*,³³⁰ the U.S. Court of Appeals for the Eleventh Circuit affirmed a 2007 district court decision holding that Article 33 of the Montreal Convention does not bar application of the doctrine of *forum non conveniens*.³³¹ No other court has directly addressed this issue, and the two U.S. Courts of Appeals that have ruled on whether an action arising under the older Warsaw Convention may be dismissed on *forum non conveniens* grounds have arrived at opposite conclusions: the Ninth Circuit has held that the Warsaw Convention bars application of *forum non conveniens*,³³² while the Fifth Circuit has held that it does not.³³³ No U.S. court outside the Ninth Circuit has adopted *Hosaka*; indeed, commentators have noted that the Ninth Circuit arrived at its decision in *Hosaka* "despite substantial and acknowledged federal court precedent to the contrary."³³⁴ Additionally, district courts frequently grant motions to dismiss on

³²⁹ The court also rejected plaintiff's argument that the Montreal Convention's limitations period rendered Jamaica an inadequate forum because "the availability of an adequate alternative forum does not depend on the existence of an identical cause of action in the other forum."

³³⁰ 584 F.3d 1052 (11th Cir. 2009).

³³¹ See *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007). Plaintiffs filed an action under the Montreal Convention on behalf of passengers killed in an airplane crash en route from Martinique to Panama. Plaintiffs were all residents of Martinique, a territory of France, and defendants were a Colombian airline and two Florida travel agencies. The District Court provided extensive reasoning as to why an action arising under the Montreal Convention may be dismissed on *forum non conveniens* grounds. The case was discussed in the 2008 Liability Reporter.

³³² *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002).

³³³ *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987) (*en banc*), vacated on other grounds *sub nom.*

³³⁴ Allen I. Mendelsohn & Renée Lieux, *The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff*, 68 J. Air L. & Com. 75, 111-112 (2003).

forum non conveniens grounds when raised in actions arising under the Warsaw or Montreal Conventions.³³⁵

The Eleventh Circuit rejected or distinguished the reasoning advanced in *Hosaka*, on which plaintiffs relied heavily. The *Hosaka* Court reasoned that while Article 28(2) of the Warsaw Convention, much like Article 33(4) of the Montreal Convention, provides that questions of procedure are to be governed by the law of the country in which the action is litigated,³³⁶ the doctrine of *forum non conveniens* was “both alien to and unwelcome by the majority of the contracting parties” and, therefore, the drafters of the Warsaw Convention did not intend for the doctrine to apply to a Warsaw Convention case.³³⁷ The *Pierre-Louis* Court reasoned that *forum non conveniens* is a longstanding feature of U.S. civil procedure and had been at the time the Montreal Convention was drafted. Therefore, the Montreal Convention unambiguously permits application of the doctrine of *forum non conveniens*.

The above point would appear to indicate that *Pierre-Louis* is limited to actions arising under the Montreal Convention. However, the Eleventh Circuit firmly disagreed with some of the other reasoning supporting the holding in *Hosaka*. For example, the *Hosaka* Court reasoned that Article 28 of the Warsaw Convention strikes “a compromise between the interests of air carriers and their customers worldwide” by providing four bases for subject matter jurisdiction while permitting the plaintiff to choose among them, and “permitting defendants to utilize *forum non conveniens* to cancel out the plaintiff’s choice would undermine this balance just as it would undermine uniformity.”³³⁸ The Eleventh Circuit rejected this argument, holding that “the purpose of the Convention is adequately safeguarded under traditional *forum non conveniens* analysis” because the alternative forum must be one that is permitted under Article 33 of the Montreal Convention.³³⁹

Affirming the district court’s *forum non conveniens* analysis, the Eleventh Circuit held that the private interest factors supported dismissal because all of the evidence relating to damages, the only contested issue, was in Martinique. Additionally, the district court did not abuse its discretion in taking into account that the U.S. was an inconvenient forum for both sides, even though plaintiffs argued that they were willing to bear the burden of producing evidence at trial and defendants had not shown that witnesses and evidence would be unavailable at trial. Finally, the district court properly held that any challenges of litigating abroad a future third-party claim against U.S. manufacturers were outweighed by the inconvenience of trying the action in the U.S.

The Court of Appeals held further that the public interest factors weighed in favor of dismissal. Any interest of the United States in deterring allegedly tortious conduct of American businesses

³³⁵ See, e.g., *In re Air Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*, 540 F. Supp. 1141 (D.D.C. 1982); *Delta Airlines, Inc. v. Chimnet, S.P.A.*, No. 07-2898, 2008 WL 5336720 (E.D. Pa. Dec. 19, 2008).

³³⁶ See Montreal Convention, Art. 33(4): “Questions of procedure shall be governed by the law of the court seized of the case;” see also Warsaw Convention, Art. 28(2): “Questions of procedure shall be governed by the law of the court to which the case is submitted.”

³³⁷ In holding that the Warsaw Convention permits application of *forum non conveniens*, the Fifth Circuit cited Article 28(2). See 821 F.2d at 1161-1162.

³³⁸ 305 F.3d at 997.

³³⁹ 584 F.3d at 1058.

was outweighed by: (1) Martinique’s interest in adjudicating actions aimed at redressing injury to its citizens; (2) the cost of trying the action in the U.S., where the amounts, including the cost of translation, would be greater than in Martinique; and (3) the burden that litigating the action in the U.S. would impose on a U.S. court and jurors.

A separate action by the families of crewmembers who died in the crash was also commenced before the same district court judge.³⁴⁰ This time, however, the district court denied defendants’ motion to dismiss on *forum non conveniens* grounds. The *Pierre-Louis* plaintiffs argued on appeal that because the two lawsuits were based on the same facts, and none of the plaintiffs in either action was a U.S. resident, the motion to dismiss their case should also have been denied. The Court of Appeals disagreed, reasoning that the two lawsuits differed significantly in the type of claims the plaintiffs alleged, which substantially altered the private and public interests at stake.

In the crewmembers’ action, plaintiffs asserted products liability and negligence claims against U.S.-based corporations responsible for the construction, maintenance, repair and airworthiness of the aircraft and/or its engine parts.³⁴¹ By contrast, the *Pierre-Louis* plaintiffs’ claims arose under the Montreal Convention, and “liability [was] presumed.”³⁴²

In denying the motion to dismiss the crewmembers’ action, the district court focused on the “breadth of plaintiffs’ product liability and negligence claims” relating to a product that was owned, operated and maintained by U.S.-based corporations for 19 years and, by comparison, was in the Colombian carrier’s possession for only one month. The Court of Appeals held that while “some important liability evidence may be in Venezuela,” where the crash occurred, and some evidence pertaining to the aircraft and the crew’s training was located in Colombia, such evidence was “bound to be scant in comparison to the volume of records generated during the nineteen years that the aircraft was residing in the U.S.”³⁴³ The Court further held that the evidence likely could not be adequately presented in South America, despite defendants’ pledge to make it available there.

Additionally, while Colombia had an interest in adjudicating an action arising from the death of Colombian citizens, the U.S. had a strong interest in ensuring that U.S. manufacturers and airlines did not produce defective products or engage in negligent conduct anywhere, especially where the defendants had responsibility for the product in the U.S. for 19 years. The Court reasoned further that the case would not unreasonably burden U.S. courts because the litigation involved corporations domiciled in the U.S. where, again, the aircraft had been present for 19 years.

The remaining private and public interest factors favored dismissal. Although evidence pertaining to damages was mostly in Colombia, the plaintiffs had a strong incentive to make it available in the U.S. Additionally, the airline’s absence from the U.S. litigation did not prejudice defendants because state law permitted a party to attribute liability to an absent party and

³⁴⁰ *In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009).

³⁴¹ *Id.* at 1196.

³⁴² 584 F.3d at 1060 n.2.

³⁴³ 632 F. Supp. 2d at 1202-1203.

defendants could sue the airline for contribution in Colombia, which they argued was a more appropriate forum anyway. Finally, it was not clear that the court would ever need to conduct a choice of law analysis, and foreign law would need to be applied only to a limited extent.

Recent proceedings in France in ongoing litigation following the Flash Airlines accident at Sharm el-Sheikh in 2004 have illustrated a new consideration: that a dismissal from a U.S. court on grounds of *forum non conveniens* may not necessarily be the end of the road in a case as far as jurisdictional issues are concerned.

Flash Airlines Flight 604 had been bound for Paris when it crashed, and all but two of the 122 decedents were either citizens of or resident in France. The plaintiffs, who were the heirs and beneficiaries of the estates of the decedent passengers, sued International Lease Finance Corporation (“ILFC”), which owned the Boeing 737-300 aircraft and leased it to Flash Airlines, Boeing, Honeywell International, the manufacturer of certain component parts of the flight management system, and Parker Hannifin Corporation, which manufactured other component parts of the aircraft, in the U.S. district court for the Central District of California, in *Gambra v. International Lease Finance Corp.*³⁴⁴ Defendants moved to dismiss the actions on the ground that France was the most appropriate forum pursuant to the doctrine of *forum non conveniens*, arguing that Flash Airlines was not subject to jurisdiction in the United States under the Warsaw Convention.

In 2005, the district court granted the defendants’ motion, ruling that France was the most appropriate forum for the cases to be heard. One of the conditions of the dismissal was that the French Court accepted jurisdiction over the claims. The plaintiffs thereafter commenced proceedings in France and immediately applied for a ruling from the French court that it did not have jurisdiction to hear the cases. At first instance, the French court held that the action was inadmissible and did not rule on the jurisdiction point. On appeal, the Court of Appeal reversed the first instance judgment and held that the action was admissible. It also held that the claims against American defendants based on product liability did not have sufficient factual and legal links with France as to justify the French court exercising jurisdiction.

The French Supreme Court, however, reversed the Court of Appeal on the grounds that the appeal from the first instance court had only been on procedural grounds – whether the action was admissible or not. French procedure does not allow such appeals; instead, the litigation is required to proceed on the merits. The jurisdiction question therefore remains open and will have to be raised and resolved as part of the substantive litigation.

IV

September 11 Litigation

The litigation against a number of airlines, their security companies, an aircraft manufacturer, and an airport authority arising from the terrorist attacks of September 11, 2001, continued into

³⁴⁴ 377 F.Supp. 2d 810, 827 (C.D.Cal. 2005).

its eighth year. The decisions discussed below demonstrate the broad range of issues arising from the ongoing litigation.

a. Fair Market Value of Destroyed Real Property

In *In re September 11 Litigation*, the U.S. district court for the Southern District of New York was asked to determine the extent to which plaintiff World Trade Center Properties (“WTCP”) and several related holding companies that owned the leases for Towers 1, 2, 4, and 5 of the World Trade Center (“WTC 1, 2, 4, and 5”) could recover damages under New York law. In 2004, WTCP filed cross-claims against certain Aviation Defendants seeking damages totaling approximately \$12.3 billion for the replacement cost of these buildings destroyed in the terrorist attacks, despite having recovered \$4.1 billion from its insurers.³⁴⁵

The Aviation Defendants moved for summary judgment asserting that: (1) WTCP was only entitled to the lesser of the fair market value of WTC 1, 2, 4, and 5 or their replacement value; (2) WTCP’s damages were the fair market value of the buildings on September 11, 2001, which totaled \$2.8 billion – the amount WTCP agreed to pay for the leases of WTC 1, 2, 4, and 5 at a worldwide auction held in April 2001 and an amount far less than the replacement costs; and (3) that pursuant to New York’s Civil Practice Law and Rule Section 4545(c) (“N.Y. C.P.L.R. § 4545(c)”), WTCP’s damages were offset entirely by the \$4.1 billion in insurance payments that WTCP had received, and accordingly WTCP had no recoverable damages against the Aviation Defendants.³⁴⁶

Relying on the New York Court of Appeals decision in *Fisher v. Qualico Contracting Corporation*,³⁴⁷ the district court held that WTCP was entitled only to the fair market value of WTC 1, 2, 4, and 5 on the date the buildings were destroyed.³⁴⁸ However, the court allowed WTCP to show by motion that the fair market value of WTC 1, 2, 4, and 5 changed between the date WTCP signed the leases in April 2001 and the date the buildings were destroyed.³⁴⁹ The court also denied without prejudice that portion of the Aviation Defendants’ motion seeking a ruling that, pursuant to N.Y. C.P.L.R. § 4545(c), WTCP’s damages were entirely offset by the \$4.1 billion in insurance payments WTCP received.³⁵⁰

Following further briefing by WTCP, the district court held that any recovery by WTCP against the Aviation Defendants was not to exceed the \$2.8 billion net present value that WTCP agreed to pay for the leases of WTC 1, 2, 4 and 5, because WTCP had failed to establish that the fair market value of the buildings exceeded this amount.³⁵¹ The Aviation Defendants subsequently renewed their motion to apply the \$4.1 billion that WTCP received in insurance payments as a collateral offset against the maximum of \$2.8 billion in damages that WTCP could recover under New York law. The court denied the Aviation Defendants’ motion without prejudice, holding

³⁴⁵ 590 F. Supp. 2d 535, 536 (S.D.N.Y. 2008).

³⁴⁶ *Id.* at 536, 540.

³⁴⁷ 98 N.Y.2d 534 (2002)

³⁴⁸ 590 F. Supp. 2d at 541.

³⁴⁹ *Id.* at 546-547.

³⁵⁰ *Id.* at 547-548.

³⁵¹ *In re Sept. 11th Litig.*, No. 21 MC 101, Slip Op. at 1-3, 6 (S.D.N.Y. Apr. 29, 2009).

that correspondence between WTCP's damages claim and its insurance recovery could not be proven without expert testimony.³⁵²

b. The Subrogation Rights of Insurers

In *In re September 11 Litigation*, the district court was asked to decide whether N.Y. C.P.L.R. § 4545(c) – which deducts from any tort claimant's recovery the amount of all collateral source payments received – prohibits an insurer from recovering from the alleged tortfeasor the amount the insurer paid to its insured.³⁵³ The Aviation Defendants and WTCP filed separate motions to dismiss the claims brought in subrogation by insurers who paid for the losses incurred by WTCP and the Consolidated Edison Company of New York, Inc., both of whom also sued the Aviation Defendants for losses in excess of their insurance recoveries.³⁵⁴ The moving parties argued that because a subrogated insurer's rights can be no greater than its insured's rights, and because the insured parties had no potential tort recovery because their tort recovery would be offset by their insurance recovery, the insurer also had no potential tort recovery.

The district court first addressed whether WTCP, which had not been sued by its insurers, had standing to bring a motion to dismiss the claims brought by WTCP's insurers against the Aviation Defendants.³⁵⁵ The court found that WTCP had standing because of the liability limits imposed by the ATSSSA.³⁵⁶ The court treated WTCP's motion as a motion to intervene pursuant to Fed. R. Civ. P. 24 and allowed WTCP to intervene.³⁵⁷

The district court then turned to the issue of subrogation rights and the collateral source rule. The court traced the history and purpose of N.Y. C.P.L.R. § 4545(c) and found that it was intended to prevent a tort claimant from receiving a double recovery – one payment from its insurer, and another from the alleged tortfeasor.³⁵⁸ However, the court, citing the recent New York Court of Appeals case, *Fasso v. Doerr*,³⁵⁹ found that this purpose did not extend so far as to extinguish an insurer's subrogation rights.³⁶⁰ Specifically, the court found that N.Y. C.P.L.R. § 4545(c) addressed only how and when insurers may assert claims in subrogation, not whether they may do so.³⁶¹ The court found nothing in the language or history of N.Y. C.P.L.R. § 4545(c) that indicated it was intended to eliminate an insurer's subrogation rights.³⁶² After

³⁵² *Id.* The court also found that: (1) WTCP's insurance recovery was allocable only to Business Interruption and Replacement Cost absent a showing by WTCP that it should be allocable to other components; (2) WTCP's retenuing costs were subsumed by its fair market value and accordingly were not recoverable; (3) WTCP's attorneys' fees incurred in litigating with its insurers were not recoverable from the Aviation Defendants; and (4) WTCP's claim preparation fees and insurance premiums should be offset against its net insurance recovery pursuant to N.Y. C.P.L.R. § 4545(c). *Id.* at 1-2.

³⁵³ 649 F. Supp. 2d 171, 172 (S.D.N.Y. 2009).

³⁵⁴ *Id.* at 174-75.

³⁵⁵ *Id.* at 176.

³⁵⁶ *Id.* The Air Transportation Safety and System Stabilization Act of 2001, Pub.L. No. 1707-42, 115 Stat. 230 (2001), at 49 U.S.C. § 40101. Pursuant to the ATSSSA, the Aviation Defendants' liability is capped at the amount of their respective insurance coverage.

³⁵⁷ 649 F. Supp. 2d at 176.

³⁵⁸ *Id.* at 178-79.

³⁵⁹ 12 N.Y.2d 80 (2009).

³⁶⁰ 649 F. Supp. 2d at 181.

³⁶¹ *Id.*

³⁶² *Id.*

noting a split in authority between New York’s Second and Fourth Judicial Departments, the court rejected the Second Department’s conclusion that N.Y. C.P.L.R. § 4545(c) was designed to benefit liability insurers by reducing payouts and concluded that the Fourth Department’s view affirming the continued existence of an insurer’s subrogation rights was correct.³⁶³ The court concluded that N.Y. C.P.L.R. § 4545(c) did not affect an insurer’s subrogation rights and allowed those insurers who paid claims for damages arising from the terrorist attacks of September 11, 2001, to proceed with their litigation against the Aviation Defendants.³⁶⁴

c. The Admissibility of Certain Evidence at a September 11th Trial

In *In re September 11 Litigation*, the district court addressed some of the potential evidentiary issues that could arise in a trial of any of the remaining three wrongful death cases or the remaining 19 property damage cases.³⁶⁵ The Aviation Defendants sought to obtain an order from the district court to overrule the government’s refusal to permit depositions of several FBI agents, and also requested rulings that: (1) portions of the Zacarias Moussaoui trial record; (2) portions of the 9/11 Commission Report and related reports; and (3) a translation of a journalist’s interview with Ramzi Binalshibh, were relevant and admissible at trial.³⁶⁶ The Aviation Defendants sought to use this evidence to show that the Aviation Defendants could not have prevented the terrorist attacks.³⁶⁷ The court held that evidence relating to the government’s alleged failures to prevent the terrorist attacks was not relevant to whether the Aviation Defendants were liable, that this evidence could delay the trial, and that the evidence potentially could threaten national security.³⁶⁸

The Aviation Defendants sought to depose FBI agents to determine what intelligence the FBI possessed prior to 9/11 and to learn about the terrorists’ preparation and training for the attacks.³⁶⁹ The U.S. Attorney’s Office denied the Aviation Defendants permission to do so and the district court affirmed such denial.³⁷⁰ The court was concerned that these depositions could pose a threat to national security.³⁷¹ The court further explained that the government’s interests outweighed the Aviation Defendants’ needs because the Aviation Defendants’ liability would depend on what they did or should have done rather than on what the government knew and/or failed to pass along to the Aviation Defendants.³⁷² The court also rejected the Aviation Defendants’ superseding cause argument on the basis that the government’s acts and knowledge preceded the Aviation Defendants’ alleged negligence, as well as their argument that if the government could not have foreseen the terrorist attacks, neither could the Aviation Defendants have foreseen them.³⁷³

³⁶³ *Id.* at 182.

³⁶⁴ *Id.* at 183-184.

³⁶⁵ *In re Sept. 11th Litig.*, 621 F. Supp. 2d 131, 140 (S.D.N.Y. 2009).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 141.

³⁶⁹ *Id.* at 143.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 145.

³⁷² *Id.* at 145-146.

³⁷³ *Id.* at 147-149.

The Aviation Defendants also sought a ruling that the 9/11 Commission Report³⁷⁴ and other public documents produced by the Commission regarding 9/11 were relevant and admissible at trial.³⁷⁵ Although the district court found that certain portions of the 9/11 Commission Report might be admissible, the court found that the other documents released by the Commission were inadmissible because they were not technically agency findings.³⁷⁶ Notwithstanding these rulings, the court directed the parties to create a joint narrative that could be submitted to the jury of the events of 9/11 and the terrorists' preparation beforehand.³⁷⁷

Next, the district court addressed the admissibility of a document containing a summary of interrogations made of captured Al Qaeda terrorist Khalid Sheik Mohammed that had been admitted into evidence at the trial of Zacarias Moussaoui.³⁷⁸ The district court ruled that the document was not admissible under Federal Rule of Evidence 804(b)(3) as a statement against the penal interest because the statements could have been the product of enhanced interrogation.³⁷⁹ The court did allow, however, that certain portions of the document might be admissible under other applicable hearsay exceptions, and reserved ruling on those specific portions.³⁸⁰

Finally, the court denied the Aviation Defendants' motion to admit the translated interview of Binalshibh, finding that the statement was untrustworthy.³⁸¹

d. The Wrongful Death and Personal Injury Cases

In *In re September 11 Litigation*, the district court summarized the findings of Sheila L. Birnbaum, the mediator appointed to resolve 95 wrongful death and personal injury cases.³⁸² The court reviewed the purpose of the ATSSSA and noted that all cases arising out of the attacks of September 11, 2001, had to be commenced in the U.S. district court for the Southern District of New York, that the defendants could only be held liable to the extent of their insurance coverage, and that the majority of those with wrongful death or personal claims arising from the attacks were compensated through the Victim Compensation Fund.³⁸³ Certain claimants chose not to use the Victim Compensation Fund and instead sued the Aviation Defendants, and the court appointed Ms. Birnbaum as mediator to resolve those claims.³⁸⁴ Ms. Birnbaum helped resolve most cases, and the court ordered the parties to the cases that had not been settled with Ms. Birnbaum's assistance to conduct damages-only discovery. The majority of those cases were then settled, and only three unsettled wrongful death cases remain currently pending.³⁸⁵

³⁷⁴ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Norton (2004).

³⁷⁵ 621 F. Supp. 2d at 150-151.

³⁷⁶ *Id.* at 151-155.

³⁷⁷ *Id.* at 151-151, 156, 161.

³⁷⁸ *Id.* at 158-159.

³⁷⁹ *Id.* at 159-160.

³⁸⁰ *Id.* at 161.

³⁸¹ *Id.* at 164.

³⁸² 600 F. Supp. 2d 549, 550-551 (S.D.N.Y. 2009).

³⁸³ *Id.* at 551-552.

³⁸⁴ *Id.* at 553.

³⁸⁵ *Id.* at 554.

e. Confidentiality Designations

In the course of discovery in *In re September 11 Litigation*, the Aviation Defendants designated as confidential a number of documents produced pursuant to a court issued Confidentiality Protective Order (“CPO”).³⁸⁶ Plaintiffs, joined by the New York Times Company, moved the court to set aside all of the Aviation Defendants’ confidentiality designations.³⁸⁷ The district court denied plaintiffs’ motion, finding that even though the Aviation Defendants designated as confidential nearly all of the documents they produced, plaintiffs never objected to the Aviation Defendants’ confidentiality designations within the time prescribed by the CPO, allowing the Aviation Defendants to reasonably rely on the CPO’s protections.³⁸⁸ The court also rejected the moving parties’ argument that they sought to expose the state of aviation security at the time of the attacks because a public record would be created at trial.³⁸⁹

f. Adding Parties to the Litigation

Cantor Fitzgerald & Co. and several affiliated companies (“Cantor”) moved to amend their complaint to name as an additional defendant Globe Aviation Services Corp. (“Globe”) and Globe’s affiliated companies, claiming that its failure to do so previously was an oversight.³⁹⁰ The district court denied Cantor’s motion, noting that Cantor could not explain why it waited more than five years before adding Globe as a defendant, particularly in light of the number of Master Complaints filed in *In re September 11 Litigation*, the enormous amount of discovery that had taken place, and the mediation of all of the property damage claims, including Cantor’s.³⁹¹ The court further noted that Globe could have reasonably believed Cantor chose not to sue it, and that the addition of Globe to Cantor’s complaint would prejudice not only Globe, but every other party to the litigation.³⁹²

V.

Competition and Antitrust

a. Air Cargo Antitrust Investigation and Litigation

The worldwide antitrust investigation and litigation involving allegations of price-fixing in the air cargo industry continues. *In re Air Cargo Shipping Services Antitrust Litigation*³⁹³ is a multi-district putative antitrust class action suit, consolidated in the U.S. district court for the Eastern District of New York (Brooklyn), which names more than 30 international carriers who provide airfreight shipping services around the world. Plaintiffs are domestic and foreign purchasers of

³⁸⁶ No. 21 MC 101, 2009 WL 2357014, at *1 (S.D.N.Y. Jul. 30, 2009).

³⁸⁷ *Id.*

³⁸⁸ *Id.*, at *3.

³⁸⁹ *Id.*, at *3, 5.

³⁹⁰ *In re Sept. 11th Litig.*, No. 21 MC 101, 2009 WL 3459477, at *1-2 (S.D.N.Y. Oct. 28, 2009). Cantor also dismissed its claims against Riggs National Corp., Riggs Bank, N.A. and Silverstein Properties, Inc.

³⁹¹ *Id.*, at *2, 4.

³⁹² *Id.*, at *3.

³⁹³ MD 06-1775 (E.D.N.Y. 2006).

the allegedly price-fixed airfreight shipping services. Plaintiffs allege that since 2000, the defendants collusively imposed fraudulent surcharges on plaintiffs' bills for air cargo shipping, purportedly reflecting increased costs related to fuel, compliance with security measures, and war-risk insurance premiums.

On August 21, 2009, the district court approved the Report and Recommendations of the Magistrate Judge granting the defendants' motions to dismiss plaintiffs' state law and European Union law claims asserted in plaintiffs' first consolidated amended complaint. The court denied defendants' motion to dismiss plaintiffs' Sherman Act allegations, concluding that plaintiffs' first consolidated amended complaint established plausible grounds to infer an agreement among the defendants to artificially inflate the prices of airfreight shipping services, and gave sufficient notice of the claims against them. The court considered that 15 defendants pleaded guilty to the charges of price-fixing and concluded that the admissions of price-fixing by so many of the defendants certainly "are suggestive enough to render a Section 1 conspiracy plausible."³⁹⁴

The antitrust claims of the class of indirect purchasers of airfreight services were dismissed by the court, and this issue is now on appeal to the United States Court of Appeals for the Second Circuit.

Lufthansa, one of the 15 defendants which pleaded guilty to the charges of price fixing, agreed to pay \$85 million in 2006 in settlement of valid class member claims. The settlement was stalled by the filing of objections by class members, and the court's requirement to file supplemental filings before ruling on the settlement agreement. The settlement was ultimately approved by the court on September 25, 2009.

The U.S. Department of Justice, the Australian Competition and Consumer Commission ("ACCC"), the Canadian Competition Bureau, and the European Commission are all conducting their own investigations into alleged cartels. The U.S. investigations have led to the prosecution of 15 airlines and have resulted in fines of \$1.6 billion, the highest fines ever imposed in a single criminal antitrust investigation. The U.S. investigations have also led to the criminal convictions of four airline executives who have agreed to pay individual fines and have been sentenced to jail sentences ranging from six to eight months.

The ACCC brought charges against thirteen carriers in December 2008, alleging that airlines throughout the world colluded to raise the price of freighting cargo by imposing fuel surcharges for more than seven years. This allegedly affected the price of cargo both into and out of New Zealand. A trial in the High Court at Auckland is expected in the near term.

The Canadian Competition Bureau has announced that three carriers pleaded guilty in Canada's investigation into the air cargo cartel in 2009 and were fined a total of \$10 million dollars.

b. Passenger Fuel Surcharge Antitrust Investigation and Litigation

Similar to the air cargo industry, criminal investigations and litigation have been undertaken against a number of carriers and certain of their employees for conspiring to fix pricing levels of

³⁹⁴ *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

certain surcharges and rates in relation to passenger fares. *In re Transpacific Passenger Transportation Antitrust Litigation Class*³⁹⁵ is a class action suit, consolidated in multi-district proceedings in the U.S. district court for the Northern District of California, alleging that carriers flying the Transpacific routes conspired to illegally impose fuel surcharges in relation to passenger fares.

Defendants have filed motions to dismiss plaintiffs' consolidated amended complaint based upon lack of subject matter jurisdiction, the lack of antitrust standing, the Filed Rate Doctrine and failure to meet the *Twombly* pleading standard.³⁹⁶

In summary, the defendants' motions to dismiss argued that plaintiffs' claims based on paying allegedly inflated prices for flights originating outside the United States must be dismissed for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act (FTAIA).³⁹⁷ The FTAIA bars Sherman Act jurisdiction over claims of foreign injury (i.e. paying higher prices for purchases concerning foreign commerce), unless the defendants' alleged conduct (a) involved import commerce or (b) had a direct, substantial and reasonably foreseeable effect on U.S. commerce, and that such direct effect proximately caused plaintiffs' foreign injury. The defendants argued that plaintiffs' conclusory allegations that defendants' conduct involved "import trade or import commerce" did not satisfy plaintiffs' burden, and that the foreign-injury claims should be dismissed based upon the FTAIA.

Defendants' motions to dismiss also argued that plaintiffs' claims were barred by the Filed Rate Doctrine because the fares or surcharges were either filed with or subject to oversight by the U.S. Department of Transportation as part of a scheme or regulation. The Filed Rate Doctrine bars money damages in any suit by private parties challenging the legality of such a fare or surcharge because a person who has paid the filed rate cannot suffer "injury" under the antitrust laws' damage provisions, even if the filed rate resulted from collusion.³⁹⁸ The defendants argued that the doctrine also extends to unfiled rates so long as the regulatory agency has not abdicated its statutory responsibility to ensure reasonable rates.³⁹⁹ The defendants reasoned that although the U.S. Department of Transportation had waived the tariff filing requirement for some of the fares encompassed by plaintiffs' complaint, it continued to exercise oversight over all international fares and surcharges, and thus the Filed Rate Doctrine is applicable.

Finally, defendants contended that plaintiffs' complaint failed to allege facts that raised a plausible inference of conspiracy under Section 1 of the Sherman Act.

Oral argument on the defendants' motions to dismiss is scheduled for March 12, 2010.

³⁹⁵ No. 07-CV-5635 (N.D. Cal. 2007).

³⁹⁶ *I.e.*, the pleading standard established in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007).

³⁹⁷ Foreign Trade Antitrust Improvements Act, 15 U.S.C. Section 6(a).

³⁹⁸ *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

³⁹⁹ *Pub. Util. Dist. No. 1 of Grays Harbor County, Washington v. Idacorp, Inc.*, 379 F.3d 641 (9th Cir. 2004).

c. The Foreign Trade Antitrust Improvements Act of 1982

The plaintiffs' first amended complaint in *McLafferty v. Deutsche Lufthansa AG et al.*,⁴⁰⁰ a class action suit filed in the U.S. district court for the Eastern District of Pennsylvania on behalf of direct purchasers of Europe-Japan passenger air travel, alleged price fixing in violation of the Sherman Act against the defendants, Lufthansa, Air France, KLM and Alitalia. The complaint was dismissed for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act (FTAIA).⁴⁰¹

The *McLafferty* plaintiffs claimed that airline representatives met in person to fix the prices and used electronic means to communicate information about price-fixing and to monitor cartel members. Plaintiffs also claimed that there were related government investigations of the alleged antitrust activity and consent agreements between Lufthansa and South Africa regarding price-fixing.

The court found that the alleged conduct constituted trade or commerce with foreign nations under the FTAIA but that purchasing airline tickets in the United States did not qualify as "import commerce" under the Act.⁴⁰² The court concluded that "the service whose price the defendants allegedly fixed is only provided wholly outside the United States" and that the record did not support a finding of direct, substantial or reasonably foreseeable anti-competitive effect on U.S. commerce. The court accordingly dismissed the plaintiffs' complaint.⁴⁰³

VI.

Denied Boarding and Removal of Passengers

a. EC Regulation 261/2004 on Denied Boarding, Cancellation and Delay

In late 2008, the ECJ published a judgment which severely limited airlines' ability to rely on a defense of "extraordinary circumstances" in defending claims for compensation under EC Regulation 261/2004 arising out of flight cancellations caused by technical problems. In the last year, the ECJ has been at it again, and has, at a stroke, purported to introduce an obligation on carriers to pay compensation for delay.

On November 19, 2009, the ECJ issued a judgment in two cases referred to it for a preliminary ruling on the correct interpretation of the delay, cancellation and compensation provisions of EC Regulation 261/2004. *Sturgeon v. Condor Flugdienst GmbH*⁴⁰⁴ and *S. Böck, C. Lepuschitz v. Air France Böck*⁴⁰⁵ concerned flight delays which caused the claimants to arrive at their destinations later than scheduled, *i.e.*, by 25 hours and 22 hours respectively.

⁴⁰⁰ No. 08-1706, 2009 WL 3365881 (E.D. Pa. Oct. 16, 2009).

⁴⁰¹ Foreign Trade Antitrust Improvements Act, 15 U.S.C. Section 6(a).

⁴⁰² *McLafferty*, *supra* at *4.

⁴⁰³ *Id.*

⁴⁰⁴ C-402/07.

⁴⁰⁵ C-432/07, November 19, 2009.

In both these cases, the claimants had argued that their flights had in reality been canceled rather than, as the carriers argued, delayed, and that they were accordingly entitled to compensation under Article 5 of Regulation 261/2004. The ECJ was asked questions by two national courts aimed at assisting in determining whether a flight had been delayed or canceled for the purposes of the Regulation. The Court however decided that, in order to give a useful answer to the German and Austrian courts which had referred the cases, it was also necessary to decide whether passengers whose flights are delayed may, for the purpose of the right to compensation under the Regulation, be treated as passengers whose flights have been canceled.

The judgment is unfortunately a lesson in not asking questions unless you really want to get the answer - the danger being that you may well get the answer you did not want.

The ECJ's judgment on the question of when a delay becomes a cancellation is not really open to criticism, and has confirmed what most carriers would expect: where a flight is "rolled over" into another flight, *i.e.*, the planning for the original flight is abandoned and passengers from that flight are carried on a different flight which was also planned, the original flight is to be regarded as having been canceled. However, a flight which departs in accordance with the original planning - even after a very lengthy delay - should not be regarded as having been canceled. It follows that a flight delay does not become a flight cancellation just because it is subject to a long delay.

Unfortunately, however, on the question of whether compensation should be payable for delayed flights, the judgment of the ECJ showed a certain lack of common sense. The ECJ's position was that the Regulation has to be interpreted consistently with the objectives for introducing this consumer protection measure in the first place. The recitals to the Regulation specify that its aim is to provide a high level of passenger protection for denied boarding, cancellation and delays. The ECJ also took the view that other aspects of the preamble to the Regulation are consistent with delay being linked with availability of compensation. The problem as the ECJ sees it is that passengers who are delayed may be every bit as inconvenienced as those whose flights are canceled, and so it would be inappropriate for one set of passengers to receive compensation while the other set does not. The trouble of course is that this is exactly what the Regulation provides and is the way in which carriers have been applying it since it came into effect five years ago.

In the face of express wording in the Regulation which specifies clearly the circumstances in which compensation is payable - denied boarding and cancellation (and not delay) - the ECJ took the purposive approach to the construction of EU law to extremes. Given that the damage sustained by passengers in the event of cancellation or delay is comparable, the ECJ has said that they cannot therefore be treated differently without the EU law principle of equal treatment being infringed. In particular, where the aim of the Regulation is stated to be to increase protection for all air passengers, the ECJ has decided that such an interpretation cannot be correct (despite the wording of the Regulation - at least on this point - being about as clear as it can be). The Court's judgment is that the Regulation, properly construed and taking its aims into account, is that passengers who are delayed are entitled to compensation under the Regulation in the same circumstances and to the same extent as passengers whose flights have been canceled.

Under the Regulation, compensation for flight cancellation is not payable where the passenger can be re-routed such that he or she departs no more than one hour before the original scheduled departure time and reaches his or her final destination no more than two hours after the original scheduled arrival time. The ECJ has now applied this concept to compensation for flight delays and has held that compensation will be payable where passengers are delayed by three hours or more in reaching their final destination.

The defense of extraordinary circumstances - hitherto available in defense of claims for compensation for cancellation - is now available equally for delays. The defense however has the same restrictions as those now applying to cancellations following the judgment in *Wallentin-Hermann v. Alitalia*,⁴⁰⁶ namely, that technical problems which give rise to delay will rarely give the carrier a defense.

The ECJ has by this judgment potentially increased carriers' financial exposure and introduced the likelihood that airlines will now be called on to pay up to €600 per passenger in the event of a flight delay.

The judgment has caused immense controversy and consternation within the industry (and amongst some regulators), and there are a number of workstreams ongoing as carriers seek ways to avoid and challenge the ECJ's ruling. There are a number of questions being considered including the status of an ECJ preliminary ruling outside the specific case in which it is given; of arguable inconsistency with a previous judgment of the ECJ's Grand Chamber (*IATA and ELFAA v. Department for Transport*), which considered several issues on the Regulation, including whether its delay provisions are in conflict with the Montreal Convention; legal uncertainty; proportionality; proper construction of EC legislation; and the correct application of the principle of equal treatment. One difficulty with the legal avenues of challenge available is that the matter will have to be brought back before the ECJ, which may prove reluctant to reconsider the issue. The financial consequences for the industry if the judgment remains in place, however, make it likely that some form of legal challenge will be pursued.

An attempt to persuade the ECJ to reconsider aspects of its judgment in *Wallentin*,⁴⁰⁷ which severely restricted carriers' ability to rely on a defense of extraordinary circumstances where flights are canceled for technical reasons, was unsuccessful in the case of *Schulze v. Deutsche Lufthansa AG*.⁴⁰⁸ The German Bundesgerichtshof referred questions to the ECJ for preliminary rulings on the following questions:

- Can a technical defect which causes a cancellation be an extraordinary circumstance within the meaning of Regulation 261/2004?
- If so, does the concept of extraordinary circumstance in the form of a technical defect also include faults which affect the airworthiness of the aircraft or the safe completion of the flight?

⁴⁰⁶ OJ No. C64/18, 2008.

⁴⁰⁷ *Id.*

⁴⁰⁸ Case C-529/08.

- Has the carrier taken all reasonable measures if it has complied with an approved maintenance schedule and with applicable regulatory standards and instructions or if the fault could not have been avoided even if it had so complied?
- If the above questions are answered in the affirmative, is that sufficient to release the carrier from its obligation to pay compensation or is further evidence required, *i.e.*, the relevant aircraft being taken out of operation and the cancellation of the flight due to lack of any replacement aircraft, would also not have been avoided by the taking of all reasonable measures?

The referral was a clear attempt to achieve some much needed clarification and watering down of the *Wallentin* judgment. Unfortunately however, the case was withdrawn from the ECJ's register after the ECJ wrote to the German Court referring it to the *Wallentin* judgment and asking whether, in the light of that ruling, the German Court wished to pursue its request for a preliminary ruling - a clear suggestion by the ECJ that it had little intention of reopening the issues raised in *Wallentin*. To date, therefore, *Wallentin* remains the current state of the law on whether technical problems can ever be extraordinary circumstances under Regulation 261/2004.

On a reference for a preliminary ruling from the German Supreme Court in *Rehder v. Air Baltic*,⁴⁰⁹ the ECJ has clarified the jurisdiction for passenger claims (arising from intra-Community flights) brought under EC Regulation No. 261/2004.

Mr. Rehder bought a return ticket from Air Baltic (the registered office of which is in Riga, Latvia) for travel from Germany to Lithuania (Munich-Vilnius-Munich). Thirty minutes before departure of the outbound flight from Munich, passengers were informed that the flight had been canceled. Mr. Rehder brought a claim in the German court having jurisdiction over Munich airport (Amtsgericht Erding), seeking compensation under the cancellation provisions (Articles 5(1) (c) and 7(1) (a)) of Regulation 261/2004.

Regulation 44/2001 lays down rules governing the jurisdiction of the courts and the recognition and enforcement of judgments in civil and commercial matters in the member states of the EU. With respect to jurisdiction, the basic principle is that it is to be exercised by the Member State in which the defendant is domiciled (Article 2 (1)). Rules of special jurisdiction are set out in Article 5. In matters relating to contracts for services, claims may be brought in the place of performance, *i.e.*, where the services were provided, or should have been provided.⁴¹⁰

At first instance, the German court determined that it had jurisdiction to hear the claim under Regulation 44/2001, Article 5 (1) (b). This decision was overturned by the appeal court after an appeal was filed by Air Baltic. The appeal court, the Oberlandesgericht Munchen, held that air transport services are "provided" at the place where the operating carrier, Air Baltic, has its head office (*i.e.*, Latvia).

On appeal by Mr. Rehder to the German Supreme Court on a point of law, the Court made a referral to the ECJ for a preliminary ruling on the interpretation of Article 5 (1) (b) of Regulation 44/2001 in the context of a passenger claim under Regulation 261. It should be noted that Mr.

⁴⁰⁹ C-204/08, July 9, 2009.

⁴¹⁰ Article 5 (1) (b) second indent.

Rehder's claim was based solely on Regulation 261 and that no claim was advanced under the Montreal Convention.

The ECJ confirmed that in respect of a contract for air transport services from one Member State to another Member State which is made with one airline as the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that air transport contract and on Regulation 261/2004 is the court having jurisdiction over either the place of departure, or of arrival. Both places have a sufficiently close link of proximity to the material elements of the contract and are places within which a passenger can, as a matter of choice, bring his or her claim under Regulation 261/2004. The ECJ also confirmed that in addition, claimants retain the option of pursuing a defendant air carrier in the place of the defendant's domicile (Article 2 (1)).

In *Thomas v. Iberia Líneas Aéreas de España S.A.*,⁴¹¹ a claim was presented by Mr. Dean Thomas on April 28, 2008, against Iberia relating to the international travel of Mr. Thomas and a companion aboard flight IB6403, on February 25, 2006, between Madrid, Spain, and Mexico City, more than two years earlier. The flight on IB6403 had been diverted to Cancun, Mexico, due to a closure of the Mexico City airport. The claimant's return flight to London was completed by March 12, 2006. Mr. Thomas' claim against Iberia sought compensation for delay under Regulation 261/2004, compensation for delay to baggage under Article 19 of the Montreal Convention (even though his luggage had been diverted with him to Cancun), and financial compensation for his time invested in pursuing the matter with the airline by telephone and correspondence. The carrier applied to strike out the claim.

The court agreed that the claimant's carriage was governed solely and exclusively by the Montreal Convention as incorporated into English law and given the force thereof by Schedule 1B to the Carriage by Air Act 1961. Because two years had expired before Mr. Thomas brought his claim, his right of action was therefore extinguished.

With regard to the application of Regulation 261/2004, the court found the wording of Article 6 to be clear: the Regulation sets out a right to compensation for delay only where the same occurs prior to scheduled departure. The Regulation does not provide for a right to compensation for flight delay following scheduled departure and during the course of flight, *e.g.*, by reason of diversion due to closure of an airport of destination.

Further, any failure as alleged to provide passenger assistance pursuant to Article 9 of Regulation 261/2004 does not give rise to a private law cause of action.⁴¹²

In *Raymond v. Iberia Líneas Aéreas de España S.A.*,⁴¹³ the claimant contracted with Iberia for round-trip carriage from London Heathrow to Montevideo, Uruguay, via Madrid, Spain. His outbound flight from London was delayed by approximately two hours. When he arrived at Madrid to find that he had missed his connecting flight to Montevideo, he decided not to continue his journey. Iberia gave him a full refund of his ticket and rerouted him back to London at no cost. Back in England he brought a claim against Iberia.

⁴¹¹ Unreported, Bromley County Court, December 16, 2009.

⁴¹² See, *Parker v. TUI UK Ltd.* [2007], and the provisions of the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (S.I. 975/2005).

⁴¹³ Unreported, Brentwood County Court, June 10, 2009.

In dismissing the claim, the court followed well established authority that the Montreal Convention precludes recovery under Article 17 for damages for simple stress, anxiety and personal inconvenience. Further, the contract which he had entered into with Iberia was a simple contract of carriage and did not fall into the type of contract which under common law might entitle the claimant to damages in the event of non-performance.

The court looked also at the possible merits of a claim under EC Regulation No. 261/2004. Clearly this was not a case of denied boarding or cancellation, and in respect of his delayed outbound flight Iberia had already met their obligations under the regulation: he had received a full ticket refund and been rerouted back to London at no cost.

In *Rigby v. Iberia Líneas Aéreas de España S.A.*,⁴¹⁴ the claimants' outbound flight from Palma de Mallorca, Spain, to Barcelona was without incident. However, at the El Prat airport in Barcelona (where the claimants were to connect with a flight to Milan, Italy), disembarkation of the inbound aircraft scheduled to operate the claimants' flight to Milan was delayed due to an unfolding wildcat strike. Some of the striking workers blockaded and then spread oil onto the runway, setting it alight. The airport was closed to air traffic for the rest of the day, causing extensive disruption to flights for several days. In fact, the claimants' scheduled flight to Milan was canceled.

Iberia argued that it was relieved from any obligation to pay compensation under Regulation 261/2004, since the disruption to its scheduled services had been caused by "extraordinary circumstances" which could not have been avoided, even if all reasonable measures had been taken.⁴¹⁵ Some 10,000 passengers were left stranded at the airport that day, and the army and police were called in to control the situation. Iberia and other carriers were simply unable, through no fault of their own, to operate flights out of Barcelona and/or (by reason of the sheer numbers of passengers affected by the strike) to comply with the requirements under Article 9 to provide individual passengers with assistance.

The court agreed with the defendant's submissions that cancellation of the outbound Milan flight due to the strike action did indeed constitute "extraordinary circumstances" under Regulation 261/2004, and so the carrier was relieved from any obligation to pay compensation to the claimants.

With regard to the delayed return flight, the district judge held that while Iberia had breached Article 9 by not providing the claimants with stipulated passenger assistance, there was no civil claim for compensation. The impossibility of providing assistance in the circumstances was reiterated in support of the defendant. It had been further argued by the defendant that the existence of statutory instrument (SI) 975/2005, the Civil Aviation (Denied Boarding, Compensation and Assistance) regulations 2005, could not be ignored. According to the Statutory Instrument, while a breach of Article 9 of the Regulation gives rise to a public law remedy, a civil claim is effectively barred. In addition, there is a distinction to be drawn in the language of Article 7 (compensation for cancellation) and Article 9 (right to care) of the Regulation. The former gives rise to a right to compensation, but the latter does not.

⁴¹⁴ Unreported, West London County Court, April 17, 2009.

⁴¹⁵ Article 5(3).

In Portugal, two passengers who had booked a flight from Lisbon to Kiev, Ukraine, sought compensation against the airline and the travel agency for direct damage and loss of profits as a consequence of the cancellation of their flight (the passengers claimed to have lost the opportunity to buy a house in Kiev at an attractive price).

The Court of Appeal considered that the passengers were only entitled to the assistance and compensation set forth in EC Regulation 261/2004. It was also decided that a flight cancellation due to a strike of ground personnel constituted an “extraordinary circumstance which could not have been avoided” by the airline. Consequently, the Court exempted the airline from paying compensation to the claimants under Article 5/3 of the Regulation 261/2004.⁴¹⁶

In Spain, the Court of Appeals has held⁴¹⁷ that the compensation provided by EU Regulation 261/2004 must not be construed as a minimum compensation preventing passengers from claiming additional compensation proportionate to the actual damage suffered by them.

In January 2010, the Italian Civil Aviation Authority (ENAC) issued a new version of the “Passengers’ Charter,” making direct reference to the November 19, 2009, ECJ decision in *Sturgeon*.⁴¹⁸

ENAC has taken a strong approach against air carriers for alleged violation of EU Regulation 261/2004 when carriers do not provide assistance or compensation to passengers for denied boarding, cancellation, lack of assistance and information.

According to Decree No. 69, ENAC has the right to issue fines which sometimes significantly exceed the cost of providing assistance and compensation to passengers. More specifically:

- Violation of Art. 4 - Denied boarding - Fine from €10,000 up to €50,000;
- Violation of Art. 5 - Cancellation - Fine from €10,000 up to €50,000;
- Violation of Art. 6 - Delay - Fine from €2,500 up to €10,000;
- Violation of Art. 10 - Upgrading and Downgrading - Fine from €1,000 up to €5,000;
- Violation of Art. 11 - Persons with reduced mobility or special needs - Fine from €10,000 up to €50,000;
- Violation of Art. 14 - Obligation to inform passengers of their rights - Fine from €2,500 up to €10,000.

As a general guideline, carriers should ensure they keep adequate evidence of the assistance/compensation provided so as to be able to contest any demand from ENAC.

⁴¹⁶ Oporto Court of Appeal, February 9, 2009.

⁴¹⁷ Court of Appeals of Barcelona, September 7, 2009.

⁴¹⁸ *Sturgeon v. Condor Flugdienst GmbH*, C-402/07, *supra*.

b. Denied Boarding (Philippines)

In *Air France Philippines/KLM Air France v. de Camilis*,⁴¹⁹ the Supreme Court of the Philippines (First Division) upheld the decision of the Court of Appeals that the airline had breached the contract of carriage by air with the respondent and acted in bad faith.

Mr. de Camilis purchased tickets to Paris, France, and an extended European vacation on Air France flights. On arriving in Moscow from Paris, Mr. de Camilis was denied entry because he had not secured a transit visa. He claimed this was because agents of Air France had failed to advise him of this requirement before his departure from Paris. An agent of Air France refused to allow Mr. de Camilis to contact his travel companions in order to advise them he was being sent back to Paris, and then reported Mr. de Camilis to the police as a security risk, resulting in his being detained and interrogated both in Paris and subsequently in Rome. Agents of Air France further failed to check Mr. de Camilis' baggage, resulting in his missing a connecting flight, and thereafter failed to provide him with a complimentary hotel room, despite representing that they would do so.

The trial court held that Air France had breached its contract of carriage and was liable to pay Mr. de Camilis Philippine Pesos (PHP) 200,000 (US\$4,200) in actual damages, PHP1,000,000 (US\$21,500) in moral damages, PHP1,000,000 (US\$21,500) in exemplary damages, and PHP300,000 (US\$6,500) in attorneys' fees.

Air France appealed to the Philippines Court of Appeal, which reduced the actual damages payable to US\$906, an amount representing the expenses Mr. de Camilis incurred from the time he was unable to join his travel group while being detained as a security risk, up to the time his flight reservation to Manila was dishonored, because the Court of Appeal held that Air France was not responsible for Mr. de Camilis being denied entry into Moscow due to his not having the requisite travel visa. The Court of Appeal left the other heads of damages undisturbed.

Air France then brought their appeal to the Supreme Court of the Philippines, claiming that Mr. de Camilis' entitlement to damages had not been clearly established, and, in the alternative, that the amounts awarded were exorbitant. The Supreme Court denied the petition to review the decision of the Court of Appeal, stating:

“time and again, we have held that the jurisdiction of this Court in a petition for review on certiorari under Rule 45 is limited only to questions of law, save for certain exceptions, none of which are present in this case.

Both the RTC [trial court] and the CA [Court of Appeal] have competently ruled on the issues of the respondent's entitlement to damages and attorney's fees as they properly laid down both the factual and legal bases for their respective decisions. We see no reason to disturb their findings.”⁴²⁰

⁴¹⁹ (2009) G.R. No. 188961.

⁴²⁰ (2009) G.R. No. 188961, pg. 4.

VII.

Consumer Protection

a. U.S. Passenger Bill of Rights Legislation

In December 2009, the U.S. government announced that new regulations taking effect in the spring of 2010 will impose stiff penalties on airlines that keep passengers unduly stranded on the tarmac without food or water or allowing them to disembark. The new regulations, however, will affect only airline passengers traveling on U.S. domestic flights.

According to the new rules, passengers cannot be kept longer than two hours without food and water. Also, if an aircraft sits on the tarmac for three hours, passengers must have an opportunity to leave the aircraft. The fines proposed by the U.S. Secretary of Transportation for violation of the regulations are steep: \$27,500 per passenger.

Airlines have expressed concerns that the new regulations will result in aircraft having to abandon their places in line for takeoff and/or return to their terminal gates, and that baggage may have to be removed from the aircraft. Aircraft may have to be de-iced more in the winter, and crews may not be able to remain with a flight if a delay is further prolonged because of these events. Accordingly, some airlines appear to have made the decision that it is preferable to cancel flights in the event of bad weather than to subject themselves to the likelihood of the fines.

These new rules and administrative fines do not require congressional approval, and are separate from efforts in the U.S. Congress to protect passengers through a U.S. Passenger Bill of Rights, discussed in previous issues of the Liability Reporter.

The current version of such legislation, known as the Airline Passenger Bill of Rights Act of 2009, as proposed anew by both sides of the U.S. Congress, has not yet been passed into law. This legislation would require each air carrier and airport operator to submit for approval by the U.S. Secretary of Transportation a proposed contingency plan meeting minimum standards established by the Secretary. Carriers will be required to provide passengers on a departure- or arrival-delayed grounded aircraft with: (1) adequate food, water, restrooms, ventilation, and medical services; as well as (2) a time frame under which passengers may disembark from a delayed aircraft after three hours, except in specified circumstances. The Bill would also require that an airport operator plan describe: (1) how passengers will be deplaned following a long tarmac delay; and (2) how facilities will be shared and gates made available to aircraft that experience such delays. Under the Bill, the Secretary of Transportation will have the power to assess a civil penalty against air carriers and airport operators that fail to submit, obtain approval of, or adhere to their contingency plans. Finally, the Bill requires that the public have access to the contingency plans and directs the Secretary to establish a consumer hotline telephone number for air passenger complaints.

b. Passengers with Disabilities

The final rule of the U.S. Department of Transportation (“DOT”) on “Nondiscrimination on the Basis of Disability in Air Travel” went into effect on May 13, 2009. The new regulations expand protections to passengers with disabilities who travel by air, add more stringent conditions on air carriers, and extend the Air Carrier Access Act (“ACAA”) to foreign carriers.

According to the DOT’s preamble to the final rule, “detailed standards and requirements are essential” to ensuring that carrier’s engage in nondiscriminatory practices.” Thus, the new rule sets forth specific accommodations carriers must undertake, rather than general objectives, to guarantee “clear and consistent implementation by the carriers, and clear and consistent enforcement by the [DOT].” Some of the specific accommodations required concern the use of medical oxygen, service animals, and safety assistants.

Regarding medical oxygen, the new rule mandates that air carriers allow an individual with a disability to use a ventilator, respirator, continuous positive airway pressure machine, or an FAA-approved portable oxygen concentrator (“POC”) in the cabin of the aircraft for all flights (except those aircraft with 19 or fewer passenger seats). The passenger’s device must meet FAA requirements (or the requirements for such devices established by a foreign carrier’s government) and must be properly stowed. Carriers must also respond to passenger inquiries on medical oxygen devices by informing the passenger of the requirements for using such devices on the aircraft, including: (1) the device must have the manufacturer labels ensuring that the device complies with all FAA regulations; (2) the device must meet the maximum weight and height restrictions; (3) the passenger must check in one hour before the carrier’s general check-in time; and (4) the passenger must provide a physician’s statement for use of a POC. Carriers must also inform a disabled passenger of the expected maximum flight duration of each segment of the passenger’s itinerary at the earlier of 48 hours after the reservation is made or 24 hours before the scheduled departure time. Further, upon inquiry, the contracting carrier in a code-share itinerary must inform the disabled passenger to contact the operating carrier for information about its requirements for use of such a device or provide such information on behalf of the operating carrier. Where a disabled passenger does not comply with the conditions of acceptance set out in the new rule, however, a carrier may deny the passenger boarding, though it must provide a written explanation to the passenger within ten days of the denial.

The new regulations governing attendants travelling with disabled passengers now refers to such attendants as “safety assistants.” The purpose of this change in terminology is to clarify that a carrier may only require an attendant to travel with a disabled person for safety reasons, rather than for the disabled person’s need for assistance with personal services, such as in using the lavatory facilities or eating, provided by a “personal care attendant.” Under the new rule, a carrier may inform passengers that its crew is not required to provide such personal services. The bases upon which a carrier can require a disabled passenger to travel with a safety assistant in the new rule are the same as in the former regulation. An air carrier may still require a passenger who has a severe vision or hearing impairment to travel with a safety assistant, but only after it has determined that the disabled person’s means of communicating either: (i) would not allow for the required safety briefings to be adequately conveyed to the passenger; or (ii) is

sign language, and the carrier cannot timely arrange for a flight crew member qualified to communicate with the disabled passenger during the flight.

The new rule provides more extensive regulations concerning an air carrier's obligation to transport service animals on board an aircraft. For example, the new rule specifies that a carrier may not deny transportation of a service animal on the basis of other passengers' religious or cultural objections to being on the same aircraft as a particular service animal. Likewise, other passengers' annoyance is not a legitimate basis for denying transportation of a service animal. Indeed, even allergies of other passengers (that do not rise to the level of a disability) or the fact that a service animal may use a (reasonable) portion of another passenger's foot space are not sufficient bases for denying a disabled person's travel with a service animal.

The new regulation also provides that a carrier must permit the transportation of an "emotional support or psychiatric service animal" where the disabled passenger provides sufficient documentation from a licensed mental health professional of the passenger's need for the animal. Additionally, the carrier must take "all steps necessary" to comply with foreign regulations to ensure the legal transportation of the service animal from the U.S. into a foreign country.

According to the new regulation, a carrier is required to accommodate exotic service animals, such as miniature horses, pigs, or monkeys, unless the carrier determines that certain factors (such as the animal's size and weight) preclude their transportation in the cabin. Upon such a determination, the carrier must provide a written explanation of its reasons denying the service animal's transportation to the passenger either at the airport or within ten days of the refusal. Even where a passenger provides sufficient documentation, however, a carrier is not required to accommodate certain types of animals, such as snakes, rodents and spiders, and foreign air carriers are never required to carry service animals other than dogs.

Because the new rule applies to foreign air carriers flying to and from the U.S. who are obligated to comply with both its national laws as well as any DOT regulations, the new rule provides for a waiver process. A foreign air carrier may petition for an exemption from complying with the ACAA where a foreign legal requirement conflicts with the DOT's requirements. The foreign air carrier must be under a legally binding mandate that imposes a non-discretionary obligation on the carrier to take or refrain from taking a certain action that is required by the ACAA. Further, where a new foreign law that conflicts with the ACAA is enacted, the carrier may take such action to comply with the new foreign law and request a waiver from the DOT, without risk of an enforcement action by the DOT during the DOT's review of the waiver request. The DOT cautions against filing frivolous waiver requests, however, which can be the subject of an enforcement action.

Additionally, in Europe, it is noted that Switzerland has adopted EU Regulation No. 1107/2006, obliging airport operators as well as airlines to grant assistance, free of charge, to passengers with reduced mobility while in airports and/or on board aircraft.

c. EC Consultation on Package Travel Directive

The EC has just closed a consultation on the EC Directive on Package Travel, Package Holidays and Package Tours, 1990 (the Directive), in which it has sought views from companies, industry associations and consumers on the operation of the Directive.

The Directive was aimed at providing protections and new rights for consumers buying and taking package holidays and contains significant provisions relating to the liability of package organizers and retailers and on financial protection for consumers in the event of the insolvency of their travel organizers. The Directive also stipulates minimum information that must be given to consumers as part of the package holiday contract, as well as the information which must be given to them prior to executing a contract and prior to their departure on holiday. The Directive also contains a definition of what constitutes a “package” for the purpose of its application, which has been the subject of much debate and case law. In the U.K., for example, the determination of whether particular travel arrangements constitute a “package,” and are thus covered by the Directive, depends to an extent on customer perception of what they believed they were buying; that leads to uncertainty in any given case as to whether the Directive (or rather its implementing legislation in the relevant Member State) is applicable or not.

There is a widespread view that this area of regulation needs to be revisited, given that the travel sector has evolved considerably since the Directive came into effect ten years ago, especially with the development of the internet, the extent to which holiday arrangements are widely available and booked on-line, and the rise of low-cost air carriers. While there remains a large market for traditional package holidays, consumers also now habitually put together their own holiday arrangements from different providers (airlines, direct hotel bookings, individual car hire arrangements and the like). There is a need to decide whether and how to protect such arrangements, including determining who is liable in the event of claims arising and whether or not all such arrangements ought to attract the same financial protection against insolvency as a traditional package holiday booking.

It is to be expected that new or amended legislation will ultimately emerge from the consultation; given the pro-consumer climate within the Commission in matters relating to passenger rights, the probable outcome will be some extension of the Directive beyond the ambit of traditional “package holidays” to the more ad hoc and individual travel arrangements now widely available and purchased by consumers. There is a related and ongoing debate between industry and regulators as to whether there ought to be some insolvency protection attaching to seat-only flight reservations made direct with an airline; the law in the U.K. is currently unnecessarily complex, but at present essentially, that protection is available only when an air ticket is sold by an agent and/or when the flight is part of a “package,” and there is no such protection when a ticket is bought direct from the carrier concerned. These issues are also being considered as part of the present consultation.

d. DOT Notice for Carrier Update of Tariffs on Baggage and Code-Share Liability

On March 26, 2009, the U.S. DOT issued a Notice, “Providing Guidance on Airline Baggage Liability and Responsibilities of Code Share Partners Involving International Itineraries,” which

calls on carriers to clarify their General Conditions of Carriage (“GCC”) and tariffs regarding baggage and code-share liability. According to the Notice, carriers were to update their GCC and tariffs to be in compliance with the DOT’s guidance by June 30, 2009, to avoid potential liability from an enforcement action.

The Notice was issued in response to many carriers’ provisions in their GCC and tariffs which limit the carriers’ liability for damage to or loss of jewelry, money, fragile or perishable items, etc., transported in checked baggage. While such exclusions of liability may be enforceable in some countries, U.S. courts generally will not enforce such provisions in claims arising under the Montreal Convention. Article 26 of the Montreal Convention provides that “[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void.”

A carrier’s liability for the loss or delay of baggage is limited under the Montreal Convention to 1,000 SDRs (approximately US\$1,500). A carrier’s liability generally cannot be limited based upon the contents of the baggage under the Convention once the baggage has been accepted for carriage, other than for the “inherent defect, quality or vice of the baggage.”

The DOT Notice opines that the inclusion of such liability exclusion provisions (without reference to its limited applicability to domestic transportation) amounts to an unfair or deceptive business practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

Some carriers include provisions in their GCC or tariffs which provide that their terms and conditions are applicable only to the extent that they are consistent with the Convention or other applicable law. The DOT has informally taken the position, however, that this limiting language is not sufficient, and that either the liability exclusions for the carriage of jewelry and other valuable items should be stricken, or additional language added to clarify that such provisions do not apply to international carriage to or from the United States.

As for code-share liability, the DOT Notice indicates that as a condition to its approval of code-share arrangements, the contracting carrier (the carrier selling the passenger ticket) must assume responsibility for the entirety of the code-share journey. The DOT objects to tariffs of contracting carriers which provide that, in a code-share arrangement, the terms and conditions of the operating carrier’s contract of carriage apply, without providing the operating carrier’s terms and conditions. The DOT also objects to tariffs that are silent as to which carrier’s contract of carriage applies in a code-share arrangement.

The DOT’s Notice on this point, however, is somewhat vague and appears to be partially inconsistent with code-share liability under the Montreal Convention. Under the Convention, a contracting carrier (which issues the ticket but does not perform any segment of the carriage in the passenger’s overall journey), as well as the operating carrier, are responsible for injuries that occur during any part of the code-share journey. If, on the other hand, the contracting carrier

performs a leg of the carriage, it is considered a “successive carrier” under Article 36 of the Convention and, as such, is only liable if it is the operating carrier when the injury occurs.⁴²¹

The DOT has advised that it will not be issuing specific guidelines as to how carriers should comply with the Notice. Apparently, the Air Transport Association, which initially pressured the DOT to issue specific guidelines, has since advised the DOT that further clarification or guidance is not necessary for compliance. Informally, however, the DOT has advised that compliance with the Notice requires carriers to remove blanket language in their tariffs which specifies that the contracting or operating carrier’s terms and conditions generally apply to code-share arrangements.

A contracting carrier must compare its terms and conditions with those of each code-share partner and determine which provisions, if any, conflict; for example check-in times, baggage allowances, carriage of pets, etc. Where the operating carrier’s terms and conditions conflict with those of the contracting carrier, the contracting carrier must state in its tariffs the precise rule of the operating carrier and the affected market.

e. Australia

In *Heathcote v. Vietnam Airlines*,⁴²² the Consumer, Trader and Tenancy Tribunal of New South Wales had to decide if damages were recoverable by Mr. Heathcote for inconvenience caused as a result of the disturbance of his flight by other passengers. On April 7, 2009, Mr. Heathcote and his wife traveled in Business Class on Vietnam Airlines from Ho Chi Minh City, Vietnam, to Sydney, Australia. During the flight, Mr. Heathcote and his wife were “constantly distracted” by the noise and behavior of two other passengers on the flight, which the Heathcotes alleged had prevented them from sleeping. Mr. Heathcote sought \$1,350 from Vietnam Airlines as compensation for the discomfort experienced on the flight.

The Tribunal found that Vietnam Airlines was not liable to pay damages to Mr. Heathcote. In reaching this decision, the Tribunal noted that the general rule is that, “damages for breach of contract cannot be awarded for distress or disappointment arising from that breach,”⁴²³ subject only to an exception where the object of the contract is to provide, “enjoyment, pleasure or freedom from distress.”⁴²⁴ The Tribunal characterized the purchase of an airline ticket as a contract merely of “air carriage” as distinguished from a contract to provide enjoyment or pleasure, and accordingly held that no damages could be claimed by Mr. Heathcote. This finding relieved the Tribunal from considering issues raised by the Warsaw Convention, including whether the Tribunal had jurisdiction to hear a claim subject to the Convention.

⁴²¹ See *Best v. BWIA West Indies Airways Limited*, 581 F. Supp. 2d 359 (E.D.N.Y. 2008); but see *Gustafson v. American Airlines, Inc.*, No. 08-10144, 2009 WL 3149745 (D. Mass. Sept. 30, 2009) (finding that where there is a code-share arrangement, the airlines are not successive carriers).

⁴²² *Ian Heathcote v. Vietnam Airlines*, Consumer, Trader and Tenancy Tribunal, GEN 09/31962.

⁴²³ *Id.* at pg. 2 of the Order.

⁴²⁴ See, *Baltic Shipping Company v. Dillon*, (1993) 174 CLR 344.

The finding is generally consistent with those in other jurisdictions,⁴²⁵ but it is interesting to compare *Heathcote* with the decision of the High Court of Malaya in *Malaysian Airlines System Berhad v. Siong*⁴²⁶ discussed below.

f. India

Over the past twelve months, there have been more than 34 decisions involving airlines made by the District Consumer Disputes Redressal Forum in the various jurisdictions across India. The tribunals have considered a wide range of complaints, including for missing or damaged baggage,⁴²⁷ failure to reserve tickets adequately,⁴²⁸ flight delays and cancellations,⁴²⁹ failure to provide correct flight meals,⁴³⁰ failure to allocate tickets in the cabin class paid for,⁴³¹ failure to provide adequate seating for a disabled passenger,⁴³² conduct of promotions and competitions,⁴³³ service of food which led to illness,⁴³⁴ and preventing passengers from proceeding through

⁴²⁵ For instance, the recent decision of the English County Court in *Cowden v. British Airways plc* (2009), 2 Lloyds Reports 653.

⁴²⁶ High Court of Malaya at Johor Baru, Civil Appeal NT(3) 12-46-2008, July 1, 2009.

⁴²⁷ *Shir Arun Bras De Sa, Smt. Elin Lono e Bras De Sa v. Air India and Ors*, (February 25, 2009), Consumer Dispute 40 of 2003; *Manish Thakkar v. Kingfisher Airlines Limited and Swi Swarnambiga Travels*, (December 2, 2009), Case No. 77/2008; *K. Ibrahim v. Lufthansa German Airlines*, (March 3, 2009), Case No. 121/2006; *Aboobacker Pilakadavath Aavi v. The Manager of Air India and The Airport Director*, (March 31, 2009), Case No. CC/08.75; *Jibu John v. Srilankan Airlines and Usha Karthik*, (May 29, 2009), Case No. CC/07/214; *Shri Arun Bras De Sa and Smt. Elin Lobo e Bras De Sa v. Air India and Ors*, (February 25, 2009), Case No. 40 of 2003; *P. Bhaskara Narayana v. The Airport Manager Air India*, (April 12, 2009), Case No. 972 of 2008; and *Abdulla Moosa v. Station Supervisor*, (July 31, 2009), Case No. 547/2002.

⁴²⁸ *Sushma Bhalchandra Bam v. Qantas Airways Ltd, Global Aviation Services Ltd and Bhagyashri Travels Pty Ltd*, (February 27, 2009), Case APDF/194/2005; *Modan Habibadas Hasanbhai v. Emirates Airlines*, (January 12, 2009), Complaint No. SMF/MUM/298 of 2004; *Smr Perianayagam and Ors v. Make My Trip and Ors*, (August 10, 2009), Case No. 335/2008; *P.N. Ganesh v. Indigo Airlines Ltd.*, (May 29, 2009), Case No. 2175/08; *Mohanan v. Srilankan Airlines Ltd.*, (August 28, 2009), Case No. CC/07/233; *Harvinder Singh Saini v. Continental Airlines and Blue Sky Worldwide Travels*, (November 27, 2009), Case No. 1489 of 2009; *Smt. Gurpreet Kaur Dhaliwal v. Minar Travels Pvt Ltd and Ors*, (November 9, 2009), Case No. M/7210/07/232/06; and *Kurian Pius v. Air Deccan*, (January 30, 2009), Case No. 2007/275.

⁴²⁹ *Mrs. Thilagavathi and Ors v. British Airways*, (January 5, 2009), Case Nos. 284, 285 and 286 of 2003; *Mr. V.N. Venkiteswaran v. Manager of Go Airlines (India) Pvt Ltd.*, (July 6, 2009), Case No. 351/2007; *S Dorai Raj and Anor v. Saudi Arabian Airlines and Oasis International*, (September 15, 2009), Case No. 501/2001; *Sampath Kumar Ramaswamy and Smt Mangala Sampath Kumar v. Air France and Ors*, (August 6, 2009), Case No. CC/09/5811; *Mujeeb Rahman v. The Indian Airlines Branch Office*, (June 30, 2009), Case No. CC/07/336; *Sri Tarun Kumar Bose v. Air Decan and Another*, (November 10, 2009), Case No. 195/2007; *Piyush Kant Jain v. Qatar Airways and Airnet Travels & Cargo Pvt Ltd.*, (August 28, 2009), Case No. 755 of 2008; *Sri Appikatla Sisir Kumar v. The General Manager Air Deccan and The Commercial Manager Air Deccan*, (February 4, 2009), Case No. 682/07; and *Kunhammed Kutty v. The Commercial Manager Air India and Akbar Travels of India*, (August 10, 2009), Case No. 08/42.

⁴³⁰ *Ronald A. Pinto v. Lufthansa German Airlines*, (January 24, 2009), Case No. CC/08/1760; *Abhinav Venkatesh v. Emirates Airways Pvt Ltd and Hyatt Travels Pvt Ltd.*, (November 9, 2009), Case No. CC/09/1052; and *Suraj Sadanand v. Emirates Airways Pvt Ltd and Hyatt Travels Pvt Ltd.*, (November 9, 2009), Case No. CC/09/1066.

⁴³¹ *Swepna Muhammadalo v. Air India Airport Manager*, (January 24, 2009), Case No. CC/08/122; and *Thanima D/oZenalFiroz v. The UAE Exchange and Financial Ltd and The Air India Ltd.*, (June 2009), Case No. CC/07/181.

⁴³² *Sri Mahendra Kr. Sarda v. The Manager, Air India*, (December 16, 2009), Case No. CC/06/159.

⁴³³ *G.C. Gopala Pillai v. Managing Director Manjira Khurana*, (September 30, 2009), Case No. 423/2000.

⁴³⁴ *Dr. G.C. Gopala Pillai v. Managing Director*, (July 15, 2009), Case No. 325/2000.

security, causing them to miss their flights.⁴³⁵ The cases usually arose from complaints under the Consumer Protection Act for deficiency of service.

The approach of the District Consumer Disputes Redressal Forum is illustrated by a number of decisions reported below. It will be apparent that the Dispute Forum does not regard itself as constrained by the Warsaw or Montreal Convention. In particular, the forum pays no regard to the principle that the liability imposed on carriers to passengers for injury during international carriage under the applicable Convention is in substitution for liability under any other law.⁴³⁶ Instead, awards of damages are made under the Consumer Protection Act without regard to the effect of the Convention. Plaintiffs rarely fail and the amount of damages awarded is in the range of \$100 to \$7000, with amounts of around \$500 being most commonly awarded.

*Kuwait Airways Corporation v. Saini*⁴³⁷ was an appeal to the State Commission in Delhi from a District Forum decision which had found that Kuwait Airways was liable for deficiency in service. The forum directed the airline to pay Indian Rupees (INR)20,000 (US\$430) for mental tension, discomfort and loss and INR5,000 (US\$100) in legal costs, for failing to deliver checked baggage to the respondent, who had been deported from Kuwait to Delhi, India, due to the cancellation of his visa by the Kuwaiti authorities. In the appeal, Kuwait Airways submitted that Mr. Saini had made a false complaint because he could not produce a boarding pass, baggage tag or landing certificate, and an extensive tracer action to locate the alleged missing baggage was unsuccessful. Alternatively, Kuwait Airways submitted that if Mr. Saini's contentions were correct, the damages payable should be limited to \$20 per kilogram pursuant to the Warsaw Convention and the *Carriage by Air Act 1972*. The Commission found that Kuwait Airways' version of events "does not inspire confidence as no person going on foreign land will not be carrying any baggage." While noting that liability for loss of baggage is limited by the relevant provision of the Warsaw Convention, the Commission found that the remedies under the *Consumer Protection Act 1986* are in addition to and not in derogation of any other law including the Warsaw Convention. Accordingly, the appeal was dismissed.

*China Airlines v. Singh*⁴³⁸ was an appeal from a District Forum decision which had found China Airlines liable for deficiency in service for releasing goods to a purchaser without the required bank release, even though the purchaser had eventually paid for the goods. On March 31, 2004, Harpreet Singh engaged China Airlines to ship goods on consignment from New Delhi, India, to Beetle Juice Clothes Ltd in the United Kingdom. Under the air waybill, the goods were not to be released to Beetle Juice Clothes Ltd until a Bank Release Order had been issued by Barclays Bank in London to state that they had received payment for the goods. In breach of the agreement, China Airlines released the goods to Beetle Juice Clothes Ltd before it had obtained the release from the Bank. Notwithstanding the fact that payment was made by the consignee for goods delivered, the Commission found that China Airlines was in breach of the *Consumer Protection Act* and ordered the airline to pay compensation of INR25,000 (US\$530).

⁴³⁵ *K.B. Kannampilly v. The General Manager and the Manager*, (December 19, 2009), Case No. 07/234.

⁴³⁶ Loc. Cit., *Sidhu v. British Airways*, (1997), AC 430; *El Al Israel Airlines Limited v. Tseng*, 525 US 155 (1999); and *Connaught Laboratories Ltd v. British Airways*, 253 DLR (4th) 601.

⁴³⁷ Appeal No. FA-1161/2006, decided on February 23, 2009.

⁴³⁸ Appeal No. FA-08/1075, decided on February 23, 2009.

*Malaysian Airlines System v. Bawa*⁴³⁹ was an appeal from a District Forum which had found Malaysia Airlines liable for deficient service for failing to deliver a checked-in wheelchair in working condition. The electronic controller of the wheelchair was found to be missing and the District Forum had ordered Malaysia Airlines to pay the full value of the wheelchair (US\$6,668) as well as compensation for mental pain and harassment (INR20,000 or US\$430) and legal costs (INR2,500 or US\$55). The claimant had initially claimed \$1,500 for the loss of the electronic controller only, but later amended the complaint to \$6,668 for a new wheelchair because the supplier of the damaged wheelchair was located in the United States and the chair would need to be returned there if it was to be repaired. On appeal, Malaysia Airlines submitted that:

1. the claimant should be bound to his initial claim of US\$1,500;
2. the chair could be repaired in India for \$400;
3. since the electronic controller was missing and not the entire chair, the District Forum should not have awarded the cost or full value of the chair; and that
4. since the wheelchair weighed 75.4kg., liability would be at most US\$1,500.

The Commission found that since the most significant part of the wheelchair was missing, the appropriate course would be to direct Malaysia Airlines to refund the entire cost of the chair, but the Commission also directed that the damaged chair be surrendered to the airline to avoid the passenger making a profit from the incident.

In *British Airways v. Mallik*,⁴⁴⁰ a husband and wife had purchased return tickets for travel from Philadelphia, Pennsylvania, to Kolkata, India, via London. At the airport in Philadelphia, Mrs. Mallik, who is physically handicapped, was told that she could not travel to Kolkata via London without a Direct Aside Transit Visa (DAVT), although she held the appropriate passport endorsements. She apparently persuaded British Airways to allow her to travel. On the return trip from Kolkata, Mrs. Mallik was not allowed to board the aircraft without a DATV in order to pass through the London Heathrow Airport. Mr. and Mrs. Mallik subsequently traveled separately on different airlines to Philadelphia. The District Forum allowed the complaint for deficiency of service and awarded compensation and costs.

On appeal, British Airways submitted that the endorsement on Mrs. Mallik's passport did not exempt her from the DATV requirements, and that one could not conclude that a DATV was not required simply because the British Airways official in Philadelphia had allowed Mrs. Mallik to travel on the outgoing flight, since he obviously had been mistaken in doing so. The Commission found that Mrs. Mallik had the appropriate passport endorsement and that the airline could not refuse to carry her back to Philadelphia via Heathrow on the basis of the same documents which she had used to travel to Kolkata via Heathrow. Accordingly, the appeal was dismissed with no order as to costs.

⁴³⁹ Appeal No. A-2007/544, decided on January 6, 2009.

⁴⁴⁰ S.C. Case No. FA/09/79, decided on May 8, 2009.

Wodhwa and Jolly v. British Airways was an appeal to a State Commission from a District Forum decision which dismissed the complaint for want of territorial jurisdiction. The complaint alleged that the District Forum had found that, because the passengers had purchased two tickets from British Airways for a journey commencing in San Francisco, only the London courts or the courts at San Francisco had jurisdiction to entertain the complaint. The Commission found that the District Forum had ignored the provisions of section 11 of the *Consumer Protection Act 1986* which specifically provides that “A complaint shall be instituted in a District within the local limits of whose jurisdiction the opposite party or each of the opposite parties, where there are more than one at the time of the institution of the complaint, actually or voluntarily resides or carries on business or has a branch office or personally works for gain.” Those provisions are similar to the provisions found in the Montreal Convention. Because British Airways had a branch office in Delhi, the State Commission ordered that the matter be sent back to the District Forum for a fresh hearing.

In *Sheela Prasad v. Kingfisher Airlines*,⁴⁴¹ the District Consumer Disputes Redressal Forum considered the liability of Kingfisher Airlines arising from flight delays. The complainant’s husband booked five tickets on Kingfisher Airlines to fly from Varansi to Delhi, on a flight that was scheduled to depart on May 21, 2008, at 1:30pm. Upon arriving at the airport, the complainant was told that the flight had been changed to 11:30am on May 19, 2008. The complainant had to book alternative flights with Jet Airways to avoid missing connecting flights to Bangalore. As a result of the delays, the passenger arrived in Bangalore late, and her daughter was unable to take her exam for entrance into medical school. Kingfisher Airlines refunded the cost of the flights, but the complainant brought the Forum action seeking compensation for pain and suffering and for the cost of one year’s tuition for her daughter, since she would need to prepare for the examination the following year.

Kingfisher Airlines argued that the timing of the flight had to be altered due to air traffic conditions beyond its control. It had informed all passengers of the change but because the complainant had only provided a mobile phone number and that phone was switched off, the airline was unable to inform her of the change. The carrier further argued that no part of the action arose in the jurisdiction where the action was brought, and that accordingly, the District Consumer Disputes Redressal Forum had no jurisdiction to hear the complaint. The Forum agreed that it did not have jurisdiction to hear this complaint. Since the airline tickets had been booked in Trivandrum, and the missed flight was in Varanasi, the Bangalore Forum had no jurisdiction over the claim. The Forum held that the complaint should be heard again in the appropriate forum.

In *Rajesh Agarwal v. American Airlines and British Airways*,⁴⁴² Mr. Agarwal booked a flight on American Airlines departing from New York for his return travel to India. When he checked in for the flight, he was issued a ‘Priority Verification Card’ instead of a boarding pass, and told to proceed to the gate to be assigned a seat. He arrived at the gate and was told to take a seat and wait for his name to be called. His name was called 10 minutes before the flight was scheduled to depart, but instead of being allocated a seat, he was informed that he had not been cleared by security and told to rush to security as the security clearance for the flight was about to close.

⁴⁴¹ CC1814/2008 (4 February 2009).

⁴⁴² 03/0/2007, (January 13, 2009).

Mr. Agarwal hurried to security and back to the gate, but despite making it back to the gate before the flight was scheduled to depart, he was denied entry to the plane, and was advised that he was booked onto a flight leaving the next morning. Upon explaining to the American Airlines supervisor that he needed to be at his destination before 9am the next day for a business meeting, he was advised to travel to LaGuardia Airport by taxi, where he would be able to board an earlier flight. Mr. Agarwal did this, but when that flight was announced, he was again denied a boarding pass. Thereafter, Mr. Agarwal was told by the Supervisor of American Airlines at LaGuardia that he was now booked on a 6:30am flight the next morning, but he was not provided with any meal or accommodation vouchers.

Mr. Agarwal claimed the cost of the taxi, one night's accommodation which had been booked at his destination and could not be used, miscellaneous airport expenses, the cost of international calls which had to be made, and an unqualified apology. British Airways was joined in the action as Mr. Agarwal had originally flown from India to the United States on a British Airways flight. The Commission found that a "gross deficiency in service in respect of the flights within the USA"⁴⁴³ had been proven, and awarded the compensation sought, as well as INR50,000 (US\$1,070) for "mental agony."⁴⁴⁴ The Commission did not make any findings against British Airways, since "no material was produced before us showing responsibility or contribution of [British Airways] in the acts/omissions in USA which caused sufferings and harassment to petitioner."⁴⁴⁵

g. Malaysia

In *Malaysian Airlines System Berhad v. Siong*,⁴⁴⁶ the High Court of Malaya heard an appeal against the quantum of damages awarded to six passengers against Malaysia Airlines for breach of contract as a result of the failure by the airline to allocate to the passengers seats which they had reserved for a flight to Melbourne. A sessions court judge had awarded the passengers Malaysian Ringgits (MYR)15,000 (US\$4,400) as general damages for distress, discomfort and a spoiled holiday.

The passengers, who were apparently members of one family, had bought six round-trip tickets for travel from Johor Bahru, Malaysia, to Melbourne, Australia, on November 15, 2003, for a holiday. The passengers had reserved seats in rows 24, 25 and 26 at the front of the aircraft because they were sensitive to engine noise. They paid a premium for the reservation. However, the passengers were seated in rows 36 and beyond, towards the back of the aircraft, for the return flight on November 18, 2003. Attempts by the passengers to have the correct seats reallocated were unsuccessful and the time involved in the attempts meant that the passengers had to eat their McDonalds dinner on the floor of the boarding lounge, in haste, before departure, which was said to have caused them great embarrassment. They alleged that the flight itself was most unpleasant and that the ill-effects spilled over into their holiday memories. They claimed, and were awarded, compensation of MYR15,000.

⁴⁴³ *Rajesh Agarwal v. American Airlines and British Airways*, 03/0/2007 (January 13, 2009), at pg. 4.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ High Court of Malaysia at Johor Bahru, Civil Appeal NT(3) 12-46 – 2008, July 1, 2009.

The appeal to the High Court of Malaya was heard by a Judicial Commissioner, who held, following *Jarvis v. Swan Tours Limited*,⁴⁴⁷ that while damages in a contract action would not normally be awarded for injury to a plaintiff's feelings or for mental distress, anguish and annoyance, there is an exception in the case of a breach of a contract to provide a holiday of an advertised standard or some other form of entertainment or enjoyment. The Judicial Commissioner held that the damages suffered by the passengers arose directly from the failure of the airline to honor its contract to reserve the seats booked by the passengers, resulting in frustration, embarrassment, mental and physical distress, inconvenience and loss of a memorable holiday. Accordingly, the Commissioner found that the damages were recoverable by the plaintiffs, and he refused to interfere with the award, holding there was no evidence presented by the airline which demonstrated that the award was so high as to make it an entirely erroneous estimate of the damage suffered.

There are some striking omissions in the reasoning of the judgment. First, the case involved the sale of tickets for carriage by air and not the purchase of a holiday package which was the case in *Jarvis*. No reference was made to that distinguishing feature, and the decision is inconsistent in that regard with decisions from other jurisdictions, where it has been held that the purchase of a flight from one destination to another, as opposed to a holiday package, was merely a contract of carriage, and not a contract to provide pleasure or peace of mind and freedom from distress.⁴⁴⁸

Secondly, no reference was made to the Warsaw Convention, and the Court did not consider the possibility that damages for emotional distress as a result of discomfort and disappointment which occurred on board the aircraft might not be recoverable in the case of international carriage.⁴⁴⁹

Third, the Court held that the failure to allocate the reserved seats was a breach of contract without reference to the airline's published terms and conditions, which expressly excluded any obligation to allocate reserved seats.

VIII.

Environmental Protection

a. California Proposition 65 Litigation

The litigation in the San Francisco Superior Court involving claims against some 38 IATA members for alleged violations of the Safe Drinking Water and Toxic Enforcement Act of 1986,⁴⁵⁰ commonly referred to as Proposition 65, was finally concluded in 2009.

⁴⁴⁷ (1973) QB 233.

⁴⁴⁸ Recent examples are *Cowden v. British Airways plc*, (2009) 2 Lloyd's Rep 653 at 16-21, and *Heathcote v. Vietnam Airlines*, *supra*.

⁴⁴⁹ See, *Morris v. KLM Royal Dutch Airlines*, (2002) 2 AC 628.

⁴⁵⁰ California Health and Safety Code, §25249.5 *et seq.*

Pursuant to the settlement agreement issued as a consent judgment by Judge Robertson, each of the carriers agreed to pay the sum of US\$30,000 to the plaintiffs and their attorneys, and to erect signs in specified format proximate to the primary entrance(s) to the airlines' work areas where jet engines were operating. For purposes of the settlement, the term "work areas" refers to areas on the ramp, tarmac, or in a maintenance facility, where employees routinely and in the ordinary scope of their employment come within 200 feet from the operating jet engine of an aircraft.

According to the consent judgment signed by Judge Robertson, the warning signs to be placed in work areas are to provide as follows:

WARNING: This area contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

The work area warning signs are to be placed next to the doors leading into the areas, whether it be the tarmac or repair shops, or other outside work areas of the carrier. The consent judgment specifies that signs to be posted in the work areas are to be placed prominently with such conspicuousness as to render it likely that employees will see and read the signs.

The wording for the signs to be placed in break rooms, according to the consent judgment, is the Proposition 65 information statement, the wording of which is attached hereto as Appendix B.

With respect to warning signs placed in break rooms, these must also be placed conspicuously in such a manner that employees will be able to see and read the signs. An appropriate place for erecting the signs in the work areas will be a notice board such as that used for carriers to place OSHA or other notices that need to be brought to the attention of employees.

It should be noted that carriers are only required to erect warning signs where they are permitted to do so by the airport authority. If a carrier does not have exclusive control over any area where warning signage is required under the consent judgment, the carrier is required to use reasonable and good faith efforts to obtain permission to post a warning in that place. If, through the exercise of reasonable and good faith efforts, a carrier is not able to obtain permission to post a warning sign required under the consent judgment, it is not required to provide such warning sign, provided the carrier has contacted the plaintiffs and discussed with them the good faith efforts undertaken to address the issue.

b. The Regulation of Greenhouse Gas Emissions in the United States

Although U.S. legislators promised to address climate change in 2009 and endeavored to enact legislation to compel U.S. industries to reduce and pay for generating emissions, the U.S. remains without any federal climate change legislation.⁴⁵¹

⁴⁵¹ This and the following sections on environmental developments have been adopted from the newsletter, *Aviation and Climate Change Law & Policy*, January 2010, Vol. 3 No. 1, by Condon & Forsyth LLP and The Hodgkinson Group, http://www.condonlaw.com/newsletters/acc_jan2010.pdf.

i. The U.S. House of Representatives

The path to enacting U.S. climate change legislation appeared to be on solid footing in mid-2009 when, on June 26, 2009, the U.S. House of Representatives passed the Waxman-Markey Bill, formally entitled the American Clean Energy and Security Act (ACES).⁴⁵²

ACES addresses climate change by subjecting GHG (greenhouse gas) emissions to a cap-and-trade program which would nationally limit the amount of GHGs that could be emitted annually. Specifically, ACES proposes to limit GHGs from covered sources to 3% below 2005 emission levels in 2012, 17% below 2005 levels in 2020, and 83% below 2005 levels in 2050. Some of the key provisions of ACES include: (1) the requirement that electric utilities meet 20% of their demand through renewable energy sources and energy efficiency by 2020; (2) the investment of US\$190 billion in new clean energy technologies and energy efficiency (\$90 billion for new investments by 2025, \$60 billion for energy sequestration – capturing and storing energy emissions to prevent them from entering the atmosphere, \$20 billion for the development of electric and other advanced technology vehicles, and \$20 billion for basic scientific research and development); (3) mandates for new energy savings standards for buildings, appliances, and industry; and (4) protection for consumers from energy price increases.

Although ACES represents the “first time either house of Congress had approved a bill meant to curb the heattrapping gases scientists have linked to climate change,”⁴⁵³ its narrow passage (on a vote of 219 to 212) has created doubt about the extent of actual support for U.S. climate change legislation.

The aviation industry has criticized ACES, and James C. May, the President and CEO of the Air Transport Association (ATA), cautioned that enactment of ACES would result in an “onerous fuel tax on the airline industry . . . Fuel costs will skyrocket, hindering the ability of U.S. airlines to continue to improve their environmental performance through fleet modernization and technological advances, weakening their ability to compete in the global markets.”⁴⁵⁴ Unlike the EU Emissions Trading Scheme, which affects airlines directly, airlines would be indirectly affected by ACES: via the extra costs passed on to airlines by the fuel producers arising out of the ACES requirement that fuel producers buy credits for the emissions from the transportation fuel that the producers sell to airlines. Although ACES did not formulate its own plan for emissions reduction, it included an amendment that would promote the development of a global framework to regulate GHG emissions from civil aviation through ICAO.

ACES is currently, and has been for some time, before the U.S. Senate awaiting debate and vote.

⁴⁵² See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 1 (2009) (http://energycommerce.house.gov/Press_111/20090701/hr2454_house.pdf).

⁴⁵³ See Broder, J., *House Passes Bill to Address Threat of Climate Change*, N.Y. Times, June 26, 2009.

⁴⁵⁴ See *Climate Bill Passes US House, Could Cost Airlines Billions*, ATW Daily News, June 30, 2009 (<http://www.atwonline.com/news/story.html?storyID=17079>).

ii. The U.S. Senate

Members of the U.S. Senate likewise sought to enact climate change legislation in 2009. On September 30, 2009, Senator John Kerry, Chair of the Foreign Relations Committee, and Senator Barbara Boxer, Chair of the Environment and Public Works Committee, unveiled a draft of a climate change bill entitled The Clean Energy Jobs and American Power Act.⁴⁵⁵ Some of the highlights of the Act include: (1) funding for research and development of new carbon capture and sequestration technology, advanced nuclear technology and nuclear waste management; and (2) investing in low-carbon power generation, including natural gas. The Act provides reduction targets of 20% by 2020 and 80% by 2050 from 2005 levels. To accomplish the reduction targets, the Act includes a Pollution Reduction and Investment system that would cover less than 2% of American businesses, i.e., only the largest U.S. polluters.

The Environment and Public Works Committee voted on November 5, 2009, to report the Act out of Committee; however, procedural tactics prevented a vote on the Act, and 2009 ended without the passage of U.S. climate change legislation.

iii. The U.S. Environmental Protection Agency

Although Congress has been unable to promulgate U.S. climate change legislation, the Environmental Protection Agency (“EPA”) has been active in accordance with the U.S. Supreme Court decision finding that the EPA has the power to regulate CO₂ and other GHG emissions as air pollutants under the Clean Air Act (CAA).⁴⁵⁶

On September 22, 2009, the EPA announced its Final Rule requiring large U.S. emitters of GHGs to commence monitoring and reporting their GHG emissions as of January 1, 2010.⁴⁵⁷ The monitoring and reporting requirement, which will affect approximately 10,000 facilities, is estimated to address nearly 85% of U.S. GHG emissions. On September 30, 2009, the EPA issued its proposed rule under the CAA relating to stationary sources emitting at least 25,000 tons of GHGs per year.⁴⁵⁸ The proposed rule would require large industrial sources to obtain construction and operating permits for their GHG emissions. It is estimated that covered facilities, responsible for approximately 70% of U.S. GHG emissions, include makers of turbofan and turbojet airplane engines rated at more than 6,000 lbs. thrust.

On December 7, 2009, the EPA released its long-awaited final ruling that GHG’s “threaten the public health and welfare of the American people,” with emissions from on-road vehicles

⁴⁵⁵ See *The Clean Energy Jobs and American Power Act of 2009*, S. 1733, 111th Cong. § 1 (2009) (http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2bd98e05-883b-442e-b749-bbd04cf07d59).

⁴⁵⁶ See *Massachusetts v. Env’tl Prot. Agency*, 127 S. Ct. 1438, 1447 (2007).

⁴⁵⁷ See EPA, *Mandatory Reporting of Greenhouse Gases - Final Rule*, 40 CFR Parts 86, 87, 89 et al., Oct. 30, 2009 (<http://edocket.access.gpo.gov/2009/pdf/E9-23315.pdf>).

⁴⁵⁸ See EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 40 CFR Parts 51, 52, 70, 71, Sept. 30, 2009 (<http://www.epa.gov/nsr/documents/GHGTailoringProposal.pdf>); see also EPA, *Fact Sheet – Proposed Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (<http://www.epa.gov/nsr/fs20090930action.html>).

contributing to that threat.⁴⁵⁹ The EPA’s Administrator, Lisa P. Jackson, noted the finding was based “on decades of sound, peer-reviewed, extensively evaluated scientific data . . . that came from around the world and from . . . US scientists.”⁴⁶⁰ Ms. Jackson added that the “long-overdue finding cements 2009’s place in history as the year when the United States Government began seriously addressing the challenge of greenhouse gas pollution and seizing the opportunity of clean energy reform.”⁴⁶¹

In further pursuit of the EPA’s regulatory powers under the CAA, and pursuant to the Supreme Court decision in *Massachusetts v. EPA* clarifying those powers, the Institute for Policy Integrity filed a petition for rulemaking with the EPA seeking to have the agency “propose and adopt regulations instituting a cap-and-trade system to control emissions of greenhouse gases from fuels used in motor vehicles, nonroad vehicles, and aircraft, and to begin this process immediately.”⁴⁶² The EPA is trying to do what the U.S. Congress is presently unable or unwilling: regulate GHG emissions and pollutants.

c. The European Union Emissions Trading Scheme

In August 2009, the EU suffered several setbacks with respect to incorporating the aviation industry into the existing ETS. One setback involved numerous discrepancies in the originally published list of administering Member States.⁴⁶³ For example, Delta Airlines and Northwest Airlines were listed separately but the two operators merged in October 2008. Due to industry and Member State objections about the original list’s inaccuracies and the need for an accurate list, because aviation is being incorporated into the EU ETS on a state-by-state basis, the European Commission (EC) published a revised list on August 22, 2009. The revisions include the addition of numerous carriers; the original list included 2,753 operators while the revised list includes 2,939 operators.⁴⁶⁴ On January 3, 2010, the EU announced its publication of a provisional updated list of carriers subject to the ETS and that a full updated list would be published in February 2010.⁴⁶⁵

Another setback related to Eurocontrol’s methodology to achieve the 2004-06 historical emissions figure for the aviation industry, which the Aviation Directive required the EC to determine by August 2, 2009.⁴⁶⁶ Operators objected to the methodology Eurocontrol was using

⁴⁵⁹ See *EPA: Greenhouse Gases Threaten Public Health and the Environment*, EPA Press Release, Dec. 7, 2009.

⁴⁶⁰ See *Administrator Lisa P. Jackson Remarks on the Endangerment Finding on Greenhouse Gases*, EPA, Dec. 7, 2009.

⁴⁶¹ *Id.*

⁴⁶² See *Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels*, Institute for Policy Integrity, N.Y.U. School of Law, July 29, 2009

(http://www.eenews.net/public/25/11954/features/documents/2009/07/29/document_gw_01.pdf).

⁴⁶³ See Commission of the European Communities, *Commission Notice Pursuant to Article 18a(3)(a) of Directive 2003/87/EC -- Preliminary List of Aircraft Operators and their Administering Member States*, Feb. 11, 2009.

⁴⁶⁴ See *Commission Regulation (EC) No 748/2009*, Aug. 5, 2009

(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:219:0001:0094:EN:PDF>).

⁴⁶⁵ See Alcock, C., *New EU Aviation Emissions Trading Scheme List Released*, AIN, Jan. 3, 2010.

⁴⁶⁶ See European Parliament and Council, *Directive 2008/101/EC*, Ch. II, Art. 3(b), 3(c), Nov. 19, 2008 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0101:EN:NOT>); see also *Commission Decision 2009/339/EC of 16 April 2009 Amending Decision 2007/589/EC As Regards the Inclusion of Monitoring*

because the historical emissions figure, which was being calculated with Pagoda (the EU's prototype environmental cockpit) figures, combined with actual fuel data submitted by operators, failed to include CO² emissions from running auxiliary power units (APUs) on the ground between on-blocks and off-blocks, a figure that the operators estimated to be about 1-2% of an operator's total emissions. Thus, historical emissions were underreported and future fuel data reports that would require inclusion of APU fuel consumption would be erroneously high relative to the historical baseline. The new historical figure is expected to be formally announced in mid-2010.⁴⁶⁷

An additional setback experienced by the EU involves the August 31, 2009, deadline by which each operator was initially required to submit to its administering Member State its Monitoring Plan, outlining the methodology that would be used by each operator to accurately and reliably monitor and report emissions and payload data.⁴⁶⁸ As a result of the inaccurate list of administering Member States and the imperfect methodology used in determining the historical emissions figure, the U.K., which is responsible for the majority of carriers being incorporated into the EU ETS, postponed the first critical deadline for incorporating aviation into the EU ETS: the U.K. permitted its operators to skip the August 31, 2009, deadline for submitting their Monitoring Plans and to submit their Monitoring Plans by November 12, 2009, and their Benchmarking Plans by December 31, 2009. Several other EU Member States also postponed their deadlines, including Germany (new October 20, 2009, deadline), Italy (new September 30, 2009, deadline), Greece (new September 30, 2009, deadline), and Sweden (new October 15, 2009, deadline).⁴⁶⁹ It is unknown whether any of the new deadlines have been met or whether a penalty will be imposed for strict non-compliance with the new deadlines.

The EU experienced yet another setback when, on September 23, 2009, the European Court of First Instance annulled the EC's decisions to reject GHG emissions plans submitted by the Polish and Estonian governments in 2006. The EC rejected the plans, asserting that they were not compatible with the Directive and reducing the total sum of emissions allowances to three-quarters of the amount that Poland proposed and half of the amount that Estonia proposed. The court found that the EC had exceeded its powers and that Member States have the right to determine allocation allowances among different economic operators. This decision creates doubt about the EU's ability to manage and control its ETS. On December 11, 2009, the EC issued subsequent decisions rejecting the emissions plans submitted by Poland and Estonia. The EC's Environment Commissioner, Stavros Dimas, stated that the "new decisions [took] into account the court rulings" but that the total allowances sought to be allocated by the two Member States to their operators remained excessive.

On December 16, 2009, the Air Transport Association commenced litigation in the United Kingdom seeking to block the EU's inclusion of the international aviation industry into its ETS.

and Reporting Guidelines for Emissions and Tonne-Kilometre Data From Aviation Activities, Apr. 16, 2009 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:103:0010:0029:EN:PDF>).

⁴⁶⁷ See *EC to Postpone Aviation Emissions Cap Announcement Until 2010*, ATW, Oct. 1, 2009 (<http://www.atwonline.com/news/story.html?storyID=18053>).

⁴⁶⁸ See *Directive 2008/101/EC*, Ch. II, Art. 3(c).

⁴⁶⁹ See, e.g., *Carbon Confusion*, Flight Int'l, Aug. 18-24, 2009; see also Buyck, C., *The EU's Environmental Maze*, ATW, Oct. 2009.

Joined by American Airlines, Continental Airlines and United Airlines, the lawsuit represents the first legal challenge to the application of the EU ETS to international air carriers and alleges that: (1) the Aviation Directive interferes with the principle of international law concerning the exclusive sovereignty of each state over the airspace above its territory; (2) it violates Articles 1, 11, 12, 15, 24 and 44 of the Chicago Convention; and (3) it violates both the Open Skies Agreement between the U.S. and the EU, and the Kyoto Protocol. Although ATA members have complied with the Aviation Directive (under protest), time is of the essence in resolving the claims because Member States were required to implement the Aviation Directive by February 1, 2010.

Despite the setbacks, the EU is pressing forward to ensure compliance with the EU's Directive. For example, in April 2009, the EC issued Decision 2009/339/EC which identifies the operator for the purposes of the EU ETS as the airline whose ICAO designator is used for the flight.⁴⁷⁰ Further, in mid-2009, the EC specifically defined the exception to the complex monitoring and reporting rules under the EU ETS for the business aviation community (*i.e.*, operators emitting less than an annual threshold of 10,000 tons of CO₂, or operators with less than 243 flights every three months). Under the agreement, small emitters were required to send only their reporting plans to their respective supervising national authorities by the August 31, 2009, deadline, which would have signaled that the small emitters opted for the simplified procedure. However, this agreement would be subject to any new deadlines imposed by individual administering Member States. Further, it is not clear how the EC's failure to release the historical emissions figure impacts this agreement.

In October 2009, the 27 EU Member States agreed to a proposal to cut aviation's GHG emissions by 10% of 2005 levels by 2020. However, the EU expressed its preference that an agreement be reached at Copenhagen to include the aviation industry and that the "parties ... commit to work through ICAO to enable an agreement that does not lead to competitive distortions or carbon leakage [the increase of carbon emission in one area due to the reduction of carbon emissions in another area], that is agreed in 2010 and approved by 2011."⁴⁷¹ Lastly, in December 2009, Iceland, Liechtenstein and Norway, which are not Member States of the EU but are brought together with the EU through the Agreement on the European Economic Area, agreed to incorporate the Aviation Directive into their national laws.

d. Global Efforts to Control Climate Change: The Copenhagen Accord

Nations of the world, industry leaders, nongovernmental agencies and individuals continue to tackle the issue of climate change and to attempt to reduce man-made (anthropogenic) emissions, as demonstrated at the United Nations Climate Change Conference held in December 2009 in Copenhagen, Denmark (Copenhagen Conference). The Intergovernmental Panel on Climate Change (IPCC) recently updated its data and found that the aviation industry accounted for 4.9% of man-made climate impacts in 2005, substantially more than the 3% figure it last released and more than double the 2% figure often cited by the aviation industry.⁴⁷²

⁴⁷⁰ See *Commission Decision 2009/339/EC* of April 16, 2009.

⁴⁷¹ Aviation & Env. News Serv., *The EU Set Climate Targets Ahead of Copenhagen*, Oct. 23, 2009.

⁴⁷² See *Aviation Now Contributes 4.9% of Climate Change*, Manchester Metro Univ., May 28, 2009 (<http://www.mmu.ac.uk/news/news-items/news-detail.php?id=1066>).

Many nations are attempting to control GHG emissions, but it remains unclear whether aviation's contribution can be sufficiently reduced, or even capped, on a world-wide basis. Although the International Civil Aviation Organization (ICAO), the entity charged under the Kyoto Protocol with the responsibility to regulate international aircraft emissions, recently announced its proposal to reduce GHGs, the aviation industry also announced its own proposal. All of the different proposals came together at Copenhagen, where the original intent of the participants was to establish a successor agreement to the Kyoto Protocol. However, when world leaders, including U.S. President Obama, met in November 2009 at the Asian Pacific Economic Cooperation Forum, it was agreed that expectations for Copenhagen would be reduced to a "politically-binding" agreement, not a fully ironed-out, legally-binding agreement, which the leaders hoped they could achieve during a subsequent summit.

World leaders then met at the Copenhagen Conference and attempted to negotiate a successor agreement to the Kyoto Protocol. The result of these negotiations was the "Copenhagen Accord" (Accord) achieved by the US, China, India, Brazil and South Africa. The Accord, a 12-paragraph document, is not a legally-binding agreement to reduce GHG emissions. Rather, the Accord is a statement of intention that merely commits individual nations to act on their own to address climate change and provides a "goal of limiting the global temperature rise to 2 degrees Celsius above pre-industrial levels by 2050."⁴⁷³

Many nations, individuals and environmental groups have criticized the Accord because it failed to include not only mid-term or long term GHG reduction targets for both industrialized and developing nations, but it also failed to set a goal for achieving a legally-binding successor agreement to the Kyoto Protocol sometime in 2010. Although few of the 193 attending nations favored the Accord, nearly all of the attending nations agreed to "take note"⁴⁷⁴ of the Accord.

The Accord also included a "system for monitoring and reporting progress toward . . . national pollution reduction goals," representing an enormous compromise between the U.S. (which wanted full transparency) and China (which wanted no monitoring and reporting oversight).⁴⁷⁵ Another key aspect of the Accord was the commitment by industrialized nations to provide \$100 billion to assist developing countries "adapt to the impacts of climate change" and to shift to sources of energy that emit fewer GHGs.⁴⁷⁶

The extremely contentious nature of the Copenhagen negotiations and the weakness of the Accord have cast doubt among many as to whether the current United Nations Framework Convention on Climate Change (UNFCCC) system for addressing global climate change will actually achieve a successor agreement to the Kyoto Protocol. At this point, there exists no legally binding successor agreement and no consensus to achieve such an agreement in 2010.

⁴⁷³ See, e.g., Broder, J., *Many Goals Remain Unmet in 5 Nations' Climate Deal*, N.Y. Times, Dec. 19, 2009.

⁴⁷⁴ The phrase "take note" has been variably explained as "the lowest level of recognition, equivalent to diplomatic disdain," *Copenhagen's Lesson in Limits*, WSJ, Dec. 20, 2009, and "shorthand for acceptance." Revkin, A. and Broder, J., *A Grudging Accord in Climate Talks*, N.Y. Times, Dec. 20, 2009 (quoting Robert C. Orr, the United Nations Assistant Secretary General for Policy and Planning).

⁴⁷⁵ Broder, J., *Many Goals Remain Unmet in 5 Nations' Climate Deal*.

⁴⁷⁶ *Id.*

The next UNFCCC Climate Change Conference is scheduled to be held in Mexico City, Mexico, in November 2010. Currently, the EU has the only legally-binding GHG emissions reduction system.

e. Aviation Industry Response

i. IATA and ICAO Emissions Proposals

On October 10, 2009, Giovanni Bisignani, Director General and CEO of IATA, reiterated the industry's proposal at the ICAO meeting on climate change in Montreal. The industry plan seeks to improve fuel efficiency by an average of 1.5% by 2020, carbon neutral growth by 2020, and a 50% reduction in carbon emissions by 2050 compared with 2005 levels. Prior to the release of IATA's "industry" proposal, the Aviation Global Deal Group (AGD), comprised of international airlines, aviation industry-related companies and The Climate Group, announced its proposal earlier this year. The AGD proposal supported the equal treatment of all airlines and set forth three different "scenarios relative to 2005." One scenario called for carbon neutral growth by 2020 (so that 2020 emissions would be equal to 2005 emissions even with growth in the industry). The other two scenarios called for a 5% absolute reduction in emissions by 2020 and a 20% absolute reduction in emissions by 2020. AGD's long-term target sought to reduce emissions between 50-80% by 2050 based on 2005 levels.

During a high level meeting on October 9, 2009, ICAO's Group on International Aviation and Climate Change (GIACC) agreed on a set of emissions goals similar to those set forth in IATA's proposal. Perhaps the greatest highlight of the GIACC proposal is the ICAO endorsement to set industry targets at an international level, i.e., using a global sectoral approach. While ICAO's proposal is stricter than IATA's – calling for a 2% annual improvement in fuel efficiency and an "aspirational goal" of 2% annual improvement from 2021 through 2050 – ICAO's proposal fails to include a carbon neutral goal.

ii. Development of Aviation Biofuels and Alternative Fuels

In keeping with their perseverance to reduce costs through advancements in technology, airlines and aircraft manufacturers have remained diligent in their quest to develop and utilize biofuels and alternative fuels.

The Sustainable Fuel Users Group is an industry working group comprised of Air France, Air New Zealand, ANA, Cargolux, Gulf Air, Japan Airlines, KLM, SAS, Virgin Atlantic Airways, recently augmented by Alaska Airlines, British Airways, Cathay Pacific, TUIfly, and Virgin Blue. Boeing and Honeywell are associate members. The Group was founded to help accelerate the production of sustainable biofuels and use by commercial aviation. In addition to research projects using algae and *jatropha curcus*, the Group expects to launch a sustainability assessment of halophytes, a class of plant that thrives in a saltwater habitat.

The use of biofuels could dramatically change the industry's reliance on kerosene and reduce the industry's emissions. Air New Zealand announced astonishing results for its recent biofuel test flight: up to 1.4 tons of fuel and 4.5 tons of CO² can be saved on a 12-hour long haul flight

powered by a 50:50 blend of the biofuel jatropha and traditional jet A1 fuel. Air New Zealand further reported that the biofuel offered performance improvements over jet A1 in that it has a higher net heat of combustion. However, doubt exists as to whether jatropha-based fuel could replace kerosene, particularly after the global energy company BP recently abandoned a project to produce biofuel from jatropha based on studies that suggest that the crop would have to be grown in better agricultural conditions than originally thought to yield enough biofuel for production.

On November 23, 2009, KLM Royal Dutch Airlines successfully operated the first biofuel flight with passengers on board utilizing a 50:50 fuel blend with camelina.

On October 5, 2009, Qatar Airways made its first passenger flight with a natural gas fuel blend. The Rolls Royce Trent 556-equipped Airbus A340-600 aircraft flew from London-Gatwick to Doha in the State of Qatar using a 50:50 blend of synthetic gas-to-liquid kerosene (GTL) and conventional oil-based kerosene. The blended fuel burned with nearly zero sulphur dioxide emissions and far lower particulate emissions than traditional kerosene. In the summer of 2009, GTL and other synthetic fuels were certified for use in commercial aviation and can now be blended up to 50% with standard petroleum based fuel. However, because natural gas is a fossil fuel, questions remain about GTL's GHGs.⁴⁷⁷

Eight U.S. carriers have agreed to buy up to 1.5 million gallons of synthetic fuel annually for their ground service equipment at LAX. The airlines include Alaska Airlines, American Airlines, Continental Airlines, Delta Airlines, United Airlines, Southwest Airlines, UPS and US Airways. The fuel will be used to power ground and cargo handling equipment.

iii. Operations and Air Traffic Management

Many operators and governments are making significant strides in improvements to their operations and flight management to reduce fuel consumption. Minor changes, such as reducing weight by removing magazines from seatbacks to reducing ground time with engines running and improvements in ATM to permit more direct point-to-point flights, are the low-hanging fruit that can substantially reduce fuel consumption without waiting for great technological advances.

Given the world leaders' inability to agree on a legally-binding agreement at Copenhagen, the EU's setbacks, and the U.S. Legislature's inability to agree on climate change legislation, the issue remains a political quagmire without a glimpse of resolution.

f. Tenth Circuit De-Icing Opinion

In *Crandall v. City and County of Denver*,⁴⁷⁸ two former employees of United Airlines sued for injunctive relief against the City and County of Denver under the Resource Conservation and Recovery Act of 1976.⁴⁷⁹ The Resource Conservation and Recovery Act is a comprehensive statute designed to minimize the present and future threat to human health and the environment

⁴⁷⁷ See Airline Weekly, JetGreen, Environment, Conservations & Fuel, Issue No. 258, Oct. 19, 2009.

⁴⁷⁸ 2010 WL 230918 (10th Cir., Feb. 8, 2010).

⁴⁷⁹ 42 U.S.C. § 6902, *et. seq.*

caused by hazardous waste. The Act provides a private right of action to enforce its provisions, but requires a plaintiff who commences suit to show that the person or entity they are suing is contributing to or has contributed to the handling of hazardous waste which may present an imminent and substantial endangerment to health or the environment.

The plaintiffs argued that aircraft de-icing fluid, which can produce hydrogen-sulfide gas when it decomposes, endangered human health at Concourse B of the Denver International Airport. At the time the case was decided by the district court, the City of Denver no longer practiced full airplane de-icing and had taken steps to clean up contamination from the de-icing fluid. The plaintiffs sought injunctive relief to prevent the City from reinstating the practice in the future.⁴⁸⁰

The district court denied plaintiffs relief, on the grounds that: (1) the City of Denver no longer permits full-plane de-icing at the gates; (2) the plaintiffs did not discharge the burden of proof to show that the de-icing fluid presents an imminent and substantial endangerment to health, as required by the Resource Conservation and Recovery Act of 1976; and (3) the Resource Conservation and Recovery Act governs only the fluid which flows in storm water into Concourse B of the Denver airport; accordingly, the fluid that degrades outside Concourse B was governed by the Clean Water Act.⁴⁸¹

On appeal, the Tenth Circuit held that plaintiffs failed to demonstrate that aircraft de-icing fluid at the airport might present an imminent and substantial endangerment to health, and based on this holding, declined to reach the question of whether the Resource Conservation and Recovery Act or the Clean Water Act governed the decomposition of the fluid outside of Concourse B. In so holding, the Court of Appeals reasoned that to meet their burden of proof with respect to proving whether the hazardous waste handler presents an imminent and substantial endangerment to health, the plaintiffs must show that danger to health is not merely possible, but must threaten to occur immediately.⁴⁸² The Court held that even though harm might not occur for a long time, there is no endangerment unless the present or imminent situation can be shown to present a risk of later harm.⁴⁸³

The Court reasoned that the evidence showed that aircraft de-icing fluid can injure human health if “(1) sufficient quantities of the fluid (2) degrade into sufficient quantities of hydrogen-sulfide gas, which (3) enter into an area where humans are present.”⁴⁸⁴ However, at the time of trial, there was no detectable hydrogen sulfide gas in Concourse B and no prospect of there being such gas; the gas could be a problem only if full-plane de-icing were to be renewed at the Concourse gates and the measures instituted by Denver were then to prove ineffective in protecting employees and passengers from the gas. Thus, the Court held, there was neither imminent harm nor imminent endangerment which would justify the issuance of an injunction to the plaintiffs.⁴⁸⁵

⁴⁸⁰ *Crandall v. City and County of Denver*, at *1-2.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at *5, citing *Meghrig v. K.F.C. Western*, 516 U.S. 479, 485 (1996).

⁴⁸³ *Crandall v. City of Denver* at *7, citing *Attorney General of Oklahoma v. Tyson Foods*, 565 F.3d 769, 777 (10th Cir. 2009).

⁴⁸⁴ *Crandall v. City and County of Denver* at *8.

⁴⁸⁵ *Id.* at *9.

Notably, the Court rejected plaintiffs' argument that they were entitled to relief because Denver had ceased full-plane de-icing at the gates only as a result of the litigation, and it was free to renew the practice and cause harm to the health of its employees and the environment. The Court of Appeals upheld the district court's decision that such a change in Denver's policy would not satisfy the requirement of "imminent harm" under the Act.

IX.

Preemption of Tourist Taxes under U.S. Airline Deregulation Act

The 2009 Liability Reporter discussed *Sanchez v. Aerovias De Mexico, S.A. De C.V., dba Aeromexico*⁴⁸⁶ and *Sanchez v. Mexicana de Aviacion S.A. de C.V., dba Mexicana Airlines*,⁴⁸⁷ where a California resident with citizenship in both the United States and Mexico filed federal class-action lawsuits against two Mexican carriers. The plaintiff sought to recover Mexican tourist taxes collected by the carriers from all passengers who traveled between California and Mexico during the last ten years and who paid the tax, but were actually exempt from the tax because of their status as Mexican citizens.

The district court granted the airlines' motions for summary judgment, accepting their argument that the Airline Deregulation Act (ADA) preempted plaintiff's claims. The court concluded that the airlines' activities in collecting the taxes were governed by the ADA as part of the management of "rates, routes and services." Plaintiff filed an appeal with the Court of Appeals for the Ninth Circuit.

The Ninth Circuit Court of Appeals in San Francisco rendered a decision on January 5, 2010, affirming the district court's ruling.⁴⁸⁸ The Court of Appeals upheld the lower court's decision that the plaintiff's claims, which were based upon alleged improper collection of a tourism tax, were preempted by the ADA.

The essential issue presented to the Court of Appeals was whether the ADA preempted all of the plaintiff's claims. It is well established that all claims relating to airline "prices, routes, or services" are governed by the ADA and are therefore federally preempted. The issue on appeal was whether the ADA applied to this plaintiff's claims in the context of this case.

The plaintiff argued that the ADA did not apply to her claims on two grounds: (1) the collection of the tourism tax was not governed by the ADA because it was not related to the "price" of Ms. Sanchez's passenger ticket, but that the ticket price and the tax were separate; and (2) the language used by Aeromexico on its website constituted a contractual obligation that the airline voluntarily assumed to collect only those taxes that passengers were legally required to pay.

The Court of Appeals dealt summarily with the issue of whether the ADA applied, holding that the collection of the tax was obviously related to the price of the passenger ticket. The court held

⁴⁸⁶ No. CV 07-7280 (C.D. Cal. Mar. 25, 2008).

⁴⁸⁷ No. CV 07-7196 (C.D. Cal. Mar. 25, 2008).

⁴⁸⁸ *Sanchez v. Aerovias De Mexico, S.A. De C.V.*, --- F.3d ---, No. 08-55588, 2010 WL 10981 (9th Cir. Jan. 5, 2010).

that: “[W]e see no need to dwell on whether Sanchez’s claims relate to the air carriers ‘price’. The ticket price included the tourism tax and other fees and surcharges.” Since the court found that the collection of the tax “related to price,” the court held that the ADA preempted Ms. Sanchez’s claims unless Aeromexico had voluntarily agreed to collect the tax only from those passengers who were obligated to pay it.

The Court of Appeals recognized that even in cases otherwise governed by the ADA, claims would not be preempted if the airline breached an obligation to the passenger which it had voluntarily assumed by contract. Turning to the language of the Aeromexico website, the court held that the language did not amount to a voluntarily agreement by the airline to collect the tax only from those from whom it was due.

The *Aeromexico* case was a companion to a virtually identical lawsuit brought by Ms. Sanchez against Mexicana. The Court of Appeals also upheld the dismissal of the lawsuit against Mexicana.⁴⁸⁹ Since Ms. Sanchez’s claims against Mexicana were held to be time-barred, the Court of Appeals did not reach the contractual issues in that case. However, the district court’s dismissal of the case against Mexicana concluded that the language of the Mexicana website was not sufficient to constitute a contractual undertaking to screen passengers to determine if they were exempt from the tax.

A third case involving a different plaintiff against Delta Airlines was filed and dismissed by another district court following the dismissal of the *Aeromexico* and *Mexicana* cases.⁴⁹⁰ The district court judge who dismissed the case against Delta referred to the language on the Mexicana website, concluding that it did not constitute a contractual undertaking by the airline to screen passengers.

On February 16, 2010, the Ninth Circuit denied the plaintiff’s petition for a rehearing *en banc*, effectively bringing the matter to a conclusion.

This decision is significant because it reinforces the broad preemptive effect of the ADA in all cases which relate to airline “prices, routes, and services.” It is consistent with decisions in other jurisdictions which have held that various claims relating to the collection of taxes are preempted. The Ninth Circuit Court of Appeals has historically been regarded as having a somewhat more restrictive view of the preemptive effect of the ADA.

X.

Domestic Aviation Litigation

A number of cases brought against airlines under domestic law are worthy of consideration.

⁴⁸⁹ *Sanchez v. Compania Mexicana de Aviacion S.A.*, No. 08-55553, 2010 WL 55518 (9th Cir. Jan. 5, 2010).

⁴⁹⁰ *McMullen v. Delta Air Lines, Inc.*, No. 08-1523, 2008 WL 4449587 (N.D. Cal. Sept. 30, 2008), *aff’d*, No. 08-17435, 2010 WL 55526 (9th Cir. Jan. 5, 2010).

a. United States

A Texas state Court of Appeals overruled a lower court's decision to require the former Chief Executive Officer of Continental Airlines Inc., Larry Kellner, to give a deposition in a lawsuit over a December 2008 crash that injured dozens of passengers. The Court based its decision on the finding that Mr. Kellner did not have unique or superior knowledge related to the accident.⁴⁹¹

The Continental flight in question veered off the runway at the Denver International Airport and caught fire. Destined for Houston, the flight had approximately 115 people on board, and 38 were hospitalized with injuries after the crash. Although no passengers were killed in the crash, the plaintiffs claimed that Continental and the pilots could have done more to maintain passenger safety. Plaintiffs sought Mr. Kellner's deposition on the grounds that after the accident, he made statements to the effect that Continental would take measures to ensure such an accident never happened again. Plaintiffs stated that they needed to depose Mr. Kellner in order to ascertain exactly what he had done to back up this assertion.

The Court of Appeals, noting the high standard required for deposing corporate executives, held that Mr. Kellner had demonstrated that he did not have unique or superior knowledge regarding what occurred before and during the accident or the cause of the accident. The Court noted that Mr. Kellner had presented another Continental employee who was the airline's representative relative to the incident. The plaintiffs had not said whether they had taken the other employee's deposition or that they were unable to elicit the information they sought from him. For these reasons, the Court of Appeals overruled the trial court's determination that Mr. Kellner should be deposed.

b. Israel

In *Chim Nir v. David Ben Yitach*,⁴⁹² the claimant was a passenger in a helicopter who was injured in a crash on May 24, 2002, and brought an action for personal injury against the helicopter operator. The operator, Chim Nir (and its insurers), filed a motion to strike out the claim on the grounds that the claim was time-barred, since the relevant two-year limitation period under the Israeli Carriage by Air Law 1980 had already elapsed.

The claimant argued that the Carriage by Air Law should not apply because: (i) he had no contractual relationship with the carrier and had not purchased a flight ticket "for reward," and (ii) there was no carriage by air from one place to another as required by the Law (the claimant was a photographer filming an advertisement at the time of the accident).

The Tel Aviv district court found in favor of the carrier and dismissed the claim. While the claimant had not himself entered into a contract for reward with the operator, the aircraft had been leased (by a third party) and consideration paid. There was no doubt that "reward for flight" had occurred. Secondly, the definition under the Carriage by Air Law as to "domestic flight" did not require that the place of departure and the place of destination be in different

⁴⁹¹ Shannon Henson, *Court Won't Compel Continental CEO Crash Testimony*, Law 360.

⁴⁹² CM 7913/08 in CF 1444/06, November 4, 2009.

locations: the helicopter flight met the definition under the Law, which merely calls for both places to be “within the territory of Israel.”

c. Germany

Defense lawyers in aviation cargo cases often argue that the plaintiff has to prove the contents of packages handed over to the carrier for carriage by air. In the past, the view of the German Federal Court of Justice (Bundesgerichtshof) and the German lower courts has been that the production by plaintiff of both a commercial invoice and a corresponding packing list is necessary to establish the contents of cargo, and that if the defendant still challenges the adequacy of the plaintiff’s evidence, the defendant then bears the burden of disproving the plaintiff’s claim concerning the contents of the shipment.

However, in a judgment handed down on April 2, 2009,⁴⁹³ the German Federal Court of Justice has held that it is not necessary for the plaintiff to provide both a packing list and a corresponding commercial invoice in order to evidence the contents of goods handed over to a carrier, and that only one of these document types will be required as sufficient evidence to the satisfaction of the court, unless the carrier is able to raise substantiated objections.

d. Norway

The Norwegian Supreme Court recently delivered judgment in a matter on the production of accounts of routes and other strategic documents by Norwegian Air Shuttle ASA (“Norwegian”) during the litigation of an action filed by Norwegian against SAS AB and SAS Scandinavian Airlines Norge AS, claiming damages under the so-called *Amadeus*⁴⁹⁴ case, which concerned illegal use of Norwegian’s ticketing data, and the *BTI* case, which concerned illegal use of information received in a document from an employee of the travel agency Bennet BTI Nordic AS.⁴⁹⁵

The Appeal Committee of the Supreme Court weighed Norwegian’s interests of secrecy against the need for disclosure of the information in order to decide on the question of damages, and ordered production of the accounts of routes, but not the strategic documents.

e. The Netherlands

*Barin v. State of The Netherlands*⁴⁹⁶ addressed the question of whether an environmental ticket tax levied as of July 1, 2008, in respect of airline passengers departing from Dutch airports was in conformity with Article 15 of the Chicago Convention. The final sentence of Article 15 provides that no fees, dues or other charges shall be imposed by any contracting state in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting state or persons or property thereon. The Supreme Court considered that the aim of the tax was not to provide for a certain return, but to make visible in the price of airline tickets

⁴⁹³ No. I ZR 61/06.

⁴⁹⁴ Rt. 2007.1841.

⁴⁹⁵ Judgment by the District Court of Asker and Bærum against SAS Norge AS and the employee concerned.

⁴⁹⁶ Case No. LJN BI3450, Supreme Court, July 10, 2009.

(part of) the costs of air traffic to society in order to increase the awareness of the public of the costs (which are not clearly expressed in the price of airline tickets) that are associated with environmental damage resulting from aviation; at the same time, the Court noted that the price of tickets is rather low compared to other modes of transport due to the fact that consumption taxes like duties or VAT are not levied on international carriage by air.

The Court ruled that the term “charges” in Article 15 of the Chicago Convention refers only to charges providing for a certain return and, as the ticket tax did not provide for a certain return, it was not subject to the prohibition on charges in Article 15. The tax was therefore not illegal. In reaching this decision, the Supreme Court also considered judgments of the Belgian Council of State and the English High Court which raised comparable issues on levies.

f. India

In *Lufthansa German Airlines v. IFC Despatch (I) Pvt. Ltd.*,⁴⁹⁷ the high court of Delhi considered section 18 of the India Limitation Act, which extends the commencement of the limitation period for recovery of a debt where the person owing the debt “acknowledges” that debt.

The defendant in this case, IFC Despatch (“IFC”), was a courier company which had engaged the plaintiff, Lufthansa German Airlines (“Lufthansa”), to provide air carriage for its business since 1993. Lufthansa claimed that during this period, the payment of bills was often irregular, and that on occasion, checks received from IFC were dishonored. Lufthansa notified IFC of the fact that the defendant’s checks were being dishonored, and eventually, on November 22, 1995, gave the defendant an ultimatum that if the outstanding invoices were not paid by December 1, 1995, Lufthansa would stop accepting shipments from IFC and commence proceedings. In response, the defendant provided Lufthansa with three checks, all of which were dishonored as well. Lufthansa then sued to recover the amount owed to it by IFC.

The defendant disputed the claim on the grounds that the claim was time barred, since the obligations were incurred in the financial years of 1996, 1997 and 1998. The defendant also brought a counterclaim for money owed to it for Lufthansa’s non-deduction of baggage allowances to which IFC claimed it was entitled under the relevant contract.

In supporting its claim that the action was not time barred, the plaintiff relied on section 18 of the Limitation Act, as interpreted by the case of *Bank of Baroda v. S.K. Aggarwal*,⁴⁹⁸ in which it was held that an acknowledgment of liability provided a new starting point to the limitation period, so long as that acknowledgment was made before the expiration of the limitation period.⁴⁹⁹ Accordingly, Lufthansa argued that because balance sheets showing the defendant’s overdue amounts had been signed and filed by the defendant with the Registrar of Companies (ROC), the defendant had acknowledged the debts and that therefore, the period began to run again from the dates those statements were filed.

⁴⁹⁷ No. 1214/2005 (July 6, 2009).

⁴⁹⁸ 1995 (35) DRJ 687.

⁴⁹⁹ A decision based on section 18 of the Limitation Act.

IFC accepted that filing the documents with the ROC was an acknowledgment and would restart the limitation, but submitted that it was the dates of signing the balance sheets, rather than the dates on which they were filed, which counted as the acknowledgement, and because each balance sheet was signed a year in advance, Lufthansa's action remained time barred. The court agreed with the defendant's argument, holding that:

“the contention of the plaintiff that the balance sheet was filed in the year 2002 and thus the acknowledgement period starts from that date, has no force as it is only the date of signing of balance sheet that is to be seen in order to acknowledge the liability.”⁵⁰⁰

The result of this holding was that because the lawsuit had not been filed by Lufthansa within three years of the date of the acknowledgment of liability, its case was time barred.

In *Delhi Express Travels Pvt Ltd v. International Air Transport Association and Ors*,⁵⁰¹ the high court of Delhi had to decide whether an arbitration clause contained in an agreement between the plaintiff and the first defendant would be enforced, where there were several other defendants to the action who were not parties to the agreement.

The plaintiff was carrying on business as a travel agent and was an accredited travel agent of the first defendant, the International Air Transport Association (IATA), which distributes tickets to agents and collects payments from agents in return, on a fortnightly basis, for the benefit of airlines. The second defendant was the Travel Agents Federation of India, an association of travel agents to which the plaintiff belonged. That body arranged insurance for its members, which was purchased from the third defendant, the United India Insurance Co Ltd.

The plaintiff and IATA had several financial disputes, with both parties claiming the other owed them unpaid accounts. Accordingly, the plaintiff commenced this action to seek recovery of money that it was allegedly owed by IATA, and to obtain an order requiring IATA to file a claim against the insurance company for the amounts owed to IATA by the plaintiff.

Before filing a defense in the lawsuit, IATA applied to have the matter arbitrated under section 8 of the Arbitration Act of 1996, in accordance with IATA's Travel Agent's Handbook and the Passenger Sales Agency Agreement between IATA and the plaintiff, which provided for review by the Travel Agency Commissioner⁵⁰² and, if the agent remained aggrieved, for arbitration.

The plaintiff argued that the dispute over competing claims of sums of money did not involve a decision which the Travel Agency Commissioner was entitled to review, and that in any event, the Commissioner had given no decision which could be submitted to arbitration. The court rejected the argument that the Commissioner was only authorized to address disputes over termination of Passenger Sales Agency Agreements, and held that decisions by IATA concerning sums of money due to it were reviewable by the Commissioner as matters within the meaning of

⁵⁰⁰ *Lufthansa German Airlines v. IFC Despatch (I) Pvt. Ltd.*, No. 1214/2005 (July 6, 2009) at 19.

⁵⁰¹ 13094/2007 in CS(OS) 1044/2007 (May 28, 2009).

⁵⁰² The Travel Agency Commissioner is appointed jointly by IATA and the United Federation of Travel Agents Association to provide impartial dispute resolution.

the phrase “decisions affecting agents.” The court further held that the arbitration could not be avoided simply because the step of obtaining a decision of the Commissioner had not been taken.

The plaintiff had further contended that arbitration was not possible in circumstances where the dispute also concerned the second and third defendants, who were not parties to the Passenger Sales Agency Agreement. In support of this argument, the plaintiff relied on *Sukanya Holdings Pvt Ltd v. Jayesh H Pandya*,⁵⁰³ contending that an application under section 8 is not maintainable when there are additional parties to the lawsuit who are not parties to the arbitration agreement. Against this argument, IATA had cited *W.P.I.L. v. NTPC Ltd.*,⁵⁰⁴ in which it was held that non-parties to an arbitration agreement which were nonetheless parties to the lawsuit were neither necessary nor proper parties to the adjudication of the dispute, the arbitration agreement will be enforced.

The court held that the second and third defendants were not necessary parties to the dispute between the first defendant and the plaintiff. No relief was claimed against the second defendant, which was only joined because it had arranged the insurance policy with the third defendant. Further, the court noted that the plaintiff’s primary case was that it owed no money to IATA, and if that were found to be correct, nothing would be payable by the third defendant to IATA under the insurance policy. Accordingly, the court found that the matter of whether the plaintiff owed the first defendant any money needed to be determined before any liability on the part of the third defendant could arise. Moreover, there was merit in the contention that the plaintiff could not compel IATA to make a claim under the policy for payment of any amount which the plaintiff might be found to owe to IATA. “Thus the presence of the defendants No 2&3 in the suit is not found to come in the way of allowing the application under Section 8 of the Arbitration Act.”⁵⁰⁵

The court ordered the dispute between the plaintiff and the first defendant to be referred to arbitration, and for the lawsuit as to the second and third defendants to be dismissed, on the grounds that there was no valid cause of action against them.

g. South Korea

On June 16, 2009, in *In Sook Jeong (and others) v. China Northern Airlines*,⁵⁰⁶ the High Court in Seoul delivered judgment in the last remaining passenger fatality claim arising from the crash of China Northern Airlines MD-82 off the bay of Dalian, Peoples Republic of China (PRC), on May 7, 2002. The judgment is noteworthy in two regards: first, in relation to the issue of jurisdiction, and secondly, the application by the Korean Court of PRC law on damages.

The aircraft, operated by a PRC carrier, was on a domestic flight from Beijing to Dalian when the accident occurred near Dalian. The Court conceded that the claim’s closest nexus was most obviously with the PRC. However, the deceased was a South Korean national and his widow

⁵⁰³ AIT 2003 SC 2252.

⁵⁰⁴ MANU/DE/0078/2009.

⁵⁰⁵ *Delhi Express Travels Pvt Ltd v. International Air Transport Association and Ors*, 13094/2007 in CS(OS) 1044/2007 (May 28, 2009) at 25.

⁵⁰⁶ Case 2006Na30787, Seoul High Court, June 16, 2009.

and dependants were ordinarily resident in Korea. These facts, coupled with public policy considerations (to include equality between the parties, fairness, efficiency of trial and efficacy of judgment) were sufficient for the Korean Court to find jurisdiction.

The Court then moved to find that the law of the PRC on damages should be applied. A marked feature of PRC law pertaining to the assessment of damages for death and/or personal injury is that damages are calculated not by reference to the pre-accident income level of the individual deceased, but by reference to the average income and expenditure levels of persons in the city where the claim is being tried. For example, in calculating damages payable in the event of death, PRC law provides that the amount recoverable is 20 times the average annual disposable income of a resident of the city where the claim is being tried. The actual earning capacity of the deceased is simply not considered. Secondly, under PRC law, the definition of “a dependent” is given a narrow construction. For example, the spouse of a deceased is not entitled to damages as a dependent if he or she is capable of being gainfully employed. Finally, under PRC law, interest on damage awards is not payable as a right.

Accordingly, in applying the PRC law on damages, the spouse of the decedent was denied damages on the basis that she was capable of being gainfully employed. Damages were awarded to the deceased’s three minor children. In assessing their entitlement, the Court applied the income/expenditure levels of a resident of Seoul in computing the award. Damages were therefore higher than would have been the case if the case had been heard before a court in the PRC, where income levels are generally much lower. The Court disregarded the application of the carrier’s liability limit in cases of domestic carriage under PRC law (CNY70,000 (approx. US\$10,250)). The Court held that to apply the limit would practically deny the claimants any meaningful damages on which they could sustain their livelihood while living in Korea and as such, to apply this limited liability would be contrary to public policy under Article 10 of the Private International Act.

h. Philippines

In *Kuwait Airways Corporation v. Philippine Airlines Inc.*,⁵⁰⁷ the Philippine Court of Appeals considered whether a prior agreement between Kuwait Airways and Philippine Airlines would have precedence over a subsequent agreement that was made between the Kuwait government and the Philippine government with respect to the airlines.

On October 21, 1981, Kuwait Airways and Philippine Airlines entered into a Commercial Agreement, annexed to which was a Joint Services Agreement. The Commercial Agreement covered a twice-weekly Kuwait Airways flight on the route Kuwait-Bangkok-Manila. The agreement stipulated that the Kuwait Airways flights were authorized to board passengers in Manila and deplane them in Kuwait, and vice versa, but could not pick up or drop off passengers in Bangkok (*i.e.*, no fifth freedom rights). The Joint Services Agreement allowed Philippine Airlines to book passengers on Kuwait Airways’ aircraft until Philippine Airlines commenced operations via Kuwait, and Kuwait Airlines was to share in the revenue from traffic between Manila and Kuwait.

⁵⁰⁷ (May 8, 2009) G.R. No. 156087.

After both these agreements were entered into, the Philippine government entered into a confidential memorandum of understanding (“CMU”) with the Kuwait government, which stated, among other things, that the operation of the Commercial Agreement would not be subject to any royalty payments. It is important to note that at the time the CMU was entered into, Philippine Airlines had become a private company, and was no longer controlled by the Philippine government.

On May 15, 1995, Kuwait Airways sent a letter to Philippine Airlines terminating the Commercial Agreement, despite a clause which provided that the Commercial Agreement could not be terminated before October 31, 1995. Since Kuwait Airways would not agree to continue to perform under the Commercial Agreement through October 31st, Philippine Airlines claimed damages in the form of royalty payments. Although Kuwait Airways argued that royalty payments were prevented by the terms of the CMU, Philippine Airlines was successful in the trial court, which held that the CMU could not divest the proprietary rights of Philippine Airlines under the Commercial Agreement.

Kuwait Airways appealed to the Court of Appeal, seeking clarification as to whether the CMU was superior to the Commercial Agreement. The Court of Appeals considered the power of a government to bind a corporation, noting that the mere signing of a document by a government was not enough of itself to bind an independent corporation. The Court further noted that if the Philippine government had intended the CMU immediately to terminate the Commercial Agreement, it could have enacted legislation to ensure that result, stating that:

“while we sympathize with the petitioner, who reasonably could rely on the commitment made to it by the Philippine government, we still have to respect the segregate identity of the government and that of a private corporation and give due meaning to that segregation, vital as it is to the very notion of democracy.”⁵⁰⁸

Accordingly, it was held that the Commercial Agreement prevailed over the CMU, and Kuwait Airways was bound to pay Philippine Airlines the royalties payable thereunder.

In *Commissioner Internal Revenue v. Philippine Airlines Inc.*,⁵⁰⁹ the Supreme Court of the Philippines affirmed the decision of the Court of Tax Appeals⁵¹⁰ that the exemption available to Philippines Airlines from paying all forms of tax other than corporate income tax was not contingent upon corporate income tax actually being paid.

Section 120 of the Philippine National Internal Revenue Code of 1997 provides that:

“There shall be collected upon every overseas dispatch message or conversation transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment service, a tax of 10% on the amount paid of such services.”

⁵⁰⁸ *Kuwait Airways Corporation v. Philippine Airlines Inc.*, G.R. No. 156087 at pg 16.

⁵⁰⁹ G.R. No. 180043 (July 14, 2009).

⁵¹⁰ August 9, 2007, in CTA EB No. 221.

For the period between January and December 2001, the Philippine Long Distance Telephone Company collected from Philippine Airlines a 10% tax on the amount the airline paid for overseas calls, and paid this tax to the Commissioner of Internal Revenue. On April 8, 2003, Philippine Airlines filed an administrative claim for a refund of the tax based on section 13 of Presidential Decree No. 1590, which granted Philippine Airlines an exemption from all taxes except either basic corporate income tax or franchise tax, whichever was lower.

Philippine Airlines brought a claim in the Court of Tax Appeals (CTA), arguing that because it had a loss in 2001, rather than a profit for that year, it was not required to pay any corporate income tax, and that the section still applied to allow it the benefit of exemption from paying any additional taxes. The CTA upheld this argument, and on June 14, 2006, ordered that the money be refunded. The Commissioner of Internal Revenue appealed to both the CTA First Division and then to the CTA *en banc*, but both appeals were dismissed.

The Commissioner then appealed to the Supreme Court, arguing that the phrase, “in lieu of all other taxes” in Presidential Decree No. 1590 meant that, for the exemption to apply, it would have been necessary for Philippine Airlines to have paid either franchise or corporate income tax. The Supreme Court rejected the submission, stating that: “The language used in Section 13 of the Presidential Decree No. 1590, granting respondent tax exemption, is clearly all-inclusive,” and dismissed the appeal.

XI.

Criminal Liability of Air Carriers

Continental Airlines faces ongoing criminal prosecution in France over the January 25, 2000, crash of a Concorde jet at Charles de Gaulle airport. Continental, two of its employees, and three French aviation officials are on trial for manslaughter.

Prosecutors base charges against Continental on the grounds that a Continental DC-10 dropped a metal piece onto the runway minutes before the Concorde took off. Prosecutors allege that the runway debris ripped the Concorde’s tire, sending pieces of rubber into its fuel tanks and starting a fire. Continental claims the fire broke out on the Concorde before the aircraft reached the runway debris.

A Continental mechanic is accused of violating guidelines by replacing the DC-10's wear strip with titanium instead of a softer metal usually called for, such as aluminium. France has issued an arrest warrant for him. The mechanic’s supervisor is also on trial for validating the strip's installation. Neither of them traveled to France to attend the trial's opening.

The prosecution also accuses French officials of underestimating trouble spots on the Concorde. While France's aviation authority concluded that the crash could not have been predicted, a judicial inquiry determined that the fuel tanks of the aircraft lacked sufficient protection from shock, and determined that officials had been aware of the problem since a series of incidents in 1979.

The French court declined to dismiss the case before trial based on defense counsel's challenge to the indictment, on the grounds that it failed to mention those facts in favor of Continental as required by French law. The prosecution is ongoing.⁵¹¹

Six former officials and employees of the now defunct airline Líneas Aéreas Privadas Argentinas ("LAPA") were acquitted recently in the trial resulting from the crash of one of LAPA's aircraft in 1999, in which 65 people died. Two former airline employees were convicted and sentenced, but will not go to jail.⁵¹²

One of LAPA's airplanes, a Boeing 737, heading for Córdoba, Spain, crashed against a fence in the Jorge Newbery Airport in Buenos Aires, Argentina, as it was about to take off on August 31, 1999. When it hit the ground, the airplane caught fire. Sixty passengers and three crew members died; two people who were driving in a car next to the airport died when they were hit by the aircraft as it spun off the runway. Investigation results showed that the LAPA crew tried to take off without selecting the flaps, despite an aural take-off configuration warning during the takeoff roll. Poor cockpit discipline while preparing for takeoff and during takeoff was also cited as a cause.

In Europe, two pilots performing a touch-and-go maneuver in Pristina, Kosovo, were recently found guilty of negligent interference with public transportation in a decision handed down by the Swiss Federal Criminal Court,⁵¹³ which had jurisdiction over the matter because the aircraft being flown by the two pilots was registered in Switzerland.

XII.

Employment Litigation

a. Germany

On November 18, 2009, the case of *Prigge, Fromm and Lambach v. Deutsche Lufthansa AG*⁵¹⁴ was referred by the German Federal Labour Court for a preliminary ruling by the ECJ. Article 2(5), Article 4(1) and/or Article 6(1), first sentence, of Council Employment Directive 2000/78/EC establish a general framework for equal treatment in employment and occupation. The issue for the ECJ's consideration is whether Directive 2000/78 and/or the general Community-law principle prohibiting discrimination on grounds of age are to be interpreted as precluding rules of national law (a German collective employment agreement) recognizing a working age limit of 60 for commercial airline pilots. Pursuant to Article 6 of the Directive, difference of treatment on grounds of age is not to constitute discrimination if within the context of the relevant national law they are objectively and reasonably justified by a "legitimate aim," and if the means of the same are appropriate and necessary.

⁵¹¹ Doland, Angela, "French Court Upholds Concorde Crash Trial," Associated Press, February 3, 2010.

⁵¹² The judges acquitted the former company chairman and the former deputy president, who were indicted for their responsibility in the fatal crash.

⁵¹³ SK-2008-25, June 8, 2009.

⁵¹⁴ European Court of Justice, Case C-447/09.

b. Great Britain

*British Airways v. Mak*⁵¹⁵ concerned 17 female BA cabin crew members of Chinese nationality who lived and were ordinarily based in Hong Kong. They sought to bring a claim against their employer in Great Britain in relation to a policy of termination of employment of female cabin crew at a certain age with a one-off payment but without pension rights. The cabin crew sought to have their claim heard in the British courts, applying relevant domestic discrimination legislation.

The relevant legislation in Great Britain, the Race Relations Act 1976 and the Employment Equality (Age) Regulations 2006, provides that its territorial jurisdiction covers people who work "wholly or partly" in Great Britain. In seeking to establish jurisdiction the cabin crew argued that as part of their duties they worked on flights between Hong Kong and Gatwick or Heathrow. While stopping over in England, they attended short work briefings and were sometimes on call during their hotel stays between flights. They also had to attend occasional training sessions in London.

The Employment Appeal Tribunal (EAT), supporting an earlier 2008 decision of a Pre Hearing Review Employment Tribunal, ruled that the cabin crew's connection with Great Britain was sufficient to enable them to bring race and age claims before the British employment tribunals. The case shows that a relatively small connection can still bring someone under the jurisdiction of a country's discrimination laws (and not just race and age discrimination).

c. Philippines

In *Philippine Airlines Inc v. Heirs of Bernardin Zamora*,⁵¹⁶ the Supreme Court of the Philippines, Second Special Division, affirmed the decision of the Philippines Court of Appeal, which on August 13, 2004, had ruled that Mr. Zamora had been unlawfully transferred and then terminated from his employment at Philippine Airlines.

Mr. Zamora was a cargo representative assigned to the International Cargo Operations – Import Operations Division (ICO-IOD) of Philippine Airlines. He alleged that some time in December 1993, his supervisor instructed him to alter some entries in a Handling Report to conceal the supervisor's smuggling and pilfering activities. When he refused to follow this order, Mr. Zamora was accused by his supervisor of being insubordinate and negligent towards customers and transferred to the Domestic Cargo Operations. Mr. Zamora refused to accept the transfer, and continued to report to his previous jobsite. In the meantime, Mr. Zamora reported his supervisor's misdemeanors to management and attended conferences regarding these allegations.

At some stage during the period of the conferences, Mr. Zamora ceased to receive paychecks from Philippine Airlines, allegedly because he had not reported to take up his new position and had consequently been marked absent at that location. On January 30, 1998, Mr. Zamora was

⁵¹⁵ The Employment Appeal Tribunal, January 20, 2010.

⁵¹⁶ Supreme Court of the Philippines (March 31, 2009), Special Second Division, G.R. No. 166996 and GR No. 164267.

terminated from his employment due to being absent from his new position without official leave, being insubordinate and negligent towards customers, and being disrespectful to authority.

On September 28, 1998, the labor arbiter dismissed Mr. Zamora's complaint that his transfer had been illegal for lack of merit, ruling that the transfer had only been temporary, and had been designed to diffuse the tension between Mr. Zamora and his supervisor. On July 26, 1999, the National Labor Relations Commission (NLRC) reversed this decision, declaring Mr. Zamora's transfer illegal, and ordering Philippine Airlines to return him to his former position.

Philippine Airlines failed to comply with this order, and requested that the National Labor Relations Commission revoke the order on the grounds that the ICO-IOD no longer existed and accordingly Mr. Zamora could not work there. The NLRC agreed, but ordered, in lieu of his reinstatement, that Mr. Zamora be given severance pay equal to one month's salary for every year of his service with Philippine Airlines.

Mr. Zamora then appealed to the Court of Appeal, claiming that the ICO-IOD had not been abolished, and on August 13, 2004, the Court of Appeal ordered Mr. Zamora's reinstatement. Philippine Airlines thereafter moved for reconsideration of the judgment, on the grounds that Mr. Zamora had been in prison for an unrelated crime of murder since October 2, 2000, whereupon the Court of Appeal amended its decision to provide that Mr. Zamora would receive severance pay in lieu of reinstatement.

Philippine Airlines appealed to the Supreme Court on the grounds that:

1. The decision of the NRLC never became final and executory as it was not properly served on Philippine Airlines, and accordingly the airline's motion for reconsideration was not untimely filed;
2. Mr. Zamora's transfer was legal;
3. Mr. Zamora's dismissal was legal; and
4. Philippine Airlines should not now be ordered to give Mr. Zamora severance pay in lieu of reinstatement, due to his incarceration.

The Supreme Court held that the decision of the NRLC had become final and executory. This decision was based on the fact that the document had been sent to the address for Philippine Airlines contained on the court record, and had been returned marked 'MOVED.' Because no change of address had been filed, the non-receipt of the order was due to the omission of Philippine Airlines. Accordingly, it was held that the NRLC decision had been properly served, and was therefore final and executory. This finding meant that the case could not be reopened.

In *Juinito A. Garcia and Alberto J. Dumago v. Philippine Airlines Inc.*,⁵¹⁷ the Supreme Court of the Philippines En Banc had to decide whether employee were entitled to wages for the period

⁵¹⁷ G.R. No 164856, 20 January 2009.

between their dismissal and reinstatement pursuant to an appeal, where the employees had not actually worked during that period because their employer was in receivership.

The circumstances of the case concerned the dismissal of two employees who were caught sniffing shabu while working. The employees filed a complaint for illegal dismissal before the labor arbiter which was successful, and Philippine Airlines was ordered to reinstate the employees. Philippine Airlines was by then in receivership, making it impossible to reinstate the employees, and accordingly the Court of Appeal overturned the decision which had ordered their reinstatement. The employees then brought an action claiming their wages for the period between the labor arbiter's decision and the appeal, during which they would have been reinstated if Philippine Airlines had not been in receivership.

The claim for wages during the period the reinstatement order was in force reached the Supreme Court, which reviewed diverging authorities on the issue. In *Air Philippines Corp. v. Zamora*⁵¹⁸ it had been held that:

“even if the order of reinstatement of the labor arbiter is reversed on appeal, it is obligatory on the part of the employer to reinstate and pay the wages of the dismissed employee during the period of appeal until reversal by the higher court.”

In contrast, the Court noted that, in the case of *Genuino v. National Labor Relations Commission*,⁵¹⁹ it had been held that the employee had been paid but was working during the period pending a successful appeal by his employer, and that he would be obliged to refund the money following the appeal.

The Supreme Court held that the social justice principles of labor law outweighed the doctrine of unjust enrichment, and that the views expressed in the former case should prevail. It would be unjust to require an employee to pay back money after losing his case on appeal because the employee would have spent the wages to make ends meet during the pendency of the appeal. As the Court stated: “It is a mirage of a stop-gap leading the employee to a risky cliff of insolvency.” Accordingly, the Court held that, even if the order of a labor arbiter is reversed on appeal, the employer must pay the wages of the dismissed employee during the period of appeal and until the decision is reversed.

However, after a labor arbiter's decision is reversed by a higher tribunal, the employee may be barred from collecting the accrued wages, if it is shown that the delay in enforcing the reinstatement pending appeal was without fault on the part of the employer. In this case, because Philippine Airlines was in receivership pursuant to a court order, and had no power to reinstate the employees, the Court found that the airline was not bound to pay the wages for the period between the order for reinstatement and the appeal.

⁵¹⁸ *Zamora* G.R. No 148247, August 7, 2006, 498 SCRA 59 at 72-73.

⁵¹⁹ G.R. Nos 142732-33, 4 December 2007, 539 SCRA 342.

XIII.

Surface Damage by Aircraft

a. Status of the Rome Convention

On May 2, 2009, the International Civil Aviation Organization adopted two treaties governing air carrier liability for damages to third parties caused by the operations of international flights. These treaties were developed to replace and modernize the Rome Convention, which was never widely adopted. The Convention on Compensation for Damage Caused by Aircraft to Third Parties in Case of Unlawful Interference (Unlawful Interference Compensation Convention) governs damage to third parties caused by unlawful interference with an international flight, which encompasses interference in the form of terrorist activity. The Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention) covers damage to third parties caused by the normal operation of an aircraft on an international flight.

i. The General Risks Convention

The stated purpose of the General Risks Convention is to ensure adequate compensation for third parties who suffer damage caused by an aircraft in flight.⁵²⁰ The General Risks Convention applies to damage to third parties that occurs within the borders of a State Party caused by an aircraft in flight on an international flight, other than damage caused as a result of an act of unlawful interference.⁵²¹ The General Risks Convention does not cover damage caused by government aircraft, which the treaty defines as aircraft used in military, customs, and police services.⁵²² The Convention also provides that a State Party may declare that the Convention's scheme of liability applies to its domestic flights.⁵²³

The Convention provides that the operator of an aircraft on an international flight will be liable for damages sustained by third parties based on the weight of the aircraft involved. Article 4 of the Convention sets forth different ranges of liability based on the weight of the aircraft, from 750,000 SDRs to 700,000,000 SDRs.

The Convention imposes liability on the operator of the aircraft for damage to property and environmental damage and allows for damages to be paid for death, bodily injury and mental injury.⁵²⁴ Damages due to mental injury are compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury, although the term "recognizable psychiatric illness" is not defined in the Convention.⁵²⁵ Notably, this is the first instance of an explicit legislative

⁵²⁰ *Convention on Compensation for Damage Caused by Aircraft to Third Parties*, Preamble.

⁵²¹ *Id.*, Article 2.4.

⁵²² *Id.*, Article 2.1.

⁵²³ *Id.*, Article 2.2.

⁵²⁴ *Id.*, Article 3.3.

⁵²⁵ *Id.*, Article 2.1.

provision in private air law that allows for compensation for mental injury caused from direct exposure to the likelihood of imminent death or bodily injury.⁵²⁶

There is an “exclusive remedy” provision which states that any action for compensation for damage to third parties brought against the operator can only be brought subject to the conditions in the Convention. This provision was inserted with the intention of preventing a claimant from invoking domestic law to try to circumvent the Convention scheme of liability.⁵²⁷

The General Risks Convention provides that it shall enter into force on the 60th day following the date of deposit of the 35th instrument of ratification.⁵²⁸

ii. The Unlawful Interference Convention

The Unlawful Interference Compensation Convention was adopted with the aim of harmonizing the rules governing compensation for the consequences of an event of unlawful interference with aircraft in flight and achieving an equitable balance of all interests should such an unfortunate incident occur.⁵²⁹

The Unlawful Interference Compensation Convention provides that aircraft operators shall be liable for damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight as a result of an act of unlawful interference.⁵³⁰

Like the General Risks Convention, the Unlawful Interference Compensation Convention provides that a State Party may opt to apply the Convention to domestic flights as well. The Unlawful Interference Compensation Convention does not apply to damage caused by State aircraft.⁵³¹

Article 4 of the Convention concerns the scope of the operator’s liability. The liability of the operator is based on the weight of the aircraft involved, and ranges from 750,000 SDRs to a maximum of 700,000,000 SDRs.

Chapter III of the Convention establishes the International Civil Aviation Compensation Fund (International Fund), an independent legal entity primarily established to pay compensation to persons suffering damage in the territory of a State Party. The Convention provides that the International Fund will be composed of a Conference of Parties (COP) which will in turn be composed of a Secretariat headed by a director. The International Fund also has the discretion to provide financial support where an operator from a State Party causes damage in a non-Party State, which would otherwise not be governed by the Convention.

⁵²⁶ Abeyratne, Ruwantissa, “*The ICAO Conventions on Liability for Third-Party Damage Caused by Aircraft*,” Air and Space Law 34, no. 6 (2009) 403-416, 406.

⁵²⁷ General Risks Convention, Article 12.

⁵²⁸ *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* (Unlawful Interference Compensation Convention), Preamble.

⁵²⁹ General Risks Convention, Article 23.

⁵³⁰ *Id.*, Article 2.1.

⁵³¹ *Id.*, Article 2.2, 2.4.

Where there is damage for which the operator is liable, it will pay up to the level of its cap under Article 4, and the International Fund will pay additional compensation beyond the level of the cap.⁵³² The COP will provide financial support to the operator when the total amount of damages exceeds the Article 4 limits up to the amount of 3,000,000,000 SDRs for each event.

The amounts contributed by the International Fund will be mandatory amounts collected in respect of each passenger and each ton of cargo departing on an international commercial flight from a State Party. The operator is required to collect the amounts and remit them to the International Fund. Where an operator fails to collect or remit contributions, the Director of the International Fund is empowered to take appropriate measures for recovery of the amount due.⁵³³

To the extent that the total amount of damages to a person exceeds the aggregate amount payable by both the operator and the International Fund, that person may claim additional compensation from the operator if the person proves that the operator or its employees have contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.⁵³⁴

Damages are recoverable under the Unlawful Interference Compensation Convention for death, personal injury, damage to property, and environmental loss. As is the case with the General Risks Convention, the Unlawful Interference Compensation Convention also allows for the recovery of damages for mental injury, provided that such mental injury is caused by a “recognizable psychiatric illness” resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.⁵³⁵

Damage occurring in any State Party is compensable, regardless of whether the operator is from a State Party. In certain instances the Convention has retained the flexibility to apply to such damages that occurs in a non-Party State, where an operator from a State Party causes damage in a non-Party State. In such a situation, an aggrieved party may seek damages from the International Civil Aviation Compensation Fund as discussed above.

The Convention further provides that any action for compensation for damage to a third party due to an act of unlawful interference can only be brought against the operator or the International Fund subject to the conditions and limits of liability in the Convention.⁵³⁶

Additionally, the Convention provides for various subrogation options. The International Fund can subrogate against the operator, and both the International Fund and the carrier can subrogate against the terrorist and any “other persons” (such as ground handlers, airports, and air traffic controllers) whose fault may have contributed to the damage.⁵³⁷

⁵³² Unlawful Interference Compensation Convention, Article 18.

⁵³³ *Id.*, Article 12.

⁵³⁴ *Id.*, Article 23.

⁵³⁵ *Id.*, Article 3.

⁵³⁶ Unlawful Compensation Convention, Article 29.

⁵³⁷ Gates, Sean and George Leloudas, “*From Rome to Montreal in 57 Years: Worth the Wait*,” *The Air and Space Lawyer*, Volume 22, Number 3, page 4, 2009.

The Convention provides that it will enter into force 180 days after the deposit of the thirty-fifth instrument of ratification on condition that the total number of passengers departing in the previous year from airports in all of the States that have ratified is at least 750,000,000, as will appear from declarations made by these States.⁵³⁸

Most commentators agree that these treaties present a significant improvement over the 1952 Rome Convention, which was drafted before terrorism was a significant concern to the international airline industry. Although many believe that these treaties constitute a significant step towards the establishment of a uniform legal standard governing the international liability of air carriers for damages to third parties on the ground, some critics are not convinced that this area of law should be governed by treaty.⁵³⁹

At the ICAO conference, IATA and its member airlines contended that the conventions were not necessary because the ICAO member states have dealt with major aviation incidents under domestic laws, and cited the success of the U.S. legislative response to 9/11. IATA also noted the availability of insurance to cover such risks.⁵⁴⁰

The manufacturers of aircraft also objected to the conventions on the grounds that they provide aircraft manufacturers no protection while capping the carriers' liability, even though both the manufacturer and the carrier often face liability for such incidents.⁵⁴¹

Further, an obvious issue arises from the financial elements of the Unlawful Interference Compensation Convention, in the sense that it makes available only 3,750,000,000 SDRs for compensation following a terrorist attack absent misconduct of the airline itself or of other service providers. These assets, however, would be unlikely to cover compensation for another attack of the magnitude of 9/11.⁵⁴²

An important question is whether these Conventions will receive the requisite number of state ratifications to come into force. The General Risks Convention only requires 35 state ratifications, although from discussions during and after the Conference it appears unlikely that the European Union states will ratify the General Risks Convention. With respect to the Unlawful Interference Compensation Convention, although it also requires 35 state ratifications to come into force, the treaty imposes the additional requirement that there must be 750 million traveling passengers departing from the ratifying states. At the Conference, the representatives of France and Germany indicated that it was unlikely that they would ratify the Unlawful Interference Compensation Convention. The United States has made no statement either way, but as long as the United States provides coverage against terrorism, the airlines will likely lobby against ratification.⁵⁴³

⁵³⁸ *Id.*, Article 40.

⁵³⁹ "From Rome to Montreal in 57 Years: Worth the Wait," *supra*, page 4.

⁵⁴⁰ Abeyratne, Ruwantissa, "The ICAO Conventions on Liability for Third-Party Damage Caused by Aircraft," *Air and Space Law* 34, no. 6 (2009) 403-416, 406.

⁵⁴¹ *Id.* at 410.

⁵⁴² "From Rome to Montreal in 57 Years: Worth the Wait," *supra*, page 5.

⁵⁴³ "From Rome to Montreal in 57 Years: Worth the Wait," *supra*, page 6.

b. Domestic Law on Surface Damage

In Australia, the federal Damage by Aircraft Act of 1999 establishes a regime of strict and unlimited liability for surface damage caused by aircraft. In *ACQ Pty Limited v. Cook*,⁵⁴⁴ a crop-dusting aircraft owned by ACQ Pty Limited and operated by Aircare Moree Pty Limited was spraying cotton north of Moree in New South Wales when it collided with a power line conductor, which caused the power line to drop to a height of 1.5 meters above a muddy field. NorthPower, which was responsible for the conductor, dispatched two employees, Mr. Cook (the plaintiff) and Mr. Buddee, to attend to the problem. Arriving at the accident site, the plaintiff and Mr. Buddee agreed that Mr. Buddee would drive to a links site seven kilometers away and isolate the conductor, and that the plaintiff would wait until the conductor was isolated before commencing his assessment. However, the plaintiff approached the conductor before it was isolated, stumbling in the muddy conditions, and fell within 60mm of the conductor, which caused an electric arc between the conductor and the plaintiff, badly injuring the plaintiff.

The plaintiff brought proceedings in the district court of New South Wales against ACQ and Aircare for damages pursuant to sections 10 and 11⁵⁴⁵ of the Damage by Aircraft Act. In 2007, the district court found that notwithstanding the contributory negligence of the plaintiff and the negligence of NorthPower, because the liability of ACQ and Aircare was created by the Damage by Aircraft Act and not in tort, the defense of contributory negligence was not available to ACQ and Aircare against the plaintiff, and they had no right of contribution against NorthPower.

In 2008, the Court of Appeal affirmed the lower court's finding that contributory negligence was not available as a defense to an action brought under the Damage by Aircraft Act. The Court of Appeal also held that the lower court was correct to assess the damages in this case under the state Civil Liability Act 2002 of New South Wales, the provisions of which were incorporated into federal law by the Judiciary Act.⁵⁴⁶

⁵⁴⁴ (2009) HCA 28 (August 5, 2009); discussed in the *IATA Liability Reporter* 2008, pgs 35-36, and the *IATA Liability Reporter* 2009, pgs 74-75.

⁵⁴⁵ Section 10(1) provides that: "This section applies if a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:

- (a) an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened; or
- (b) an impact with part of an aircraft that was damaged or destroyed while in flight; or
- (c) an impact with a person, animal or thing that dropped or fell from an aircraft in flight; or
- (d) something that is a result of an impact of a kind mentioned in paragraph (a), (b) or (c)."

Section 10(2) provides that if section 10 applies, both the operator of the aircraft immediately before the impact happened, and the owner of the aircraft immediately before the impact happened, are jointly and severally liable in respect of the injury, loss, damage or destruction.

Section 11 provides that: "Damages in respect of an injury, loss, damage or destruction of the kind to which section 10 applies are recoverable in an action in a court of competent jurisdiction in Australian territory against all or any of the persons who are jointly and severally liable under that section in respect of the injury, loss, damage or destruction without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants."

⁵⁴⁶ This supports the contention that damages assessed under the Montreal Convention will also be assessed under state legislation designed to limit some heads of damages. See *IATA Liability Reporter* 2008, pg 23.

An appeal by NorthPower against the finding that it was also liable in negligence was allowed, and as a consequence it was unnecessary for the Court to decide if contribution was available as between those liable under the Act and the defendant liable at common law.

In 2009, ACQ and Aircare (the appellants) were granted special leave to appeal that decision to the High Court of Australia. The appellants submitted that the legislation did not provide a universal comprehensive scheme to award damages to every person who sustained an injury that was in some way connected to the impact of an aircraft, part of an aircraft, or something which fell from an aircraft while it was in flight. They contended that the words of the Damage by Aircraft Act created a geographical limitation. Further, they submitted that the plaintiff's own negligence was so high as to break the chain of causation. Finally, the appellants argued that the Court of Appeal's approach to the construction of the Damage by Aircraft Act would lead to an "absurd, extraordinary, capricious, irrational and obscure" result.

However, in a unanimous decision, the High Court rejected the appellants' submissions. The Court found that the plaintiff's injuries were caused by the dangerous position of the conductor, and its dangerous position was the result of an impact with the aircraft; accordingly, there was "no linguistic strain" in characterizing what happened to the plaintiff as a personal injury caused by "something" that is "a" result of an impact between the aircraft in flight and the power line conductor, so as to support the application of the Damage by Aircraft Act.

The High Court also noted that the Court of Appeal was correct to conclude that section 10(1)(d) of the Damage by Aircraft Act does extend liability from "direct consequences" to "indirect or consequential results," without elaborating what these concepts mean.

The High Court's reasoning may soon only have historic relevance, because in the Australian government's discussion paper on the *Review of Carriers' Liability and Insurance* which was released in May 2009,⁵⁴⁷ the government decided that, in view of the outcome of this case, "a range of refinements are necessary to fine-tune the operation of the [Damage by Aircraft] Act".⁵⁴⁸ First, the government has foreshadowed that it will give consideration to amending the Damage by Aircraft Act so as to:

1. recognize contributory negligence and allow compensation payments to be reduced when victims are partly responsible for their losses;
2. provide a "right of contribution," allowing compensation payments to be appropriately apportioned between those who have contributed to the cause of an air crash;
3. clarify that it provides the exclusive remedy available to third party victims, so that they are prevented from mounting legal proceedings based on alternative areas of law;
4. disallow claims for compensation for mental injury suffered by air crash witnesses;

⁵⁴⁷ Available at:

http://www.infrastructure.gov.au/aviation/international/files/Liability_Insurance_Discussion_Paper.pdf.

⁵⁴⁸ *Id.* at pg 28.

5. clarify whether consequential damages are available under the Act, noting the overall objectives of the carriers' liability and compulsory insurance legislation; and
6. ensure that damages are assessed in accordance with state government civil liability regimes.

XIV.

Airports

a. Responsibility for Damage to Aircraft on the Ground

In a Swiss judgment handed down on December 14, 2009, in *A. v. Unique*,⁵⁴⁹ the airport operator, Flughafen Zürich AG, was found not liable for damage caused to an aircraft owned by A. which collided with a luggage cart on the taxiway at Zurich Airport. The cause of the incident was unclear. The luggage cart had either been blown onto the taxiway by the jetblast coming from another aircraft leaving its parking stand, or it had rolled there independently due to unsecured brakes. The collision damaged the aircraft's lower left wing and the left aileron.

Unique was sued in its capacity as the operator of the Zurich airport. According to federal Swiss regulations, the airport operator is responsible for safety and proper conduct on the airport site. Unique argued that it was not in breach of any duty and that it was not responsible for third party actions which may have caused the luggage cart to move.

The Swiss Federal Administrative Court upheld Unique's arguments and found that, in order to be liable for the damage, the airport operator must have a duty to act and its failure to act must have resulted in the damage in question, *i.e.*, the damage would not have occurred if the airport operator had acted diligently. In this instance, it was held that Unique was not in breach of its duties, since all of the aircraft involved in the incident were given correct instructions by ground control. In addition, the Court noted that the airport operator is not responsible for the actions of third parties supporting the airport operator in its tasks and who are not employees of the airport operator, provided that they are supervised diligently.

In *ZS-SVN Syndicate v. 43 Air School (Pty) Ltd and Another*,⁵⁵⁰ the owner of a Cessna 340 aircraft which crashed upon landing at the airport in Port Alfred, South Africa, at the end of a recreational flight from East London on March 14, 2003, filed a lawsuit in the Eastern Cape provincial division court of South Africa to hold the airport operator liable for the damages to his aircraft. Neither the pilot nor his passenger was injured in the crash.

On the date of the incident, there were three cleared but unpaved grass runways at the Port Alfred airport, running parallel to each other, only one of which was operative. Construction had begun in 2002 on the two other runways; however, one of those had been abandoned as too close to the existing runway, and work on the second new runway was incomplete.

⁵⁴⁹ Case ref. A-318/2009.

⁵⁵⁰ 2007 (6) SA 389 (E).

On final approach, the pilot initially lined up with the new, but unopened, runway. After speaking to the tower, he moved the aircraft onto the abandoned runway where the aircraft ran into a mound of sand and ground. The aircraft then veered to the right and ended up on its belly.

At issue was the negligence of the airport operator in failing to provide the pilot with sufficient information about the state of the airport's runways, and the negligence of the pilot in his failure to identify the correct runway to land on.

The court first noted that South African laws regulating the operation of airports have recognized that expertise is required for such operations. It was further noted that, in considering the standard of care to be applied where expertise is called for, the courts of South Africa have held⁵⁵¹ that a person is not expected to bring the highest possible degree of professional skill, but rather is bound to employ reasonable skill and care.

The court then found, in light of the ruling in *Kruger v. Coetzee*,⁵⁵² that the defendant airport operator should have reasonably foreseen that any cleared area of land which might look like a runway from the air carried the risk of being mistaken for a runway, and was negligent in failing to mark all of the strips so as to make it sufficiently clear which ones were operative runways and which were not. The airport operator was further deemed negligent in failing to initiate an Aeronautical Information Notice ("NOTAM") containing specific information about the airport's runways, but was found to have acted in a reasonable manner upon realizing the pilot's confusion.

The court also found that the pilot was negligent in failing to give sufficient consideration to the potential dangers in landing on an unmarked runway, or to adequately confirm the location and markings of the operative runway before attempting to land his aircraft.

Accordingly, the court held that, taking into account the duties and respective deviation of the two parties from the standard of reasonableness required of them, it was just and equitable to apportion fault equally between the airport operator and the pilot.

b. Ground Handling Services

The construction of the termination clause in a Ground Handling Agreement between Tiger Airways and a company providing ground handling services at Singapore Changi Airport was considered by the High Court of the Republic of Singapore in *Tiger Airways Pte Ltd v. Swissport Singapore Pte Ltd*.⁵⁵³ The ground handling company, Swissport Singapore, held a license issued by the Civil Aviation Authority of Singapore to provide ground handling services at Changi Airport, and it had entered into an agreement with Tiger Airways to provide ground handling services until March 25, 2011. The Ground Handling Agreement contained a termination clause which provided that, if the necessary license or other authorization held by either party was revoked, canceled or suspended, the other party was entitled to terminate the Ground Handling Agreement on 24 hours' notice.

⁵⁵¹ *Van Wyk v. Lewis*, 1924 AD 438 at 444.

⁵⁵² 1966 (2) SA 428 (A).

⁵⁵³ (2009) SGHC 178.

As a result of the global economic downturn, Swissport Singapore decided to exit the Singapore market and gave notice to the Civil Aviation Authority of Singapore, which accepted the notice and terminated Swissport Singapore's license. Swissport Singapore then gave notice to Tiger Airways of its cancellation of the Ground Handling Agreement pursuant to the termination clause.

Swissport Singapore contended that the termination clause permitted it to terminate the Agreement if its license was in fact canceled, regardless of the reasons for cancellation, and that the operation of the termination clause was not limited to an involuntary cancellation by the Civil Aviation Authority of Singapore. In support of that argument, Swissport Singapore contended that both parties were new participants in the market, and that the termination clause was intended to operate as an exit clause that would allow either party to terminate the Ground Handling Agreement if that party's operations turned out to be unprofitable.

The Court rejected that argument and held that the clause, on its proper construction and in light of the other provisions of the Ground Handling Agreement, operated only to permit termination in the case of an involuntary cancellation of either party's license. The Court stated that any other construction would have been inconsistent with the business purpose of the Ground Handling Agreement, which expressly provided for a five-year term subject only to certain specific situations in which it could be terminated. Such termination provisions would have been largely unnecessary if either party were able to terminate by obtaining a voluntary cancellation of its license or authorization.

Accordingly, the Court held that the termination clause did not entitle Swissport Singapore to terminate the Ground Handling Agreement by procuring a voluntary termination of its license, and that it was liable to pay damages to the airline for breach of the contract.

c. NTSB Reporting Requirements

On January 7, 2010, the U.S. National Transportation and Safety Board ("NTSB") published a final rule that clarifies and amends its regulations related to notification and its reporting requirements regarding aircraft accidents or incidents. Specifically, the NTSB has codified additional incidents which operators are obligated to report. They are: (1) internal turbine engine component failure resulting in debris coming out of the engine through a path other than the exhaust (uncontained engine failures); (2) release of a propeller blade; (3) complete loss of information from 50% of an aircraft's cockpit displays; (4) certain Airborne Collision Avoidance System ("ACAS") resolution advisories; (5) damage to helicopter tail or main rotor blades requiring major repair; and (6) any other incident where a carrier lands on a taxiway, incorrect runway, or other area not designed as a runway, or some other runway incursion requiring immediate corrective action.

d. Judicial Review of Airport Charges

In *Air New Zealand and others v. Wellington International Airport*,⁵⁵⁴ the New Zealand Court of Appeal held that judicial review was not available to challenge prices set by Wellington International Airport, an airport authority created under the Airport Authorities Act of 1986, which provided in section 4(3) that: “every airport operated or managed by an airport authority must be operated or managed as a commercial undertaking.”

Under the Airport Authorities Act, Wellington International Airport had the power to set the landing charges charged to the airlines so long as the airlines were consulted before the decision was made.

Following consultation, Wellington International Airport set the landing charges applicable to Air New Zealand for the period from July 1, 2007, to June 30, 2012. Air New Zealand and its associated airlines objected to the charges, arguing that because Wellington International Airport was required to be run as a “commercial undertaking” under the Airport Authorities Act, the airport authority was therefore under an obligation to set prices at levels which would occur in a competitive market. Air New Zealand further contended that the prices had been set in an irrational way which did not take into account relevant considerations.

The Court of Appeal reviewed the grounds on which judicial review was sought and noted that in many previous cases of this kind,⁵⁵⁵ the Court had refused to intervene in pricing decisions, observing that:

“In our view, Air New Zealand’s pleadings will require the Court to embark on a wide-ranging analysis of WIAL’s pricing decisions and all that lies beneath them... It is difficult to see how a court could conduct such an enquiry effectively within the constraints that have traditionally been applied to judicial review claims.”⁵⁵⁶

The Court held that the grounds pleaded were not available. The Court said of the claim for review based on the fact that the pricing had not been set in a way which would occur in a competitive market:

“Parliament has decided that price control will be undertaken through the mechanisms in Part 4 of the Commerce Act rather than through the courts. That is a feature of the light-handed regulatory regime. There are good reasons for it...undertaking an assessment of whether or not an entity such as WIAL is charging monopoly prices will be time consuming, difficult

⁵⁵⁴ (2009) NZCA 259 (29 June 2009).

⁵⁵⁵ Including *Air New Zealand v. Nelson Airport*, HC NEL CIV 2007-442-584; *Auckland Electric Power Board v. Electricity Corporation of New Zealand Ltd.* (1994), 1 NZLR 551; and *Mercury Energy Ltd v. ECNZ* (1994), 2 NZLR 385 (PC).

⁵⁵⁶ *Air New Zealand and others v. Wellington International Airport* (2009), NZCA 259 (June 29, 2009) at 75.

and contentious, requiring a thorough examination of all the elements that go to make up prices.”⁵⁵⁷

XV.

Travel Agency Commissions

*Garuda v. ANVR et al.*⁵⁵⁸ addressed the question of whether, under the terms of the IATA Passenger Sales Agency Agreement (IATA Resolution 824), a commission payable to agents is also due on Passenger Service Charges (“PSC”) made to airlines by airport operators for services rendered by the airport operators to departing or transferring passengers. As of 1997, the PSC was listed as a separate cost category on airline tickets.

In interpreting the relevant phrase “on the amount of fares applicable to the air transportation” contained in Article 9.4.1. of the related IATA Resolution 814, the Appeal Court in Amsterdam noted that the nature of the PSC is compensation agreed between the airport operator and the airline, and as such it qualifies as business costs of the airline comparable to landing charges and parking fees (which are not separately listed on tickets). It is not deemed to be a tax levied under public law. Moreover, the text of Article 9.4.2. supports the notion that the fare which is subject to commission consists of the total cost price due from a passenger for travel from A to B, with the exception of items specifically mentioned in that Article.

According to the Appeal Court, the compensation paid for use of airport services cannot be considered to be part of those exceptions. Finally, prior to 1997, the PSC was not specifically listed on the ticket but was considered part of the airline’s costs, and as such, was included in the ticket price. The Appeal Court concluded that the nature of the PSC, the text and meaning of the relevant provisions, and industry practice up until 1997 all support the notion that the PSC is included in the “fare” and that, therefore, a commission is also due on the amount of these charges.

There have been a number of other decisions relating to the above question during 2009.

The Portuguese Association of Travel and Tourism Agencies (“PATA”) sought compensation on behalf of its associates from Iberia on the grounds that, since January 1, 1994, Iberia had been separating the PSC from the passenger fare in its ticket prices, and had excluded the value of the PSC when calculating the commission to be paid to PATA’s member travel agencies which are duly registered with IATA under the passenger sales agreement.

The Supreme Court of Justice of Portugal⁵⁵⁹ confirmed the decisions of the first instance court and that of the Lisbon Court of Appeal, both of which had ruled in PATA’s favor. Thus, it was expressly recognized by the Supreme Court of Justice that travel agencies registered with IATA were entitled to claim compensation from Iberia for breach of the passenger sales agreement (and

⁵⁵⁷ *Air New Zealand and others v. Wellington International Airport* (2009), NZCA 259 (June 29, 2009) at 67.

⁵⁵⁸ Appeal Court Amsterdam, March 31, 2009, Case Ref. LJN BJ0740.

⁵⁵⁹ Supreme Court of Justice Decision of May 14, 2009.

IATA resolutions 814 and 824). However, the Supreme Court of Justice also ruled that PATA was not duly empowered by its associates to claim such compensation. Thus, the interested travel agencies must commence new and separate proceedings against Iberia.

PATA has commenced civil proceedings against British Airways on the same grounds.

Although the first instance court ruled in PATA's favor, the Lisbon Court of Appeal ruled against it.⁵⁶⁰ The Lisbon Court of Appeal considered that the PSC is due from the passenger and not from the airline, and determined that the aforesaid charge is not included in the definition of "passenger fare" because it is, in fact, a fiscal tax. Thus, the Court decided that the PSC should not be included in the travel agencies' commissions. It was further held that PATA was not duly empowered by its associates to claim compensation against BA for breach of the passenger sales agreement.

An appeal has been lodged with the Supreme Court of Justice against the decision of the Lisbon Court of Appeal. In judging such appeal, the Supreme Court of Justice will probably bear in mind its previous decision of May 14, 2009, in relation to Iberia. If the Supreme Court of Justice reaches a decision contradictory to its previous judgment, a further appeal to a collective panel composed of all the judges of the Supreme Court of Justice civil division is possible in order to settle the dispute and establish a precedent.

PATA instituted civil proceedings against Lufthansa on the same issue.

The Supreme Court of Justice revoked the decisions of the first instance court and the Lisbon Court of Appeal (which had both ruled in PATA's favor) on the grounds that PATA was not duly empowered by its associates to claim compensation for breach of the passenger sales agreement.⁵⁶¹ In its decision, the Supreme Court of Justice only ruled on the preliminary issue of the representation powers granted to PATA by its associates, and did not decide whether travel agencies are entitled to claim compensation from Lufthansa for breach of the passenger sales agreement.

In *Commissioner of Income Tax New Delhi v. Singapore Airlines Ltd and ors*,⁵⁶² the high court of Delhi had to consider whether commissions earned on airfares by travel agents would fall within the definition of section 194H of the Income Tax Act of 1961, which defines a commission as a "payment received directly or indirectly by a person acting on behalf of another person,"⁵⁶³ whether paid by cash, check, draft, or any other mode.⁵⁶⁴ The court further was to consider whether tickets issued to travel agents at concessional prices would bring the transactions within the ambit of section 194H.

The cases were initially heard by the Commissioner of Income Tax Appeals, which held that the commissions being paid to travel agents were "commissions" within the meaning of the Income Tax

⁵⁶⁰ Decision of the Lisbon Court of Appeal, May 19, 2009.

⁵⁶¹ Supreme Court of Justice Decision of October 27, 2009.

⁵⁶² ITA No 306/2005 (April 13, 2009).

⁵⁶³ *Commissioner of Income Tax New Delhi v. Singapore Airlines Ltd and ors*, ITA No 306/2005 (April 13, 2009), at 18.

⁵⁶⁴ *Id.*, at 19.

Act, and accordingly found the airlines to be in default of their tax obligations. The airlines appealed to the Tribunal, which reversed this decision, holding that because the airline only receives the net fare (and thus does not know how much the consumer has paid for the ticket and how much has been collected in commissions), commissions could not be said to have been paid by the airline.

The court began by analyzing section 194H, noting that it would only apply if:

- There was a principle/agent relationship between the airline and the agent;
- The payments made were “income by way of commission”;
- The commission was paid for services rendered;
- The commission was received by the travel agent either directly or indirectly; and
- The income was paid by cash, check, draft or any other mode.

The court found that there was “no doubt” that there was an agency agreement between the airline and the travel agent.⁵⁶⁵ The court then examined whether the payments made were “income by way of commission,” noting that “it is not disputed that any amount which the travel agent would receive over and above the net fare would be assessed in the hands of the travel agent as profit, gain or income.”⁵⁶⁶ Thus, the court held that the payments did come within the definition of commission, noting that although the airlines do not know how much commission is received at the time of sale, they are made aware of this information via a billing analysis after the ticket has been sold. Accordingly, the court stated that:

“it should be remembered that s194H casts an obligation on the assessee to deduct tax at source. Once an obligation is cast it is for the assessee-airline to retrieve the necessary information from the travel agent.”⁵⁶⁷

This categorization of the commissions meant that “the assessee-airlines were thus obliged to deduct tax at source at the rate prescribed.”⁵⁶⁸ Accordingly, the matter was remitted to the lower court for a determination of the quantum of tax owing.

The court further held that the reduced price tickets offered to travel agents did not come within the definition of commissions, noting that “the difference in price is a discount, that is, a deduction on the full value of the ticket,”⁵⁶⁹ rather than a commission.

⁵⁶⁵ *Id.*, at 23.

⁵⁶⁶ *Id.*, at 23.

⁵⁶⁷ *Id.*, at 26.

⁵⁶⁸ *Id.*, at 28.

⁵⁶⁹ *Id.*, at 29.3.

**CONVENTION FOR THE UNIFICATION OF CERTAIN RULES
FOR INTERNATIONAL CARRIAGE BY AIR
DONE AT MONTREAL ON 28 MAY 1999**

Entry into force:	The Convention entered into force on 4 November 2003*.
Status:	94 Parties.

State	Date of signature	Date of deposit of instrument of ratification, acceptance (A), approval (AA) or accession (a)	Date of entry into force
Albania		20/10/04 (a)	19/12/04
Argentina (22)		16/12/09 (a)	14/02/10
Australia		25/11/08 (a)	24/01/09
Austria (10)		29/04/04 (a)	28/06/04
Bahamas	28/05/99		
Bahrain		02/02/01(a)	04/11/03
Bangladesh	28/05/99		
Barbados		02/01/02 (a)	04/11/03
Belgium (1)(15)	28/05/99	29/04/04	28/06/04
Belize	28/05/99	24/08/99	04/11/03
Benin	28/05/99	30/03/04	29/05/04
Bolivia	28/05/99		
Bosnia and Herzegovina		09/03/07 (a)	08/05/07
Botswana		28/03/01 (a)	04/11/03
Brazil	03/08/99	19/05/06	18/07/06
Bulgaria		10/11/03 (a)	09/01/04
Burkina Faso	28/05/99		
Cambodia	28/05/99		
Cameroon	27/09/01	05/09/03	04/11/03
Canada (6)	01/10/01	19/11/02	04/11/03
Cape Verde		23/08/04 (a)	22/10/04
Central African Republic	25/09/01		
Chile (21)	28/05/99	19/03/09	19/05/09
China (18)	28/05/99	01/06/05	31/07/05
Colombia	15/12/99	28/03/03	04/11/03
Cook Islands		22/05/07 (a)	21/07/07
Costa Rica	20/12/99		
Côte d'Ivoire	28/05/99		
Croatia		23/01/08 (a)	23/03/08
Cuba	28/05/99	14/10/05	13/12/05
Cyprus		20/11/02 (a)	04/11/03
Czech Republic (3)	28/05/99	16/11/00	04/11/03
Denmark (1)(11)	28/05/99	29/04/04	28/06/04
Dominican Republic	28/05/99	21/09/07	20/11/07
Ecuador		27/06/06 (a)	26/08/06
Egypt		24/02/05 (A)	25/04/05
El Salvador		07/11/07 (a)	06/01/08
Estonia	04/02/02	10/04/03	04/11/03
Finland (4)	09/12/99	29/04/04	28/06/04
France (1)	28/05/99	29/04/04	28/06/04
Gabon	28/05/99		
Gambia		10/03/04	09/05/04
Germany (1)(12)	28/05/99	29/04/04	28/06/04
Ghana	28/05/99		
Greece (1)	28/05/99	22/07/02	04/11/03
Hungary		08/11/04 (a)	07/01/05
Iceland	28/05/99	17/06/04	16/08/04
India		01/05/09 (a)	30/06/09

State	Date of signature	Date of deposit of instrument of ratification, acceptance (A), approval (AA) or accession (a)	Date of entry into force
Ireland (1)	16/08/00	29/04/04	28/06/04
Italy (1)	28/05/99	29/04/04	28/06/04
Jamaica	28/05/99	07/07/09	05/09/09
Japan (8)		20/06/00 (A)	04/11/03
Jordan	05/10/00	12/04/02	04/11/03
Kenya	28/05/99	07/01/02	04/11/03
Kuwait	28/05/99	11/06/02	04/11/03
Latvia		17/12/04 (A)	15/02/05
Lebanon		15/03/05 (a)	14/05/05
Lithuania (17)	28/05/99	30/11/04	29/01/05
Luxembourg (2)	29/02/00	29/04/04	28/06/04
Madagascar	28/05/99	28/12/06	26/02/07
Malaysia (20)		31/12/07 (a)	29/02/08
Maldives		31/10/05 (a)	30/12/05
Mali		16/01/08 (a)	16/03/08
Malta	28/05/99	05/05/04	04/07/04
Mauritius	28/05/99		
Mexico	28/05/99	20/11/00	04/11/03
Monaco	28/05/99	18/08/04	17/10/04
Mongolia		05/10/04 (a)	04/12/04
Montenegro (23)		15/01/10 (a)	16/03/10
Mozambique	28/05/99		
Namibia	28/05/99	27/09/01	04/11/03
Netherlands (14)	30/12/99	29/04/04	28/06/04
New Zealand (5)	13/07/01	18/11/02	04/11/03
Niger	28/05/99		
Nigeria	28/05/99	10/05/02	04/11/03
Norway		29/04/04 (a)	28/06/04
Oman		28/05/07 (a)	27/07/07
Pakistan	28/05/99	19/12/06	17/02/07
Panama	28/05/99	13/09/02	04/11/03
Paraguay	17/03/00	29/03/01	04/11/03
Peru	07/09/99	11/04/02	04/11/03
Poland	28/05/99	17/01/06	18/03/06
Portugal (1)	28/05/99	28/02/03	04/11/03
Qatar (16)		15/11/04 (a)	14/01/05
Republic of Korea		30/10/07 (a)	29/12/07
Republic of Moldova		17/03/09 (a)	17/05/09
Romania	18/11/99	20/03/01	04/11/03
Saint Vincent and the Grenadines		29/03/04 (a)	28/05/04
Saudi Arabia	28/05/99	15/10/03	14/12/03
Senegal	28/05/99		
Singapore (19)		17/09/07 (a)	16/11/07
Slovakia	28/05/99	11/10/00	04/11/03
Slovenia	28/05/99	27/03/02	04/11/03
South Africa	28/05/99	22/11/06	21/01/07
Spain (13)	14/01/00	29/04/04	28/06/04
Sudan	28/05/99		
Swaziland	28/05/99		
Sweden (1)	27/08/99	29/04/04	28/06/04
Switzerland	28/05/99	07/07/05	05/09/05
Syrian Arab Republic		18/07/02 (a)	04/11/03

State	Date of signature	Date of deposit of instrument of ratification, acceptance (A), approval (AA) or accession (a)	Date of entry into force
The former Yugoslav Republic of Macedonia		15/05/00 (a)	04/11/03
Togo	28/05/99		
Tonga		20/11/03 (a)	19/01/04
Turkey	28/05/99		
Ukraine		06/03/09 (a)	06/05/09
United Arab Emirates		07/07/00 (a)	04/11/03
United Kingdom (1)	28/05/99	29/04/04	28/06/04
United Republic of Tanzania		11/02/03 (a)	04/11/03
United States (7)	28/05/99	05/09/03	04/11/03
Uruguay	09/06/99	04/02/08	04/04/08
Vanuatu		09/11/05 (a)	08/01/06
Zambia	28/05/99		
Regional Economic Integration Organisations			
European Community (9)	09/12/99	29/04/04 (AA)	28/06/04

* As a result of the first review of limits of liability conducted by ICAO in accordance with Article 24, the rounded revised limits, effective as of 30 December 2009, in Special Drawing Rights (SDRs), are:

- 19 SDRs per kilogramme in the case of destruction, loss, damage or delay in relation to the carriage of cargo (Article 22, paragraph 3)
- 1 131 SDRs for each passenger in case of destruction, loss, damage or delay with respect to baggage (Article 22, paragraph 2)
- 4 694 SDRs for each passenger in relation to damage caused by delay in the carriage of persons (Article 22, paragraph 1)
- 113 100 SDRs for each passenger for damage sustained in case of death or bodily injury of a passenger (for the first tier) (Article 21, paragraph 1)

- (1) Upon signature of the Convention, this State, Member State of the European Community, declared that, “in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention”.
- (2) On 3 October 2000, ICAO received from Luxembourg the following declaration: “The Grand Duchy of Luxembourg, Member State of the European Community, declares that in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention”.
- (3) Upon deposit of its instrument of ratification, the Czech Republic notified ICAO that “as a Member of the International Monetary Fund, [the Czech Republic] shall proceed in accordance with Article 23, paragraph 1 of the Convention”.
- (4) By a Note dated 13 July 2000, Finland transmitted a declaration dated 7 July 2000 signed by the Minister for Foreign Trade, setting forth the wording quoted in note (1) above.
- (5) Upon deposit of its instrument of accession (deemed to be an instrument of ratification), New Zealand declared “that this accession shall extend to Tokelau”.
- (6) At the time of ratification, Canada made the following declaration: “Canada declares, in accordance with Article 57 of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 and signed by Canada on 1 October 2001, that the Convention does not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Canada, the whole capacity of which has been reserved by or on behalf of such authorities [Article 57(b)].”

- (7) The instrument of ratification of the United States contains the following declaration:
“Pursuant to Article 57 of the Convention, the United States of America declares that the Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes in respect to the functions and duties of the United States of America as a sovereign State.”
- (8) By a Note dated 24 October 2003 signed by the Minister for Foreign Affairs, Japan informed ICAO “that, in accordance with Article 57(a) of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, the Government of Japan declares that this Convention shall not apply to international carriage by air performed and operated directly by the Government of Japan for non-commercial purposes in respect to its functions and duties as a sovereign State.”
- (9) The instrument of approval by the European Community contains the following declaration: “Declaration concerning the competence of the European Community with regard to matters governed by the Convention of 28 May 1999 for the unification of certain rules for international carriage by air (the Montreal Convention):
1. The Montreal Convention provides that Regional Economic Integration Organisations constituted by sovereign States of a given region, which have competence in respect of certain matters governed by this Convention, may become parties to it.
 2. The current Member States of the European Community are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
 3. This declaration is not applicable to the territories of the Member States in which the Treaty establishing the European Community does not apply and is without prejudice to such acts or positions as may be adopted under the Convention by the Member States concerned on behalf of and in the interests of those territories.
 4. In respect of matters covered by the Convention, the Member States of the European Community have transferred competence to the Community for liability for damage sustained in case of death or injury of passenger. The Member States have also transferred competence for liability for damage caused by delay and in the case of destruction, loss, damage or delay in the carriage of baggage. This includes requirements on passenger information and a minimum insurance requirement. Hence, in this field, it is for the Community to adopt the relevant rules and regulations (which the Member States enforce) and within its competence to enter into external undertakings with third States or competent organisations*.
 5. The exercise of competence which the Member States have transferred to the Community pursuant to the EC Treaty is, by its nature, liable to continuous development. In the framework of the Treaty, the competent institutions may take decisions which determine the extent of the competence of the European Community. The European Community therefore reserves the right to amend the present declaration accordingly, without this constituting a prerequisite for the exercise of its competence with regard to matters governed by the Montreal Convention.
- *Sources:
- 1) Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, Official Journal of the European Union, L 285, 17.10.1997, p. 1;
 - 2) Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, Official Journal of the European Union, L 140, 30.05.2002, p. 2.”
- (10) The instrument of accession by Austria contains the following declaration:
“The Republic of Austria declares according to Article 57 of the Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 that this Convention shall not apply to:

- a) international carriage by air performed and operated directly by the Republic of Austria for non-commercial purposes in respect to its functions and duties as a sovereign State;
 - b) the carriage of persons, cargo and baggage for the military authorities on aircraft registered in or leased by the Republic of Austria, the whole capacity of which has been reserved on behalf of such authorities.”
- (11) The instrument of ratification by Denmark contains a declaration that until later decision, the Convention will not be applied to the Faroe Islands.
- (12) The instrument of ratification by Germany was accompanied by the following declaration:
“In accordance with Article 57 of the Convention of for the Unification of Certain Rules for International Carriage by Air of 28 May 1999, the Federal Republic of Germany declares that the Convention shall not apply to international carriage by air performed and operated directly by the Federal Republic of Germany for non-commercial purposes in respect to its functions and duties as a sovereign State or to the carriage of persons, cargo and baggage for the military authorities of the Federal Republic of Germany on aircraft registered in or leased by the Federal Republic of Germany, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (13) The instrument of ratification by Spain contains the following declarations:
“The Kingdom of Spain, Member State of the European Community, declares that in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention.”
- “In accordance with the provisions of Article 57, the Convention shall not apply to:
- a) international carriage by air performed and operated directly by Spain for non-commercial purposes in respect to its functions and duties as a sovereign State;
 - b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Spain, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (14) The instrument of ratification by the Kingdom of the Netherlands states that the ratification is for the Kingdom in Europe.
- By a Note dated 29 April 2004 from the Ministry of Foreign Affairs, the Netherlands transmitted to ICAO the following declaration: “The Kingdom of the Netherlands, Member State of the European Community, declares that in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention”.
- (15) By a Note dated 15 July 2004 from the Minister of Foreign Affairs, Belgium transmitted to ICAO the following declaration in accordance with Article 57:
“the Convention does not apply to:
- a) international carriage by air performed and operated directly by Belgium for non-commercial purposes in respect to its functions and duties as a sovereign State;
 - b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Belgium, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (16) In its instrument of accession, Qatar confirmed the application of the following declaration in accordance with Article 57:
“the Convention does not apply to:
- a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State, and/or
 - b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (17) The instrument of ratification by Lithuania contains the following declarations:
“. . . in accordance with Article 57 . . . , the Seimas of the Republic of Lithuania declares that this Convention shall not apply to international carriage by air performed and operated directly by the Republic of Lithuania for non-commercial purposes in respect to its functions and duties as a sovereign State; and also shall not apply to

the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by the Republic of Lithuania, the whole capacity of which has been reserved by or on behalf of such authorities.”

“ . . . in accordance with the Treaty establishing the European Community, the Seimas of the Republic of Lithuania declares that the Community has competence to take actions in certain matters governed by the Convention.”

- (18) (A) The instrument of ratification by China contains the following declaration:
“The Convention does not apply in the Hong Kong Special Administrative Region of the People’s Republic of China until notified otherwise by the Government of the People’s Republic of China.”
(B) In addition, the Representative of China on the Council of ICAO made the following declaration at the time of deposit of the instrument of ratification:
“The Convention applies in the Macao Special Administrative Region of the People’s Republic of China.”
(C) By a letter dated 20 October 2006, the Representative of China on the Council of ICAO made the following statement on behalf of the Government of the People’s Republic of China (PRC):
“Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the PRC provides that the application to the Hong Kong Special Administrative Region of the PRC of international agreements to which the PRC is or becomes a party shall be decided by the Central People’s Government in accordance with the circumstances and needs of the Region and after seeking the views of the Government of the Region.
In consultation with the Government of the Hong Kong Special Administrative Region, the Government of the PRC has decided to apply the Convention in the Hong Kong Special Administrative Region of the PRC from the date of December 15, 2006.”
- (19) The instrument of accession by Singapore contains the following declaration in accordance with Article 57:
“the Convention shall not apply to:
a) international carriage by air performed and operated directly by the Republic of Singapore for non-commercial purposes in respect to its functions and duties as a sovereign State; and
b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by the Republic of Singapore, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (20) The instrument of accession by Malaysia is accompanied by the following reservation:
“Malaysia, in accordance with Article 57 (b) of the Montreal Convention, declares that the Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Malaysia, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (21) The instrument of ratification by Chile contains the following reservation in accordance with Article 57 (b):
“The Republic of Chile declares that the Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.”
- (22) The instrument of accession by Argentina contains the following “interpretative declaration”: “For the Argentine Republic, the term ‘bodily injury’ in Article 17 of this treaty includes mental injury related to bodily injury, or any other mental injury which affects the passenger’s health in such a serious and harmful way that his or her ability to perform everyday tasks is significantly impaired.”
- (23) The instrument of accession by Montenegro contains the following reservation in accordance with Article 57:
“this Convention shall not apply to:
a) international carriage by air performed and operated directly by Montenegro for non-commercial purposes in respect to its functions and duties as a sovereign State;
b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Montenegro, the whole capacity of which has been reserved by or on behalf of such authorities.”

PROPOSITION 65

The California Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65, requires that businesses provide warnings about exposures to chemicals known to the State of California to cause cancer, birth defects or other reproductive harm. A list of chemicals that are known to the State to cause cancer, birth defects or other reproductive harm is published by the Governor. The list can be found at

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html

Materials at or around [Airline] facilities, such as jet engine exhaust, contain chemicals that are on the State's Proposition 65 list. Additional information regarding chemicals at this facility can be found in the Material Safety Data Sheets.

Warning signs are posted in certain areas pursuant to Proposition 65. These warnings state:

WARNING: This area contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

Appendix B

This edition of *The Liability Reporter* was prepared by Rod D. Margo, Scott D. Cunningham, John Maggio, Ivy L. Nowinski, and Elisabeth Sillars of Condon & Forsyth LLP, with contributions from Julia K. Doyle, Christopher B. Queally, and Stephen M. Rinka of Condon & Forsyth's Los Angeles office; and Michael J. Holland, Katherine B. Posner, Stephen R. Stegich, Marshall S. Turner, Chris R. Christensen, Anthony U. Battista, Desmond T. Barry, Jr., Bartholomew J. Banino, Victoria A. Turchetti, Allison Surcouf, Jean C. Rose, Evan Kwarta, Laura McGinn, Eric C. McNamar, and Marissa N. Lefland of Condon & Forsyth LLP, New York.

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The Liability Reporter is intended to provide a summary of aspects of the matters discussed herein, and not to render comprehensive legal or other professional advice. Members in need of specific legal advice should consult a lawyer. For further information on any of the matters discussed herein, please contact:

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