ISSN 1123-5802

DIRITTO DEI TRASPORTI 2023 - Anno XXXVI n. 1

GIURISPRUDENZA AL VAGLIO

U.S. COURT OF APPEAL, 2ND CIRC. 10 SETTEMBRE 2021 CASE NO. 20-3426-CV (2ND CIR. 2021)

Pooler, Chin & Lohier
A. Cohen v. *American Airlines, Inc.*, e *al*.

Trasporto di persone – Trasporto aereo internazionale – Convenzione di Montreal 1999 – Decadenza ai sensi dell'art. 35 – Convenzione di Varsavia 1929 – Danno alla persona – Decadenza ai sensi dell'art 29 – Willful misconduct – Irrilevanza.

Riassunto dei fatti – Il 27 dicembre 2018, il signor Aryeh Cohen ha citato in giudizio American Airlines, Inc. e American Airlines Group, Inc. (collettivamente American), e Jane e John Does presso il tribunale dello Stato di New York, sostenendo che, durante l'imbarco su un volo da Parigi, Francia, a Dallas-Texas, USA, il 28 dicembre 2015, un assistente di volo John Does gli ha urlato contro, lo ha colpito e gli ha causato lesioni. American ha chiesto di trasferire il caso al tribunale distrettuale, sostenendo che, poiché il presunto incidente è avvenuto a bordo di un aereo, si applicava la Convenzione di Montreal del 1999, e quindi il tribunale distrettuale aveva la giurisdizione federale. American ha quindi eccepito la prescrizione di due anni prevista dalla Convenzione di Montreal in quanto l'incidente si era verificato il 28 dicembre 2015 mentre la sua denuncia era stata presentata quasi tre anni dopo l'evento. La corte distrettuale ha quindi accolto l'eccezione di decadenza dalla domanda ritenendo infondate le deduzioni dell'attore il quale sosteneva che la decadenza stabilita dalla Convenzione di Montreal del 1999 non dovesse operare in caso di atti intenzionali commessi dal vettore o dai suoi dipendenti e preposti. Cohen ha quindi impugnato tale sentenza innanzi alla Corte d'Appello del Secondo Circuito.

Il comportamento volontario, temerario o negligente dell'assistente di volo, comportante una lesione personale del passeggero, non consente di aggirare il termine di decadenza di due anni, previsto dall'art. 35 della Convenzione di Montreal, per l'inizio dell'azione risarcitoria nei confronti del vettore. Ciò trova riscontro anche nel fatto che, sebbene l'art. 25 della Convenzione di Varsavia prevede che il vettore non possa avvalersi dei limiti di responsabilità, in essa stabiliti, in caso di danno corporale provocato da condotta volontaria o temeraria e nella consapevolezza che verosimilmente ne sarebbe derivato un danno, la Convenzione di Montreal, che ha sostituito la prima, non contiene alcuna disposizione di analogo tenore, che colleghi la condotta volontaria ai danni alla persona ([1]).

Discussion – Because Cohen alleged that he was injured while boarding an international flight, his claims fall under the Montreal Convention, a multilateral treaty that «applies to all international carriage of persons, baggage or cargo performed by aircraft» Montreal Convention, ch. I, art. 1. It is the successor to the Warsaw Convention of 1929. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air (the «Warsaw Convention»), Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105. The Montreal Convention was promulgated to «reform the Warsaw Convention so as to harmonize the hodgepodge of supplementary amendments and intercarrier agreements of which the Warsaw Convention system of liability consists». Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004) (internal quotation marks omitted).

Under the Montreal Convention, a «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 ... injury took place on board the aircraft or in the course

([1]) V. la nota di Ihab Aria, a p. 206.

of any of the operations of embarking or disembarking». Montreal Convention, ch. III, art. 17, § 1. While «accident» is not defined in the Montreal Convention, the Supreme Court has interpreted the substantively identical provision of the Warsaw Convention as «an unexpected or unusual event or happening that is external to the passenger». Air France v. Saks, 470 U.S. 392, 405 (1985); see Warsaw Convention, ch. III, art. 17.

Precedent pertaining to the Warsaw Convention is instructive because many provisions of the two Conventions are substantively similar. As the Eleventh Circuit has noted, «the drafters of the Montreal Convention sought to retain as much of the existing language of the Warsaw Convention as possible so as to preserve the substantial body of existing precedent and avoid uncertainty[.]» *Underwriters at Lloyds Subscribing to Cover Note B0753PC1308275000 v. Expeditors Korea Ltd*., 882 F.3d 1033, 1045 (11th Cir. 2018).

Similarly, the Senate Foreign Relations Committee report addressed the Montreal Convention's drafting history, particularly regarding the continued applicability of judicial decisions interpreting the Warsaw Convention, as follows:

[W]hile the Montreal Convention provides essential improvements upon the Warsaw Convention and its related protocols, efforts were made in the negotiation 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. S. Exec. Rep. 108–8, at 3 (2003) (citation and alteration omitted).

In that regard, many other Circuits and district courts in this Circuit have frequently relied on cases interpreting the Warsaw Convention as persuasive authority to interpret corresponding provisions of the Montreal Convention. *See, e.g., Dagi v. Delta Airlines*, 961 F.3d 22, 28 (1st Cir. 2020) (applying Saks's definition of «accident» from Warsaw Convention to claim under Montreal Convention); *Doe v. Etihad Airways*,

P.J.S.C., 870 F.3d 406, 425-26 (6th Cir. 2017) (same); *Phifer v. Icelandair*, 652 F.3d 1222, 1223-24 (9th Cir. 2011) (same); *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1171-73 (11th Cir. 2014) (applying Warsaw Convention precedent to claim for damages due to delay under Article 19 of the Montreal Convention); *Best v. BWIA West Indies Airways Ltd.*, 581 F. Supp. 2d 359, 362-63 (E.D.N.Y. 2008) (utilizing Warsaw Convention precedent in defining «carrier» as that word is used in the Montreal Convention); *Baah v. Virgin Atl. Airways Ltd.*, 473 F. Supp. 2d 591, 596-97 (S.D.N.Y. 2007) (interpreting the phrase «place of destination» in Article 33(1) of the Montreal Convention in line with previous courts' interpretation of «place of destination» in Article 28(1) of the Warsaw Convention). We agree with these authorities and hold that Montreal Convention provisions may be analyzed in accordance with case law arising from substantively similar provisions of its predecessor, the Warsaw Convention.

We now turn to the merits of Cohen's appeal. We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6) and its interpretation and application of statutes of limitations and treaties. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (Rule 12(b)(6) dismissal); *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011) (statute of limitations); *Swarna v. Al-Awadi*, 622 F.3d 123, 132 (2d. Cir. 2010) (treaty). «When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used». *Ehrlich*, 360 F.3d at 375 (citation omitted).

France and the United States are signatories to the Montreal Convention and therefore bound by it. Cohen alleges that, upon boarding an international flight from France to Texas, a John Doe flight attendant yelled at him, hit him, an caused him injury. Cohen does not contest that the injury occurred on board the aircraft while embarking, see Montreal Convention, ch. 3, art. 17, § 1, due to an «accident», as that word is defined in cases interpreting the Montreal and Warsaw Conventions. Therefore, his claims fall under the

Montreal Convention, and any remedy must be had pursuant to that Convention. *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999) («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.») (citation, brackets, and internal quotation marks omitted) (discussing Articles 1 and 17 of the Warsaw Convention, which are substantively similar to Articles 1 and 17 of the Montreal Convention). The Montreal Convention provides that «[t]he 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, ch. III, art. 35, § 1. The Warsaw Convention's Article 29 contains almost identical language. Warsaw Convention, ch. III, art. 29, § 1 («The right to damages shall be extinguished if an action is not 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».); *see also King v. Am. Airlines, Inc.*, 284 F.3d 352, 356 (2d Cir. 2002) (recognizing that claims under the Warsaw Convention are subject to a two-year statute of limitations); *Dagi*, 961 F.3d at 24 (recognizing the same for the Montreal Convention). Cohen alleged that he boarded his nonstop flight to Texas on December 28, 2015.

Although Cohen claimed that the «flight was significantly delayed», Supp. App'x at 4, the two-year limitations period for filing a complaint under the Montreal Convention began on the date on which the aircraft ought to have arrived in Texas—presumably either that same day or December 29, 2015. Therefore, his complaint, filed almost three years after the December 28, 2015 accident, was untimely regardless of the flight delay, and the district court did not err in dismissing it on this ground.

Cohen argues that the Montreal Convention's two-year

statute of limitations does not apply to his claims because he alleges that the flight attendant's conduct was willful, and Article 25 of the Warsaw Convention states that, in cases where damage is caused by willful misconduct «the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability». Warsaw Convention, ch. III, art. 25, § 1. We reject this argument. While the Montreal Convention incorporated many of the Warsaw Convention's substantive provisions, there is no substantively identical article in the Montreal Convention that reflects the provisions of Article 25 of the Warsaw Convention governing the removal of damage caps for willful misconduct. Indeed, there is no provision in the Montreal Convention regarding «willful misconduct» relating to personal injury claims.

Even if we analyze Cohen's argument under Article 25 of the Warsaw Convention, it fails. Cohen's argument conflates limitations on the amount of recoverable damages with the statute of limitations, and he provides no authority to suggest that Article 25 of the Warsaw Convention voids the statute of limitations. *See In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1286 (2d Cir. 1991), *overruled on other grounds*, *Zicherman v. Korean Air Lines, Co.*, 516 U.S. 217 (1996) (concluding that Article 25 does not «lift Article 29's statute of limitations»); *see also In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485-89 (D.C. 11 Cir. 1991). Therefore, whether the flight attendant's actions were intentional, «willful», reckless, or negligent, Cohen cannot circumvent the Montreal Convention's two-year statute of limitations by way of an unrelated provision of the Warsaw Convention.

Cohen also asserts that the Montreal Convention does not preempt local law in cases of willful misconduct. But courts have consistently held that the Warsaw and Montreal Conventions preempt state law and provide the sole avenue for damages claims that fall within the scope of the Conventions' provisions. *See Tseng*, 525 U.S. at 161 (reversing a prior Second Circuit decision that permitted plaintiffs to alternatively sue under local law even if they did not qualify

for relief under the Warsaw Convention); *Dagi*, 961 F.3d at 27-28 (explaining that «the Montreal Convention preempts all local claims that fall within its scope, even if the claims are not cognizable ... under the Convention»). And even if Cohen's claim for «willful» misconduct could be brought under New York state law, which the parties agree applies, it would likely still be untimely because the statute of limitations on claims for damages arising from assault or battery in New York is one year. *See* N.Y. C.P.L.R. § 215(3).

Finally, Cohen challenges the district court's denial of leave to amend. We review denials of leave to amend for abuse of discretion. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). «Although [Federal Rule of Civil Procedure] 15(a) provides that leave to amend a complaint shall be freely given when justice so requires», *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995) (internal quotation marks omitted), district courts may deny leave to amend «for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party», TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 505 (2d Cir. 2014) (internal quotation marks omitted).

We find no abuse of discretion in the district court's denial of leave to amend. Although Cohen argues on appeal that he should have been given the chance to amend his complaint at least once, he does not address the basis for the district court's denial: that his motion to amend was made in bad faith. Accordingly, he has waived any challenge to the district court's ruling. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) («Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal»).

In any event, Cohen's proposed amended complaint differed from his original complaint only insofar as it alleged the loss of two pairs of sunglasses on an American flight from Miami to Nassau occurring three years after the events giving rise to his original allegations. The district court did not abuse its discretion in ruling that the new allegation

was included solely to avoid the Montreal Convention's two-year statute of limitations, and thus was made in bad faith. *Cf. Ansam Assocs., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (affirming denial of motion to amend when the new proposed claims «concerned a different period of time», and «allege[d] an entirely new set of operative facts of which it cannot be said that the original complaint provided fair notice», thereby prejudicing defendant (internal quotation marks omitted).

* * *

Willful misconduct of the air carrier and its principals does not result in forfeiture of the two-year statute of limitations under Article 29 of the 1929 Warsaw Convention and Article 35 of the 1999 Montreal Convention. A confirmation from U.S. case law.

1. Preamble – The Second Circuit Court's glossed judgment evokes the analysis of opinions held by the doctrine and court case law as to the essence of circumstantial evidence and circumstantial trials. While generally accepting this judgment's thesis, we may find there at least the following assumptions: *first of all*, it agrees with jurisprudence adopted by many other jurisdictions which holds that Montreal Convention provisions may be analyzed in accordance with case law arising from substantively similar provisions of its predecessor, the Warsaw Convention. *Secondly*, it notices that the Plaintiff's argument conflated limitations on the amount of recoverable damages with the statute of lim-

itations, and that Article 25 of the Warsaw Convention, if applicable, does not lift Article 29's statute of limitations.

2. The exemption from the air carrier's limitation of liability in case of willful misconduct of a flight crewmember under the Warsaw Convention's Art. 25: same destiny under Montreal Convention? – The 1999 Montreal Convention represents the most modern international convention in the field. It consolidates the various earlier legal instruments known as the «Warsaw-system conventions» ([1]) into a single text and provides the basis for genuine uniformity of laws governing transportation by air. However, it continues, for the foreseeable future, to co-exist at the international level with the earlier Warsaw-system conventions. As a result, the international legal framework for carriage by air remains complex. Even for States which have adopted the Montreal Convention, the Warsaw-system conventions may be applicable in relation to trade with some or most of their trading partners. Thus, effective national implementation ([2]) – and application – of the various international air law

([1]) Thus, Warsaw for the 1929 Warsaw Convention itself, Hague for the 1955 Hague Protocol to Amend the Warsaw Convention (ICAO Doc. 7632), Guatemala City for the 1971 Guatemala City Protocol to Amend the Warsaw Convention as Amended at The Hague 1955 (ICAO Doc. 8932), and Guadalajara for the 1961 Guadalajara Convention supplementary to the Warsaw Convention (ICAO Doc. 8181). The four 1975 Montreal Protocols additional to or amending the Warsaw Convention (ICAO Docs. 9145, 9146, 9147 and 9148) are respectively abbreviated to MAP1, MAP2, MAP3 and MP4.

([2]) Certo è che la questione della individuazione della giurisdizione sembra avere perduto il carattere sistemico che tradizionalmente le viene attribuito. Le norme di riferimento sono state di recente autorevolmente interpretate in una dimensione strettamente processuale che le propone non solo come norme sulla giurisdizione, ma anche come disposizioni sulla competenza territoriale interna nella prospettiva di realizzare un più corretto equilibrio degli interessi in gioco privilegiando, tuttavia, quelli degli utenti del trasporto aereo. Il tema, in termini generali, viene proposto

conventions remains a necessity ([3]).

It is evident that Courts continue to assess, interpret and apply, or not apply, the Warsaw Convention as well as the Montreal Convention to claims that arise out of international carriage of passengers and property. The case law from the past years provides further analysis on several provisions in the treaty, as well as its preemptive effect. Yet, disagreements and divisions remain in the interpretation of many of its provisions ([4]).

---

secondo il modello dell'equo contemperamento degli interessi di attore e convenuto; il primo, posto così nelle condizioni di potere individuare agevolmente il giudice competente; il secondo, di poter contare su una più agevole possibilità di prognosi circa il foro nel quale verrà chiamato a resistere all'altrui pretesa. Proprio in questo senso è stato ritenuto che i criteri stabiliti dalla convenzione di Bruxelles del 1968, e quindi dal reg. CE n. 44/2001, stabiliscano non solo la competenza internazionale, e quindi la giurisdizione, ma anche la competenza territoriale interna senza rinvio alle norme processuali nazionali. Si tratta di una questione controversa (20), ampiamente dibattuta, con particolare riferimento alla corrispondente disposizione dell'art. 28 della convenzione di Varsavia del 1929, e che, per quanto riguarda il nostro ordinamento, sembrava definitivamente risolta con l'intervento delle Sezioni unite della Corte di cassazione che hanno stabilito la prevalenza della sola opzione giurisdizionale»; A. Zampone, *La giurisdizione nel trasporto aereo: antiche e nuove questioni*, in *Riv. dir. nav.*, 2, 2020. «Per Cass., sez. un., ord. 4 maggio 2016, n. 8901, in *Dir. mar*. 2018, 148 ss., with footnote of C. Medina, Competenza e giurisdizione nella convenzione di Montreal sul trasporto aereo internazionale, l'art. 33 della convenzione di Montreal non si occupa della competenza per materia in tema di controversie tra passeggero e vettore aereo, ma disciplina la diversa questione del riparto di giurisdizione tra giudici appartenenti a Stati diversi, in virtù del quarto comma della medesima norma, ove si stabilisce che alla controversia tra vettore e passeggero si applicano le disposizioni processuali della legge del foro e quindi anche le norme in tema di riparto interno della competenza territoriale»; as cited in A. Zampone, 2016.

([3]) *Carriage Of Goods by Air*: A Guide to The International Legal Framework Report by The UNCTAD Secretariat, UNCTAD/SDTE/TLB/2006/1 27 June 2006, 4.

([4]) C. Cotter, *Recent Developments in Montreal Convention*

In principle, Courts adopt the applicability of both conventions; the 1929 Warsaw Convention and the 1999 Montreal Convention, as a dual system, and cite their stance by precedents interpreting the Warsaw Convention as persuasive authority to interpret corresponding provisions of the Montreal Convention, *e.g.,* applying Warsaw Convention precedent to claim for damages due to delay under Article 19 of the Montreal Convention, utilizing Warsaw Convention precedent in defining «carrier» as that word is used in the Montreal Convention, and interpreting the phrase «place of destination» in Article 33.1 of the Montreal Convention in line with previous courts' interpretation of «place of destination» in Article 28.1 of the Warsaw Convention.

While «accident» is not defined in the Montreal Convention, the Court adopted the interpretation of the U.S. Supreme Court substantively identical provision of the Warsaw Convention as *an* «*unexpected or unusual event or happening that is external to the passenger*» ([5]), and as that word is defined in cases interpreting the Montreal and Warsaw Conventions ([6]). Therefore, the Court finds that the

---

Litigation, in *J. Air L. & Com*. 2014, 316.

([5]) *Air France v. Saks, 470 U.S. 392, 405 (1985*); Warsaw Convention, Ch. III, art. 17 states that «*The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking*».

([6]) «La nozione di «*Accident*» […] è una nozione aperta, che impone una valutazione caso per caso. Essa delimita l'area della responsabilità per inadempimento dell'obbligo di protezione e del danno risarcibile, ma non impone al passeggero altro onere probatorio se non quello di dimostrare il pregiudizio e allegare, indicare la verificazione dell'accadimento che ha dato luogo al danno evento (la morte o la lesione del passeggero), secondo prossimità ed immediatezza, a bordo dell'aeromobile o nel corso delle operazioni di imbarco o sbarco. Il contenuto dell'onere probatorio cui è tenuto il passeggero si sostanzia

Plaintiff's incident qualifies as an accident ([7]) and that the claims fall under the Montreal Convention, and any remedy must be had pursuant thereto ([8]).

---

nella collocazione di tale evento nell'ambito spazio-temporale della responsabilità del vettore »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«; art. 17.1 Convenzione di Montreal). Qualora il vettore voglia esonerare la responsabilità dovrà a sua volta dimostrare la causa effettiva del danno e ricondurla ad uno degli eventi esonerativi indicati dalla Convenzione secondo i principi di imputazione della responsabilità. Non spetta al passeggero dimostrare la causa effettiva del danno evento (o la causa mediata del danno qualora ci si trovi in presenza di una concatenazione di eventi). Anche nel *leading case* «*Saks*», al quale generalmente ci si riferisce nell'attribuire l'onere della prova della causa del danno in capo al passeggero, viene affermato, con intenzione chiaramente semplificatoria, che il danneggiato deve essere in grado di provare "only be able to prove" che "some link in the chain was unusual or unexpected event external to the passenger"»; A. Zampone, *La Nozione di «Accident» nella Convenzione di Montreal 1999 e la «Contributory Negligence» del Passeggero*, *Dir. trasp*. 2021, 17.

([7]) In *Kruger v. Virgin Ad. Airways, Ltd., 976 F. Supp. 2d 290, 294 (E.D.N.Y. 2013)*, the first issue was whether the incident with the flight attendant was an «accident» under the Montreal Convention. The Court noted that the Supreme Court has defined 'accident' under the Convention as 'an unexpected or unusual event or happening that is external to the passenger. The definition 'should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries.' The court concluded that «Because the altercation was an »accident« under Article 17 that occurred while embarking, the Montreal Convention applied to the plaintiff's injury. As such, the Montreal Convention preempted the plaintiffs' state law claims». C. Cotter, *Recent Developments in Montreal Convention Litigation,* 79.

([8]) It is clear from several cases that service from flight attendants and other air personnel has a direct relation to the operation of an aircraft. Accordingly, where a passenger is injured as a result of conduct or actions of airline personnel, which are outside the scope of normal aircraft expectations, procedures, events, or operations, an aviation accident occurs, *See T. A. Weigand, Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention, American University*

The judgment addresses that Plaintiff's attempt to overcome the applicability of the Montreal Convention and the liability limits and the two-year statute of limitation thereunder by arguing the willful misconduct exception before the Court and asserting that the Montreal Convention does not preempt local law in cases of willful misconduct ([9]). Such arguments for the willful misconduct exception were an attempt to resort to Article 25 of the Warsaw Convention, which strips the carrier of the defences stipulated under the convention if the damage was caused by the carrier's willful misconduct ([10]). More importantly, a carrier shown to have caused an injury through willful misconduct is not entitled to the liability limits that would otherwise govern ([11]). In practice, this provision is difficult for plaintiffs to use successfully, particularly in jurisdictions that define willful misconduct as an act done to intention-

---

International Law Review, V. 16 Issue 4., 2001, P. 946., and this aligns with the approach the Court adopted in its judgment in establishing that the injury sustained by the Plaintiff's is indeed an accident, and as a result dispensing the discussion whether the flight attendant's act qualifies as a «willful misconduct» or not by resorting to the applicable law.

([9]) The Court elaborated that even if Cohen's claim for «willful» misconduct could be brought under New York state law, which the parties agree applies, it would likely still be untimely because the statute of limitations on claims for damages arising from assault or battery in New York is one year. See N.Y. C.P.L.R. § 215(3).

([10]) Wilful Misconduct is defined by common law courts, although the definition and terms could differ slightly, as «willful performance of an act, or omission, with the knowledge that the act or omission will cause damage or harm; or willful performance of an act, or omission, with reckless and wanton disregard of probable consequences of that act or omission». See D. Damar, *Wilful Misconduct in International Transport Law*, 2011, 63.

([11]) A. Montesano, *La perdita del diritto alla limitazione della responsabilità degli operatori del trasporto aereo alla luce della Convenzione di Montreal, Ri. Group c. trib. di roma 18-X-2018, Air France ed altri,* in *Dir. mar*. 2020, 207.

ally cause harm, since, as one commentator points out, «it could prove extremely difficult to convince a jury that a pilot would intentionally cause a crash since the pilot's own life would be at risk» ([12]).

While the Court was correct in its decision to reject such argument, relying on the fact that «while the Montreal Convention incorporated many of Warsaw Convention's substantive provisions, there is no substantively identical article in the Montreal Convention that reflects the provisions of Article 25 of the Warsaw Convention governing the removal of damage caps for willful misconduct, indeed, there is no provision in the Montreal Convention regarding 'willful misconduct' relating to personal injury claims», the question has always been whether the willful misconduct exception was indeed abrogated by the Montreal Convention ([13]).

The abrogation of the wilful misconduct exception did not start with promulgating the Montreal Convention, but years before that, starting with amending the Warsaw Convention by the Hague Protocol 1955, through to Article X of the 1971 Guatemala City Protocol which amends article 25 of the Warsaw Convention as amended by the Hague Protocol to eliminate the provision that, in the case of the carriage of passengers, permits the limits to be bro-

---

([12]) J. Mckay, *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, in *Case Western Reserve Journal of International Law* 2002, 79

([13]) See, e.g., *Bassam v. Am. Airlines, 287 F. App'x. 309, 312–13 (5th Cir. 2008)*. The court noted: «Only four articles of the Montreal Convention are relevant here. Article 17 defines conditions for carrier liability for harm to passengers, including death or bodily injury and for loss or damage to checked baggage. Article 19 similarly defines conditions for carrier liability for damage caused by delay in the carriage by air of passengers, baggage, or cargo. Articles 21 and 22 set forth a strict liability regime for fault of the carrier as to these damages but place a limitation of liability for each type of claim. Article 22(5), however, provides a willful misconduct exception to this limitation».

ken upon proof «that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result… ([14]) », ([15]) arriving to the Montreal Convention. The bottom line is, considering the aforementioned concrete circumstance back to the Warsaw Convention regime, as per the plaintiff's argument, still leads the Court to the same conclusions. It is true that unlike the Warsaw Convention, the Montreal Convention does not have any exception to the limit of liability for willful misconduct *per se*. Rather, Article 22.5 has language akin to willful misconduct ([16]). Yet, this Article is limited to the limits of liability in relation to delay, baggage and cargo and does not apply to personal injury claims ([17]).

([14]) This provision is continued, however, to apply to the carriage of cargo since no substantive change was made in that legal regime.

([15]) R. Boyle, *The Guatemala Protocol to the Warsaw Convention*, 1975, 75.

([16]) It states: «The foregoing provisions of paragraph 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that such servants or agents was acting within the scope of its employment». This indicates that Article 22(3) liability in the case of carriage of cargo is excluded from the Article 22(5) exceptions, because it only refers to the provisions of paragraphs 1 and 2 [i.e., Articles 22(1) and 22(2)]. But whether the exclusion of Article 22(3) from the exceptions provided for in Article 22(5) means that the limit on liability is unbreakable is an issue federal courts have not decided. The bottom line is, under Article 22(3), the use of willful misconduct argument is a Hail Mary. Even under Article 22(5), the plaintiff bears a heavy burden of showing willful misconduct. Succinctly put, under this exception, the plaintiff can only win on a wing and a prayer.

([17]) C. Ogolla, *Death Be Not Strange. The Montreal Convention's Mislabelling of Human Remains as Cargo and Its Near Unbreakable Liability Limits*, 2019, 87, 88.

3. The irrelevance between Warsaw Convention's limitation of liability and the two-year statute of limitations under Montreal Convention – The purpose of the Montreal Convention was, and continues to be: 1. to establish some degree of uniformity in the manner in which claims arising in the course of international travel are handled; 2. to limit the potential liability of the air carrier so as to aid in the development of international air transportation, to provide a definite basis for insurance rates for airlines, and, thereby, to reduce operating expenses, with subsequent savings to the airline industry and its passengers. Article 29 of the Montreal Convention states that «*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* ...». One such limitation is Article 35, which states that «*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 aircraft on which the carriage stopped*» ([18]). Hence, as a rule, any claim to which the Montreal Convention applies is subject to its two-year statute of limitations ([19]).

Looking at Article 29 of the Warsaw Convention and Article 35 of the Montreal Convention, one immediately notices that as the conventions set out a uniform time limitation of two years for actions, it stands to reason that the time limit to be established would be unbreakable, with the consequence that no suspension or interruption would be allowed. A substantial number of courts acknowledged this principle and considered the time limit established to be

---

([18]) The Warsaw Convention's Article (29) contains almost identical language to Montreal Convention's Article (35).

([19]) A. Stewart, *The Montreal Convention's Statute of Limitations - A Failed Attempt at Consistency*, in *Journal of Air Law and Commerce* 2015. 269.

unbreakable, and that it therefore was not supposed to be suspended or interrupted. This position was reaffirmed on several occasions. For example, in 2018, the Federal Court of Australia confirmed pre-existing case law established under the Warsaw Convention, and held that the time limits of the 1999 Montreal Convention were unbreakable. Similar decisions can be found in other jurisdictions, such as in the United States and in Russia ([20]).

Rightfully, the Court went further on in its judgment by establishing that even if the Plaintiff's argument under Article 25 of the Warsaw Convention was to be analyzed, it fails, as such argument conflates limitations on the amount of the monetary limits of liability (damage caps) with the statute of limitations under Article 35 of the Montreal Convention, and the Plaintiff, therefore, provides no authority to suggest that Article 25 of the Warsaw Convention voids the statute of limitations. The Court relied on the *Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1286 (2d Cir. 8 1991)*, overruled on other grounds, *Zicherman v. Korean Air Lines, Co., 516 U.S. 217 9 (1996)* «concluding that Article 25 does not lift Article 29's statute of limitations» to back this particular of its decision, hence, it concluded that whether the flight attendant's actions were intentional, willful, reckless, or negligent, the Plaintiff cannot circumvent the Montreal Convention's two-year statute of limitations by way of an unrelated provision of the Warsaw Convention.

4. The preemptive effect of the Montreal Convention – The judgment also addressed the Plaintiff's argument which asserts that the Montreal Convention does not preempt local law in cases of willful misconduct. It held that the Plaintiff's claims were exclusively governed by the Montreal Convention, which preempts any local law, and that the Warsaw

([20]) C.I. Grigorieff, *Uniformity and Fragmentation of the 1999 Montreal Convention on International Air Carrier Liability*, 2022, 505, 507.

and Montreal Conventions do preempt state law and provide the sole avenue for damages claims that fall within the scope of the Conventions' provisions. The Court went further and elaborated that even if the Plaintiff's claim for willful misconduct could be brought under New York state law, the local law which the parties agree applies, it still be untimely because the statute of limitations on claims for damages arising from assault or battery in New York is one year.

Preemption under the Montreal Convention is governed by Article 29 «Basis of Claims», which is similar to the language in Article 24 of the Warsaw Convention ([21]). The preemptive effect of this provision may be total: defined as the extinguishing of a cause of action that falls outside of the limitation or conditions of the Convention, leaving the Plaintiff without remedy, for example if an event causing injury to a passenger during international carriage by air does not constitute an accident for the purposes of Article 17, or may be partial: defined as the conversion of a cause of action into a cause of action that falls within the limitation or conditions of the Convention. The leading case in relation to pre-emption is *El Al Israel Airlines, Ltd v. Tsui Yuan Tseng* ([22]), where the Court stated that to the extent recovery is

([21]) Article 29 of the Montreal Convention states that: «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».

([22]) *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 US 155, 1999 *US Lexis* 505; The U.S. Supreme Court's decision in El Al Israel Airlines v. Tseng7 in 1999 resolved many issues regarding the preemptive effect of the Warsaw and Montreal Conventions. In Tseng, the Supreme Court confirmed the Warsaw Convention's goal of creating a uniform system of liability, holding that «recovery for a personal injury suffered

«*not allowed under the Convention, it is not available at all*».

At first blush, the exclusivity principle appears to cover all actions: 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. Certainly, this clause appears to have a global effect, carefully worded to ensure that it encompassed any action in whatever form it was created. The cases listed above are testament to the global nature of the presumptive effect at least as against those actions presented against the carrier, but there remains doubt about the effect on other parties, not covered by the Montreal Convention ([23]).

IHAB ARJA

'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' Art. 17, 49 Stat. 3018, if not allowed under the Convention, is not available at all«.Since Tseng, it has become well established that «[f]or all air transportation to which the Montreal Convention applies, if an action for damages falls within one [of] the treaty's damage provisions, then the treaty provides the sole cause of action under which a claimant may seek redress for his injuries», *See* B. BANINO, *Recent Developments In Air Carrier Liability under the Montreal Convention, The Brief* 3/2009, 23.

([23]) P. NENNAN, *The Effectiveness of the Montreal Convention as a Channelling Tool Against Carriers*, in *The Aviation & Space Journal*, January, 1/ 2012, 21, 23.