International Aviation Liability, Its History and Evolution

Jonathan R. Todd*

Vanessa I. Gomez **

Sara Mishic***

Air carriage is unique in many ways including its history and law. As a relatively recent modality the twentieth century technology emerged with near immediate application to international commerce. This speed of change necessitated the quick and pragmatic development of applicable international law. Air carriage has been governed by convention practically since its inception. The Warsaw Convention and the later Montreal Convention helped to advance the technology through standardized liability limits, available defenses, claims procedures, and similar critical aspects necessary to achieve efficient global movements. Today these standards have become so ubiquitous that they are often adopted as accepted measures even for domestic United States interstate and intrastate air traffic, which are largely unregulated from a liability perspective.

This article provides a comparative sampling of the key liability provisions in the two Conventions and their application to this intense, fast-paced, complicated, and fact-specific business.

International Law Emerges

The Warsaw Convention was drafted in 1929 primarily to address concerns in the nascent airline industry regarding damage claims, the potential for bankruptcy risk if those claims are unlimited, and related insurance pressures.[1] Warsaw addressed these issues by establishing a limitation of liability and devising uniform rules governing air transport claims.[2]

The Convention was subsequently amended between 1955 and 1966, but given that it had many signatory nation states, the amendments created a degree of confusion over what was intended to be a uniform international system. In 1999, the United Nations' International Civil Aviation Organization released the Montreal Convention with the goal of addressing air carriers' cries for clarity following the onslaught of amendments. Montreal generated a more cohesive system of air carrier liability. It became effective in the United States in 2003 and has now been ratified in over 130 countries.

International Law Evolves

The Montreal Convention notably updated the Warsaw Convention to provide carriers with more predictability regarding their respective rights and obligations. For example, Montreal explicitly states that the rules are intended to include servants and agents of the carrier as well as contracting carriers. Plaintiffs cannot, however, aggregate damages to a level that exceeds the highest amount which could be awarded against the carrier under the Convention. Montreal additionally created a two-tier liability system that shifted the burden put on plaintiffs to recover: (i) a near strict-liability regime for claims up to a threshold that is stipulated in Special Drawing Rights (SDRs); and (ii) a negligence standard for claims over that threshold.

Other key updates brought by the Montreal Convention are explained here, including changes made to limitations of liability, claims periods, defenses to claims, force majeure provisions, and undisclosed transportation substitutions across modes.

Limitations of Liability

Establishing an agreed-upon floor for liability limits is a fundamental objective of both Conventions and, as one would expect, it has evolved over time. No longer established in Gold Francs, the Montreal Convention updated the standard to SDRs which are a monetary standard based upon five currencies and established by the International Monetary Fund. The precise value of SDR fluctuates with monetary exchanges, and the liability threshold (expressed in a number of SDRs per kilogram) is periodically updated under the Convention to account for the effects of inflation.

Specifically, Article 22 of the Warsaw Convention limits cargo liability of the carrier to 250 Francs per kilogram, which

* Partner, Benesch (Cleveland, OH)
** Associate, Benesch (Cleveland, OH)
*** Paralegal, Benesch (Cleveland, OH)

amounts to approximately $9.75 USD per kilogram of cargo. The Montreal Convention changed the recovery measurement from Francs to SDRs. In 1999, Montreal's parallel Article 22 increased the limitation of liability to 17 SDRs per kilogram or about $23.21 USD per kilogram. The most recent update brought the recovery limit to 22 SDRs per kilogram, which in today's exchange amounts to around $30.04 USD per kilogram. Unlike the Warsaw Convention, Article 25 of Montreal brought flexibility to a new level by specifying that parties may waive the limits of liability set in Article 22 and contract for either higher limits of liability or none at all.

The limitations of liability established under the Conventions are closely adhered to by the courts. In one example, the US Court of Appeals for the Eleventh Circuit capped a logistics provider's liability to 17 SDRs per kilogram, which was the then-current liability limit provided for by Article 22 of Montreal Convention.[3] The Eleventh Circuit applied the Montreal Convention as referenced in the respective air waybill. The court disagreed with the pharmaceutical shipper's contention that a service agreement executed 11 months before the Montreal Convention became effective could include a stipulation waiving limits on liability, and as a result of that timing, determined the Warsaw Convention – which did not allow for parties to waive limitation of liability by contract – should apply.[4]

Claims Periods

While both Conventions lay out periods for damage, delay, and legal claims, Montreal notably updated those periods. Articles 26 and 29 of the Warsaw Convention establish claims periods for loss, damage, and delay. According to Article 26, damage claims must be brought within seven days from the date of receipt of goods and delayed claims must be made within 14 days from the date of delivery. In contrast, Article 31 of the Montreal Convention extends the claims period for damaged goods to 14 days from the date of receipt, and likewise extends the claims period for delayed goods to 21 days from the date of delivery.

A two-year limitation on bringing suit is found under each Convention. On the one hand, litigation under Article 29 of the Warsaw Convention must be brought "within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." The Montreal Convention analog, Article 35, also imposes a two-year claim. Interestingly, this bar is not absolute. Courts have held that Montreal's plain language does not include claims for contribution and indemnification within this two-year limitation.[5]

Defenses to Claims

Defenses available in response to damage or delay claims differ between the two Conventions. Article 20 of the Warsaw Convention exempts liability if a carrier proves that it has "taken all the necessary measures to avoid the damages or that it was impossible for [it] to take such measures," or that the damage was caused by negligent pilotage or negligence in handling of the aircraft. Article 21 additionally provides air carriers a defense to liability if the damage was "caused by or contributed to by the negligence of the injured person."

The Montreal Convention created a more comprehensive set of familiar defenses. Article 18 details a wide range of exemptions from air carrier liability: inherent defect, quality, or vice; defective packing by a third party; act of war or an armed conflict; and act of public authority carried out in connection with the entry, exit, or transit of the cargo. Article 20 also excludes liability analogous to Warsaw's Article 21 where the damage was "caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation."

Force Majeure Provisions

While neither Convention contains "force majeure" or "Act of God" language, each expressly exempts liability for carriers in circumstances beyond the carrier's control. Montreal brought about updates to account for the "extraordinary circumstances" noted in both Conventions although the net effect of said changes was minor.

Article 20 of the Warsaw Convention exempts a carrier's liability if it has "taken all the necessary measures to avoid the damage or that it was impossible for [it] to take such measures." Article 34 of the Convention additionally notes that it does not apply to "carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business." Warsaw does not define "impossible" and "extraordinary circumstances," but the terms can generally be construed to include weather conditions or political unrest as defenses for carriers in the case of delayed or damaged cargo.

Article 19 of the Montreal Convention contains a similar provision regarding the impossibility for the carrier to take measures to prevent damage. The Illinois Northern District Court reasoned that the impossibility defense under Article 19 of the Montreal Convention, as applied to delay liability, turns not on the fact of a delay but instead on the reasonableness of the airlines attempts to mitigate damage caused by that delay.[6]

Also, Article 18 of the Montreal Convention includes an explicit defense for damage caused by an act of war or armed conflict. The New York Southern District Court determined that a hijacking of a plane by terrorists constituted an accident as opposed to an extraordinary circumstance that would exclude coverage under the Warsaw Convention.[7] If those circumstances were reconsidered today under Montreal, this type of event would be categorized as a force majeure event under Article 18.

Undisclosed Substitutions of Carriage

The Warsaw Convention is silent on remedy for instances in which a carrier agrees to provide a consignor with carriage by air and, without the consignor's consent, wholly or partially substitutes carriage by another mode of transport. In those instances, Article 18 of the Montreal Convention treats carriage by another mode of transport the same as carriage by air.

Certain International Law Keystones Remain

The harmonizing effect of each Convention has served the industry well. Updates are to be expected over time; however, as with any well-reasoned body of law, some common themes remain largely unchanged over the years as Warsaw and then Montreal matured. Some key similarities include maintaining provisions regarding the usage of inland and combined carriage as well as the freedom to contract to account for unique terms.

Inland and Combined Carriage

The concept of "international carriage," defined in Article 1 of both Conventions includes any carriage in which the nation states of departure and destination are parties to the Convention. If one country is not a party and the other is a party then the Convention will cover carriage to the extent there is an agreed upon stopping place in another country regardless of whether that country is a party. Combined carriage that has temporary break in transit or is performed by different carriers as a single through operation are also included in the definition of "international carriage."

Article 31 of the Warsaw Convention, Article 38 of the Montreal Convention, and Article 18 of both limit applicability to carriage by air and do not extend to inland portions of travel, except for carriage "for the purpose of loading, delivery, or transshipment." Under that exception, both Conventions presume any damage, "subject to proof of the contrary, to have been the result of an event which took place during the carriage by air." The practical result is that the presumption of loss during air carriage may indeed exist in the absence of evidence to the contrary, which may be difficult to establish particularly for concealed damage.

Some courts have recognized the simplifying effect of this approach. The US Court of Appeals for the Second Circuit found that an air carrier may be presumed liable for loss occurring during ground transport regardless of whether it is provided for on a waybill.[8] The Second Circuit explained both the purpose behind and drafting history of Article 18 of the Warsaw Convention, finding that this clause took into account the shipper's expectations to have door-to-door service, which could only exist via combined carriage, while seeking to avoid the sometimes impossible task of evidencing precisely where loss occurred.[9]

In these situations where inland carriage is expected, if contracting parties wish to clearly delineate terms between modalities then that is of course permitted. The Conventions allow the parties the freedom to include terms relating to other modes of carriage in their contracts as long as the provisions of the Convention apply to the carriage by air. The Warsaw Convention explains this in Article 31 and the Montreal Convention does so in Article 18.

Freedom to Contract

Finally, a critical point in contracting for all international air transportation services is that the parties have long enjoyed freedom to largely contract around Convention provisions. Article 33 in the case of Warsaw and Article 27 in the case of Montreal stand for the proposition that commercial and even legal terms can be negotiated provided that no party is deprived of the fundamental minimums established under the respective Convention. This gives flexibility to business teams when negotiating the particular details of service, while maintaining a limit to those terms. For example, the terms of an Air Transportation Services Agreement or an Air Waybill issued by an air carrier or indirect air carrier may establish a lengthier claims period or a recovery amount in excess of the then-current SDR cap on liability established by Montreal.

However, attempting to establish terms lesser than the respective Convention, risks a court reinstating those terms to the extent that the Convention applies. The US Court of Appeals for the Fifth Circuit rejected an air carrier's contract of carriage expressly disclaiming liability and instead applied the liability limit provided by the Montreal Convention.[10] In *Muoneke*, the Fifth Circuit applied the Montreal limit of liability to loss experienced during air travel that occurred just weeks after Montreal went into effect.[11]

Endnotes

1 *Atia v. Delta Airlines, Inc.*, 692 F. Supp. 2d 693, 698–99 (E.D. Ky. 2010).
2 *Id; El Al Israel Airlines v. Tseng*, 525 U.S. 155, 169, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (*quoting Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991)).
3 *Eli Lilly & Co. v. Air Exp. Int'l USA, Inc.*, 615 F.3d 1305, 1308 (11th Cir. 2010).
4 *Id.*
5 *Chubb Ins. Co. of Eur. S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1026-28 (9th Cir. 2011).
6 *Pumputiena v. Deutsche Lufthansa, AG*, No. 16 C 4868, 2017 WL 66823, at *5, 10-11 (N.D. Ill. Jan. 6, 2017).
7 *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 977–78 (S.D.N.Y. 1977).
8 *Com. Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 464–66 (2d Cir. 2003).
9 *Id.*
10 *Muoneke v. Compagnie Nationale Air France*, 330 F. App'x 457, 460–62 (5th Cir. 2009).
11 *Id.*