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## **THE MONTREAL AND WARSAW CONVENTIONS: INTERNATIONAL LEGAL LIABILITY THEN AND NOW**

### **INTRODUCTION**

On September 5, 2003, the United States became the thirtieth signatory to ratify the Montreal Convention of 1999<sup>1</sup>, thus bringing the Montreal Convention into force on November 4, 2003. At the present time, seventy-two countries adhere to the Montreal Convention, with Ecuador being the most recent signatory.

The Montreal Convention is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the Warsaw Convention system of liability. The Montreal Convention governs the rights of those passengers who are engaged in “international carriage” by air, as that term is defined in Article 1 of the Montreal Convention. This newsletter highlights those provisions of the Montreal Convention which apply to passenger injury or death and the loss, damage, delay and/or destruction of cargo and passenger baggage.

### **WHEN DOES THE MONTREAL CONVENTION APPLY?**

The first step in analyzing the applicability of the Montreal Convention is to examine the passenger ticket and determine whether the passenger’s itinerary provides for “international carriage” by air. “International carriage” is defined by Article 1.2 of the Montreal Convention as any carriage in which,

according to the agreement between the parties (e.g., the passenger ticket), the place of departure and the place of destination are situated either:

1. Within the territories of two State Parties, or
2. Within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a party to the Convention.

For example, the following transportation is governed by the Montreal Convention:

- U.S./U.K. (the U.S. and U.K. are parties to the Montreal Convention)
- U.S./Argentina/U.S. (the U.S. is a party to the Montreal Convention but Argentina is not)

As the second example demonstrates, it is the point of origin and final destination that are relevant, not intermediary stopping point. Therefore, it is important to know whether the country of departure and country of final destination are parties to the Montreal Convention. For a complete list of the countries which are signatories to the Montreal Convention, see the website maintained by the International Civil Aviation Organization (ICAO), found at <http://www.icao.int/icao/en/leb/mt199.htm>.

While seventy-two countries are parties to the Montreal Convention, more than one hundred and twenty nations are signatories to the Warsaw Convention. Therefore, there will be some situations where an airline’s liability is governed (and limited) by the Warsaw Convention system of

liability, rather than the Montreal Convention. In an attempt to make the liability rules for international transportation easier to understand, the Air Transport Association (ATA), a trade association for major U.S. airlines, recently received approval from the Department of Transportation (DOT) of an Implementing Provisions Agreement (called "IPA 2005") which would apply to international carriage under both the Warsaw and Montreal Conventions, and would adopt the liability and baggage rules of the Montreal Convention for all transportation to and from the United States. Each airline signing IPA 2005 agrees to be bound by the liability rules of the Montreal Convention, even though the more restrictive Warsaw Convention liability rules may be applicable to the particular transportation. As indicated, the DOT recently approved IPA 2005.

Since the Montreal Convention provides for more generous passenger recoveries than the Warsaw Convention, IPA 2005 does not run afoul of those articles of the Montreal Convention (Articles 26, 47 and 49) which prohibit reduction of the carrier's liability below the Montreal Convention's limits by any other agreement.

## **SIGNIFICANT PROVISIONS OF THE MONTREAL CONVENTION**

Some of the more significant provisions in the Montreal Convention include:

**The Goals of the Montreal Convention:** While the goal of uniformity remains unchanged, the Warsaw Convention goal of limiting liability of the air carrier for passenger injury or death has been replaced with the goal of "ensuring protection of the interest of consumers in international carriage by air and the need for equitable compensation based on the principals of restitution."

**Cargo/Documentation (Articles 4 through 16):** The Montreal Convention simplifies the documentation for the carriage of passengers, checked baggage and cargo and facilitates electronic ticketing and air waybills. In effect, it incorporates the provisions of the 1975 Montreal Protocol No. 4 and the 1961 Guadalajara Convention. Moreover, there are no sanctions for non-compliance with the new and simplified documentation requirements.

**Liability for passenger injury or death (Articles 17 and 21):** A major feature of the Montreal Convention is unlimited liability. However, the conditions precedent for air carrier liability (*i.e.*, an "accident" on board the aircraft or during embarking/disembarking causing "death" or "bodily injury") remain unchanged from the Warsaw Convention liability regime.

Under the Montreal Convention, the carrier is liable for passenger injury or death up to 100,000 Special Drawing Rights (SDRs) (approximately US\$150,000), subject to the defense of contributory/comparative liability. For claims in excess of 100,000 SDRs, the carrier is not liable if it proves that the damage "was not due to the negligence or other wrongful act or omission of the carrier" or was "solely due to the negligence or other wrongful acts or omission of a third party."

**Limitations on Liability for Checked and Unchecked Baggage:** Article 22 of the Montreal Convention governs the air carrier's limits of liability with respect to baggage. Article 22.2 provides that in the case of baggage, be it checked or unchecked, the liability of the carrier for destruction, loss, delay or damage is limited to 1,000 SDRs (approximately US\$1,500) per passenger unless the passenger, when delivering the baggage to the carrier, makes a special declaration of value and pays a supplementary sum as required by the carrier. In that case, the carrier is responsible to pay an amount not exceeding the declared sum. The carrier is liable for loss, damage or delay of unchecked baggage only where the damage is caused by the fault of the carrier. Carriers are not liable when the damage resulted from the inherent defect, quality or vice of the baggage under Article 18.

The SDRs referred to in the Montreal Convention are an artificial currency created by the International Monetary Fund (IMF). The value of the SDR fluctuates daily and can be obtained from the ICAO website: <http://www.icao.int/icao/en/leb/treaty.htm>. The applicable value date is the date of the judgment or settlement (Article 23.1). For example, as of August 18, 2006, the value of 1 SDR was USD 1.486. Thus, if judgment relating to a lost bag of a passenger was rendered on August 18, 2006, the carrier's maximum liability would be US\$1,486 or 1,000

SDRS, regardless of how many bags were lost. While this limit of liability is substantially greater than that under the old Warsaw Convention limits of liability, it is still much less than the current U.S. domestic carriage limit of liability of US\$2,800, set forth in 14 C.F.R. § 254.4. The liability limits set forth in Article 22 of the Montreal Convention are subject to revision every 5 years.

**Exception to Liability Limit:** The carrier's liability limitation under the Montreal Convention for destroyed, delayed, lost or damaged baggage is inapplicable if the damage resulted from: (1) the carrier's intent to cause damage, or (2) recklessness and with knowledge that damage would likely result.

**Limitation on Liability for Cargo:** Carriers will be liable for delay or loss of, or damage to, cargo if the event causing such delay, loss or damage took place during carriage by air. Moreover, if a carrier substitutes surface transportation for a portion of the transportation contracted to be completed by air, the liability of the surface carrier also will be governed by the Convention. The carrier may be exonerated from liability if the damage was caused by some inherent defect, quality or vice, or by defective packaging. The limit of liability for cargo, which is unbreakable, is 17 SDRs (approximately US\$25) per kilogram of cargo delayed, lost, destroyed or damaged.

**Passenger Delay (Article 19):** The liability limit in case of the delay of a passenger is 4,150 SDRs (approximately US\$6,200). The carrier is not liable for delay if it proves it took all measures that could reasonably be required to avoid the damage or that it was impossible to take such measures.

**Attorneys' Fees (Article 22(6)):** The Convention provides that, where permitted by the law of the forum, a claimant may be awarded court costs and other legal expenses (including attorneys' fees), with interest, if the amount of damages awarded to the claimant exceeds any written settlement offer made by the carrier within six months of the accident or before litigation is commenced, whichever is later.

**Review of Limits (Article 24):** The Convention provides that the limits of liability are to be reviewed at five year intervals (or upon the request

of 1/3 of the State Parties, if the inflation factor exceeds 30% since the last revision). If the review concludes that the inflation factor has exceeded 10%, the ICAO shall notify the State Parties of a revision of the limits of liability.

**Advance Payments (Article 28):** While not required by the Montreal Convention, Article 28 requires a carrier to make advance payments for passenger injury or death if required by the carrier's national law in order to meet the "immediate economic needs" of the person(s) entitled to payment.

**Notice of Complaint (Article 31):** The Montreal Convention requires the passenger to make a timely notice of complaint to the carrier in the event of damaged or delayed baggage as follows:

- Damaged baggage: notice must be given within 7 days from the date of receipt of the damaged baggage.
- Delayed baggage: the notice must be made within 21 days from the date that the baggage should have been returned to the passenger.

Each notice of complaint must be made in writing and dispatched within the above noted times. If timely notice of complaint is not made, the carrier is not responsible in the absence of fraud on the part of the carrier. However, passengers are not required to submit a notice of complaint for non-delivery of checked baggage.

**Jurisdiction (Article 33):** In addition to the four jurisdictions presently specified where an action for damages must be brought under Article 28 of the Warsaw Convention, a "fifth jurisdiction" has been added which allows an action for wrongful death or personal injury to be brought in the territory of a State Party in which the passenger has his principal and permanent residence, to or from which the carrier operates, and in which that carrier conducts business.

**Basis of Claim/Exclusivity (Article 29):** The Convention provides the exclusive cause of action and all claims can be brought only under the conditions and limits of the Convention.

**Types of Damages (Articles 17 and 29):** There is no limitation on the types of recoverable compensatory damages. The types of available damages are determined by conducting a choice of law analysis. However, the Montreal Convention does not allow the recovery of damages for pure mental injury and contains an express prohibition on the recovery of “punitive, exemplary or any non-compensatory damages.”

**Time Limits (Article 35):** Article 35 of the Montreal Convention provides that any action for damages must be brought within two years from the date of the arrival of the flight. If legal proceedings are not brought within this two-year period, the case is barred. Because the Montreal Convention supercedes state law in cases where the Convention is applicable, failure to file a lawsuit within two years is the death knell for a lawsuit governed by the Convention.

**Recourse Against Third-Parties (Article 37):** It is expressly stated that the Convention shall not prejudice an air carrier’s right of recourse against any other party or entity.

**Mutual Liability (Article 41):** The Convention contains detailed provisions relating to carriage performed by a carrier other than the contracting carrier, which would include carriers in a code-share or wet lease arrangement. The Convention provides that the acts and omissions of the actual carrier and its agents in relation to the carriage performed by the actual carrier, also shall be deemed to be those of the contracting carrier, while the acts and omissions of the contracting carrier and its agents in relation to the carriage performed by the actual carrier, also shall be deemed to be those of the actual carrier. Thus, the Convention introduces a system of mutual liability of actual and contracting carrier, making each liable for the acts or omissions of the other. This will benefit passengers or their representatives, while complicating life for carriers engaged in operations such as code-shares and wet leases.

**Insurance (Article 50):** The Convention imposes a duty upon the contracting States to require air carriers to maintain “adequate insurance” covering their liability under the Convention. The determination of what constitutes “adequate insurance” is left to each contracting State.

**Invalidity of Contractual Provisions (Articles 26, 47 and 49):** Any contractual provision which reduces the extent of the carrier’s liability or infringes upon the rules laid down by the Montreal Convention is void. Thus, the carrier cannot:

- lower the limit of liability below 1,000 SDRs in a baggage case;
- disclaim liability for loss of jewelry, electronics, cameras or valuable items (*e.g.*, in conditions of contract or in a limited release tag);
- require suit to be brought in any particular jurisdiction; or
- require notice of complaint for damage or delay be given in less than the time periods set forth in Article 31.

## CONCLUSION

Because the Montreal Convention has been in effect just in excess of two years, there are relatively few cases interpreting it. *See e.g., Weiss v. El Al Israel Airlines*, 04 Civ. 9803 (GEL) (S.D.N.Y. May 22, 2006); *Ehrlich v. American Airlines, Inc.*, 366 F.3d 360 (2d Cir. 2004); and *Paradis v. Ghana Airways Limited*, 348 F.Supp. 2d 106 (S.D.N.Y. 2004). These limited cases have applied the substantive law provisions of the Warsaw Convention since to a great degree the Montreal Convention tracks the substantive provisions of the Warsaw Convention. However, the differences between the Warsaw Convention and the Montreal Convention will be highlighted in future cases as issues are litigated concerning Montreal Convention Articles 20 (the exoneration clause) and 21(2) (where the carrier may seek to limit its liability to 100,000 SDRs by proving that the damage was not due to a carrier’s negligence or that the damage was solely due to the negligence or wrongful act of a third-party). In cases where damages for delay of passengers and loss and delay of baggage are sought, the Montreal Convention limits of 1,000 SDRs (baggage) and 4,150 SDRs (delay) can be exceeded only where wilful misconduct is proven. *See* Article 22(1)(2)(5).

<sup>1</sup> Official Title: Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature on 28 May 1999, *reprinted in* S. Treaty Doc. 106-45, 1999 WL 333292734 (Treaty).

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