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Post-Pandemic Aviation News: Airlines Recover and Passenger Rights


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The commercial aviation industry is in recovery mode from the financial crisis it experienced in 2020 as a result of the COVID-19 pandemic. With vaccines becoming widely available, international travel restrictions beginning to lift, and passenger reluctance to travel fading, an economic upturn is finally on the horizon. The International Air Transport Association (IATA), the commercial aviation industry's main trade body, predicted in October that net losses airlines will incur would reduce to $11.6 billion in 2022 from $51.8 billion in 2021 and $137.7 billion in 2020. Domestic travel within the United States is estimated to reach 93% of the pre-pandemic level in 2022. "We are past the deepest point of the crisis," IATA Director General Willie Walsh told the group's annual meeting. "While serious issues remain, the path to recovery is coming into view."[1]

Though new hurdles related to passenger health have emerged as a result of the pandemic, like COVID-19 virus mutations, commercial air travel in general remains safer than ever. According to IATA's 2020 Safety Report, the all-accident rate for commercial airlines globally last year was 1.71 accidents per million flights. With a fatality risk of 0.13, on average, a person would have to travel by air every day for 461 years before experiencing an accident with at least one fatality.[2] Nevertheless, passengers continue to sustain injuries while flying. What costs airlines and insurers the most money are the non-newsworthy events: small injuries like burns caused by hot liquid spills; concussions caused by bags falling from overhead compartments; and spinal injuries caused by falls or severe turbulence.

1 The Jurisdiction Challenge

Injured passengers and their attorneys who seek compensation for injuries sustained on airlines must then decide where to sue. Making the right decision will determine how and how much the passenger will recover. It is, therefore, critically important to choose the right forum in which to register the claim. If injured passengers can sue in the United States and avoid dismissal, they will most likely receive greater compensation than if their actions are filed in courts outside the U.S. U.S. damages recoveries are more favourable to plaintiffs than in other countries. Of course, a passenger injured while travelling overseas on a U.S.-based airline can file suit in the U.S. jurisdiction where the airline is based. Even so, U.S. courts can dismiss claims based upon the *forum non conveniens* doctrine and close courtroom doors to passengers who do not live in the U.S. The choice of where to file suit is most complicated for American travellers who are injured outside the U.S. while travelling on foreign airlines. Those passengers are certain to confront daunting challenges when the airlines inevitably raise jurisdictional defences which are really part of a strategy to limit passenger recoveries.

Injuries that occur during international travel are governed by the 1999 Montreal Convention, the global treaty that regulates liability for passenger injuries and deaths that occur during international air travel with damages determined by the law of the forum state. The Montreal Convention replaced the 1929 Warsaw Convention which established uniform rules for international air travel and limited potential air carrier liability for passenger injuries. Damages are no longer subject to treaty limitations, but many of the legal precedents developed under the Warsaw Convention still apply to Montreal Convention cases.

2 Passengers' Jurisdiction Options

The Convention provides "subject matter" jurisdiction for lawsuits filed in the United States District Courts on "federal question" grounds pursuant to 28 USC 1331. Article 33 of the Montreal Convention offers five potential places in which lawsuits may be filed. Article 33(1) outlines the first four: the carrier's domicile; the carrier's principal place of business; the place of business where the contract (*i.e.*, ticket purchase) was made; and the passenger's place of ultimate ticketed destination. At the insistence of the United States, Article 33(2) added what is now commonly referred to as "the Fifth Jurisdiction": the passenger's principal and permanent residence, so long as the residence is located in the territory of a State Party to the Convention where the airline operates flights and maintains a physical presence, either directly or through a contractual relationship with another airline. Adding the Fifth Jurisdiction was intended as a major breakthrough for U.S. passengers.[3]

Plaintiffs, however, cannot rely solely on "subject matter" jurisdiction to maintain a lawsuit in the United States courts. They must also satisfy the District Court's requirement that it can exercise "personal" jurisdiction over the nonresident airline. Personal jurisdiction requires a determination that a nonresident defendant must defend itself against a legal claim in the U.S. court in which the lawsuit is filed.

3 Personal Jurisdiction: "General" and "Specific"

Under United States law, a nonresident defendant must be subject to either "general" or "specific" jurisdiction. General jurisdiction requires that the nonresident defendant's activities are so continuous and systematic in the forum state that it is essentially "at home" there.[4] Aside from the exceptional case, a corporation is at home only in the state of its formal place of incorporation and its principal place of business. The "specific" jurisdiction inquiry is more exacting and focuses on the relationship of the nonresident defendant, the forum, and the claims pending before the court. The exercise of specific personal jurisdiction is proper only if the forum state's long-arm statute confers jurisdiction over the nonresident defendant and the exercise of jurisdiction does not violate Constitutional due process standards.[5]

Several recent motions to dismiss passenger U.S. lawsuits filed by foreign airlines have been decided by the District Courts in the airlines' favour on grounds that the nonresident airlines are not subject to "specific" personal jurisdiction in the United States. The dismissals occurred even though the airlines in question conduct regularly scheduled flights into and out of U.S. airports. In these cases, the courts hold that the Montreal Convention conferred "subject matter" only and plaintiffs failed to prove an independent basis for personal jurisdiction.

4 The "Fifth Jurisdiction" Option Should Bar Dismissal Of U.S. Passenger Claims

The text and purpose of the Fifth Jurisdiction is clear. Its intent is to allow U.S. passengers to obtain fair compensation from foreign airlines in U.S. courts. The recent dismissals of U.S. passenger claims against foreign airlines injured outside the U.S. plainly renders the Fifth Jurisdiction meaningless by adding an additional contra-textual hurdle that passengers must overcome. We posit that the District Courts issued rulings that are plainly wrong because they relied on decisions and logic that pre-date the 1999 Montreal Convention (MC99) and conflict with the new treaty. To be clear, because these dismissals are wrong, we contend that the ever-growing string cites of bad law must end.

5 *Ford v. Montana*

The Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021), though not directly involving a MC99 jurisdiction issue, is extremely important to the aviation litigation jurisdiction analysis. *Ford* breathes new life into the "fair and reasonable" standard that controlled personal jurisdiction issues, and weighs heavily on the interpretation and application to the Convention's Article 33(2) in U.S jurisprudence. Here is why.

The *Ford* case involved two product liability actions in which the plaintiffs sued the Ford Motor Company in states in which the death-causing accident occurred and in which the plaintiffs resided. Ford moved to dismiss the cases arguing that the states could exercise personal jurisdiction over the corporation only if the plaintiffs' claims arose out of Ford's conduct in those states. Ford claimed that in neither suit could plaintiff demonstrate that the design, manufacture or sale of the product by Ford occurred in those states. In short, the vehicles were designed, manufactured and sold elsewhere and hence said Ford there was no claim-related connection to the jurisdictions. Put another way, Ford asserted that the claims did not "arise" out of its in-state activities in states in which they were sued. Ford's position was rejected by the States' supreme courts and the U.S. Supreme Court.

To reach that conclusion the U.S. Supreme Court relied most heavily on the "canonical" jurisdiction decision, *International Shoe v. Washington*, 326 U.S. 310. *International Shoe* held that a state's authority to exercise personal jurisdiction over a defendant depends on whether the defendant had sufficient contacts with the forum state to make it "reasonable" to require the defendant to defend the lawsuit in the forum state. That "reasonableness" inquiry demands an assessment of whether the maintenance of the suit "does not offend the traditional notions of fair play and substantial justice". That analysis in turn requires broader examination of the defendant's conduct in the forum state.

Until *Ford*, reliance on the "reasonableness" and "fair play and substantial justice" standard of *International Shoe* was diluted by later decisions. In its stead, the Supreme Court formulated incrementally heightened personal jurisdiction standards holding that there had to be a direct causal relationship between the plaintiffs' claims and the defendants' activities in the forum state, *i.e.*, the claims had to "arise out of" defendant's forum state activities to support specific jurisdiction.

Applying the rationale of the *Ford* decision to jurisdiction predicated on MC99 33(2), it would seem now to be clear that an international airline that conducts regular scheduled flights to the United States in its own planes or in code-share operations, has landing rights at U.S. airports, earns revenue from U.S. passengers, provides related services, markets itself to U.S. passengers and – most importantly – *agreed to be bound by the jurisdiction standards of MC99 33(2) cannot avoid personal jurisdiction in U.S. courts when a U.S. resident passenger injured anywhere sues the airline in the U.S.* That is precisely what the MC99 33(2) unambiguous treaty text says. The court's holding in *Ford* reinvigorates the purpose behind MC99 33(2). As this article has demonstrated, the U.S. Government's fight to gain that right should not be defeated by a hyper-technical and now rejected argument, namely that the injury claim must arise *directly* out of the conduct in the forum state.

Had *Ford* been decided before the spate of recent cases that have dismissed Article 33(2) jurisdiction claims initiated by U.S passengers against foreign air carriers, those actions most likely would have been allowed to proceed. With MC99's virtual absolute liability standard for unlimited damages, the cases would have been easily resolved.

We are encouraged by the *Ford* decision and anticipate that the defendant airlines currently celebrating short-term victory will eventually be disappointed when a Montreal Convention jurisdictional decision is appealed to a higher court and judges interpret the law as the Convention draftsmen intended. A textualist Supreme Court, like the one sitting today, presumably would apply Article 33(2) as written and hold that any foreign airline that flies to and from the United States implicitly *consented* to be sued there when they accepted American passengers on their planes. Indeed, there would be a clear disconnect in any opinion that presumes otherwise. The airlines have long had "clear notice" of their exposure to U.S. litigation when U.S. passengers are injured while travelling on non-U.S. carriers doing business in the United States. Not only did they have clear notice, they incorporated MC99 in its entirety into their tariffs and then created a "contractual" commitment to jurisdiction in the U.S. courts.

More generally, what is sometimes overlooked in analysing aviation accident jurisdiction issues is the real practical impact of MC99 treaty restrictions and how those restrictions must be taken into account in framing an effective litigation strategy.

Keep in mind when airlines cannot be sued, manufacturers become the target defendant.

6 The Jurisdiction Issues Faced By Ethiopian Airlines Flight 302 Passengers

For example, in the aftermath of the Ethiopian Airlines Flight 302 crash it became obvious within days that the Boeing 737 MAX had a very serious flight control system design defect. In that case, the aircraft manufacturer's liability was undeniable, and that had enormous implications for the entire aviation industry. That led to more than a year of grounding of the entire MAX fleet and related production slowdowns. Though subject matter and personal jurisdiction in U.S. courts over Boeing and other component part manufacturers was never in doubt, the non-airline defendants could still have pressed to avoid litigation in U.S. courts by asserting a *forum non conveniens* (FNC) claim. Though an FNC claim was not likely to succeed in the Ethiopian Airlines Flight 302 case, it had to be taken seriously because the case involved a foreign carrier and a foreign accident investigation. Meanwhile, the airline was insulated from suit in the U.S.

The FNC doctrine gives courts the discretion to decline to hear a case based on the theory that the action should be tried in another forum based upon competing interests of the fora and the convenience of the litigants and the witnesses. FNC challenges are frequently advanced by defendants in aviation cases when accidents occur outside the U.S., and in which victims include both U.S. and foreign citizens or defendants are non-U.S. carriers.[6]

When the Warsaw Convention was controlling, if a court had treaty jurisdiction, the court could not decline to exercise its jurisdiction based on FNC. However, by the time the Montreal Convention went into effect in the United States in 2003, FNC had been firmly established in the common law, and U.S. courts would often decline to hear cases if venues in other countries provided an available alternate forum.

7 The FNC Hurdle Is Not Insurmountable

Today, as noted above, the FNC determination is within the sound discretion of the U.S. District Court judge and the defendant has the burden of proving the "*conveniens*" elements necessary for the court to dismiss a claim on these grounds.

An FNC challenge can be defeated even if the country to which defendants are attempting to move the case is the airline's home country or the location of the accident and is an adequate alternative forum to hear the litigation. While the foreign country may have an interest in adjudicating accidents that involve its corporate citizens, this factor alone is not sufficient to support an FNC dismissal. That is especially so when the case is already in suit in a U.S. court and involves legitimate competing interests. Plaintiffs must focus on persuading the court that both "public" and "private" interest factors weigh heavily in favour of keeping the case in the United States. To make a convincing case for "public interest" factors, plaintiffs should point out that the United States has a legitimate interest in ensuring the safety of its residents travelling abroad, and that promoting the integrity of products manufactured in the U.S. is materially advanced by holding the manufacturer to U.S. safety standards. Plaintiffs must also convince the court that the U.S. judicial system will not be over-burdened by the litigation.

The most important aspect of the "private interest" factors test is the location of witnesses. If the plaintiff and other important key witnesses, like technical experts, medical providers and damages witnesses, are located in the United States, their availability to testify in a U.S. court would weigh in favour of keeping the case in the United States. Foreign defendants like to argue that they will be inconvenienced if they are ordered to produce witnesses for depositions in the United States. That assertion has largely been rendered moot thanks to modern advances in video depositions and electronic discovery. The Ethiopian Airlines Flight 302 case against Boeing is a good example of a litigation in which most depositions were completed on a remote video platform, with dozens of remote observers, and millions of pages of written evidence were exchanged by purely electronic means. Not only did the parties not have to leave their countries of residence to conduct thorough and comprehensive discovery, they didn't even have to leave their desks.

Conclusion

Behind the rhetoric and Latin phrases are the most important issues: whose law and what elements of that law should control death and injury claims? How will economic loss be calculated? Will the plaintiff be entitled to recover non-economic losses, like pain and suffering, as well loss of society of a spouse and loss of parental guidance? Are punitive damages recoverable? Make no mistake, those are the real issues that lie behind the jurisdiction debate in every case. It is for this reason that attorneys, barristers, and solicitors representing passengers must develop the strongest jurisdiction arguments to justify litigation in the most favourable forum for each passenger.

Endnotes

1. Singh, Rajesh Kumar. "Airlines see sharply lower losses in 2022, recovery in sight". Reuters. 6 October 2021. https://www.reuters.com/business/aerospace-defense/iata-sees-sharp-fall-airline-losses-2022-2021-10-04/.
2. IATA Pressroom. Press Release No. 15: IATA Releases 2020 Safety Report, Details Airline Safety Performance. 25 March 2021. https://www.iata.org/en/pressroom/pr/2021-03-25-01/.
3. Montreal Convention Article 33(2) states: "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."
4. *Daimler AG v. Bauman*, 571 U.S. 117, 126-27, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 (2014).
5. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).
6. In the EU, The Rome I Regulation determines which national law should apply to contractual obligations in civil and commercial matters involving more than one country. The Rome II Regulation provides a framework to allow EU courts to decide what the applicable law is when injury arises out of non-contractual obligations.

Marc S. Moller, a trial and appellate lawyer, a partner at Kreindler & Kreindler LLP for more than 35 years, has specialised in representing plaintiffs in commercial and general aviation accident, mass disaster and other wrongful death and personal injury cases. The results in some of those cases established important legal precedents and set records for recoveries in the jurisdictions in which the actions were filed. Mr. Moller's trial record has earned him the distinction of being elected Fellow of the American College of Trial Lawyers and he has been the recipient of numerous awards and honors during his distinguished career. He has been appointed Lead Counsel or Chairman of Plaintiffs' Steering Committees in mass disaster cases and served as trial counsel in matters involving virtually every type of commercial and general aviation aircraft, corporate jet and charter aircraft, helicopters and military aircraft in operation today. This breadth of experience and extensive publications have made him a valuable consultant in litigation outside of the United States even when the United States jurisdiction requirements cannot be satisfied.

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