

*INTERPRETATION OF THE MONTREAL 99 CONVENTION IN A
FORUM NON CONVENIENS CASE*

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Claims for damages under Art 33 of the Montreal 1999 Convention have at the option of the plaintiff five jurisdictions;

-the domicile of the carrier,

-carrier's principal place of business,

- where the contract of carriage was made and carrier has a place of business,

-the destination, and finally

- where the passenger has his principal and permanent residence.

The West Caribbean case

Subject to a recent appeal, the federal court of the southern district of Florida dismissed on the grounds of *forum non conveniens* a claim asserted by the families of passengers of the West Caribbean crash of August 16, 2005.¹ The crash, killing all on board, occurred in Venezuela en route from Panama to Martinique and passengers as well as the plaintiffs were residents of Martinique. Actual carrier of the flight was the Colombian company West Caribbean Airways that contracted with Newvac, a Florida corporation, to supply an MD-81 aircraft and crew for this and other flights during a three month period of time. Newvac contracted for the seating capacity and subsequent resale of it to Globe Trotter, a local Martinique travel agency, which in its turn sold individual seats on the aircraft to passengers.

Contracting carrier

The Court found that Newvac was contracting carrier under Article 39 that says;

The provisions of this chapter shall apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the

¹ 2007 WL 5559325 (S.D.Fla.).

contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Application of the doctrine of forum non conveniens

Although the Court found Newvac to be a carrier within the meaning of the Montreal 99 Convention it nevertheless dismissed the claim based on the doctrine of *forum non conveniens*.

Article 33 of the Montreal 99 Convention as well as the corresponding Article 28 of the Warsaw Convention contains the following reference to local law:

“Questions of procedure shall be governed by the law of the court seised of the case”

Subsequent to an analysis of *Hosaka v. United Airlines, Inc.*² where the Court found itself to be unable to apply the doctrine of *forum non conveniens* in a case where jurisdiction existed under the Warsaw Convention.³, the Court in *West Caribbean* discussed the issue whether this doctrine can be applied in a case arising under the Montreal 99 Convention. With reference to the fact that the doctrine of *forum non conveniens* was firmly entrenched in the procedural law of the United States by the time the Montreal 99 Convention was drafted, the Court found the text to be unambiguous and by implication permits the application of the doctrine of *forum non conveniens*.

Passenger’s deference in its choice of forum under Art. 33

What is then the standard of plaintiff’s deference in carrier cases when it comes to the choice of one of the forums provided by Art 33 of Montreal 99? Should courts be free to dismiss or transfer cases at its discretion as long as there remains another of the five jurisdictions available? Alternatively, are courts strictly bound by the letters of the Montreal 99 Convention to hear cases that fit into its textual framework of Art 33 jurisdiction?

Obviously, the plaintiff’s deference in the choice of one of the five jurisdictions is brought into the text itself, i.e. it is the passenger who chooses his forum of preference.

² 305 F. 3d 989 (9th Cir. 2002).

³ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

Intrerpretation of treaties under international law

If we agree with the West Caribbean Court that the text of Art 33 is unambiguous, it would follow that passengers' deference to chose the forum can only be restricted if there exist under international law a principle to construe the Montreal Convention contrary to the plain text.

With reference to *Eastern Airlines v. Floyd*⁴, the West Caribbean opinion says that the interpretation of a treaty would begin with the text of the treaty and the context in which the written words are used. It also states that other rules of construction may be brought to bear on difficult or ambiguous passages. Further on, it says that treaties are interpreted more liberally than private agreements and to ascertain their true meaning we may look beyond the written words to the history of the treaty. It is here the so called *Travaux Préparatoires* come into play. Typically the *Travaux Préparatoires* would involve work at the creation of the treaty such as minutes and reports from international conferences in the process of the drafting of the Montreal 99 Convention.

The Montreal 99 Convention is an international multilateral treaty and its construction and interpretation must be governed by the international law of treaties.⁵ The fundamental provisions of the Vienna Convention of 1969 codify customary international law of treaties and it is in principle applicable also to States that did not ratify it.

What is generally the underlying interests, and, in that sense, the true meaning of Article 33 and the naming of the five fora under Article 33? One obvious interest is to avoid conflicts of jurisdictions⁶ since in the interest of unified law there must be no conflicts of where to exercise the rights under such law.

Again, if there is no doubt after a grammatical interpretation there is no reason of proceeding further by interpreting the Montreal 99 Convention in the context of the legal source or in the light of the aim and purpose of the legal source, i.e. the text the Convention must simply be interpreted by the plain meaning of its words.⁷

⁴ 499 U.S. 530, 111 S.Ct. 1489, 113 L. Ed.2nd 569 (1991);

⁵ Paul S. Dempsey and Michael Milde; "International Air Carrier Liability: The Montreal Convention of 1999", page 45.

⁶ Paul S. Dempsey and Michael Milde; "International Air Carrier Liability: The Montreal Convention of 1999", page 217.

⁷ Paul S. Dempsey and Michael Milde; "International Air Carrier Liability: The Montreal Convention of 1999", page 48, citing the case *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

The plain meaning of the words

Looking at the words of the text, it appears far-fetched that the reference in Art 33 to local law for issues of procedure would have the plain meaning that the forum Court would have the discretion to do exactly the opposite of what is being said in the first paragraph of the very same rule and to apply a doctrine that enables the Court to refuse to exercise its jurisdiction to hear the case. The reasoning rather brings the impression of reverse engineering after first having taken the position that the cases should go. Rather, the plain meaning of the words is simply that the forum court will determine the rules of the proceedings whereby it will resolve the substantive claim before it and filed by a passenger by virtue of the wording of Article 33 of the Montreal 99 Convention.

As much as we may like or dislike the result depending on the side we may take, the Montreal 99 Convention operates by putting liability on both actual and contracting carriers thereby resolving the long lasting issue of the *Guadelajara Convention*⁸, and we must simply accept this fact and, although sometimes surprisingly, such carriers might have their domicile or principal place of business in a state where local law happens to be considered relatively friendly to passenger claims.

Conclusions and final remarks

Both parties of the two sides of aviation litigation today can rightly be considered to engage in so called forum shopping; the plaintiffs at the stage of selecting the forum where to initiate the action and similarly the defendants by seeking to remove the case to a jurisdiction where local law treats passenger claims less favorable. Both parties typically spend considerable time at the beginning of the proceedings trying to either stay where filed or trying to remove the case to another jurisdiction, and although passengers are normally economically weaker than carriers and its insurers, neither of the sides should bear more blame than the other for trying to protect his interests relating to the important issue of jurisdiction.

In summary of the above, there are reasons to believe that the decision to sending out the West Caribbean cases from a Florida District Court will be set aside and cases be sent back for trial in that Montreal 99 Convention forum selected by plaintiff. One should though keep in mind that in order to reverse the decision plaintiffs must meet the high standard of “abuse of discretion”. The rationale for a reversal is not the subjective interest of either of the two sides in aviation accident litigation, in

⁸ 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 Guadelajara on 18 September 1961.

particular the interest or aversion respectively to litigate in a U.S. forum, but rather a matter of law for the consistency in the interpretation of the Montreal 99 Convention.

Civil aviation is international in its nature and accidents in civil aviation lead to claims from passenger from states all over the world. It is not the transferring of claims and sending cases to other courts and subjecting carriers to multiple law suits across the globe that will provide for fair handling of passenger claims. Instead, local substantive law of the forum should be able to measuring and awarding each passenger the full value of his claim depending on the economic and other circumstances of that particular passenger or survivor. After all, it is in everyone's interest of having one single liability determination of an international aviation accident and, as the case may be, followed by separate damage determinations to provide the value of each individual case.

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