CONTRIBUTED CONTENT & PRESENTATIONS

Air Carrier Liability Regimes: Compare and Contrast of Warsaw and Montreal Provisions

SEPTEMBER 13, 2023

Authors: Jonathan R. Todd, Vanessa I. Gomez

Air carrier liability has been governed by international convention nearly since the inception of the technology. In 1903, the Wright Brothers infamously conducted powered flight at Kitty Hawk. In 1919, the first reported scheduled international passenger air service occurred. Just a decade later by 1929, an international treaty known as the Warsaw Convention harmonized international law of air carrier liability. This foundational moment largely set the standard for traffic between member nation states until the Montreal Convention in 1999.

The intervening 70 years between Conventions saw the rise of globalization, consumerism, and technological connectivity. The utility of a harmonizing liability regime was clear in this wake of change-so clear that it became so ubiquitous its standards were (and are) often adopted for even domestic United States interstate and intrastate air traffic liability minimums, which remain largely unregulated to this day.

Tactical challenges remain in the intense, fast-paced, and complicated fact-specific transportation business. The granular legal questions that it yields often do not fit into neat boxes while, as time is ticking, business needs an actionable answer. For example, what are the balance of relative risks and liabilities when moving air cargo between countries where the older Warsaw Convention may apply in lieu of the more common Montreal Convention?

This article compares and contrasts key liability provisions of Warsaw and Montreal for just those occasions.

Warsaw and Montreal Convention Background

The Warsaw Convention was signed in 1929 as a response to insurers' concerns regarding the potentially unlimited damages air carriers may suffer when providing service. In 1933, the Convention went into effect, creating an international liability regime with limits for the burgeoning aviation industry. Since then, the Warsaw Convention has been amended to change the liability limits and protocol for air carriers, including the Hague Protocol of 1955, Guadalajara Convention of 1961, Montreal Agreement of 1966, Guatemala City Protocol of 1971, Montreal Protocols of 1975, and IATA Intercarrier Agreements of 1966.

The Montreal Convention was signed in 1999 as the United Nations' International Civil Aviation Organization sought to address the numerous amendments to the Warsaw Convention. This new consolidated agreement created a more cohesive system of air carrier liability. It became effective in the United States in 2003 and today is ratified in over 130 countries.

Comparing and Contrasting the Conventions

Notably the Montreal Convention updated the Warsaw Convention to provide carriers and 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 an amount that would exceed the highest amount that could be awarded against either party under the Convention. Montreal additionally created a two-tier liability system that shifted the burden put on plaintiffs to recover with a near strict-liability regime for claims up to a Special Drawing Rights (SDRs) threshold and a negligence standard for claims over that threshold.

Other key points of difference between the Warsaw and Montreal Conventions are explained here.

Claims Periods. As you would expect, both the Warsaw and Montreal Conventions lay out claims periods for damage, delay, and other legal claims. The Montreal Convention updated those periods in notable ways.

Articles 26 and 29 of the Warsaw Convention control the claims periods for claims of damaged and delayed cargo. 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. Legal claims, on the other hand, fall under Article 29 and 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 addresses claims periods in Articles 31 and 35. 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. Like the Warsaw Convention, the Montreal Convention has a two-year claim period under Article 35. Courts have found that this two-year statute of limitation does not include claims for contribution and indemnification.

Recovery Amount. Limiting the liability amount for air carriers was a major component of the Warsaw Convention, since this was one of the primary concerns of insurers who were wary of issuing policies to air carriers in the case of potentially unlimited damages. Article 22 of the Warsaw Convention limits cargo liability of the carrier to a sum of 250 Francs per kilogram, which would amount to around $9.75 USD per kilogram of cargo. Various later amendments increased the recovery amount, with Article 22 of the Montreal Convention of 1999 increasing the amount to a sum of 17 SDRs per kilogram, or about $23.21 USD. This amount was updated to 19 SDRs in 2010 and, most recently, 22 SDRs per kilogram, making the current recovery amount per kilogram around $30.04 USD today. SDR value is set by the International Monetary Fund as a composite of five world currencies that, as a result, changes with some frequency.

Defenses to Claims. Defenses available to carriers for 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 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."

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, 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 to the Convention. Combined carriage that has breaks or is performed by different carriers as a single operation is 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 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.

Both Conventions allow the parties the freedom to include terms relating to other modes of carriage in their contracts as long the provisions of the Convention are only observed to the carriage by air. While the Warsaw Convention explains this in Article 31, the Montreal Convention does so in Article 18.

Force Majeure Provisions. Neither the Warsaw nor the Montreal Convention contains an express force majeure or "Act of God" provision in those terms. Each Convention has language that does, however, exempt liability for carriers in circumstances beyond the control of the carrier.

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 Montreal Convention contains a similar provision regarding the impossibility for the carrier to take measures to prevent damage. Article 18 of the Montreal Convention includes an explicit defense for damage caused by an act of war or armed conflict. Additionally, Article 51 notes that documentary requirements for air waybills, cargo receipts, and other records of the carriage

found in Articles 4,5,7, and 8 do not apply in the case of carriage performed in “extraordinary circumstances outside the normal scope of a carrier’s business.”

Freedom to Contract Unique Terms

Finally, a key point to remember with all air transportation transactions is that the parties enjoy a freedom to contract under either the Warsaw or the Montreal Convention. 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, but it does provide 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 measure. Attempting to establish terms lesser than the respective Convention, however, risks a court reinstating those terms to the extent that the Convention applies.

Jonathan R. Todd is a partner in Benesch’s Transportation & Logistics Group and may be reached at (216) 363-4658 or jtodd@beneschlaw.com.

Vanessa I. Gomez is an associate in the firm’s Transportation & Logistics Group and may be reached at (216) 363-4482 or vgomez@beneschlaw.com.

Sam Fujikawa is a summer associate with the firm and a second-year law student at Vanderbilt Law School.