



# Aviation Law



**CONDON / FORSYTH**

Michael J. Holland

# The Warsaw Convention (1929) and The Montreal Convention (1999)



# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<b>Applicability</b>	<p><b>Article 1</b> – Applies to all “international transportation” by aircraft for hire with a place of departure and destination in two Contracting States, or within one Contracting State where there is a stop in another State; applies equally to gratuitous transportation performed by “an air transportation enterprise”</p> <p>Transportation by successive carriers is considered one undivided international carriage if regarded by the parties as a single operation, even if segments of the transportation are domestic</p> <p><i>Haldimann v. Delta Airlines</i>, 168 F.3d 1324 (D.C. Cir. 1999) (objective evidence (e.g. on ticket or air waybill) trumps subjective intent of party in determining whether domestic segment constitutes part of undivided international transportation)</p>	<p><b>Article 1</b> – Same as Warsaw Convention (1929) except uses phrase “international carriage,” and “air transport undertaking” replaces “an air transportation enterprise,” which arguably suggests a broader application</p>

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

## *Passenger Injury or Death*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Liability/Cause of Action for Injury/Death</i>	<p><b>Article 17</b> Carrier “presumptively” liable for passenger “bodily injury” or death caused by an “accident”</p> <p><i>Air France v. Saks</i>, 470 U.S. 392 (1985) (an “accident” is “an unexpected or unusual event or happening that is external to the passenger.”)</p> <p><i>Olympic Airways v. Husain</i>, 540 U.S. 644 (2004) (event may be “link in the chain of causes”)</p> <p><i>Eastern Airlines v. Floyd</i>, 499 U.S. 530 (1991) (mental or psychic injuries not recoverable without bodily injury)</p>	<p><b>Article 17(1)</b> Same as Article 17 of the Warsaw Convention</p>

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

## *Passenger Injury or Death*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Limit of Liability</i>	<p><b>Article 22</b> In case of passenger injury/death, air carrier liability limited to \$8,300 (carriers agreed to increase limit to \$75,000 in 1966 Montreal Agreement with respect to flights to/from the U.S.)</p>	<p><b>Article 21(1)</b> Air carrier subject to liability <i>without proof of fault</i> for provable damages up to 113,100 SDRs (approx. \$164,429)</p> <p><b>Article 21(2)</b> Carrier not further liable if:</p> <ul style="list-style-type: none"> <li>a) damage was not due to its negligence/wrongful act/omission;</li> <li>b) damage was solely due to the negligence/wrongful act/omission of a third party</li> </ul>
<i>Wilful Misconduct</i>	<p><b>Article 25</b> Air carrier liable for all provable “compensatory” damages without limit if passenger injury/death caused by “wilful misconduct” or carrier</p>	N/A – Air carrier waives all liability limits for passenger injury/death

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

## *Passenger Injury or Death*

	<b><i>Warsaw Convention (1929)</i></b>	<b><i>Montreal Convention (1999)</i></b>
<b><i>Defenses</i></b>	<p><b><i>Article 20(1)</i></b> Carrier not liable if it proves that it took “all necessary measures” to avoid the damage or it was impossible to take such measures (defense waived per 1966 Montreal Agreement)</p> <p><b><i>Article 21</i></b> Contributory negligence of passenger may “exonerate” the carrier in whole or in part</p>	<p><b><i>Article 21(2)</i></b> Carrier not liable for damages in excess of 113,100 SDRs if damage not due to the negligence or wrongful act/omission of carrier <b>OR</b> damage solely due to negligence or wrongful act/omission of third party</p> <p><b><i>Article 20</i></b> Contributory negligence: carrier not liable to extent carrier proves damages caused or contributed by acts/ omissions of passenger/ plaintiff</p>
<b><i>Advance Payments</i></b>	<b><i>Not Addressed</i></b>	<p><b><i>Article 28</i></b> If required by carrier’s national law (see, e.g., <i>EC Reg. No. 2027/97</i>)</p>

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

---

## *Passenger Delay*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Liability/ Cause of Action for Delay of Passengers</i>	<b>Article 19</b> Carrier liable for damage occasioned by delay in transportation of passengers	<b>Article 19</b> Same as Warsaw Convention
<i>Limit of Liability</i>	<b>Article 22(1)</b> In case of passenger delay, air carrier liability limited to \$8,300	<b>Article 22(1)</b> Liability limit for delay is 4,694 SDRs (approx. \$6,824)

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

---

## *Passenger Delay*

	<b><i>Warsaw Convention (1929)</i></b>	<b><i>Montreal Convention (1999)</i></b>
<b><i>Wilful Misconduct</i></b>	<b><i>Article 25</i></b> Air carrier liable without limit if delay caused by “wilful misconduct” of carrier	<b><i>Article 25</i></b> Liability limit not applicable if damages resulted from act/omission “done with intent to cause damage or recklessly with knowledge that damage would probably result.” If servant/agent acted with intent or recklessly, the servant/agent must be acting within scope of employment
<b><i>Defenses</i></b>	<b><i>Article 20(1)</i></b> Carrier not liable if it proves that it took “all necessary measures” to avoid the damage or it was impossible to take such measures	<b><i>Article 19</i></b> Carrier not liable if it proves that it took all measures that it could <i>reasonably</i> take to avoid damage or it was impossible to take such measures  <b><i>Article 20</i></b> Contributory negligence: Carrier not liable to extent carrier proves damages caused or contributed by acts/omissions of passenger/plaintiff



# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

---

## *Damage, Loss or Delay of Baggage*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Notice of Applicability of Convention – Baggage Check</i>	<p><b>Article 4</b></p> <p>Carrier must record certain particulars (e.g., number of pieces and weight) and give notice of Convention applicability on baggage check or it may not exclude/limit its liability</p>	<p><b>Article 3</b></p> <p>Carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage, and give notice of convention’s applicability but failure to deliver proper baggage identification tags or notice does not affect the carrier’s entitlement to limit its liability</p>

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

---

## *Damage, Loss or Delay of Baggage*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Liability/ Cause of Action for Damage/Loss of Baggage</i>	<p><b>Article 18</b></p> <p>Carrier liable for damage sustained in the event of damage, destruction or loss of checked baggage or any goods, if the “occurrence” which caused the damage took place during “transportation by air” (i.e., while in the charge of the carrier)</p>	<p><b>Article 17(2)</b> – Checked Baggage: Carrier liable for damage sustained in the case of destruction, loss or damage to checked baggage “upon condition only” that the event which caused the damage took place on board the aircraft or during any period within which baggage was in the charge of the carrier</p> <p><b>Article 17(2)</b> – Unchecked Baggage: Carrier liable if damage resulted from its fault</p>
<i>Liability/ Cause of Action for Delay of Baggage</i>	<p><b>Article 19</b></p> <p>Carrier liable for damage occasioned by delay in transportation of baggage</p>	<p><b>Article 19</b></p> <p>Same as Warsaw Convention</p>

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

## *Damage, Loss or Delay of Baggage*

	<b><i>Warsaw Convention (1929)</i></b>	<b><i>Montreal Convention (1999)</i></b>
<b><i>Notice of Claim</i></b>	<b><i>Article 26(2)</i></b> Written Notice of Claim must be made: -Damage: 3 days -Delay: 14 days	<b><i>Article 31(2)</i></b> Written Notice of Complaint must be made: -Damage (checked baggage): 7 days -Delay: 21 days
<b><i>Limit of Liability</i></b>	<b><i>Article 22(2)</i></b> Checked baggage: \$20 per kilogram <b><i>Article 22(3)</i></b> Unchecked baggage: \$400	<b><i>Article 22(2)</i></b> Liability limit for damage/destruction/loss/delay is 1,131 SDRs (approx. \$1,644) per passenger for checked/ unchecked baggage
<b><i>Wilful Misconduct</i></b>	<b><i>Article 25</i></b> Air carrier liable without limit if damage/destruction/loss/delay caused by “wilful misconduct” of carrier	<b><i>Article 22(5)</i></b> Unlimited liability if damage was done intentionally or recklessly

# Legal Regime Applicable to Air Carrier Liability for International Transportation by Air

## *Damage, Loss or Delay of Baggage*

	<i>Warsaw Convention (1929)</i>	<i>Montreal Convention (1999)</i>
<i>Defenses</i>	<p><b>Article 20</b> Carrier not liable if it proves that it took “all necessary measures” to avoid the damage or it was impossible to take such measures, or that the damages were caused by error in piloting , in handling aircraft, or navigation</p> <p><b>Article 21</b> Contributory negligence of passenger may “exonerate” the carrier in whole or in part</p>	<p><b>Article 17(2) – Damage/Loss- Checked Baggage:</b> Carrier not liable to extent damage resulted from the inherent defect, quality or vice of the baggage</p> <p><b>Article 17(2) – Damage/Loss- Unchecked Baggage:</b> Carrier not liable unless damage resulted from its fault or its agents/servants</p> <p><b>Article 19 – Delay:</b> Carrier not liable if it proves that it took all measures that it could reasonably take to avoid damage or impossible to take such measures</p> <p><b>Article 20 – Damage/Loss/Delay:</b> Contributory negligence: Carrier not liable to extent carrier proves damage/delay caused or contributed by acts/omissions of passenger/plaintiff</p>

# EU 261



# EU 261 Class Action Litigation

---

- European Union Regulation (EC) No 261/2004 (“EU 261”) provides passengers with the right to receive compensation for flights cancelled or delayed three or more hours
- Applies to all flights operated by EU carriers and to flights operated by non-EU carriers that depart from the EU
- Exceptions apply – e.g., “extraordinary circumstances”; comparable re-routing; passenger check-in time and ticket purchase at publicly available fare
- Obligation to pay compensation falls on the **operating** carrier

# EU 261 Class Action Litigation

---

- U.S. plaintiffs' lawyers are using U.S. class actions to try to enforce EC 261 rights in US courts
  - U.S. class action procedures (Fed. R. Civ. P. 23) permit a single individual plaintiff to commence an action on behalf of unknown individuals
- Since 2011, a number of separate class action lawsuits have been filed against carriers that fly between the U.S. and the European Union
- If successful, the class action mechanism could transform an individual claim for €600 into a multi-million dollar litigation as thousands of passengers could be affected

# EU 261 Class Action Litigation

---

- Two theories of liability used in EU 261 class action suits:
  - Breach of Contract
  - Direct Statutory Violation of EC 261
- Thus far, U.S. courts have unanimously dismissed EU 261 claims based on the following grounds:
  - Airline Deregulation Act (49 U.S.C. § 41710 *et seq.*) preempts a claim for breach of contract *unless* the airline expressly agrees to abide by the Regulation in its Conditions of Carriage – e.g., *Giannopoulos*, 2011 WL 3166159 (N.D. Ill. July 27, 2011)
  - No private right of action to litigate a violation of EC 261 in U.S. courts – *Volodarskiy v. Delta Airlines*, 784 F.3d 349 (7th Cir. 2015)



# DOHSA



# Death on the High Seas Act (DOHSA)

---

- DOHSA **enacted in 1920** to provide a remedy to families who lost loved ones at sea
- Exclusive remedy for death caused by accident on the high seas beyond a marine league (i.e., more than 3 nautical miles)
- DOHSA only allowed recovery for **pecuniary damages/loss**
  - *Dooley v. Korean Air* (1998); *Zicherman v. Korean Air* (1996)
- Limited claimants: decedent's spouse, parent, child, or dependent relative

# 2000 Amendments to DOHSA

---

- Congress amended DOHSA in 2000
  - Legislation signed on April 5, 2000, and applicable for deaths resulting from ***commercial aviation accidents*** which occurred after July 16, 1996
- DOHSA amended to **no longer be applicable to commercial aviation accidents within 12 nautical miles** (or closer to the shore of any state)
- DOHSA amended to allow the recovery of **nonpecuniary damages** (damages for loss of care, comfort, and companionship)
- The amendment, however, retained the provision of DOHSA denying recovery for **punitive damages**



# Thank You for listening.



**CONDON / FORSYTH**

Michael J. Holland