Recommended citation:[1]

Am. Soc'y Int'l L., "International Air Transportation," in
Benchbook on International Law § III.D (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/airtransport.pdf

D. International Air Transportation

International aviation treaties cover claims for damage to persons and property arising from international air carriage. The most challenging issues related to judicial application of the treaties involve two choice-of-law questions:

- Is the particular claim governed by a treaty?
- If so, which treaty?

Some cases that have been removed from state court further raise difficult questions about federal subject-matter jurisdiction.

This chapter first provides a brief historical overview of international aviation law. It next identifies the main treaties and other agreements applicable in U.S. courts. It then addresses choice of law and subject-matter jurisdiction. The final sections summarize the key substantive rules contained in the treaties.

1. History of International Aviation Law

The 1929 Warsaw Convention – formally titled the Convention for the Unification of Certain Rules Relating to International Carriage by Air[2] – is the first international treaty addressing claims for damage to persons and property arising from international air carriage. The main goal of the treaty was to foster the development of a nascent commercial airline industry by establishing strict limits for liability of air carriers. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991). Since 1929, states have concluded a series of subsequent treaties that have gradually increased the liability limitations. The airlines themselves have also entered into a series of private, voluntary agreements (inter-carrier agreements) that displace the treaty rules in certain cases.

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[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. 11, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html [hereinafter Warsaw Convention]. This Convention, which entered into force on Feb. 13, 1933, has 152 states parties; among them is the United States, for which the Convention entered into force on Oct. 29, 1934. Int'l Civil Aviation Org., *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague on 28 September 1955*, http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (last visited Dec. 9, 2013).

Next came the 1944 Chicago Convention.[3] Formally titled the Convention on International Civil Aviation, this treaty established a multilateral organization in order to pursue goals outlined in the Convention's preamble, such as:

- Promoting the safe and orderly development of international civil aviation; and
- Providing for the establishment of air transportation services in a manner that advances equal opportunity as well as sound and economical operations.

That multilateral body – the International Civil Aviation Organization, or ICAO – has the status of a specialized agency of the United Nations. ICAO promulgates international standards for aviation and serves as a forum through which its nearly 200 member states may cooperate on global aviation issues.[4]

At an ICAO meeting in 1999, the Convention for the Unification of Certain Rules for International Carriage by Air, typically called the Montreal Convention, was formed and signed.[5] This 1999 Montreal Convention replaces the 1929 Warsaw Convention with a modernized liability regime that recognizes the advances in aviation safety. Accordingly, it increased the liability limits for air carriers under the Warsaw Convention.

2. Treaties Applicable in U.S. Courts

Numerous international aviation treaties may arise in U.S. courts, even if the United States is not a party:

- The 1929 Warsaw Convention, described *supra* § III.D.1. Article 22 of this treaty sets limits of: 125,000 French francs per passenger for claims involving death or personal injury; 250 French francs per kilogram for claims involving lost or damaged registered luggage or goods; and 5,000 French francs for lost or damaged objects that the passenger carries himself or herself.

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[3] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, *available at* http://www.icao.int/publications/pages/doc7300.aspx [hereinafter Chicago Convention]. This Convention, which entered into force on Apr. 4, 1947, has 190 states parties; among them is the United States, which deposited its instrument of ratification on Aug. 9, 1946. *See* Int'l Civil Aviation Org., *Convention on International Civil Aviation*, http://www.icao.int/publications/Documents/chicago.pdf (last visited Dec. 9, 2013).

[4] *See* Int'l Civil Air Org., *ICAO in Brief*, http://www.icao.int/about-icao/pages/default.aspx (last visited Dec. 9, 2013).

[5] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, *available at* http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/toc.html [hereinafter Montreal Convention]. This treaty, which entered into force on Nov. 4, 2003, has 104 states parties; among them is the United States, for which the treaty entered into force on Nov. 4, 2003. Int'l Civil Aviation Org., *Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last visited Dec. 9, 2013). This 1999 treaty governing carriage by air should not be confused with another Montreal Convention, concluded in 1971 – an antihijacking treaty formally titled the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and described *supra* § II.A.3.e.

- The 1955 Hague Protocol,[6] or supplementary treaty, to the 1929 Warsaw Convention. Article XI of the Hague Protocol amended the Warsaw Convention by raising the limit for personal injury claims to 250,000 French francs, or about $16,600 per passenger.

- The 1961 Guadalajara Convention[7] amended the Warsaw Convention by creating special rules for the indirect carriage of cargo, in which the shipper purchases transportation from one carrier, such as a freight-forwarder, but the transportation is provided by a different carrier.

- The 1975 Montreal Protocol Nos. 1[8] and 2[9] express the liability limits in the Warsaw Convention and Hague Protocol in Special Drawing Rights to facilitate conversion to local currency.

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[6] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.hague.protocol.1955/doc.html [hereinafter Hague Protocol]. This Protocol, which entered into force on Aug. 1, 1963, has 137 states parties; among them is the United States, for which the Hague Protocol entered into force on Dec. 14, 2003. Int'l Civil Aviation Org., *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague on 28 September 1955*, http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (last visited Dec. 9, 2013).

[7] 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, Sept. 18, 1961, 500 U.N.T.S. 31, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.guadalajara.supplementary.convention.1961/ [hereinafter Guadalajara Convention]. This treaty, which entered into force May 1, 1964, has 86 states parties. Int'l Civil Aviation Org., *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 Signed at Guadalajara on 18 September 1961*, http://www.icao.int/secretariat/legal/List%20of%20Parties/Guadalajara_EN.pdf (last visited Dec. 9, 2013). The United States is not a party; nevertheless, the Guadalajara Convention may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

[8] Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 23, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.1.1975/portrait.pdf [hereinafter Montreal Protocol 1]. This Montreal Protocol entered into force on Feb. 15, 1996, and has 49 state parties. ICAO, Parties to Montreal Protocol No. 1, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/AP1_EN.pdf (last visited Dec. 9, 2013). Although the United States is not a party to this protocol, the protocol may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

[9] Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 63, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.2.1975/portrait.pdf [hereinafter Montreal Protocol 2]. This Montreal Protocol entered into force on Feb. 15, 1996, and has 50 state parties. ICAO, Parties to Montreal Protocol No. 2, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/AP2_EN.pdf (last visited Dec. 9, 2013). Although the United States is not a party to this protocol, the protocol may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

- The 1975 Montreal Protocol No. 4[10] amended the Warsaw Convention by modernizing the air cargo rules.

- The 1999 Montreal Convention – formally titled the Convention for the Unification of Certain Rules for International Carriage by Air[11] – supersedes the Warsaw Convention and subsequent treaties for some (but not all) claims arising after November 4, 2003.

3. Key Treaties and U.S. Principle of Self-Execution

The 1929 Warsaw Convention is a self-executing treaty, meaning that "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

To date, no federal appellate court has ruled explicitly that the 1999 Montreal Convention – which, as stated above, supersedes the 1929 Warsaw Convention in some circumstances – is self-executing. The Senate report accompanying treaty ratification, however, indicates that the 1999 treaty also is self-executing. It states:

> The Montreal Convention, like the Warsaw Convention, will provide the basis for a private right of action in U.S. courts in matters covered by the Convention. No separate implementing legislation is necessary for this purpose.

S. Exec. Rep. No. 108-8, at 3 (2003). All judicial decisions that have applied the Montreal Convention are consistent with the proposition that the treaty is self-executing.

Judicial decisions applying the 1929 Warsaw Convention constitute an important body of precedent for resolving analogous claims under the 1999 Montreal Convention, as the Senate report recommending ratification recognized, S. Exec. Rep. No. 108-8, at 3 (2003):

> 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.

4. Inter-Carrier Agreements

As noted *supra* § III.D.1, many commercial airlines have entered into a series of inter-carrier agreements that displace the treaty rules in certain cases. The key aspects of these agreements are as follows:

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[10] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, S. Exec. Rep. No. 105-20, 2145 U.N.T.S. 36, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.3.1975/doc.html [hereinafter Montreal Protocol]. This Montreal Protocol has 58 state parties and entered into force for the United States on Mar. 4, 1999. Int'l Civil Aviation Org., *Montreal Protocol No. 4*, http://www.icao.int/secretariat/legal/List%20of%20Parties/MP4_EN.pdf (last visited Dec. 9, 2013).

- Article 17 of the 1966 Montreal Inter-carrier Agreement raised the 1929 Warsaw Convention limit for personal injury claims to $75,000 per passenger.

- The 1997 International Air Transport Association (IATA) Inter-carrier Agreements[12] require carriers to waive the defense of non-negligence under Article 20(1) of the Warsaw Convention for the portion of a claim that does not exceed 100,000 SDRs, or a route-specific amount identified by the carrier, unless the carrier can prove that the damage was not due to negligence, wrongful act, or omission of the carrier itself, its servants, or agents. They also eliminate the Convention's liability limit for bodily injury or death. *See* Matthew Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time?*, 65 J. Air. L. & Com. 273, 284, 287 (1998-99).

5. Scope of Application of Treaties

The 1999 Montreal Convention and the 1929 Warsaw Conventions apply to "all international carriage of persons, baggage or cargo performed by aircraft for reward." Montreal Convention, art. 1.1; *accord* Warsaw Convention, art. 1.1.

International air carriage means any carriage with regard to which the origin and destination, as identified in the agreement between the parties, are:

- In different countries (regardless of any breaks in carriage), both of which are parties to the convention.

- In the same country (which is a party to the convention), if there is an agreed stop in another country (which does not have to be a party to the applicable convention). Thus, international round-trip air carriage from a country which is a party to a convention is international air carriage, even if the intermediate destination is not a convention party.

Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

If carriage is performed by several successive carriers, it is deemed to be "one undivided carriage if it has been regarded by the parties as a single operation," regardless of whether the governing contracts take the form of a single contract or a series of contracts. Montreal Convention, art. 1.3; Warsaw Convention, art. 1.3. Moreover, air carriage "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." Montreal Convention, art. 1.3; *accord* Warsaw Convention, art. 1.3.

[12] Inter-carrier Agreement on Passenger Liability, opened for signature Oct. 31, 1995; Agreement on Measures to Implement the IATA Inter-carrier Agreement, opened for signature May 16, 1996. *See also* Montreal Convention, art 21.

6. Determining the Applicable Law

To be considered when determining applicable law are preliminary issues, the nature of the flights under review, and the nature of the applicable agreement. Each is discussed below.

For information about which states are parties to which treaties, and the dates on which states became parties to particular treaties, see Int'l Civil Aviation Org., *Current lists of parties to multilateral air treaties*, http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (lasted visited Dec. 9, 2013).

a. Preliminary Issues

To determine whether a particular claim is governed by the 1999 Montreal Convention, the 1929 Warsaw Convention, or some other agreement, the court must first determine whether "the place of departure and the place of destination . . . are situated . . . within the territories of two States Parties." Montreal Convention, art. 1.2; *accord* Warsaw Convention, art. 1.2.

The places of departure and destination are determined according to the terms of the agreement between the air carrier and the passenger (for passenger travel), or the air carrier and the consignor (for cargo shipments). *See* Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

The applicable law varies according to whether the flight is a round-trip or one-way flight; these options are discussed in turn below.

b. International Round-Trip Flights

The applicable law for an international round-trip flight depends on whether the flight begins and ends in the United States.

i. International Round Trips Beginning and Ending in the United States

Round-trip air transportation that begins and ends in the United States and has a stopping point outside the United States is covered by the conventions, regardless of whether the country in which the stopping point is located is a party to any international aviation treaty. Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

The 1999 Montreal Convention applies to a round-trip flight beginning and ending in the United States if travel occurred on or after November 4, 2003.[13]

[13] Montreal Convention, art. 55. The Warsaw Convention, as amended by Montreal Protocol No. 4, applies to a round-trip flight beginning and ending in the United States if travel occurred between Mar. 4, 1999, and Nov. 4, 2003. The Warsaw Convention, without amendment, applies to a round-trip flight beginning and ending in the United States if travel occurred before Mar. 4, 1999. For travel occurring before Nov. 4, 2003, inter-carrier agreements may increase liability above the treaty-based limits.

ii. International Round Trips Beginning and Ending Outside the United States

The treaties apply to flights if the place of departure and the place of destination are both "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." Montreal Convention, art.1.2; *accord* Warsaw Convention, art. 1.2.

For a round trip beginning and ending in State X, the court should first determine the international aviation treaties to which State X was a party on the date of air carriage.

If State X was not a party to the 1999 Montreal Convention on the date of the air carriage, but was a party to the 1929 Warsaw Convention, inter-carrier agreements may increase liability above the treaty-based limits.

If no treaty applies – that is, if the origin state was not party to any international aviation treaty on the relevant date – then ordinary tort and contract principles apply.

c. One-Way International Air Carriage

The applicable law for one-way international carriage depends on whether the flight began or ended in the United States.

i. Either the Place of Departure or the Place of Destination is in the United States

For one-way international air carriage in which the place of departure or the place of destination was in the United States, the court must determine whether the United States and the other country were both parties to the same treaty on the date on which air carriage occurred. The United States was party to the following treaties as of the dates specified:

- 1955 Hague Protocol, as of December 14, 2003;
- 1999 Montreal Convention, as of November 4, 2003;
- 1975 Montreal Protocol No. 4, as of March 4, 1999; and
- 1929 Warsaw Convention, as of October 29, 1934.[14]

If the United States and the other state were both parties to the 1999 Montreal Convention on the relevant date, that Convention will govern over the rules of the Warsaw Convention, Montreal Protocol No.4, and Hague Protocol. Montreal Convention, art. 55.

[14] For air carriage between Mar. 4, 1999, and Dec. 14, 2003, the United States was in a treaty relationship with others state parties to the 1975 Montreal Protocol No. 4. However, federal appellate courts are divided on whether, during this period, the United States was in a treaty relationship (other than the 1929 Warsaw Convention) with states that were parties to the 1955 Hague Protocol, but not to the 1975 Montreal Protocol No. 4. *Compare Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 957-58 (9th Cir. 2006) (concluding that the United States effectively became a party to the Hague Convention when it ratified the Montreal Protocol) *with Avero Belgium Ins. v. American Airlines Inc.*, 423 F.3d 73, 82-89 (2d Cir. 2005) (concluding that the United States did not become a party to the Hague Convention when it ratified the Montreal Protocol).

If the United States and the other state were not both parties to the same treaty on the relevant date, then no treaty applies. *See Chubb & Son v. Asiana Airlines*, 214 F.3d 301, 314 (2d Cir. 2000) (holding that separate adherence by two countries to different versions of a treaty is insufficient to establish a treaty relationship), *cert. denied*, 533 U.S. 928 (2001). In this situation, courts should apply ordinary tort and contract law principles.

If the court determines that a particular case is governed by a treaty that predates the Montreal Convention, inter-carrier agreements may increase liability above the treaty-based limits.

As a general rule, a later treaty between two states governs over the incompatible terms of a prior treaty between the same two states.[15]

ii. Neither the Place of Departure nor the Place of Destination is in the United States

For one-way international air carriage in which both the place of departure and the place of destination were outside the United States, the court must determine whether the departure country and the destination country were both parties to the same treaty on the date on which air carriage occurred.

If the place of departure and place of destination were both outside the United States, the court must consider the potential applicability of the following treaties: the 1929 Warsaw Convention, the 1955 Hague Protocol, the 1961 Guadalajara Convention, the 1975 Montreal Protocols, and the 1999 Montreal Convention.

Having ascertained whether the departure country and destination country were both parties to the same treaty on the relevant date, the court should apply the principles set forth *supra* § III.D.5.

d. Inter-Carrier Agreements

In the mid-1990s, the major international air carriers – acting under the auspices of the International Air Transport Association – entered into private, voluntary agreements. These are known as the 1997 Inter-Carrier Agreements. In January 1997, the U.S. Department of Transportation issued an order approving these agreements. D.O.T. Order 97-1-2 (Jan. 8, 1997). *See* George N. Tompkins, Jr., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* 12-15 (2010). Some air carriers that have not signed these agreements are subject to the 1966 Montreal Inter-Carrier Agreement. Indeed, under 14 C.F.R. Part 203, 1 (2013), certain air carriers

[15] *See* Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf [hereinafter Vienna Convention on Treaties]. This treaty, which entered into force on Jan. 27, 1980, has 113 states parties; however, the United States is not among them. U.N. Treaty Collection, *Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Dec. 9, 2013). Nevertheless, as discussed *infra* § IV.A, U.S. officials have recognized this provision of the treaty to represent customary international law, a source of law discussed *infra* § I.B.

operating to or from the United States must assent to the Montreal Agreement and waive the liability limits and defenses in the Warsaw Convention.

i. Claims Governed by the Montreal Convention

If the analysis set out *supra* § III.D.6.a. or § III.D.6.c. shows that the Montreal Convention applies, that Convention supersedes all inter-carrier agreements.

ii. Claims Governed by the Warsaw Convention and Subsequent Amendments

If the analysis set out *supra* § III.D.6.a. or § III.D.6.c. shows that the claim is governed by the Warsaw Convention and/or subsequent amendments to that treaty (including the 1955 Hague Protocol, the 1961 Guadalajara Convention, or the Montreal Protocol), then:

- If the carrier is party to the 1997 Inter-Carrier Agreements, those agreements take precedence over earlier treaty rules.

- If the carrier is not party to the 1997 Inter-Carrier Agreements, but is party to the 1966 Montreal Inter-Carrier Agreement, the 1966 agreement supersedes earlier treaty rules and is superseded by later treaty rules.

- If the carrier is not party to any of the inter-carrier agreements, then the treaty rules apply. *See* Tompkins, *supra*, at 1-15. For carriage to or from the United States, the carrier may be required to waive certain aspects of the treaty rules. *See* 14 C.F.R. Part 203 (2010).

iii. Claims Not Covered by Any Treaty

As detailed below, if the analysis set out *supra* § III.D.6.a. or § III.D.6.d. shows that the claim is not governed by any treaty, then courts should apply ordinary tort and contract law principles.

7. Federal Jurisdiction

Federal courts have jurisdiction over claims arising under the 1999 Montreal Convention and the 1929 Warsaw Convention (and subsequent amendments thereto), as detailed below.

a. Federal Question Jurisdiction

Article 17 of the Warsaw Convention creates a federal cause of action for claims involving death or personal injury; it provides a basis for jurisdiction under the general federal question statute, 28 U.S.C. § 1331 (2006). *See, e.g.*, *Benjamins v. British European Airways*, 572 F.2d 913, 916-19 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

The same holds true for Article 17 of the Montreal Convention. *See* S. Exec. Rep. No. 108-8, at 3 (2003) ("The Montreal Convention, like the Warsaw Convention, will provide the basis for a private right of action in U.S. courts in matters covered by the Convention.").

Article 18 of both Conventions creates a federal cause of action for damage to cargo; this also provides a basis for federal jurisdiction. One lower court wrote that although "[t]he Warsaw Convention provides the cause of action," the statute that "provides the sole basis of federal court jurisdiction" is the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1601 *et seq.* (2006), discussed in detail *supra* § II.B. *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1026-27 (2d Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997).

Article 19 of both Conventions addresses damage caused by "delay in the carriage by air of passengers," baggage or cargo. No case holds explicitly that Article 19 provides a basis for federal question jurisdiction, but the rationale that courts have employed with respect to Articles 17 and 18 applies equally to Article 19.

b. Removal Jurisdiction

If a plaintiff brings suit in state court and pleads a claim under Article 17, 18, or 19 of the Montreal or Warsaw Convention, removal to federal court is permissible under ordinary rules governing removal procedure and jurisdiction for federal question cases. *See* 28 U.S.C. §§ 1441, 1446-47 (2006).

c. Removal Jurisdiction and Complete Preemption

The Montreal and Warsaw Conventions preempt at least some state tort law claims. The Supreme Court has held "that recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking' . . . if not allowed under the Convention, is not available at all." *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999) (quoting, in part, Article 17 of Warsaw Convention).

Under the doctrine of complete preemption, "Congress may so completely pre-empt a particular area [of law] that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *see also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). Thus, if a plaintiff files a state tort law action in state court, without alleging a federal cause of action, that tort claim is effectively converted into a federal claim if plaintiff's claim falls within the scope of a federal statute or treaty that has completely preemptive effect. In such cases, the claim is removable to federal court on the theory that plaintiff's claim is really a federal claim disguised as a state law claim.

Lower federal courts are divided about whether state law claims related to the Montreal and Warsaw Conventions are removable to federal court under the doctrine of complete preemption:

- Some lower federal courts have held that the Montreal and Warsaw Conventions completely preempt state tort law claims within the scope of the treaties. *See, e.g.*, *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1153 (8th Cir. 1999); *In re Air Crash at Lexington, Kentucky*, 501 F. Supp. 2d 902, 913 (E.D. Ky. 2007). If those courts

are correct, cases filed in state court in which plaintiffs plead only state law claims are removable to federal court under the doctrine of complete preemption.

- However, other federal courts have concluded that the Conventions do not completely preempt state law. *See Narkiewicz-Laine v. Scandinavian Airlines Sys.*, 587 F. Supp. 2d 888, 890 (N.D. Ill. 2008) (emphasizing that "[b]ecause the conditions and limits of the Montreal Convention are defenses to the state-law claims raised by the plaintiff, they do not provide a basis for federal-question subject matter jurisdiction.").

The Supreme Court has not yet ruled on this issue. Moreover, the Supreme Court's decisions applying the doctrine of complete preemption do not provide clear guidance on the contours of the doctrine. *See, e.g.*, Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. Pa. L. Rev. 537 (2007); Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. Pa. L. Rev. Pennumbra 186 (2007); Paul E. McGreal, *In Defense of Complete Preemption*, 156 U. Pa. L. Rev. Pennumbra 147 (2007).

8. Venue

Claims based on the Montreal Convention or the Warsaw Convention must be filed in a domestic court "in the territory of one of the" state parties. *See* Montreal Convention, art. 33; Warsaw Convention, art. 28.1. The plaintiff is free to choose the court of the place where:

- The carrier has its domicile;
- The carrier has its principal place of business;
- The international air carriage contract was made, if the carrier has a place of business there; or
- The intended destination of the international air carriage that gave rise to the claim is located.

Montreal Convention, art. 33.1; Warsaw Convention, art. 28.1.

The Montreal Convention adds a fifth option: "In respect of damage resulting from the death or injury of a passenger, an action may be brought . . . 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" if certain other conditions are satisfied. Montreal Convention, arts. 33.2, 33.3.

No other basis will support venue in a suit of this nature filed in a state or federal court in the United States.

9. Types of Claims Covered by Treaties

Claims that may be covered by these treaties include: death or bodily injury of a passenger; destruction or loss of or damage to baggage or cargo; and damage caused by delay. Each is discussed below.

a. Death or Bodily Injury of a Passenger

Article 17.1 of the Warsaw and Montreal Conventions states:

> 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.

The Supreme Court has applied Article 17 in several cases. The Court has held that an injury "caused by the normal operation of the aircraft's pressurization system" is not an "accident" within the meaning of Article 17. *Air France v. Saks*, 470 U.S. 392, 396, 405 (1985). Article 17 does not allow "recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury." *Eastern Airlines v. Floyd*, 499 U.S. 530, 533, 551 (1991).

The Court held in 2004 that the term "accident" in Article 17 includes a case in which "the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin." *Olympic Airways v. Husain*, 540 U.S. 644, 646, 652-56 (2004).

b. Destruction or Loss of or Damage to Checked or Unchecked Baggage

Both the Montreal and Warsaw Conventions provide: "The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier." Montreal Convention, art. 17.2; *accord* Warsaw Convention, art. 18.1.

Furthermore, "[i]n the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents." Montreal Convention, art. 17.2.

c. Destruction or Loss of or Damage to Cargo

"The carrier is liable for damage sustained in the event of the destruction or loss of or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air." Montreal Convention, art. 18.1; *accord* Warsaw Convention, art. 18.1

"The carriage by air . . . comprises the period during which the cargo is in the charge of the carrier." Montreal Convention, art. 18.3; *accord* Warsaw Convention, art. 18.2.

The treaties contain very specific rules. See treaty text for details.

d. Damage Caused by Delay in the Carriage of Passengers, Baggage or Cargo

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Montreal Convention, art. 19; *accord* Warsaw Convention, art. 19.

10. Limitation of Liability

States established liability limitations for air carriers in the 1929 Warsaw Convention. States and airlines gradually increased those liability limitations in a series of treaties and other agreements concluded over the next seven decades. *See* Montreal Convention. The liability limitations that apply to a particular claim depend on which treaty or other agreement applies to that claim. This section summarizes the liability limitations in the 1999 Montreal Convention.

a. "Special Drawing Rights"

The Montreal Convention expresses liability limitations in terms of "Special Drawing Rights." Montreal Convention, arts. 21-23. The Special Drawing Right is an international reserve asset that the International Monetary Fund created in 1969. To determine the dollar equivalent, a court must calculate the conversion rate between dollars and Special Drawing Rights on the date of the judgment. Montreal Convention, art. 23.1.

Current information about conversion rates is available at International Monetary Fund, *SDR Valuation*, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx (last visited Dec. 9, 2013). As of late 2013, one Special Drawing Right was worth about US $1.54. *Id*.

b. Periodic Adjustment for Inflation

The liability limitations in the Montreal Convention "shall be reviewed by the Depositary at five-year intervals . . . by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision." Montreal Convention, art. 24.1.

Information about inflation adjustments is published in the *Federal Register*. *See* Inflation Adjustments to Liability Limits Governed by the Montreal Convention Effective December 30, 2009, 74 Fed. Reg. 59017 (Nov. 16, 2009).

c. Limitation of Liability for Death or Injury of Passengers

According to the treaty text, carriers are subject to strict liability, without any need for plaintiffs to prove fault, for claims involving death or bodily injury not exceeding 100,000 Special Drawing Rights per passenger. Montreal Convention, art. 21.1. This figure has since been adjusted for inflation. The current figure is 113,100 Special Drawing Rights. *See* 74 Fed. Reg. 59017.

"The carrier shall not be liable for damages [for death or bodily injury] to the extent that they exceed for each passenger [113,100] Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party." Montreal Convention, art. 21.2; 74 Fed. Reg. 59017.

An air carrier does not lose the benefit of the liability limitation for passenger injury or death under the Warsaw Convention if the carrier fails "to provide notice of that limitation in the 10-point type size required by a private accord among carriers." *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 124, 128-30 (1989).

d. Limitation of Liability for Claims Involving Baggage, Cargo, or Delay

"In the case of damage caused by delay . . . in the carriage of persons, the liability of the carrier for each passenger is limited to" 4,694 Special Drawing Rights. Montreal Convention, art. 22.1; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 4,150.)

"In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1131] Special Drawing Rights for each passenger unless the passenger has made . . . a special declaration of interest . . . and has paid a supplementary sum if the case so requires." Montreal Convention, art. 22.2; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 1,000.)

"In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [19] Special Drawing Rights per kilogram, unless the consignor has made . . . a special declaration of interest . . . and has paid a supplementary sum if the case so requires." Montreal Convention, art. 22.3; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 17.)

The treaties contain very specific rules. See treaty text for details.

e. No Punitive Damages

"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 . . . .

In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable." Montreal Convention, art. 29.

f. Prior Changes in Liability Limitations

The liability limitations summarized above are based on the 1999 Montreal Convention. Depending on the facts of a particular case, other limitations may apply.

11. Other Defenses

Apart from establishing liability limitations, the Montreal Convention and related agreements create several other defenses. This section briefly summarizes the most important defenses: contributory negligence; estoppel; statute of limitations; federal preemption; and sovereign immunity. Courts should consult the treaty text for additional details.

a. Contributory Negligence

"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 . . . 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." Montreal Convention, art. 20. This provision applies to claims for property damage as well as personal injury claims.

b. Estoppel

"Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage." Montreal Convention, art. 31.1. "If no complaint is made within the times" specified in Article 31, "no action shall lie against the carrier, save in the case of fraud on its part." Montreal Convention, art. 31.4.

c. Statute of Limitations

"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 from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." Montreal Convention, art. 35.1.

d. Federal Preemption

The Montreal and Warsaw Conventions preempt at least some state tort law claims within the scope of the Conventions. The Supreme Court has held "that recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking' . . . if not allowed under the Convention, is not available at all." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999) (quoting, in part, Article 17 of the 1929 Warsaw Convention).

e. Sovereign Immunity

The United States ratified the Montreal Convention subject to this sovereign immunity declaration:

> [T]he Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes in respect to the functions and duties of the United States of America as a sovereign State.

Montreal Convention, 2242 U.N.T.S. 309, 461. Article 57 of the Montreal Convention expressly authorizes this type of reservation.

12. Treaty Interpretation

In cases involving the Warsaw Convention, the Supreme Court has indicated that U.S. courts should take account of judicial decisions in other countries that are parties to the Convention. *E.g.*, *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 173-76 (1999); *Eastern Airlines v. Floyd*, 499 U.S. 530, 550-51 (1991); *Air France v. Saks*, 470 U.S. 392, 404 (1985). *See also Olympic Airways v. Husain*, 540 U.S. 644, 658-63 (2004).

Numerous published judicial decisions from domestic courts in other countries have interpreted specific provisions of the Warsaw Convention and, more recently, of the Montreal Convention. For suggestions about how to find relevant judicial decisions from other jurisdictions, *see infra* § IV.B. The court likely will order the parties to provide briefing about foreign legal decisions in any case in which this would be useful.