

AIR CARRIER LIABILITY FOR PASSENGER INJURY OR DEATH OCCURRING DURING INTERNATIONAL CARRIAGE BY AIR: AN OVERVIEW OF THE MONTREAL CONVENTION OF 1999

ANDREW J. HARAKAS

It has been almost fifteen years since the Montreal Convention (1999)¹ entered into force replacing the Warsaw Convention (1929).² Currently, there are 122 parties to the Montreal Convention, including the United States, Canada, China, Japan, South Korea, Mexico, and the EU member states, but still less than the 152 states that are a party to the Warsaw Convention.³ Though the seventy years of case law interpreting the Warsaw Convention continues to be important in interpreting the many similar provisions of the Montreal Convention, there is a significant body of case law now expressly addressing the Montreal Convention.

1. The Warsaw Convention System of Liability

Before addressing the Montreal Convention, a basic overview of the “Warsaw System” is helpful. With 152 parties to the Warsaw Convention, it is one of the most

1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, *available at* 1999 WL 33292734 [hereinafter Montreal Convention].

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C. § 40105 [hereinafter Warsaw Convention].

3. For a current list of state parties see http://www.icao.int/secretariat/legal/List%20of%20Parties/Mt199_EN.pdf.

widely adhered to and litigated⁴ treaties in the world and still applies to certain carriage.⁵ The Warsaw Convention, however, has had a dynamic and turbulent history. It has been subject to four protocols amending the original text,⁶ one supplementary convention,⁷ denunciation by the United States (subsequently withdrawn), supplemental “private” agreements among air carriers,⁸ and various challenges to its constitutionality.⁹ This patchwork of amendments, supplementary conventions, and protocols often is referred to as the “Warsaw System” of liability.

A significant reason for this turbulent history was due to the dissatisfaction, especially by the United States, with the low limits of liability for passenger injury and death (\$8,300). Until 1995, little progress had been made in increasing these limits because no general consensus could be reached among the Warsaw

4. The United States Supreme Court has addressed issues relating to the Warsaw Convention on nine separate occasions. See *Olympic Airways v. Husain*, 540 U.S. 644 (2004); *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999); *Dooley v. Korean Air Lines*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *Lisi v. Alitalia-Linee Aeree Italiane*, 390 U.S. 455 (1968), *aff'g by an equally divided court*, 370 F.2d 508 (2d Cir. 1966).

5. Notable nonsignatories to the Montreal Convention include Malaysia, Mauritius, Nicaragua, Russia, Sri Lanka, Thailand, and Venezuela.

6. **The Hague Protocol (1955):** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw Oct. 12, 1929, done at the Hague on Sept. 28 1955, 478 U.N.T.S. 371, *reprinted in* S. Exec. No. 105-20 (entered into force Aug. 1. 1963); **Guatemala City Protocol (1971):** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw Oct. 12, 1929, as amended by the Protocol, done at the Hague on Sept. 28, 1955, ICAO Doc. No. 8932 (not yet in force); **Montreal Additional Protocol No. 3 (1975):** Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw Oct. 12, 1929, as amended by the Protocols Done at the Hague on Sept. 28, 1955 and at Guatemala City on Mar. 28, 1971, ICAO Doc. No. 9147 (not yet in force); **Montreal Protocol No. 4 (1975):** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw Oct. 12, 1929 as amended by the Protocol done at the Hague on Sept. 28, 1955, 2145 U.N.T.S. 26 (entered into force June 14, 1998).

7. **Guadalajara Supplementary Convention (1961):** Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, ICAO Doc. No. 8181 (entered into force May 1, 1964).

8. **Montreal Agreement (1966):** Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. § 40105 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302; 1995 IATA Intercarrier Agreement/1996 IATA Measures of Implementation Agreement-MIA).

9. Courts in the United States consistently have found the Warsaw Convention to be constitutional. See *Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387, 390 (5th Cir. 1992); *In re Air Crash in Bali, Indonesia*, Apr. 22, 1974, 684 F.2d 1301, 1309–10 (9th Cir. 1982); *Duff v. Varig Airlines, Inc.*, 185 Ill. App. 3d 992, 993–95, 542 N.E.2d 69, 70–71 (1989). The Italian Constitutional Court, however, declared the Article 22(1) limits of liability in both the original Warsaw Convention and as amended by the Hague Protocol to be contrary to the basic principles of the Italian Constitution and thus were unconstitutional. See *Coccia Ugo v. Turkish Airlines*, No. 132/1985 (Italian Const. Ct. May 2, 1985), *reprinted in* X Air Law, No. 6 at 297 (1985).

Convention signatories as to the amount or relevance of any limits. In 1995–1996 the carriers took matters into their own hands and many members of the International Air Transport Association (IATA) voluntarily waived the Warsaw Convention limits of liability for passenger injury and death by means of a private agreement (IATA Intercarrier Agreements) and amendment of their passenger tariffs. Finally, in May 1999, action was taken at the governmental level by the International Civil Aviation Organization (ICAO),¹⁰ which drafted and adopted the Montreal Convention. The goals of the Montreal Convention, however, differ from those of the Warsaw Convention. Whereas the primary goals of the Warsaw Convention were uniform liability rules and limiting the liability of the air carriers to protect a fledgling industry, the goals of the Montreal Convention are to provide passengers with full recovery for compensatory damages as well as uniform liability rules.¹¹

As noted, while the Montreal Convention replaces the Warsaw Convention in its entirety (see Article 55), courts interpreting the Montreal Convention look to existing Warsaw Convention case law because the Montreal Convention “contains provisions which embrace similar language as the Warsaw Convention” and “so as not to result in a complete upheaval of the ‘common law’ surrounding the Warsaw Convention.”¹² This is consistent with the ratification history of the Montreal Convention, which makes plain that the drafters of the Convention as well as Congress intended to preserve the case law developed under the Warsaw Convention by adopting similar language in the text of the Montreal Convention. The Senate

10. ICAO, established by the Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 6605 (Dec. 7, 1944) (“Chicago Convention”), is a specialized agency of the United Nations and is headquartered in Montreal, Canada. In addition to providing a forum for its 191 contracting states to develop and adopt international air law conventions, ICAO sets international standards and regulations necessary for the safety, health, security, efficiency, and regularity of air transport.

11. See *Seshadri v. British Airways PLC*, 2014 WL 5606542, at *5 (C.D. Cal. Nov. 4, 2014); *Greig v. U.S. Airways Inc.*, 28 F. Supp. 3d 973, 975 (D. Ariz. 2014); *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006) (“[T]he Montreal Convention represent[ed] a significant shift away from a treaty [(the Warsaw Convention)] that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers.”), *aff’d*, 309 Fed. Appx. 483 (2d Cir. 2009); *Knowlton v. American Airlines, Inc.*, 2007 WL 273794 (D. Md. Jan. 31, 2007). The Preamble to the Montreal Convention recognizes, *inter alia*, “the need to modernize and consolidate the Warsaw Convention and related instruments” and “the importance of ensuring protection of the interest of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.” 1999 WL 33292734, at *29

12. *Watts v. American Airlines, Inc.*, 2007 WL 3019344, at *2 (S.D. Ind. Oct. 10, 2007); see *Jacob v. Korean Air Lines Co. Ltd.*, 606 Fed. Appx. 478, 480 n.2 (11th Cir. 2015); *Lee v. Air Canada*, 2017 WL 108058, at *3 (E.D.N.Y. Jan. 10, 2017); *Gustafson v. American Airlines, Inc.*, 658 F. Supp. 2d 276, 282 (D. Mass. 2009); *Kruger v. United Airlines, Inc.*, 2007 WL 3232443, at *3 (N.D. Cal. Nov. 1, 2007); *In re Air Crash at Lexington, KY*, Aug. 27, 2006, 501 F. Supp. 2d 902, 907 (E.D. Ky. 2007); *Baah v. Virgin Atlantic Airways, Ltd.*, 473 F. Supp. 2d 591, 595 (S.D.N.Y. 2007); *Onwuteaka v. Northwest Airlines, Inc.*, 2007 WL 1406419, at *1, n.2 (S.D. Tex. May 10, 2007); *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006).

Foreign Relations Committee's report on the Convention directly addressed the continued applicability of judicial decisions interpreting the Warsaw Convention:

In the nearly seventy years that the Warsaw Convention has been in effect, a large body of judicial precedent has been established in the United States. The negotiators of the Montreal Convention intended to preserve these precedents. According to the Executive Branch testimony, "[w]hile the Montreal Convention provides essential improvements upon the Warsaw Convention and its related protocols, efforts were made in the negotiations and drafting to retain existing language and substance of other provisions to preserve judicial precedent relating to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention and its related protocols."¹³

A. THE WARSAW CONVENTION OF 1929

The Warsaw Convention, the result of two international conferences in 1925 and 1929, entered into force in 1933.¹⁴ The Warsaw Convention had two primary goals: (1) to establish worldwide uniform laws for claims arising out of international aviation accidents and (2) to limit the liability of the air carrier in the event of an accident.¹⁵

The primary articles relating to damages for passenger injury or death under the Warsaw Convention are Articles 1, 17, 20, 21, 22, 24, 25, 28, and 29. Article 1 sets forth the applicability and scope of the Warsaw Convention. Article 17 creates a cause of action for passenger death or bodily injury. Article 20 provides that the carrier shall not be liable if it proves that it has taken "all necessary measures" to avoid the damage and Article 21 contains a defense based on the contributory/comparative negligence of the passenger. Article 22(1) limits the

13. S. Exec. Rep. 108-8, at 3 (2003). *See also* 149 Cong. Rec. S10870 (daily ed. July 31, 2003) (statement of Sen. Biden) ("[A] large body of judicial precedents has developed during the [] seven decades [since the United States became a party to the Warsaw Convention.] The negotiators intended [], to the extent applicable, to preserve these precedents."); PAUL S. DEMPSEY & MICHAEL MILDE, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999 at 7 (McGill University, Centre for Research in Air & Space Law 2005) (The drafters of the Montreal Convention "tried, wherever possible, to embrace the language of the original Warsaw Convention and its various Protocols, with the purpose of not disrupting the existing jurisprudence. . . . Thus, the 'common law' of the Warsaw jurisprudence is vitally important to understanding the meaning of the Montreal Convention.").

14. For a discussion of the history and substantive provisions of the Warsaw Convention, see Floyd v. Eastern Airlines Inc., 872 F.2d 1462, 1467-69 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991); *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 928 F.2d 1267, 1270-71 (2d Cir. 1991). *See also* MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER (Kluwer 1981); MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT (Kluwer 1977); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967); *Ide*, *History and Accomplishments of C.I.T.E.J.A.*, 3 J. AIR L. & COM. 27 (1932).

15. *See* Eastern Airlines v. Floyd, 499 U.S. 530 (1991); *In re Air Disaster at Lockerbie*, 928 F.2d 1267, 1271; *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978).

liability of a carrier for passenger injury or death to \$8,300 unless the injury or death was proximately caused by the “wilful misconduct” of the air carrier or its employees within the meaning of Article 25 of the Convention. Article 24 renders the Warsaw Convention exclusive, and Article 28 sets forth four places where an action for damages must be brought: (1) the court of the domicile of the carrier, (2) of his principal place of business, (3) where he has a place of business through which the contract has been made, or (4) before the court at the place of destination. Finally, Article 29 sets forth a two-year period of limitations for the commencement of actions.

B. THE AMENDMENTS AND SUPPLEMENTS TO THE WARSAW CONVENTION

As noted, the Warsaw Convention was subject to numerous protocols and an amending convention, and many of the principles addressed by these instruments related to passenger liability have been incorporated into the Montreal Convention. Briefly, these consist of the following:

- **The Hague Protocol (1955).** The Hague Protocol amended the Warsaw Convention to clarify certain provisions with respect to the liability of the carrier’s agents and servants, documents of carriage, and to increase the limit of liability to \$16,600. This Protocol entered into force in 1963 and has 137 parties. Almost fifty years after it was drafted, the United States ratified the Hague Protocol in 2003. It entered into force in the United States on December 14, 2003.
- **The Guadalajara Supplementary Convention (1961).** With the development of interline and charter agreements, it became necessary to establish clear rules governing the liability of “contracting” and “actual” carriers rather than leaving such rules to be developed by the various courts interpreting the original Warsaw Convention. The Guadalajara Supplementary Convention supplements the Warsaw Convention and specifically addresses the liability of the “actual carrier” and “contracting carrier” and their servants and agents. The Guadalajara Convention entered into force in 1964 and currently has eighty-six parties. The United States never ratified this Convention but these issues are addressed in Chapter V of the Montreal Convention.
- **The Montreal Agreement (1966).** Dissatisfaction with the low liability limits culminated in the denunciation of the Warsaw Convention in 1965 by the United States.¹⁶ On November 15, 1965, the U.S. State Department gave a Notice of Denunciation of the Warsaw Convention pursuant

16. Press Release No. 268, U.S. Dep’t of State (Nov. 15, 1965).

to Article 39, effective May 15, 1966 (Dept. State Press Release No. 268). In what was viewed as an “interim” solution, the United States withdrew the notice of denunciation one day before the denunciation was to become effective with the announcement that the Civil Aeronautics Board had approved an agreement between the United States and the majority of international air carriers, wherein the air carriers agreed (1) to be bound by an increased liability limit of \$75,000 (including legal fees and costs) and (2) to waive the “all necessary measures defense” of Article 20(1) with respect to passenger injury or death. This agreement is known as the 1966 Montreal Agreement.¹⁷ The Montreal Agreement is not a treaty binding on states, but rather is a “special contract” with the air carriers applicable to all international air transportation to, from, or having an agreed stopping place in the United States.¹⁸

- **The Guatemala City Protocol (1971).** The Guatemala City Protocol rendered the carrier strictly liable for any “event” (replacing the Article 17 term “accident”) that occurred on board the aircraft or during embarking/d disembarking, increased the limit of liability, and added a fifth jurisdiction (the passenger’s domicile/permanent residence) to Article 28 of the Warsaw Convention. The goal of the Guatemala City Protocol was to minimize litigation and expedite compensation because the liability of the carrier is established without regard to fault and the limit of liability is unbreakable (i.e., there is no “wilful misconduct” exception). The Protocol contains a settlement inducement clause and authorizes a domestic supplement in the form of a supplemental compensation plan, providing for additional damages as determined by individual nations in accordance with their own requirements. This Protocol never entered into force as only seven states ratified the Protocol and entry into force depended on 30 ratifications, including the five states which represented 40 percent of the world’s air traffic, which effectively gave the United States a veto. The United States never ratified the Protocol.

17. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in note following* 49 U.S.C. § 40105 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). Each international air carrier is required to adhere to the Montreal Agreement as a condition of its foreign air carrier permit in order to operate in the United States. The carrier files a signed counterpart of CAB Agreement 18900 and a tariff that includes its terms. *See* 14 C.F.R. Part 203. For a discussion regarding the background of the Montreal Agreement, *see* *Air France v. Saks*, 470 U.S. 392, 406–07 (1985) and *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967). However, air carriers implementing the IATA Intercarrier Agreements (discussed *infra*) have been granted an exemption from this requirement by the U.S. DOT.

18. *See* *Eastern Airlines v. Floyd*, 499 U.S. 530, 549 (1991).

- **Montreal Additional Protocol No. 3 and Montreal Protocol No. 4 (1975) (the Montreal Protocols).**¹⁹ These Protocols were designed to promote the expeditious settlement of claims and to modernize the rules applicable to international transportation of passengers, baggage, and cargo. In combination with earlier amendments made at the Hague (1955) and Guatemala City (1971), these Protocols would have provided for (1) liability of the airlines without proof of fault, (2) an unbreakable limit of 100,000 Special Drawing Rights (SDRs),²⁰ (3) a settlement inducement clause, (4) expanded Article 28 jurisdiction,²¹ and (5) the right of a party to the Montreal Protocols to establish a supplemental compensation plan. Disagreement over the operation and funding of a Supplemental Compensation Plan ultimately led to rejection of the Protocols by the United States. Montreal Protocol No. 4 (MP4) languished in the U.S. Senate for over two decades, due in large part to the fact that it was linked to the ratification of Montreal Protocol No. 3 (MP3). However, with the widespread implementation of the IATA Inter-carrier Agreement (discussed *infra*), many of the perceived problems with the Warsaw Convention and MP3 (and the supplemental compensation plan²²) no longer presented an obstacle to the acceptance of MP4 independently of MP3. Almost twenty-three years after being drafted, MP4 came into force on June 14, 1998, and was ratified by the United States on September 28, 1998. Currently, there are sixty state parties to MP4.
- **The IATA Inter-carrier Agreements of 1995–1996.** Beginning with the Japanese Initiative in the early 1990s, whereby the airlines of Japan voluntarily waived the Warsaw limits of liability for passenger injury or death, the attitude toward a possible solution to the governmental deadlock regarding fixing the Warsaw Convention began to change among the air carriers. In October 1995, members of IATA agreed, in what is known as the IATA Inter-carrier Agreement (IIA), to take steps to waive the Warsaw Convention/Hague Protocol Article 22(1) limitation for passenger injury or death

19. Montreal Protocols No.1 and No. 2 (1975) substitute SDRs (*see infra* note 20) for gold francs in Warsaw Convention and The Hague Protocol, respectively.

20. A Special Drawing Right (SDR) is an accounting unit of the International Monetary Fund made up of major currencies (currently, the U.S. dollar, Euro, Japanese yen, pound sterling, and the Chinese renminbi). *See* http://www.imf.org/external/np/fin/data/rms_sdrv.aspx; Montreal Convention, Article 23.

21. Under the Protocols, an action may also be brought within the jurisdiction in which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of that state.

22. It is notable that the September 11th Victim Compensation Fund of 2001, which was established to address the thousands of 9/11 claims, operated in a manner very similar to the compensation scheme contemplated by the Supplemental Compensation Plan. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101).

arising out of an Article 17 accident. In April 1996, IATA drafted the IATA Measures of Implementation Agreement (MIA), an agreement to implement the IIA.²³ As with the 1966 Montreal Agreement, the IIA/MIA were considered an interim solution to improve the legal relationship between air carriers and their passengers until “ICAO can bring into force a new international legal instrument amending the Warsaw System.” The IIA/MIA embraced the following concepts, all of which are incorporated into the Montreal Convention: (1) a universal approach to liability limits, (2) no limits on compensatory damages for passenger injury or death, and (3) waiver by carriers of their defenses under the Warsaw Convention/Hague Protocol up to 100,000 SDRs. Approximately 122 air carriers signed the IIA and 108 air carriers signed the MIA, effectively waiving liability limits for passenger injury or death. As in the case of the Montreal Agreement, the IATA Agreement is not a treaty but a private agreement by the air carriers to voluntarily waive the limits of liability.²⁴ With the adoption of the Montreal Convention these agreement are largely rendered moot.

II. *The Montreal Convention of 1999*

In May 1999, ICAO convened a diplomatic conference in Montreal to consider a draft convention intended to modernize and replace the existing Warsaw System of liability. The conference was attended by 118 states. The Montreal Convention was adopted and signed by fifty-two states, including the United States, on May 28, 1999. The Montreal Convention of 1999 contains few “new” principles and essentially consolidates the existing Warsaw System into a single treaty and revises various articles in accordance with modern realities and concerns.²⁵ The Letter of Submittal by the U.S. Department of State summarized the principal features of the Montreal Convention as follows:

23. For a discussion of the IATA Intercarrier Agreements see *In re Air Crash at Little Rock Arkansas*, on June 1, 1999, 291 F.3d 503, 506, n.2 (11th Cir. 2002); *Price v. KLM-Royal Dutch Airlines*, 107 F. Supp. 2d 1365, 1368-70 (N.D. Ga. 2000); *Verdesca v. American Airlines, Inc.*, 2000 WL 1538704, at *2 (N.D. Tex. Oct. 17, 2000); GEORGE N. TOMPKINS, *LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS OF THE U.S.* 13 (KLUWER LAW INTERNATIONAL 2010).

24. In 2006, the DOT approved the Air Transport Association of America’s 2006 IPA Agreement, which replaces and expands carrier IIA/MIA as well as harmonize U.S. liability rules with those that apply in the EU. See DOT Order 2006-10-14 (Oct. 26, 2006). See also EC Regulation 889/200 (amending EC Regulation 2027/97), which applies the Montreal Convention regime to all carriage by EU airlines. Note that the ATA is now known as “Airlines for America.”

25. For a detailed overview of the Montreal Convention see DEMPSEY & MILDE, *supra* note 13.

(1) it removes all arbitrary limits on recovery for passenger death or injury; (2) it imposes strict liability on carriers for the first 100,000 SDR^[26] of proven damages in the event of passenger death or injury; (3) it expands the bases for jurisdiction for claims relating to passenger death or injury to permit suits in the passenger's homeland if certain conditions are met; (4) it clarifies the obligations of carriers engaged in code-sharing operations; and (5) it preserves all key benefits achieved for the air cargo industry by Montreal Protocol No. 4. . . .²⁷

Whereas some courts have characterized the Montreal Convention, as they did the Warsaw Convention, as creating absolute liability, “this is not entirely accurate.”²⁸ Even though the Montreal Convention was intended to speed settlement and facilitate passenger recovery, it contains various provisions that operate to qualify liability, such as the “accident” and “bodily injury” requirement of Article 17.1, the contributory negligence defense of Article 20, and the no negligence defense in Article 21. Thus, liability under the Convention can be viewed as “absolute” only in the sense that after the Article 17 conditions for liability have been established the burden shifts to the carrier to exclude or limits its liability pursuant to Article 20 and Article 21.

A. ARTICLE 1 — SCOPE OF APPLICATION

Article 1 of the Montreal Convention is the key provision in determining the applicability of the Convention. Article 1 provides the following:

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.
2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two State Parties, or 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 State Party. Carriage between two points within the territory of a State

26. Article 24 of the Montreal Convention provides a mechanism for the review of the maximum liability every five years if the inflation factor exceeds 10 percent from last review. The Convention came into force in 2004, which called for a review in 2009. The inflation factor was calculated at 13.1 percent, triggering an increase effective in December 2009. See 74 FR 59017 (Nov. 16, 2009). The revised limit for bodily injury/death set forth in Article 21 was increased from 100,000 SDRs to 113,100 SDRs. *Id.* No adjustment was made in 2015 as the inflation factor was 8.2 percent, thus below the 10 percent threshold. See ICAO Working Paper, C-WP/14148 (May 21, 2014).

27. Letter of Submittal from Deputy Secretary Strobe Talbott, U.S. Dep't of State, June 23, 2000, reprinted in S. Treaty Doc. No. 106-45 at X (1999 WL 33292734, at *7).

28. *Saks*, 470 U.S. at 407.

Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.
4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 1 makes the Montreal Convention applicable to all international air carriage performed by aircraft for reward and to gratuitous carriage by aircraft performed by an “air transport undertaking.”²⁹

In addressing the meaning of “gratuitous carriage by aircraft performed by an air transport undertaking,” courts have mostly focused on what persons the convention covers when it refers to gratuitous carriage of passengers in commercial aircraft.³⁰

The phrase “air transport undertaking” which replaced “air transportation enterprise” in Article 1(1) of the Warsaw Convention is not defined but some commentators believe that “common interpretation” would dictate that the term contemplates “airlines and other entities duly licensed under the laws of a State to perform carriage of passengers, baggage and goods for remuneration” (whether or not receiving remuneration for the transportation involved).³¹

Another commentator ascribes to a broader view of an “air transport undertaking”:

The prior language employed in the Convention for gratuitous travel was “enterprise,” not “undertaking.” The word “enterprise” in the Warsaw Convention would apply to an airline (an air transport enterprise), but most likely would not apply to an air transport operation of a company which is not an airline. The language “undertaking” presumably could cover private companies such as IBM which flies customers free from New York to Toronto. Such a flight probably would not be covered by the term “enterprise” under the Warsaw Convention because IBM is not in

29. Article 2 further states that the Convention extends to air carriage performed by the state if it falls within Article 1.

30. See *Sulewski v. Federal Express*, 933 F.2d 180 (2d Cir. 1991) (“passenger” status under the Convention does not require a fare paying traveler insofar as Article 1(1) applies to gratuitous travel); *Lavergne v. Atis Corp.*, 767 F. Supp. 2d 301 (D.P.R. 2011). Cf. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, n.30 (5th Cir. 1967) (noting that the object of this provision was to “exclude the application of the [Warsaw] Convention to casual, isolated flights when a free ride is afforded by an owner not engaged in the business (enterprise) of flying”).

31. See *DEMPSEY & MICHAEL MILDE*, *supra* note 13.

the air transportation business. As a result, the term “undertaking” could expand the coverage of the new Convention and its unlimited, presumptive liability regime to a trip with a friend from London to Nice in a private aircraft.³²

The only decision to address this issue adopted the former view, finding that “Article 1.1 clearly refers to a business dedicated to air transport.”³³

The critical element of Article 1, however, is the existence of an agreement between the parties providing for international carriage. To qualify as international carriage the places of departure and destination have to be either in two states that have ratified the Montreal Convention or within a single state that has ratified the Montreal Convention, so long as there is an agreed stopping place in another state, whether or not it has ratified the Montreal Convention.

For example, a one-way trip from the United States to the Russian Federation would not be governed by the Montreal Convention because Russia (as of 2016) is not a party to the Convention. However, if the transportation was round-trip U.S.–Russia–U.S., it would be governed by the Montreal Convention, as the place of departure and destination are both within the territory of a contracting state (the United States) with an agreed stopping place in another state (Russia)³⁴ but one-way carriage (U.S.–Russia) would be governed by the Warsaw Convention/Hague Protocol. Therefore, the Warsaw Convention remains relevant, as it may be applicable depending on the full routing of the passenger.

Domestic flights without a stopover in another state do not qualify as international carriage even if they have crossed international airspace. However, a domestic leg of an overall international flight may, under most circumstances, be deemed international carriage.³⁵

Article 1.3 states that carriage performed by several successive carriers is deemed to be one undivided carriage if it has been regarded by the parties as a single operation, whether it is pursuant to a single contract or a series of contracts.³⁶ The

32. See Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 AIR AND SPACE LAW 15 (2000).

33. See *Lavergne v. Atis Corp.*, 767 F. Supp. 2d 301 (D.P.R. 2011).

34. See *Benjamin v. American Airlines, Inc.*, 32 F. Supp. 3d 1309, 1315 (S.D. Ga. 2014); *Razi v. Qatar Airways*, 2014 WL 496654 (S.D. Tex. Feb. 6, 2014); *Jones v. USA 3000 Airlines*, 2009 WL 330596, at *2 (E.D. Mo. Feb 9, 2009); *Bunis v. Israir GSA, Inc.*, 511 F. Supp. 2d 319, 322 (E.D.N.Y. 2007); *In re Air Crash at Lexington*, WL 1876456; *Knowlton v. American Airlines*, 2007 WL 273794 (D. Md. Jan. 31, 2007); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007).

35. See *Cattaneo v. American Airlines, Inc.*, 2015 WL 5610017 (N.D. Cal. Sept. 24, 2015); *Greig.*, 28 F. Supp. 3d 973, 976; *Heinemann v. United Continental Airlines*, 2011 WL 2144603 (W.D. Wash. May 31, 2011); *Gerard v. American Airlines, Inc.*, 2007 WL 2205364 (Conn. Super. July 12, 2007).

36. Where the Montreal Convention applies, the jurisdictional requirements of Article 33, which sets forth where an action may be maintained, must also be satisfied to allow a U.S. court to adjudicate the claim before it. See *infra* for a discussion of Article 33. See, e.g., *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C. Cir. 1988) (Warsaw Convention). Under the Warsaw Convention, courts analyze Article 1(3) and

determination of whether carriage is successive³⁷ requires evidence that *both* parties separately issued tickets for domestic carriage and for international carriage regarded the carriage as an undivided, single operation. This requires an inquiry into the intent of the parties *at the time* they entered into those contracts for carriage.³⁸ To determine the parties' intent, courts look to the terms of the contract or agreement of carriage, for example, evidenced by the ticket,³⁹ which "should be interpreted according to the objective, rather than the subjective, intent of the parties."⁴⁰ When a contract is unambiguous, it alone is taken to express the intent of the parties.⁴¹ Therefore, the focus is on the objective manifestations of the parties' intent expressed by the ticket in order to determine both a passenger's "destination" and whether the passenger's transportation constituted a "single operation"

jurisdictional requirements simultaneously and apply the same test to determine whether domestic carriage is successive carriage for purposes of Article 1(3) as well as to determine the "destination" for purposes of Article 28(1). *See* *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 986–87 (9th Cir. 2004); *Haldimann v. Delta Airlines, Inc.*, 168 F.3d 1324, 1325 (D.C. Cir. 1999).

37. "Successive carriage" is carriage that is considered by the parties to the contract to be a single operation, such as interline operations, as opposed to code-share type operations. Article 36 of the Montreal Convention (discussed *infra*) addresses the liability of successive carriage and Articles 39–48 (discussed *infra*) address liability for code-share type operations.

38. *See* *Cattaneo v. American Airlines, Inc.*, 2015 WL 5610017, at *2 (N.D. Cal. Sept. 24, 2015); *Richards v. Sing. Airlines Ltd.*, 2013 WL 6405868, (C.D. Cal. Dec. 4, 2013); *Lin Zhang v. Air China Ltd.*, 866 F. Supp. 2d 1162, 1167 (N.D. Cal. Apr. 17, 2012); *Kruger v. United Air Lines, Inc.*, 2007 WL 3232443, at *4 (N.D. Cal. Nov. 1, 2007); *see also* *Auster v. Ghana Airways Ltd.*, 514 F.3d 44 (D.C. Cir. 2008); *Coyle*, 363 F.3d 979, 986; *Gerard*, 2007 WL 2205364, at *3–4.

39. The best evidence of the contract for carriage is the passenger ticket. *See* *Dordieski v. Austrian Airlines*, 2016 WL 4437958 (N.D. Ind. Aug. 8, 2006); *Gerard* WL 2205364, at *3 (Montreal Convention); *see also* *Coyle*, 363 F.3d 979, 987 (citing cases and other authorities); *see also* *In re Air Crash of Aviateca Flight 901 Near San Salvador, El Salvador on Aug. 9, 1995*, 29 F. Supp. 2d 1333, 1341 (S.D. Fla. 1997); *In re Air Disaster Near Cove Neck, New York*, 774 F. Supp. 732, 734 (E.D.N.Y. 1991) ("It is now well settled that the ticket does not constitute the contract of carriage. . . . Rather, the ticket constitutes a memorialization of the contract of carriage, which evidences the relationship between the carrier and the purchaser.").

40. *See* *Lin Zhang v. Air China Ltd.*, 866 F. Supp. 2d 1162, 1167 (N.D. Cal. Apr. 17, 2012); *Gustafson v. American Airlines, Inc.*, 658 F. Supp. 2d 276, 285 (D. Mass. 2009); *Kruger v. United Airlines, Inc.*, 2007 WL 3232443, at *4 (N.D. Cal. Nov. 1, 2007); *see also* *Auster v. Ghana Airways Ltd.*, 514 F.3d 44, 47 (D.C. Cir. 2008) ("The convention requires notice, not clairvoyance"), quoting *Santleben v. Continental Airlines, Inc.*, 178 F. Supp. 2d 752, 757 (S.D. Tex. 2001); *Robertson v. American Airlines, Inc.*, 401 F.3d 499, 502, 504 n.3 (D.C. Cir. 2005); *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 986 (9th Cir. 2004); *Haldimann v. Delta Airlines, Inc.*, 168 F.3d 1324, 1325 (D.C. Cir. 1999); *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 819 (9th Cir. 1995); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997); *Swaminathan v. Swiss Air Transp. Co.*, 962 F.2d 387, 389 (5th Cir. 1992); *Manion v. American Airlines, Inc.*, 17 F. Supp. 2d 1, 4 (D.D.C. 1997).

41. *Id.*; *Cattaneo v. American Airlines, Inc.*, 2015 WL 5610017, at *2 (N.D. Cal. Sept. 24, 2015); *Santleben*, 178 F. Supp. 2d 752, 755.

of international carriage for purposes of the Convention.⁴² Though the focus is on the ticket for a passenger's air carriage, for limited purposes courts have looked to other evidence so long as it is *objective* extrinsic evidence to explain that which is on the ticket, or *to a limited degree* to connect flights together as, or rule out the possibility that certain flights were, part of an undivided transportation even when the flight coupons do not *themselves* evince such a connection (or its absence).⁴³ Subjective extrinsic evidence cannot properly be considered. The fact that the Montreal Convention no longer requires the issuance of passenger tickets does not alter the fundamental interpretive principle that objective evidence controls.⁴⁴

B. ARTICLE 3—PASSENGER DOCUMENTATION

Article 3 of the Montreal Convention merges the documentation requirements for passengers and baggage, simplifying the documentation necessary for travel and allowing airlines to adopt modern and efficient ticketing procedures (e.g., e-tickets). Article 3.1 simply requires the carrier to deliver a document indicating the places of departure/destination and agreed stopping places. Article 3.2, however, allows the carrier to substitute this document by any other means that preserves this information. Thus, e-tickets are acceptable in place of the traditional paper tickets.

The most significant change in Article 3 relates to the notice requirement. Under Article 3 of the Warsaw Convention, failure to provide notice of the Convention's applicability deprives the carrier of the limits of liability.⁴⁵ Article 3.4 of the Montreal Convention simply requires that a passenger be given written notice

42. See *Cattaneo*, 2015 WL 5610017, at *2; *Kruger*, 2007 WL 3232443; see also *Auster*, 514 F.3d 44; *Robertson*, 401 F.3d 499, 502, 504 n.3; *Haldimann*, 168 F.3d 1324, 1325.

43. *Id.*; see also *Coyle*, 363 F.3d 979, 989; *Petriere v. Spantax, S.A.*, 756 F.2d 263, 265–66 (2d Cir. 1985) (looking to “the objective facts of the ticketing” in determining that the parties had a single contract for undivided international transportation because passengers’ flight coupons “were issued sequentially at the same time and the same place for round-trip travel to be interrupted by no more than a five-day stopover”); *In re Air Crash Disaster at Warsaw, Poland*, on Mar. 14, 1980, 748 F.2d 94, 96–97 (2d Cir. 1984) (“As a result of the separate handling of the ticket reservations, payment, issuance, and delivery for the domestic flights and the LOT flight, not only would the passengers not be likely to have considered the flights as a ‘single operation,’ . . . but the carriers could not have considered that they were ‘successive.’”); *In re Air Crash of Aviateca Flight 901*, 29 F. Supp. 2d 1333, 1340 (referring to trade usage to decipher an industry code affixed to a particular flight coupon); *McLoughlin v. Commercial Airways (Pty) Ltd.*, 602 F. Supp. 29, 33 (E.D.N.Y. 1985) (“[W]here, as here, the parties arrange and pay in full for an international trip at the outset, each leg of the journey (even though some legs may be wholly domestic, covered by a separate ticket and carried on a separate airline) is within the Convention.”).

44. See *Kruger*, 2007 WL 3232443, at *4 (Montreal Convention).

45. See *Chan*, 490 U.S. 122 (sanction of Article 3(2) of Warsaw Convention applies only where no passenger ticket is delivered and not simply because the font size of the notice was too small.).

that the Convention applies,⁴⁶ but there is no sanction for noncompliance (see Article 3.5⁴⁷)—on the other hand, there is no limit of liability for passenger injury or death.⁴⁸

C. ARTICLE 17.1—DEATH AND INJURY OF PASSENGERS

The central feature of the Montreal Convention is unlimited liability.⁴⁹ The conditions for air carrier liability, however, remain unchanged from the Warsaw Convention.⁵⁰ Article 17.1 of the Montreal Convention creates the exclusive cause of action⁵¹ and sets forth the conditions under which an air carrier⁵² may be liable for passenger injury or death during international carriage. Article 17.1 (which is almost identical to Article 17 of the Warsaw Convention) provides:

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

As under the Warsaw Convention, a carrier is liable for passenger injury/death only if the claimant establishes the following three conditions: (1) there has been an “accident,” which causes (2) the passenger to suffer death or “bodily injury,” and (3) the accident took place “on board” the aircraft or “in the course of any

46. The notice need not be printed on the ticket itself, a simple poster at the check-in desk is sufficient or a reference/link in the itinerary receipt. See 14 C.F.R. § 221.105 related to ticket notices where the Warsaw Convention applies.

47. See *Dordieski*, 2016 WL 4437958 (N.D. Ind. Aug. 8, 2006); Gustafson, 658 F. Supp. 2d 276, 281; *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 489 (S.D.N.Y. 2009).

48. See *In re Air Crash at Lexington*, 501 F. Supp. 2d 902.

49. The Warsaw Convention, together with the Montreal Agreement, served to limit an air carrier’s liability for a passenger injury or death to the sum of \$75,000, unless the injury/death was proximately caused by the “wilful misconduct” of the air carrier within the meaning of Article 25 of the Warsaw Convention, in which event the monetary limit in Article 22 on recoverable damages was not available to the carrier. See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991).

50. As noted in the Letter of Transmittal of the Montreal Convention to the U.S. Senate:

1. [W.17; GCP.IV.1] Paragraph 1 provides for carrier liability for death or bodily injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking. The carrier’s limited defenses to liability are provided for elsewhere in the Convention (i.e., Article 21, below). It is expected that this provision will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments. S. Treaty Doc. No. 106-45, at 9 ((1999 WL 33292734, at *17).

51. See *Jacob*, 606 Fed. Appx. 478, 480; *In re Air Crash at Lexington*, 501 F. Supp. 2d 902; *Baah v. Virgin Atlantic Airways, Ltd.*, 473 F. Supp. 2d 591, 593 (S.D.N.Y. 2007).

52. The Convention applies to the agents and servants/employees of the carrier as well. See Montreal Convention, Article 30 and discussion *infra* discussing Article 30.

of the operations of embarking or disembarking.”⁵³ Though neither the Warsaw Convention nor the Montreal Convention defines these terms, they have been the subject of numerous court decisions.

1. “Accident”

In light of the retention of the “accident” standard by Article 17.1, the courts have followed Warsaw Convention precedent in interpreting “accident” under the Montreal Convention.⁵⁴

The meaning of “accident” under the Warsaw Convention was addressed by the Supreme Court in *Air France v. Saks*.⁵⁵ After reviewing the language, drafting history and structure of the Warsaw Convention, the Court found that the injury must be caused by an “accident,” not simply by an “occurrence” on board the aircraft. The Court in *Saks* concluded that liability under Article 17 of the Convention arises

only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.⁵⁶

“But when the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.”⁵⁷ Thus, “[n]ot every incident or occurrence during a flight is an accident within the meaning of Article 17 even if the incident gives rise to an injury.”⁵⁸

Accordingly, to establish an Article 17.1 “accident,” the plaintiff has the burden to establish (1) that an unusual or unexpected event took place; (2) that this event was external to the passenger, that is, the event was not a passenger’s own internal reaction to normal operation of the aircraft; and (3) the unusual or unexpected event proximately caused the injury alleged by the passenger.⁵⁹

53. See *Watts v. American Airlines, Inc.*, 2007 WL 3019344 (S.D. Ind. Oct. 10, 2007); *Bunis v. Israir GSA, Inc.*, 511 F. Supp. 2d 319 (E.D.N.Y. 2007); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007). See also *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004); *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999); *Saks*, 470 U.S. 392, 405–06; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535–36 (1991).

54. See *Bridgeman v. United Continental Holdings, Inc.*, 552 Fed. Appx. 294, 297 (5th Cir. 2013) (citing cases); *White v. Emirates Airlines, Inc.*, 493 Fed. Appx. 526, at *3 (5th Cir. 2012); *Watts*, 2007 WL 3019344; *Bunis*, 511 F. Supp. 2d 319; *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005 (N.D. Cal. 2007).

55. *Saks*, 470 U.S. 392 (1985).

56. *Id.* at 406.

57. *Id.*

58. *Id.* at 403.

59. *Vanderwall v. United Airlines, Inc.*, 80 F. Supp. 3d 1324 (S.D. Fla. 2015); *Ugav v. Amer. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1365 (S.D. Fla. 2008).

Even after *Saks*, the courts continued to struggle with the meaning of an “accident,” especially when the injury was not caused by any malfunction or abnormality in the aircraft’s operation or crew.

a. Assault/Passenger Torts. For example, courts have found an “accident” where the air carrier has facilitated a tort by a fellow passenger⁶⁰ or committed a tort itself.⁶¹ Some courts, however, require a plaintiff to not only prove an unusual or unexpected event or happening external to the passenger, but also that the event or happening related to the operation of the aircraft or a risk associated with or characteristic of air travel.⁶² These courts have refused to find an Article 17 “accident” for an assault on a passenger by another passenger⁶³ or government official(s),⁶⁴ unless the airline plays a causal role in the commission of the assault.⁶⁵

Courts (especially within the First Circuit) have used a two-prong approach requiring evidence demonstrating (1) an unusual or unexpected event or happening external to the passenger and (2) the event was a “malfunction or abnormality

60. *Lahey v. Singapore Airlines, Ltd.*, 115 F. Supp. 2d 464 (S.D.N.Y. 2000); *Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278 (N.D. Ill. Dec. 1, 1997).

61. *Marotte v. American Airlines*, 296 F.3d 1255 (11th Cir. 2002); *Fishman v. Delta Air Lines*, 132 F.3d 138 (2d Cir. 1998); *Maxwell v. Aer Lingus, Ltd.*, 122 F. Supp. 2d 210, 212–13 (D. Mass. 2000); *Waxman v. C.I.S. Mexicana de Aviacion, S.A.*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998); *Gonzalez v. TACA Int’l Airlines*, 1992 WL 142399 (E.D. La. 1992), *Diaz Lugo v. American Airlines, Inc.*, 686 F. Supp. 373 (D.P.R. 1988). Compare *Zarlin v. Air France*, 2007 WL 2585061 (S.D.N.Y. Sept. 6, 2007) with *Wipranik v. Air Canada*, 2007 WL 2441066 (C.D. Cal. May 15, 2007) (beverage spill and reclined seats).

62. See, e.g., *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823 (D. Haw. 1995) (injury caused by being punched by another passenger not an “accident” because it was not “derived from air travel”); *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y. July 7, 1992) (fistfight between passengers is not an “accident” because it is not a “risk characteristic of air travel” and “[t]o suggest that a fistfight between two passengers is a characteristic risk of air travel is absurd”).

63. See *id.* See also *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 70–71 (1st Cir. 2000); *Bland v. EVA Airways Corp.*, 2014 WL 1224466 (S.D.N.Y. 2014); *Arellano v. American Airlines, Inc.*, 69 F. Supp. 3d 1345, 1350 (S.D. Fla. Nov. 25, 2015); *Tsevas*, 1997 WL 767278.

64. *Dogbe v. Delta Air Lines, Inc.*, 969 F. Supp. 2d 261, at *1 (E.D.N.Y. Aug. 27, 2013) (the Port Authority’s excessive use of force after the passenger refused to disembark did not constitute an “accident”); *Cush v. BWIA Int’l Airways Ltd.*, 175 F. Supp. 2d 483, 488 (E.D.N.Y. 2001) (passenger injury as a result of being forcibly deplaned by immigration officials was not an unexpected or unusual event); *Grimes v. Northwest Airlines, Inc.*, 1999 WL 562244, at *3 (E.D. Pa. July 30, 1999) (passenger’s injuries not caused by an unexpected or unusual event when injury occurred during confrontation with another passenger and passenger refused to deplane and was subsequently arrested by airport police), *aff’d*, 216 F.3d 1076 (3d Cir. 2000); *Levy v. American Airlines*, 1993 WL 205857 at *4 (S.D.N.Y. June 9, 1993) (plaintiff suffered injuries at hands of DEA agents in course of his extradition from Egypt on narcotics charges), *aff’d*, 22 F.3d 1092 (2d Cir. 1994) (Table).

65. See *Glassman-Bianco v. Delta Airlines*, 2016 WL 117611 (E.D.N.Y. Mar. 25, 2016) (no Article 17 accident because touching of plaintiff by pilot and removal from aircraft was not unusual or unexpected as it was caused by plaintiff’s disruptive behavior). In situations involving the restraint of or removal from an aircraft of a passenger, the Tokyo Convention, which provides immunity to the airline for the acts of crew members, may be relevant. See *Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010).

in the aircraft's operation."⁶⁶ Courts utilizing this two-prong approach base the application of the second prong on their reading of *Saks* and a treatise written by Professor D. Goedhuis, the reporter for the drafting of the Warsaw Convention.⁶⁷ This view is also in accord with the post-ratification history of the Warsaw Convention as well as the drafting history of the Montreal Convention where efforts to replace the term "accident" with "event" were rejected.⁶⁸

Other courts have rejected the two-prong approach finding it inconsistent with *Saks* and the apportionment of risk principle adopted by the Convention.⁶⁹

Still, the courts have not been consistent on this issue. In *Wallace v. Korean Air*,⁷⁰ the Court of Appeals for the Second Circuit reversed the lower court's finding of no "accident" where a passenger was sexually assaulted by a fellow passenger during an international flight. Although it was conceded by the plaintiff that no act or omission of Korean Air caused or contributed to the assault (the carrier was unaware of the assault and immediately changed plaintiff's seat upon learning of the incident), the Second Circuit held that the "characteristics of air travel" (sitting in a confined space, adjacent to strangers, in a dimly lit, unsupervised location) increased the plaintiff's vulnerability to an assault and, thus, constituted an Article 17 "accident."

b. Pre-Existing Medical Conditions. Whereas under *Saks* an injury caused by a pre-existing medical condition generally does not qualify as an "accident," many recent cases involve allegations regarding the failure to warn, assist, or render adequate

66. *Goodwin v. British Airways PLC*, 2011 WL 3475420 at *4 (D. Mass. Aug. 8, 2011); *Ramos v. Transmeridian Airlines, Inc.*, 385 F. Supp. 2d 137, 141 (D. Mass. 2005); *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 201-02 (D. Mass. 1998); see *Boyd v. Deutsche Lufthansa Aktiengesellschaft*, 2015 WL 3539685 at *6 (E.D. La. 2015); *Bland v. EVA Airways Corp.*, 11-cv-050200 (PGG), Doc. No. 21 (S.D.N.Y. Mar. 13, 2013), *reconsideration denied*, 2014 WL 1224466 (Mar. 24, 2014); *Curley v. American Airlines Inc.*, 846 F. Supp. 280 (S.D.N.Y. 1994).

67. See *Goodwin v. British Airways PLC*, 2011 WL 3475420 at *5 (D. Mass. Aug. 8, 2011) ("The principle 'that the alleged accident must relate to the operation of the aircraft has its source in the treatise of Professor D. Goedhuis, the report for the drafting of the Warsaw Convention.' As reasoned by Professor Goedhuis, 'the carrier does not guarantee safety; he is only obliged to take all the measures which a good carrier would take for the safety of his passengers.'" (citations omitted)); *Ramos*, 385 F. Supp. 2d 137, 142; *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 203-04 (D. Mass. 1998).

68. Although the term "accident" was replaced by the term "event" in the Guatemala City Protocol of 1971, this Protocol never entered into force and was never ratified by the United States, and as noted, the term "accident" was purposefully retained by the drafters of the Montreal Convention.

69. See *Lee v. Air Canada*, 2017 WL 108058 (E.D.N.Y. Jan. 10, 2017); *McCarthy v. American Airlines, Inc.*, 2008 WL 2704515 at *5 (S.D. Fla. June 27, 2008); *Arellano v. American Airlines, Inc.*, 69 F. Supp. 3d 1345, 1349 (S.D. Fla. 2014); see also *Gezzi v. British Airways*, 991 F.2d 603 (9th Cir. 1993) (indicating that an "accident" need not relate to the "operation of the aircraft").

70. *Wallace v. Korean Air*, 214 F.3d 293 (2d Cir. 2000).

medical assistance following the initial injury.⁷¹ For example, in *Husain v. Olympic Airway, S.A.*, the Supreme Court, in a 6–2 decision,⁷² held that the failure to reseat an asthmatic passenger farther away from the smoking section on a smoking flight constituted an “accident” within the meaning of Article 17 of the Warsaw Convention. In *Husain*, a passenger allergic to cigarette smoke suffered a fatal asthma attack after the flight attendant refused to assist him in finding a seat further away from the plane’s smoking section. The Court found that the crew’s departure from relevant industry standard was unusual or unexpected conduct satisfying part of the first condition precedent.⁷³ Considering whether inaction can constitute an “event” for purposes of Article 17 liability, the Court rejected Olympic Airways’s argument that only affirmative conduct can constitute an “event” under Article 17. In dismissing that argument, the majority of the Court concluded that the aircrew’s failure to assist, or its inaction, can constitute an Article 17 “event.” With respect to the element of causation, the Court concluded that the failure of the aircrew to reseat the decedent, thus exposing him to smoke, were each links in the causal chain leading to the passenger’s death.⁷⁴

c. Violation of Industry Standards. After *Husain*, courts continue to examine more closely whether departure from the carrier’s own policies or industry standards may be relevant to establishing the existence of an “accident.” Some courts have found departures from industry standards are relevant to determining whether an accident occurred or suggested that significant departures from an airline’s policies or industry standards are unusual or unexpected events.⁷⁵ Other courts, however, have interpreted *Husain* as holding that although departures from policy or industry standard

71. See, e.g., *White v. Emirates Airlines, Inc.*, 493 Fed. Appx. 526, *3 (5th Cir. 2012); *Biniz v. Continental Airlines, Inc.*, 2016 WL 6906901 (S.D. Tex. 2016); *Sook Jung Lee v. Korean Air Lines Co.*, 2012 WL 1076269 (C.D. Cal. 2012); *Watts v. American Airlines*, 2007 WL 3019344 (S.D. Ind. Oct. 10, 2007) (Montreal Convention); *Bunis v. Israir GSA, Inc.*, 511 F. Supp. 2d 319 (E.D.N.Y. 2007) (Montreal Convention); see also *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001); but see *Racjcoorar v. Air India, Ltd.*, 89 F. Supp. 2d 324 (E.D.N.Y. 2000) (no “accident”); *Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (no “accident”).

72. Justice Scalia dissented in which Justice O’Connor (the author of the *Saks* opinion) joined.

73. The district court, however, had found 50 percent comparative negligence on the part of the deceased passenger. *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1141 (N.D. Cal. 2000), *aff’d*, 316 F.3d 829 (9th Cir. 2003), *aff’d*, 540 U.S. 644 (2004).

74. The mere occurrence of an “accident” does not lead to liability under the Convention. Rather, the accident must have “caused the death or bodily injury.” See *Zarlin v. Air France*, 2007 WL 2585061 (S.D.N.Y. Sept. 6, 2007); *Agravante v. Japan Airlines Int’l Co., Ltd.*, 2007 WL 2026494 (D. Guam July 9, 2007); *Cush v. BWIA Int’l Airways, Ltd.*, 175 F. Supp. 2d 483, 487 (E.D.N.Y. 2001). While questions of proximate cause are ordinarily treated as questions of fact, it may be one for the court where there are intervening causes, or where reasonable jurors could reach only one conclusion regarding the issue of proximate cause. *Id.*

75. See *Safa v. Deutsche Lufthansa AG Inc.*, 2014 WL 4274071 (E.D.N.Y. Aug. 28, 2014), *aff’d*, 621 Fed. Appx. 82 (2d Cir. 2015); *Watts v. American Airlines, Inc.*, 2007 WL 3019344, at *3–4 (S.D. Ind. Oct. 10, 2007); *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914, 919 (9th Cir. 2004).

may be unusual or unexpected events this is not inevitably the case and will have to be evaluated in each situation. The courts have insisted on this “flexible” approach, which considers all the factual circumstances, as a “negligence-based” standard of care approach is not appropriate in light of *Husain*.⁷⁶ Nonetheless, the courts throughout have examined airline policies and industry procedures when deciding whether an accident has occurred.⁷⁷

d. DVT. Courts, however, have declined to extend the *Husain* decision to find an “accident” in cases involving claims for the failure to warn of a deep vein thrombosis (DVT) risk. The courts that have addressed the issue conclude that developing DVT does not constitute an Article 17 “accident” because (1) there is no event external to the passenger, let alone an unusual or unexpected event, and (2) the failure to warn is not an “event” as that term is discussed in *Saks* and *Husain*.⁷⁸ Rather, the air carrier’s failure to warn is viewed as an act of omission (inaction that idly allows an unfolding series of events to reach their natural conclusion) as opposed to an act of commission (inaction that produces an effect, result, or consequence) as in *Husain*’s rejection of a request for assistance.⁷⁹

e. Allergic Reactions. As a general matter, if a passenger is served a meal or drink that is unexpected or contrary to his order, food service on a flight can be the basis

76. See *White v. Emirates Airlines Inc.*, 493 Fed. Appx. 526, 534 (5th Cir. 2012); *Phifer v. Icelandair*, 652 F.3d 1222 (9th Cir. 2011); *Caman v. Continental Airlines, Inc.*, 455 F.3d 1087 (9th Cir. 2006); *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004).

77. See *Nguyen v. Korean Air Lines Co., Ltd.*, 2015 WL 10766939 (N.D. Tex. Apr. 20, 2015) (finding air carrier’s failure to place passenger in wheelchair not accident as no evidence presented that this was an unexpected or unusual event—plaintiff produced no evidence suggesting that carrier “either refused to provide her with the previously requested wheelchair or that they deviated in any way from their internal policies and procedures or from industry standards in failing to ensure that she disembarked in a wheelchair”); *Aziz v. Air India*, 658 F. Supp. 2d 1144 (C.D. Cal. 2009) (lack of AED on aircraft not unusual or unexpected); *but see Campbell v. Air Jamaica Ltd.*, 760 F. 3d 1165 (11th Cir. 2014) (airline’s departure from its own policies and industry standards was irrelevant to the accident inquiry and that the Article 17 analysis “measures only whether the event was unusual from the viewpoint of the passenger, not the carrier”); *Vanderwall v. United Airlines, Inc.*, 80 F. Supp. 3d 1324 (S.D. Fla. 2015) (“[t]he fact that a series of events is alleged to have been caused by ‘crew negligence’ does not affect whether or not the event itself, as experienced by the passenger, was unexpected.”).

78. See *Twardowski v. Am. Airlines, Inc.*, 535 F.3d 952 (9th Cir. 2008); *Caman v. Continental Airlines Inc.*, 455 F.3d 1087 (9th Cir. 2006); *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004); *Blansett v. Continental Airlines*, 379 F.3d 177 (5th Cir. 2004).

79. A similar conclusion has been reached in the DVT cases pending before courts in the United Kingdom and Australia. See *In re Deep Vein Thrombosis and Air Travel Litigation*, (2005) 3 W.L.R. 1320; 2005 WL 3299091 (U.K. House of Lords); *Povey v. Qantas Airways Limited*, (2005) 216 ALR 427; 2005 WL 1460709 (High Court of Australia).

of an accident under the Montreal Convention.⁸⁰ However, there is no accident when the passenger is served what he expected to be served.⁸¹

f. Items in Aisle and Seating. Several courts have found that absent evidence that the aircraft was “unduly untidy” it is not unusual or unexpected for there to be a single item of trash on the aisle of an aircraft while in flight.⁸² Similarly, courts have held that an airline is not liable for injuries arising from the normal arrangement and operation of aircraft seats.⁸³ Finally, courts have found that disputes over airline seat assignments are “neither unexpected nor unusual” and an airline’s refusal to reassign a passenger’s seat is not an Article 17 “accident.”⁸⁴

80. See *Schaefer–Condulmari v. US Airways Group, LLC*, 2012 WL 2920375 (E.D. Pa. 2012) (request for gluten-free meal); *Horvath v. Deutsche Lufthansa, AG*, 2004 WL 486976 (S.D.N.Y. 2004) (passenger served salmon despite informing airline of her allergy to fish); *Scala v. American Airlines*, 249 F. Supp. 2d 176, 177 (D. Conn. 2003) (passenger served cranberry juice with alcohol instead of plain cranberry juice ordered, exacerbating existing heart condition); *Bouso v. Iberia Lineas Aereas De Espnana*, 1998 WL 148422, at *2 (S.D.N.Y. 1998) (passenger injured by foreign object in an in-flight meal).

81. See *Farra v. American Airlines*, 2000 WL 862830 (E.D. Pa. 2000) (a passenger requested that his meal be served immediately after takeoff to avoid illness. Sixteen days before his flight, he was informed by a supervisor at American Airlines that this request would not be accommodated, and his meal was served at the same time as the other passengers. The court held that the meal service was not an accident because his meal was served, as expected, at the same time as other passengers. “[E]xperiencing the expected is not ‘an unexpected or unusual event.’”).

82. See *Vanderwall v. United Airlines, Inc.*, 80 F. Supp. 3d 1324 (S.D. Fla. 2015) (presence of plastic wrap in aisle was not unusual or unexpected); *Rafailov v. El Al Israel Airlines, Ltd.*, 2008 WL 2047610, at *3 (S.D.N.Y. May 13, 2008) (granting summary judgment for defendant upon finding that “[t]he presence of a discarded blanket bag on the floor of an aircraft is [not] unexpected or unusual” and could not constitute an accident); *Sethy v. Malev–Hungarian Airlines, Inc.*, 2000 WL 1234660, at *4 (S.D.N.Y. 2000) (tripping over luggage left in the aisle during boarding did not qualify as an “accident” because there was nothing “unexpected or unusual” about a bag found in an aisle during the boarding process), *aff’d*, 13 Fed. Appx. 18 (2d Cir. 2001); see also *Craig v. Compagnie Nationale Air France*, 45 F.3d 435, at *3 (9th Cir. 1994) (affirming summary judgment for defendant because plaintiff “did not submit or point to any evidence . . . that finding shoes on the floor between two seats was unusual or unexpected”); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881 (5th Cir. 1996) (granting summary judgment in favor of airline where plaintiff twisted her ankle while attempting to maneuver around fully reclined seat in front of her because the incident was not caused by an unusual event); cf. *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F. Supp. 2d 508 (S.D.N.Y. 1998) (finding that “defendant’s failure to remove a hypodermic needle may safely be viewed as an unusual, unexpected departure from ordinary procedures”).

83. See, e.g., *Plonka v. U.S. Airways*, 2015 WL 6467917 (E.D. Pa. Oct. 27, 2015) (passenger injury caused by striking in-flight entertainment box affixed under seat not an accident); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 884 (5th Cir. 1996) (finding that a fully reclined seat is not an unusual or unexpected event or happening on an airplane); *Zarlin v. Air France*, 2007 WL 2585061, at *4 (S.D.N.Y. Sept. 6, 2007) (stating that the sudden, violent reclining of a seat was unlikely to be an “accident” under the Warsaw Convention, but denying summary judgment on other grounds); *Louie v. British Airways, Ltd.*, 2003 WL 22769110, at *6 (D. Alaska Nov. 17, 2003) (finding that a comfortable seat with a leg rest is not an unexpected or unusual event in business class).

84. See *David v. United Airlines, Inc.*, 2016 WL 1573423 (C.D. Cal. Apr. 18, 2016); *Arif Naqvi v. Turkish Airlines, Inc.*, 80 F. Supp. 3d 234 (2015); *Sewer v. LIAT (1974) Ltd.*, 2011 WL 635292, at *3 (D.V.I. Feb. 16, 2011); *Dogbe v. Delta Air Lines*, 969 F. Supp. 2d 261, 272 (E.D.N.Y. 2013).

2. “Bodily Injury”

The Montreal Convention retained the phrase “bodily injury” as used in the original Warsaw Convention. When the delegates at the Montreal Conference discussed the scope of Article 17.1, they specifically considered extending a carrier’s liability to mental injuries. Their discussions, however, did not lead to a general consensus on that subject and ultimately they opted to retain the “bodily injury” language in the Montreal Convention.⁸⁵ Thus, courts interpreting the meaning of “bodily injury” in Montreal Convention cases rely upon Warsaw Convention precedent to find that pure mental anguish damages are not recoverable.⁸⁶

The meaning of “bodily injury” under the Warsaw Convention was addressed by the Supreme Court in *Eastern Airlines v. Floyd*.⁸⁷ The Court found that damages for pure mental anguish injuries are not recoverable under the Warsaw Convention because such injuries cannot be considered a “bodily injury” within the meaning of Article 17. The Court, however, expressed “no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries . . . because respondents do not allege physical injury or physical manifestation of injury.”⁸⁸ Following *Floyd*, the lower courts have interpreted the “bodily injury” requirement not to include physical manifestations of mental injuries and require the plaintiff to demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety.⁸⁹ Even when there is a bodily injury, courts limit the mental anguish damages to those caused by or flowing from the physical injury.⁹⁰

85. See *Erllich v. American Airlines*, 360 F.3d 366, 390–400 (2d Cir. 2004) (discussing drafting history of “bodily injury” under the Montreal Convention); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007).

86. *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007).

87. *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991).

88. *Id.* at 552–53.

89. See *Jacob v. Korean Air Lines Co. Ltd.*, 606 Fed. Appx. 478, 481–82 (11th Cir. 2015); *Bassam v. American Airlines*, 287 Fed. Appx. 309 (5th Cir. 2008); *Lloyd v. American Airlines, Inc.*, 291 F.3d 503 (8th Cir. 2002); *Ehrlich v. American Airlines*, 360 F.3d 366 (2d Cir. 2004); *Terrafranca v. Virgin Atlantic Airways*, 151 F.3d 108, 111 (3d Cir. 1998); *Naqvi v. Turkish Airlines, Inc.*, 2015 WL 757198 (D. D.C. Feb. 23, 2015); *Croucher v. Worldwide Flight Serv., Inc.*, 111 F. Supp. 2d 501 (D.N.J. 2000); *Li v. Quraishi*, 780 F. Supp. 117, 119 (E.D.N.Y. 1992).

90. See *Jacob v. Korean Air Lines Co. Ltd.*, 606 Fed. Appx. 478, 481–82 (11th Cir. 2015) (mental injuries are recoverable under Article 17 only to the extent that they have been caused by bodily injuries and “the Convention simply does not provide a remedy for *subsequent* physical manifestations of an earlier emotional injury.”); *Bassam v. American Airlines*, 287 Fed. Appx. 309, 317 (5th Cir. 2008) (“in looking to existing judicial precedent, courts have held that emotional injuries are not recoverable under Article 17 of the Montreal or Warsaw Convention unless they were caused by physical injuries”); *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001) (subsequent physical manifestation is not sufficient); *Doe v. Etihad Airways*, 2015 WL 5936326 (E.D. Mich. Oct. 13, 2015) (emotional distress damages are not available under the Montreal Convention in needle prick case because it was not the physical needle prick itself that caused the distress, but

3. “On Board the Aircraft” or “Embarking or Disembarking”

As with the other terms of Article 17.1, courts look to Warsaw Convention cases in defining “on board the aircraft or in the course of any of the operations of embarking or disembarking.”⁹¹ Determining whether a passenger is “on board the aircraft” has not been problematic. The same cannot be said with respect to whether a passenger is “in the course of the operations of embarking or disembarking.”

Courts consider several factors when determining whether a passenger is in the course of any of the operations of embarking/disembarking the aircraft, such as

1. the passenger’s activity at the time of the injury (e.g., imminence of actual boarding),
2. the passenger’s location at the time of the injury (e.g., physical proximity to the gate), and
3. the degree of control being asserted over the passenger at the time of injury (e.g., restrictions, if any, on the passenger’s movement).⁹²

Whether embarking or disembarking, the relevant test is flexible, and courts adapt it to the changing conditions of international travel. Overall, the courts consider the nature of the activity in which the passenger is engaged to determine if that activity can fairly be considered part of “the operations of embarking” and find that control is an integral factor in evaluating both location and activity.⁹³

the possibility that the passenger may have been exposed to an infectious disease), *appeal argued*, No. 06-1042 (6th Cir. Oct. 19, 2016); *Naqvi v. Turkish Airlines, Inc.*, 80 F. Supp. 2d 234, 241 (D. D.C. 2015) (a plaintiff’s mental injury must proximately flow from physical injuries); *Katin v. Air France-KLM, S.A.*, 2009 WL 1940363 (E.D. Tex. July 2, 2009) (emotional injuries are not recoverable under Article 17 of the Montreal Convention unless they were caused by physical injuries but finding a fact issue on whether the plaintiff’s pain, suffering, and mental anguish were caused by his physical injury); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927, *4 (E.D.N.Y. May 8, 2007) (“Emotional injuries, however, are not recoverable under the Montreal Convention unless they were caused by physical injuries”); *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007) (emotional distress damages are limited to recovery for emotional distress flowing from the physical injuries). *See also* *Lloyd v. American Airlines, Inc.*, 291 F.3d 503 (8th Cir. 2002); *Longo v. Air France*, 1996 WL 866124 (S.D.N.Y. July 2, 1996); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 668 (N.D. Cal. 1994).

91. *See* *Bunis v. Israil GSA, Inc.*, 511 F. Supp. 2d 319 (E.D.N.Y. 2007).

92. *See id.*; *see also* *Campbell v. Air Jamaica Ltd.*, 760 F. 3d 1165 (11th Cir. 2014); *David v. United Airlines, Inc.*, 2016 WL 1573423 (C.D. Cal. Apr. 18, 2016); *Boyd v. Deutsche Lufthansa Aktiengesellschaft*, 2015 WL 3539685 at *5 (E.D. La. 2015). *See* *Maugine v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir. 1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975); *Gabra v. Egyptair*, 2000 WL 1473778 (S.D.N.Y. Oct. 4, 2000).

93. In *Bridgeman v. United Continental Holdings, Inc.*, 552 Fed. Appx. 294, 298 (5th Cir. 2013), the court held that a “tight tie” between an accident and the act of entering or departing the aircraft is required for an incident to fall under Article 17.1. Thus, an injury occurring at baggage claim area is not governed by Convention. *See* *Matveychuk v. Deutsche Lufthansa, AG*, 2010 WL 3540921 (E.D.N.Y. Sept. 7, 2010) (carrier gate agent’s alleged attack of passenger in a bathroom in the Frankfurt Airport during a layover on her journey from Newark to Minsk occurred while embarking even though next flight was not for several hours).

The closer or further the passenger is to the aircraft, both physically and in terms of time, and the more controlled the passenger's movements are by the carrier, the more likely it is that the passenger will be deemed to have been embarking/disembarking at the time of the accident.⁹⁴

D. ARTICLE 20—CONTRIBUTORY/COMPARATIVE FAULT

Although the Montreal Convention creates a virtually strict liability standard for injuries caused by accidents during international travel, that liability is not absolute. Article 20 of the Convention provides:

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Courts interpreting a similar provision under the Warsaw Convention (Article 21) look to the relevant local law to determine the applicable standard and often adopt a comparative causation standard (rather than a traditional contributory

94. See *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165 (11th Cir. July 8, 2014) (incident in which plaintiff was refused accommodations, stranded at the airport, and forced to spend the night outside the airport did not occur during embarkation); *Bridgeman v. United Continental Holdings, Inc.*, 552 Fed. Appx. 294 (5th Cir. Nov. 4, 2013) (severe emotional distress and mental anguish sustained at luggage carousel was not in the scope of embarking/disembarking); *Kruger v. Virgin Atl. Airway, Ltd.*, 976 F. Supp. 2d 290 (E.D.N.Y. Sept. 30, 2013), *aff'd*, 2014 WL 4694281 (2d Cir. Sept. 23, 2014) (court found plaintiff to be in the process of embarking when plaintiff was in terminal connecting to another flight with the same airline, plaintiff did not have a layover between flights, but, instead was rushing to board next flight; plaintiff was in an area restricted to departing passengers, carrier had possession of plaintiff's passport and boarding pass, and incident occurred in proximity to boarding gate); *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190 (E.D.N.Y. Mar. 28, 2012) (plaintiff's claims occurred outside the scope of the Convention when alleged incidents occurred while plaintiff was in terminal prior to deciding whether to board flight and then while plaintiff had "ample time to roam freely about the [public] terminal before his flight was called"); *Rogers v. Continental Airlines*, 2011 WL 4407441 (D.N.J. Sept. 21, 2011) (plaintiff was in the course of disembarking when incident involved plaintiff's removal from the aircraft and events taking place in the jetway after removal); *Walsh v. Koninklijke Luchtvaart Maatschappij N.V.*, 2011 WL 4344158 (S.D.N.Y. Sept. 12, 2011) (court found that a reasonable jury could find plaintiff was in the process of embarkation at the time of injury when, forty-five minutes prior to departure time, plaintiff stood up from his seat near the departure gate in response to two boarding calls and was injured while taking steps toward joining a group of passengers near the gate).

negligence standard).⁹⁵ However, the language of Article 20 appears to require the application of a comparative fault standard.

E. ARTICLE 21 —COMPENSATION IN CASE OF DEATH OR BODILY INJURY

Article 21 of the Montreal Convention eliminates all monetary limits of liability on compensatory damages for passenger injury or death. Article 21.1 makes the carrier “strictly” liable up to 113,100 SDRs (approximately \$155,000) for provable compensatory damages sustained in case of death or bodily injury to passengers, subject only to the Article 20 contributory fault defense.⁹⁶

Article 21.2, however, provides that a carrier is not liable for damages in excess of 113,100 SDRs if the carrier proves that the damage (1) was not due to the negligence or other wrongful act or omission of the carrier or (2) was solely due to the negligence or other wrongful act or omission of a third party.

Thus, the mere fact that an Article 17 “accident” occurred does not entitle plaintiff to recover all provable damages.

Article 21.2 reformulates the Warsaw Convention Article 20 “all necessary measures” defense. Although the drafters considered this reformulated language as more favorable to the carrier by casting the defense in terms of negligence, courts had never literally required a carrier to take “all necessary measures” because if all such measures had actually been taken, the injury would not have occurred. Rather, the clause had been construed to mean “all reasonable measures.”⁹⁷ Even under the Montreal Convention’s standard, however, a carrier can only avoid liability in excess of 113,100 SDRs where an accident was not due to their negligence or the sole fault of a third party.⁹⁸ Most significant is that the carrier bears the burden of proof on this issue.⁹⁹ This defense, however, has been successful in cases where a

95. See *In re Air Crash at Lexington*, 2008 WL 1440293 at *3 (Montreal Convention); see also *Prescod v. AMR, Inc.*, 383 F.3d 861, 870 (9th Cir. 2004); *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1354 (S.D. Fla. 2008); *Wipranik v. Air Canada*, 2007 WL 2441066 (C.D. Cal. May 15, 2007); *Eichler v. Lufthansa German Airlines*, 1994 WL 30464 (S.D.N.Y. Jan. 28, 1994).

96. Pursuant to Article 24, the Article 21 “limits” are subject to periodic review/adjustment. See *supra* note 26. Also, pursuant to Article 22.6, a court may award court costs and other litigation expenses in addition to the limits set forth in the Convention if such litigation costs and expenses are allowed by local law. See *Bytska v. Swiss International Air Line*, 2016 WL 6948375 (N.D. Ill. Nov. 28, 2016) (however, Article 22(6) does not change “the bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.”).

97. *Manufacturers Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y. 1977), *aff’d*, 573 F.2d 1292 (2d Cir. 1977); see also *Helge Management v. Delta Air Lines, Inc.*, 2012 WL 2990728 (D. Mass. 2012); *In re September 11 Litigation*, 500 F. Supp. 2d 356, 359–60 (S.D.N.Y. 2007); *Kwon v. Singapore Airlines*, 356 F. Supp. 2d 1041 (C.D. Cal. 2003); *Verdesca v. American Airlines, Inc.*, 2000 WL 1538704 (N.D. Tex. 2000); *Obuzor v. Sabena Belgian World Airlines*, 1999 WL 223162 (S.D.N.Y. Apr. 16, 1999).

98. *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1354 (S.D. Fla. 2008).

99. *Delgado v. Delta Air Lines, Inc.*, 2013 WL 9838339, at *4 (S.D. Fla. Oct. 31, 2013).

passenger was injured by a fellow passenger and the carrier was not in a position to prevent the injury.¹⁰⁰

F. ARTICLE 28—ADVANCE PAYMENTS

Article 28 of the Montreal Convention requires carriers to make advance payments covering immediate economic needs, *if required by their national law*, to persons entitled to compensation as a result of an aircraft accident causing injury or death of passengers. Article 28 provides:

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Although U.S. law does not require such payments, many air carriers voluntarily make these payments to individuals needing immediate assistance pending the final resolution of any claim. EU Regulation No. 889/2002 requires Community carriers to make advance payments of not less than 16,000 SDRs. A similar provision was included in the Air Transport Association of America's 2006 IPA Agreement (discussed *supra*, note 24).

G. ARTICLE 29—BASIS OF CLAIM/EXCLUSIVITY/DAMAGES

Article 29 of the Convention (Basis of Claim) was intended to make clear that no matter how the claim is framed, the claim is governed by the Convention but that the issues of what types of compensatory damages are recoverable and who are the proper claimants are left to local law. Article 29 provides:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

100. See *Lee v. Air Canada*, 2017 WL 108058 (E.D.N.Y. Jan. 10, 2017); *Wright v. American Airlines, Inc.*, 2010 WL 446077 (N.D. Tex. Feb. 8, 2010). A federal rather than a state standard of care should apply in assessing the Article 21 no negligence defense as state standards should be preempted. See *Ahmadi v. United Continental Holdings, Inc.*, 2015 WL 4730116 (E.D. Cal. Aug. 10, 2015), *Allen v. American Airlines, Inc.*, 301 F. Supp. 2d 370, 374–75 (E.D. Pa. 2003).

1. *Basis of Claim/Exclusivity*

One of the most hotly disputed issues that confronted the courts of the United States was whether the Warsaw Convention created a cause of action and, if so, whether it was exclusive (i.e., whether state law causes of action were permissible). The issue of whether the Convention created a cause of action was resolved years ago, but the exclusivity issue was not settled until the Supreme Court decision in *El Al Israel Airlines, Ltd. v. Tseng*.¹⁰¹

In *Tseng*, the Supreme Court analyzed the effect of the Article 17 cause of action and held that recovery “if not allowed under the Convention, is not available at all.”¹⁰² The *Tseng* Court recognized that because the aim of the Convention was to provide a single uniform rule of air carrier liability for all injuries suffered in the course of international carriage of passengers, allowing a state-based action would destroy the uniformity envisaged by the Convention. Accordingly, “Article 17’s ‘substantive scope’ extends to all passenger injuries occurring ‘on board the aircraft or in the course of any of the operations of embarking and disembarking’—even if the claim is not actionable under the treaty” and “the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered.”¹⁰³

The exclusivity of the Montreal Convention is made explicit by Article 29.¹⁰⁴ Applying Article 29 together with *Tseng*, most courts find that the Montreal Convention provides the sole and exclusive cause of action and preempts all state law actions.¹⁰⁵

101. *Tseng*, 525 U.S. 155 (1999).

102. *Id.* at 161.

103. *King v. American Airlines*, 284 F.3d 352, 356–61 (2d Cir. 2002); *see Marotte v. American Airlines, Inc.*, 296 F.3d 1255 (11th Cir. 2002); *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001); *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1152–53 (8th Cir. 1999).

104. Article 29 is taken from MP4, which the Supreme Court in *Tseng*, 525 U.S. at 175, found conclusively resolved the exclusivity issue.

105. *See Alam v. American Airlines Group, Inc.*, 2017 WL 1048073, at *5–6 (E.D.N.Y. Mar. 17, 2017); *Patel v. Singapore Airlines, Ltd.*, 2017 WL 1078444, at *2–3 (C.D. Cal. Mar. 21, 2017); *David v. United Airlines, Inc.*, 2016 WL 1573423 (C.D. Cal. Apr. 18, 2016); *Vanderwall v. United Airlines, Inc.*, 80 F. Supp. 3d 1324 (S.D. Fla. 2015); *Lee v. AMR Corp.*, 2015 WL 3797330 (E.D. Pa. June 18, 2015) (citing cases); *Benamar v. Air France-KLM*, 2015 WL 2153440 (C.D. Cal. May 7, 2015); *Mateo v. JetBlue Airways Corp.*, 847 F. Supp. 2d 383, 386–87 (E.D.N.Y. 2012); *Smith v. American Airlines, Inc.*, 2009 WL 3072449 (N.D. Cal. Sept. 22, 2009); *In re Air Crash at Lexington*, 501 F. Supp. 2d 902; *Onyekuru v. Northwest Airlines*, 2007 WL 2713892 (N.D. Ill. Sept. 14, 2007); *Bunis v. Israil GSA, Inc.*, 511 F. Supp. 2d 319 (E.D.N.Y. 2007); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007); *Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005 (N.D. Cal. 2007); *Knowlton v. American Airlines, Inc.*, 2007 WL 273794 (D. Md. Jan. 31, 2007); *Igwe v. Northwest Airlines, Inc.*, 2007 WL 43811 (S. D. Tex. Jan. 4, 2007); *Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 196 (S.D.N.Y. 2004), *aff’d*, 194 Fed. Appx. 5 (2d Cir. 2006); *see also El-Zoobi v. United Airlines, Inc.*, 50 N.E.3d 1150 (Ill. App. 2016); *Gerard v. American Airlines, Inc.*, 2007 WL 2205364 (Conn. Super. July 12, 2007).

Despite the *Tseng* decision and the apparent similarity of Article 29 of the Montreal Convention to Article 24 of the Warsaw Convention, U.S. courts have been increasingly divided as to whether Montreal Convention preempts state law claims arising within the Convention's scope. This divide has fostered inconsistency in the application of a treaty established to create uniformity.

In particular, courts are divided as to whether an air carrier may remove state law claims for injuries or damages occurring within the scope of the Convention from state court to federal court by claiming that the federal court has jurisdiction because the matter arises "under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331. Several courts have found that the Convention completely preempts state law and that federal courts have jurisdiction.¹⁰⁶ However, a recent "trending majority" of courts have found that the Convention does not completely preempt a passenger's state law claims for purposes of removal to federal court.¹⁰⁷

Unfortunately, because this issue arises in removal disputes there is little chance that this conflict will be resolved by the appellate courts.¹⁰⁸

2. Recoverable Damages and Claimants

As with the Warsaw Convention, the Montreal Convention does not expressly address the issues of what compensatory damages may be recovered and who are the proper claimants. The Convention leaves these issues to the domestic law

106. See *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1153 (8th Cir. 1999) (finding passenger's state law cause of action completely preempted by Warsaw Convention and that *Tseng* decision "at the very least" reinforced its decision that the Convention completely preempts state law claims); *Rosenbrock v. Deutsche Lufthansa, A.G., Inc.*, 2016 WL 2756589 (S.D. Tex. May 9, 2016) (removal state-based baggage delay and injury claims proper as claim completely preempted by Convention); *Fadhliah v. Societe Air France*, 987 F. Supp. 2d 1057, 1064 (C.D. Cal. 2013) ("The Court finds that the Montreal Convention applies to Plaintiff's claims against Air France . . . the Court further finds that the Montreal Convention does provide the exclusive cause of action against Air France and that the Court thus has federal-question jurisdiction under the complete-preemption doctrine."); *Mateo v. JetBlue Airways Corp.*, 847 F. Supp. 2d 383 (E.D.N.Y. 2012) (same); *Ginsberg v. American Airlines*, 2010 WL 3958843, at *3 (S.D.N.Y. Sept. 27, 2010) (same); see also *Garrisi v. Northwest Airlines, Inc.*, 2010 WL 3702374, at *5 (E.D. Mich. Sept. 16, 2010); *Schaefer-Condulmari v. US Airways Group, Inc.*, 2009 WL 472882, at *8-10 (E.D. Pa. Dec. 8, 2009); *Jones v. USA 3000 Airlines*, 2009 WL 330596, at *3 (E.D. Mo. Feb. 9, 2009); *Schoeffler-Miller v. Northwest Airlines, Inc.*, 2008 WL 4936737, at *3 (C.D. Ill. Nov. 17, 2008); *In re Air Crash at Lexington*, 501 F. Supp. 2d 902, 912-14.

107. See *Hoffman v. Alitalia-Compagnia Aerea Italiana S.P.A.*, 2015 WL 1954461 (D.N.J. Apr. 28, 2015) (ordering remand); *Benjamin v. American Airlines, Inc.*, 2014 WL 3365995 (S.D. Ga. July 9, 2014); see, e.g., *Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., Ltd.*, 522 F.3d 776, 781 (7th Cir. 2008); *Adler v. WestJet Airlines, Ltd.*, 2014 WL 3114070 (S.D. Fla. July 8, 2014); *Greig v. US Airways Inc.*, 2014 WL 2999199, at *4 (D. Ariz. June 26, 2014); *Constantino v. Continental Airlines, Inc.*, 2014 WL 2587526, at *3-4 (D.N.J. June 9, 2014); *DeJoseph v. Continental Airlines, Inc.*, 2014 WL 1891407, at *8 (D.N.J. May 12, 2014).

108. Pursuant to 28 U.S.C. § 1447(d) a remand order generally is not reviewable, regardless of whether a court of appeals deems the remand order erroneous.

applicable¹⁰⁹ under the forum's choice-of-law rules.¹¹⁰ In other words, except for the recovery of pure mental anguish and punitive damages—which are not recoverable under the Montreal or Warsaw Convention¹¹¹—the Convention simply provides a pass-through to the applicable domestic law to determine the types of recoverable compensatory damages and the claimants thereof.¹¹²

H. ARTICLE 30—APPLICATION OF THE MONTREAL CONVENTION TO SERVANTS AND AGENTS

Like the Warsaw Convention, the Montreal Convention applies to the agents, servants, and employees of the carrier as well. Although the Warsaw Convention made reference to agents (but not servants) in several articles (Articles 16, 20, and 25), it did not expressly state that the Convention applied to all agents and servants of the carrier. Rather the courts interpreted the Warsaw Convention to apply to the agents and servants/employees of the carrier finding that an entity is an agent of an air carrier if it performs services in furtherance of the contract of carriage, and services within the scope of the Convention that the airline is otherwise required by law to perform.¹¹³

109. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 225 (1996) (“in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states.”).

110. Federal courts have applied different choice of law rules to claims brought under the Warsaw Convention. Some courts have applied the forum state's choice of law rules while other courts have applied federal choice of law rules. *Vumbaca v. Terminal One Grp. Assoc.* L.P. 2012 WL 1377074, at *10 (E.D.N.Y. Apr. 20, 2012). Where the accident occurs on navigable waters, courts also have applied admiralty choice of law principles. *See, e.g.*, *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 919–21 (9th Cir. 1999); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 13–14 (2d Cir. 1996); *Kruger v. Virgin Atlantic Airways, Ltd.*, 976 F. Supp. 2d 290, 298 (E.D.N.Y. 2013); *In re Air Crash at Belle Harbor, New York* on Nov. 12, 2001, 2006 WL 1288298, at *23–27 (S.D.N.Y. May 9, 2006).

111. Article 29 of the Montreal Convention expressly prohibits the recovery of punitive, exemplary, or other noncompensatory damages. *See Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007); *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007). Courts interpret the Warsaw Convention to prohibit the recovery of punitive damages. *See In re Korean Air Lines Disaster*, 932 F.2d 1475, 1485–90; *In re Air Disaster at Lockerbie*, 928 F.2d 1267, 1284; *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd in part on other grounds*, 499 U.S. 530 (1991).

112. *See Kruger v. United Air Lines, Inc.*, 481 F. Supp. 2d 1005, 1009 (N.D. Cal. 2007) (Montreal Convention).

113. *Leonardo v. Singapore Airlines, Inc.*, 140 F. App'x 661 (9th Cir. 2005), *In re Air Disaster at Lockerbie*, 776 F. Supp. 710, 714 (limits on liability apply to subcontractors which provide airport security); *see Reed v. Wisner*, 555 F.2d 1079, 1089–93 (2d Cir. 1977) (applying Warsaw Convention's limitations to airline employees); *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F. Supp. 2d 508, 514 (S.D.N.Y. 1998) (finding an aircraft cleaning service to be acting in furtherance of the airline's contract of carriage and therefore covered by the Warsaw Convention); *Johnson v. Allied Eastern States Maintenance Corp.*, 488 A.2d 1341, 1345 (D.C. 1985) (skycap company was covered by the Warsaw Convention); *see also Lerakoli, Inc. v. Pan Am. World Airways, Inc.*, 783 F.2d 33, 36 (2d Cir. 1986) (noting the “reasoning of this and other courts . . . holding that

Article 30 of the Montreal Convention expressly states that the Convention applies to the agents and servants of the carrier.¹¹⁴ Article 30.1 provides:

If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

Article 43 extends the same rule to the agents and servants of actual and contracting carriers.

Of course, if a party is not an agent of an air carrier, then the Convention has no effect on its liability under local law.¹¹⁵

I. ARTICLE 33—JURISDICTION

Article 33 of the Montreal Convention sets forth five jurisdictions where an action for damages under the Convention must be brought and states the following:

1. An action for the damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

the liability limitations for air carriers under the Warsaw Convention should be extended to employees and agents of such carriers”).

114. See *Dogbe v. Delta Air Lines, Inc.*, 969 F. Supp. 2d 261 (E.D.N.Y. 2013); *Vumbaca v. Terminal One Group Ass'n, L.P.*, 859 F. Supp. 2d 343, 362 (E.D.N.Y. 2012) (air terminal operator is agent of carrier). There are numerous other references throughout Convention to the agents and servants of the carrier. See, e.g., Articles 10 & 16 (cargo); Article 17.2 (baggage liability); Article 20 (all reasonable measures defense in relation to delay claims); Article 22(5) (intentional or reckless misconduct); Article 41 (mutual liability).

115. See Montreal Convention, Article 37 (“Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.”); compare *Vumbaca v. Terminal One Group Ass'n, L.P.*, 859 F. Supp. 2d 343, 362 (E.D.N.Y. 2012) with *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1354, 1364 (S.D. Fla. 2008) (“As to Defendant [terminal operator] Miami-Dade County, the Montreal Convention only governs carriers. Thus, because the County is not a carrier, it cannot be held liable where an action falls within the Convention’s purview.”).

3. For the purposes of paragraph 2, (a) “commercial agreement” means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; (b) “principal and permanent residence” means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.
4. Questions of procedure shall be governed by the law of the court seized of the case.

Unless one of the Article 33 fora is present in the United States, the court lacks “treaty” jurisdiction and, therefore, subject matter jurisdiction over the claim.¹¹⁶ Moreover, any pre-incident agreement that alters the Convention’s jurisdictional rule is null and void.¹¹⁷

In addition to the four jurisdictions specified by Article 33(1) for any action under the Convention, Article 33(2) adds a “fifth jurisdiction” for death and injury claims—the principal and permanent residence of the passenger—provided the carrier operates to/from that place *and conducts business in that place*.¹¹⁸

1. *The Domicile and Principal Place of Business of the Carrier*

An air carrier has only one domicile, which is the place of its incorporation or its headquarters.¹¹⁹ The carrier’s principal place of business also generally is the carrier’s place of incorporation but may differ depending on the facts.¹²⁰

2. *The Place of Business through Which the Contract Has Been Made*

Generally, in the transportation of passengers, the relevant “contract of transportation” is evidence by the passenger ticket. The “place of business through which the contract has been made” is the place where the passenger ticket was purchased

116. See *Alemi v. Qatar Airways*, 842 F. Supp. 2d 847 (2012); *Aikpitanhi v. Iberia Airlines of Spain*, 2008 WL 880535 (E.D. Mich., Mar. 31, 2008) (Montreal Convention); *Baah v. Virgin Atlantic Airways, Ltd.*, 473 F. Supp. 2d 591 (S.D.N.Y. 2007) (Montreal Convention). Because Article 33 relates to the court’s subject matter jurisdiction, it is not subject to waiver.

117. See Article 49; *Avalon Technologies, Inc. v. EMO-Trans, Inc.*, 2015 WL 1952287 (E.D. Mich. Apr. 29, 2015) (cargo action); *cf.* Article 26. In light of the fact Article 33 relates to subject-matter jurisdiction, any post-suit agreement can create jurisdiction for an action in a state other than those allowed by Article 33.

118. Article 46 of the Montreal Convention supplements Article 33 with regard to actions involving code-share or other contractual arrangements and allows suit to also be brought in the place where the actual carrier has its domicile or principal place of business.

119. See, e.g., *Razi v. Qatar Airways Q.C.S.C.*, 2014 WL 496654 (S.D. Tex. Feb. 6, 2014); *Fadhliah v. Societe Air France*, 987 F. Supp. 2d 1057 (C.D. Cal. 2013); *Aikpitanhi v. Iberia Airlines of Spain*, 553 F. Supp. 2d 872, 878 (E.D. Mich. 2008); see also *Swaminathan v. Swiss Air Trans. Co., Ltd.*, 962 F.2d 387, 390 (5th Cir. 1992); *Wylar v. Korean Air Lines*, 928 F.2d 1167, 1175 (D.C. Cir. 1991); *Smith v. Canadian Pac. Airways*, 452 F.2d 798, 803 (2d Cir. 1971); *Osborne v. British Airways PLC Corp.*, 198 F. Supp. 2d 901, 905 (S.D. Tex. 2002); *Pflug v. Egyptair Corp.*, 788 F. Supp. 698, 700 (E.D.N.Y. 1991), *aff’d*, 961 F.2d 26 (2d Cir. 1992); *In re Air Disaster Near Cove Neck*, 774 F. Supp. 718, 720 (E.D.N.Y. 1991).

120. *Id.*

or issued (e.g., a travel agent authorized to issue passenger tickets on behalf of the carrier).¹²¹

3. *The Place of Destination*

For purposes of Article 28(1) of the Warsaw Convention, and Article 33(1) of the Montreal Convention, the “place of destination” is determined by reference to the contract of carriage and is the place stated in the passenger ticket as the ultimate destination of the transportation.¹²² The place of origin and the place of destination are the same for round-trip transportation.¹²³

4. *The Principal and Permanent Residence of the Passenger (for Injury/Death Actions Only)*

The principal and permanent place of the passenger’s residence (the so-called fifth jurisdiction) was viewed by the United States as a critical component of the Montreal Convention. It was not contained in Article 28 of the Warsaw Convention and is based upon a similar provision in the Guatemala City Protocol (1961). Article 33.3 makes clear that nationality shall not be the determining factor, but may be considered as one of several factors, for determining the passenger’s “principal and permanent residence.” The court in *Hornsby v. Lufthansa German Airlines*,¹²⁴ addressed the meaning of this phrase and found:

The only conclusion to be drawn . . . is that the phrase “fixed and permanent abode” is closer in meaning to the word “domicile” than the word “residence,” and that the intent of the party is relevant to determining his or her “fixed and permanent abode.” Thus, intent must also be relevant to the phrase “principal and permanent residence”¹²⁵

Moreover, unlike the Warsaw Convention, Article 33.3 creates a basis for jurisdiction in injury or death actions even if the contract of carriage has no

121. See *Fadhliah v. Societe Air France*, 987 F. Supp. 2d 1057, 1066 (C.D. Cal. 2013); see also *Klos v. Oliskie Linie Lotnicze*, 133 F.3d 164, 167 (2d Cir. 1997); *Osborne v. British Airways PLC Corp.*, 198 F. Supp. 2d 901, 905 (S.D. Tex. 2002); *Ochoa v. Aerovias Nacionales de Colombia, S.A.*, 774 F. Supp. 725 (E.D.N.Y. 1991); see *Transvalue, Inc. v. KLM Royal Dutch Airlines*, 2008 WL 717796 (S.D. Fla. Mar. 17, 2008) (Montreal Convention, Article 33 and cargo action).

122. See *Razi v. Qatar Airways Q.C.S.C.*, 2014 WL 496654 (S.D. Tex. Feb. 6, 2014); *Fadhliah v. Societe Air France*, 987 F. Supp. 2d 1057, 1066 (C.D. Cal. 2013); *Baah v. Virgin Atlantic Airways, Ltd.*, 473 F. Supp. 2d 591 (S.D.N.Y. 2007) (Montreal Convention).

123. *Id.*

124. *Hornsby v. Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1137–38 (C.D. Cal. 2009).

125. See *Choi v. Asiana Airlines, Inc.*, 2015 WL 394198, at *3 (N.D. Cal. Jan. 29, 2015) (actual residence not U.S.); *Razi v. Qatar Airways Q.C.S.C.*, 2014 WL 496654 (S.D. Tex. Feb. 6, 2014); *In re Air Crash Over Mid-Atlantic on June 1, 2009*, 760 F. Supp. 2d 832 (N.D. Cal. 2010) (decedents’ residence in Brazil was temporary and their “principal and permanent residence” (their “one fixed and permanent abode”) was in the United States at the time of the crash). *But see Seales v. Panamanian Aviation Co.*, 2009 WL 395821 (E.D.N.Y. Feb. 18, 2009).

connection with the United States, provided that (1) the passenger is a resident of the United States and (2) the carrier has some presence in or contact with the United States. This effectively requires the carrier to have some type of minimum contact with the United States either directly or under a “commercial agreement” (e.g., a code share).

5. *Forum Non Conveniens*

United States courts traditionally have entertained forum non conveniens motions even where jurisdiction existed under Article 28 of the Warsaw Convention.¹²⁶ In *Hosaka v. United Airlines, Inc.*,¹²⁷ however, the court held that the doctrine of forum non conveniens is not available to protect airlines from litigation in an inconvenient forum where suit is brought in a jurisdiction permitted by Article 28 of the Warsaw Convention. As more litigation arising out of foreign accidents is brought before the courts of the United States, the propriety of a forum non conveniens dismissal where treaty jurisdiction exists in the United States has gained added importance.

The first court to address the availability of forum non conveniens dismissal under the Montreal Convention declined to follow *Hosaka* and dismissed an action even though Article 33 jurisdiction existed in the United States.¹²⁸ The court noted that Article 33.4 expressly states that questions of procedure are governed by the law of the forum and that the forum non conveniens doctrine is a procedural matter. Therefore, the court found that the text of the Convention permits application of the doctrine.¹²⁹ All courts to subsequently address the issue have held that the doctrine of forum non conveniens applies equally to claims under the Montreal

126. See *In re Air Crash Disaster Near New Orleans, Louisiana* on July 9, 1982, 821 F.2d 1147, 1153–54 (5th Cir. 1987), judgment vacated on other grounds sub nom., *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1031 (1989); *In re Air Crash Near Nantucket Island, Massachusetts*, on October 31, 1999, 2004 WL 1824385, at *4 (E.D.N.Y. Aug. 16, 2004); *Mutambara v. Lufthansa German Airlines*, 2003 WL 1846083, at *2 (D.D.C. Mar. 24, 2003); *Chukwu v. Air France*, 218 F. Supp. 2d 979, 987–89 (N.D. Ill. 2002); *In re Air Crash off Long Island New York*, on July 17, 1996, 65 F. Supp. 2d 207 (S.D.N.Y. 1999); *Thach v. China Airlines, Ltd.*, 1997 WL 282254, at *2–3 (S.D.N.Y. May 27, 1997); *Byrne v. Japan Airlines, Inc.*, 1984 WL 1343, at *1 (S.D.N.Y. Dec. 18, 1984).

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

128. See *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007), *aff'd*, *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). The court distinguished *Hosaka* noting that the Warsaw Convention had been drafted at a time when the doctrine was rarely utilized, its contours were undeveloped, and its procedural character was unsettled.

129. Following dismissal, plaintiffs pursued the actions in Martinique but challenged the French court’s jurisdiction under the Montreal Convention. In December 2011, the French Court of Cassation held that because the plaintiffs had already filed their Montreal Convention claims in the Southern District of Florida, French courts were precluded from ruling on the matter and effectively dismissed plaintiffs’ French court proceedings. See *Galbert v. West Caribbean Airways*, 715 F.3d 1290 (11th Cir. 2013), *aff'g*, 2012 WL 1884684 (S.D. Fla. May 16, 2012). Plaintiffs’ subsequent motions to reinstate their cases in the U.S. were unsuccessful. *Id.*

Convention brought in U.S. courts as it does to cases brought in U.S. courts under U.S. laws.¹³⁰

6. *Personal Jurisdiction*

Even prior to the Montreal Convention, courts required both subject-matter treaty jurisdiction and personal jurisdiction in an action governed by the Convention.¹³¹ As explained by the leading case of *Smith v. Canadian Pacific Airways, Ltd.*,

[i]n a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether suit may be maintained. The first level, on which this opinion turns, is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case—jurisdiction [footnote omitted] in the domestic law sense. It is only after jurisdiction in both senses is had that the question of venue is reached and a determination made regarding the appropriateness and convenience for the parties of a particular domestic court.¹³²

Thus, even if there is subject-matter jurisdiction under any of the Article 33 fora, a plaintiff must still establish personal jurisdiction over the defendant air carrier.¹³³

J. ARTICLE 35—PERIOD OF LIMITATIONS

Article 35 of the Montreal Convention (which is almost identical Article 29 of the Warsaw Convention) provides a two-year period within which to commence an action. Article 35 provides the following:

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or

130. *Dordieski v. Austrian Airlines*, 2016 WL 4437958 (N.D. Ind. Aug. 23, 2016); *Delgado v. Delta Air Lines, Inc.*, 43 F. Supp. 3d 1261 (S.D. Fla. 2013); *In re Air Crash Over Mid-Atlantic*, 760 F. Supp. 2d 832; *Khan v. Delta Airlines, Inc.*, 2010 WL 3210717, at *2 (E.D.N.Y. Aug. 12, 2010).

131. *See Welch v. American Airlines, Inc.*, 970 F. Supp. 85, 88 (D.P.R. 1997) (holding that the Warsaw Convention confers jurisdiction at a national level and for purposes of venue “a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced”); *Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826, 831 (S.D. Tex. 1994) (citations omitted) (“This court’s subject matter jurisdiction arises from the Warsaw Convention and possible diversity between the parties. Under either basis, this court looks to the [state] long-arm statute to determine personal jurisdiction.”).

132. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971).

133. *Cordice v. LIAT Airlines*, 2015 WL 5579868 (E.D.N.Y. Sept. 22, 2015); *Sampson v. Delta Air Lines, Inc.*, 2013 WL 6409865 (D. Utah Dec. 9, 2013); *Weinberg v. Grand Circle Travel, LCC*, 891 F. Supp. 2d 228, 237 (D. Mass 2012). Moreover, the Montreal Convention does not authorize nationwide service of process on a defendant. *See Sampson v. Delta Air Lines, Inc.*, 2013 WL 6409865, at *2–3 (D. Utah Dec. 9, 2013) (“it does not appear that the authors of the Montreal Convention intended to authorize ‘worldwide service of process’ thereby abrogating the service requirements of each signatory state.”). Pursuant to Article 34(4) questions of procedure are governed by local law.

from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

The two-year limitations period prescribed by Article 35 of the Montreal Convention is a strict condition precedent, absolutely barring any and all claims for damages arising out of “international carriage” if not timely commenced.¹³⁴ As a condition precedent, it is not subject to tolling/waiver¹³⁵ and bars third-party actions and cross-claims not brought within two years after accrual.¹³⁶ However, this limitation period does not bar plaintiffs from amending their complaint more than two years after the international event in question when federal civil procedure rules are fulfilled and the allegations relate to the same facts and circumstances.¹³⁷

K. ARTICLE 36—SUCCESSIVE CARRIAGE

Article 36 of the Montreal Convention (which is similar to Article 30 of the Warsaw Convention) addresses successive carriage. Article 36 provides the following:

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this

134. See *von Schoenebeck v. Koninklijke Luchtvaart Maatschappij N.V.*, 2016 WL 4207975 (9th Cir. Aug. 10, 2016) (*but see* dissenting opinion: would have allowed action even though commenced five years after accident because prior suit timely commenced in another jurisdiction); *Cattaneo v. American Airlines, Inc.*, 2015 WL 5610017 (N.D. Cal. Sept. 24, 2015); *Onyekuru v. Northwest Airlines*, 2007 WL 2713892 (N.D. Ill. Sept. 14, 2007); *see also Ramos v. American Airlines, Inc.*, 2011 WL 5075674 (W.D.N.C. Aug. 25, 2011) (injury action); *Small v. America West Airlines, Inc.*, 32 Av. Cas. (CCH) 15,878 (D.N.J. Aug. 30, 2007) (applying the Montreal Convention to baggage claim but mistakenly identifying the treaty as the Warsaw Convention).

135. See *Narayanan v. British Airways*, 747 F.3d 1125 (9th Cir. 2014); *Marotte v. American Airlines*, 296 F.3d 1255 (11th Cir. 2002); *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151 (8th Cir. 1999); *Fishman v. Delta Air Lines*, 132 F.3d 138 (2d Cir. 1998); *D’Engle v. City of New York*, 2015 WL 4476477 (S.D.N.Y. July 9, 2015); *Ireland v. AMR Corp.*, 20 F. Supp. 3d 341 (E.D.N.Y. 2014) (case involving intervening bankruptcy); *Mateo v. JetBlue Airways Corp.*, 847 F. Supp. 2d 383 (E.D.N.Y. 2012); *Dickson v. American Airlines, Inc.*, 685 F. Supp. 2d 623 (N.D. Tex. 2010) (class action tolling); *Duay v. Continental Airlines, Inc.*, 2010 WL 5342824 (S.D. Tex. Dec. 21, 2010).

136. See *Allianz Global Corporate & Specialty v. EMO Trans California, Inc.*, 2010 WL 2594360 (N.D. Cal. 2010); *Royal Ins. Co. v. Emery Air Freight Corp.*, 834 F. Supp. 633, 635–36 (S.D.N.Y. 1993). *But see Chubb Ins. Co. of Europe, S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011) (cargo action) (actions for indemnification and contribution between carriers are not subject to Article 35’s two-year period of limitations); *Connaught Laboratories Ltd. v. Air Canada* (1978), 23 O.R. 2d 176 (Can. Ont. Sup. Ct. J.) (Article 29 of the Warsaw Convention does *not* apply to suits brought by one carrier against another).

137. See *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165 (11th Cir. 2014); *Benamar v. Air France-KLM*, 2015 WL 2153440 (C.D. Cal. 2015); *In re Air Crash Near Rio Grande Puerto Rico on December 3, 2008*, 2012 WL 3962906 (S.D. Fla. 2012).

Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 36.1 contemplates international carriage performed in multiple legs by multiple carriers and subjects all successive carriers¹³⁸ performing a segment of an international carriage (as defined in Article 1.3) to the Montreal Convention. Each carrier is considered to be a party to the contract of carriage with regard to that part of the carriage that it performs. Article 36.2, however, makes clear that in the case of successive carriage, only the carrier performing that portion of the carriage during which the accident occurred may be sued, unless the first carrier has assumed liability for the entire journey.¹³⁹

L. ARTICLE 37—RIGHT OF RECOURSE AGAINST THIRD PARTIES

Unlike the Warsaw Convention,¹⁴⁰ the Montreal Convention expressly allows a recourse action.¹⁴¹ Article 37 was intended to clarify that the Montreal Convention does not affect any right of recourse of a person liable for damages under the Convention against any other person. Article 37 states:

138. See discussion of Article 1.3, *supra*.

139. See *Best v. BWIA West Indies Airways Ltd.*, 581 F. Supp. 2d 359, 365 (E.D.N.Y. 2008); *Shirobokova v. CSA Czech Airlines, Inc.*, 376 F. Supp. 2d 439, 442–42 (S.D.N.Y. 2005); see also *Pflug v. Egyptair Corp.*, 961 F.2d 26, 31 (2d Cir. 1992) (noting that Article 30 of the Warsaw Convention precludes the actual carrier for one leg of a scheduled multi-leg trip from being held liable for injuries suffered on another airline during a different leg of the trip); *Kapar*, 845 F.2d 1100, 1103 (same); *In re Air Crash at Taipei Taiwan*, on October 31, 2000, 2002 WL 32155476, at *5 (C.D. Cal. May 13, 2002).

140. See *In re Air Crash at Little Rock*, 291 F.3d 503, 517 (allowing recourse action); but see *Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999) (precluding apportionment of the carrier's liability under Florida's comparative fault statute).

141. See *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1027 (9th Cir. 2011) (cargo action); *In re Air Crash at Lexington*, 2008 WL 440293 (E.D. Ky. Feb. 12, 2008); *In re Air Crash at Lexington*, 2007 WL 2915187 (E.D. Ky. Oct. 5, 2007).

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Article 37 allows the carrier to seek indemnity or contribution from any other person or entity responsible for all or part of the damage if the applicable national law provides such a right. For example, if the applicable law does not allow contribution (e.g., a settling tortfeasor in many U.S. jurisdictions), a recourse action may not be available. Article 37, however, does not require that a judgment for damages first be entered against the carrier before it may seek recourse against any other party.¹⁴²

M. ARTICLES 39–48—CARRIAGE BY AIR PERFORMED BY A PERSON OTHER THAN THE CONTRACTING CARRIER

A principal feature of the Montreal Convention, which is not addressed by the original Warsaw Convention, is its recognition of code sharing and other similar types of arrangements between air carriers.¹⁴³

Chapter V of the Montreal Convention (Articles 39–48) is based upon the provisions of the Guadalajara Supplementary Convention of 1961, which the United States never signed. Article 39 sets forth the scope of Chapter V and states:

The provisions of this Chapter apply when a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual carrier”) performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

As with the Warsaw Convention the term “carrier” is not defined in the Montreal Convention.

Pursuant to Article 39, in a code-sharing relationship, the airline from which a passenger purchased her ticket (the contracting carrier) is liable for injuries suffered on the flight even though another airline was the “actual carrier.”¹⁴⁴

142. See *In re Air Crash at Lexington, KY*, August 27, 2006, 2008 WL 440293 (E.D. Ky. Feb. 12, 2008); *In re Air Crash at Lexington, KY*, August 27, 2006, 2007 WL 2915187 (E.D. Ky. Oct. 5, 2007).

143. Code sharing is an arrangement in which an airline sells a ticket under its name and code number, but the flight itself is operated by another airline. See 14 C.F.R. § 257.3(c); *Best v. BWIA West Indies Airways Ltd.*, 581 F. Supp. 2d 359, 364 (E.D.N.Y. 2008).

144. See *Yahya v. Yemenia-Yemen Airways*, 2009 WL 3424192 (E.D. Mich. Oct. 20, 2009); *Best*, 581 F. Supp. 2d 359, 365; *Shirobokova v. CSA Czech Airlines, Inc.*, 376 F. Supp. 2d 439, 442–42 (S.D.N.Y. 2005).

In an action arising out of the West Caribbean Airline flight 708 accident, the Eleventh Circuit court found that an entity that chartered an aircraft from an airline and thereafter entered into an agreement with a travel agent who sold the transportation on the aircraft to individual passengers qualifies as a “contracting carrier” for purposes of Article 39 of the Montreal Convention and was subject to liability under the Convention.¹⁴⁵

Article 40 addresses the respective liability of the contracting and actual carriers, as follows:

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Thus, pursuant to Article 40, the Convention applies to a “contracting” carrier for the entire carriage for which it contracted and applies to the “actual” carrier for only the part of the carriage that it performs.¹⁴⁶

Article 41 recognizes the concept of mutual liability and deems the acts/omissions of the actual carrier in relation to the carriage performed by the actual carrier to be those of the contracting carrier, and the acts/omissions of the contracting carrier, in relation to the carriage performed by the actual carrier, are deemed to be those of the actual carrier. Article 41 provides the following:

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.
2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this

145. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). See also *In re Air Crash Near Rio Grande Puerto Rico*, 2015 WL 328219; *Yahya*, 2009 WL 3873658 (based on the district court reasoning in *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299). Cf. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 334–36 (5th Cir. 1967) (examining whether the Warsaw Convention applied in the context of an accident involving a chartered aircraft and determining, *inter alia*, that under the facts of the case (e.g., the charterer “was to obtain the passengers for the flight”), the charterer acted on behalf of the passengers in entering into the charter agreement)).

146. *Pumputiena v. Deutsche Lufthansa, AG*, 2017 WL 66823 (N.D. Ill. Jan. 1, 2017).

Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Under these articles, a passenger has the option to bring an action against the carrier performing the relevant carriage (the “actual” carrier) or against the carrier with which they contracted for the carriage (the “contracting” carrier).¹⁴⁷ Articles 39–48, however, do not allow a claim against any other carrier. For example, where a passenger has a contract with the actual carrier (i.e., the same carrier is both the actual and contracting carrier), the passenger would not be entitled to bring an action against the actual carrier’s code-share partner.

Pursuant to Article 45, the plaintiff may bring an action for damages against the actual carrier and the contracting carrier either jointly or separately.¹⁴⁸ If an action is brought against only one of them, then the defendant carrier may seek to have the remaining carrier joined in the proceedings in accordance with the local law. Article 45 states:

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 44, however, makes clear that while the passenger may bring an action against either or both the actual and contracting carrier, there may be only one recovery (i.e., there can be no double recovery). Article 44 states:

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Finally, Article 46 supplements the five jurisdictions set forth in Article 33 and allows the plaintiff to sue the actual or contracting carrier in any of the Article 33

147. See *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009); *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011) (cargo action), *rev'g*, 32 Av. Cas. (CCH) 15,978 (C.D. Cal. Jan. 14, 2008). Under the Warsaw Convention, some courts had found that passengers could only bring an action against the operating carrier on whose aircraft the injuries were sustained. See *Shirobokova v. CSA Czech Airlines, Inc.*, 2005 WL 1618764 (S.D.N.Y. July 8, 2005) (a code-share partner could not be held liable under Warsaw Convention for injuries sustained to a passenger onboard an operating carrier’s flight).

148. See *Pierre-Louis*, 584 F.3d 1052.

fora, as well as in the actual carrier's domicile or principal place of business. Article 46 provides:

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

The foregoing articles have been criticized as unfairly burdening air carriers with additional liability for acts over which they have minimal or no control. As a practical matter, however, these liabilities generally are allocated among code-share partners pursuant to agreement so that each is responsible only for their actual liability. Although Article 47 of the Montreal Convention (like Article 26) provides that any contractual provision that tends to relieve a carrier of liability or fix a lower limit of liability than provided for under Chapter V of the Convention is null and void, Article 48¹⁴⁹ makes clear that the contracting and actual carriers may allocate liability as between themselves (e.g., recourse action or indemnification), so long as such arrangements are consistent with the rights provided for in Article 45.¹⁵⁰

149. Article 48 states:

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

150. See *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011) (cargo recovery action against the actual carrier).