



## Recent Case Law Addressing Three Contentious Issues in the Montreal Convention

By Christopher E. Cotter

What is the difference between a flight from New York to Los Angeles and one from New York to Vancouver? Besides the likely difference in the weather upon arrival, the two flights are governed by different bodies of law. New York–Vancouver is an international flight, governed by an international treaty signed by 97 countries in Montreal, Canada, on May 28, 1999. Popularly referred to as the Montreal Convention, the treaty addresses the liability of air carriers for damages arising out of international carriage by air.<sup>1</sup> This Convention does not apply to carriage between two points in the same country unless there is a scheduled stopping place at a point in another country.

Since the Montreal Convention became effective in the United States about a decade ago, courts have interpreted and applied the Convention under numerous factual circumstances. An examination of this case law reveals that there are areas of the treaty that have been particularly contentious. This article begins with an overview of the Convention's structure and key provisions. It then examines three controversial issues under the Convention and considers what guidance is available from precedent, including recent cases, to predict the outcome of a particular case. Although courts across the country have not rendered a consistent interpretation of all issues that arise under the Convention, the case law sheds light on the critical factors courts are likely to invoke to resolve these issues.

### A Brief Review of the Montreal Convention

The Montreal Convention is a comprehensive international treaty that addresses private international air law. In 1999, the International Civil Aviation Organization (ICAO) convened an international conference in Montreal to negotiate and adopt a new convention to replace the Warsaw Convention, a treaty drafted in 1929, when the airline industry was in its infancy.<sup>2</sup>

The Montreal Convention entered into force in the United States on November 4, 2003. It is not an amendment to the Warsaw Convention, but an entirely new treaty that supersedes and replaces it.<sup>3</sup> As one court noted, the Montreal Convention “represents

a significant shift away from a treaty that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers.”<sup>4</sup> Certainly, the Montreal Convention eliminated the very restrictive limitation amounts previously applicable to bodily injury cases. Those amounts, however, were largely superseded, at least in the United States, by industry practice long before Montreal came into force. In the carriage of cargo, Montreal does not alter the original goal of Warsaw of maintaining limited and predictable damage amounts for airlines.<sup>5</sup> In fact, Montreal has significantly increased the predictability of cargo cases with the creation of an unbreakable limitation of liability.

The drafters of the Montreal Convention tried wherever possible to embrace the language of the original Warsaw Convention and its various amendments so as not to disrupt existing jurisprudence.<sup>6</sup> Thus, the “common law” of the Warsaw jurisprudence is vitally important to the interpretation of the Montreal Convention.<sup>7</sup> Courts frequently cite cases interpreting Warsaw when interpreting and applying Montreal.

The Montreal Convention imposes strict liability on air carriers in respect of three types of loss.<sup>8</sup> Article 17 provides for carrier liability in the event of accidental death or bodily injury of a passenger while on board, embarking, or disembarking the aircraft.<sup>9</sup> Article 17 also imposes liability (subject to an inherent defect defense) for destruction or loss of, or damage to, checked baggage.<sup>10</sup> Article 18 addresses liability for damage to cargo, while Article 19 imposes liability for damages resulting from delay of passengers, baggage, or cargo.<sup>11</sup>

The Convention contains an exclusivity provision, which excludes all other claims when conditions fall within its scope.<sup>12</sup> For all air transportation to which the Convention applies, if an action for damages, however founded, falls within the substantive scope of one of the Convention's three liability-creating provisions, “the Convention provides the sole cause of action under which a claimant may seek redress for his injuries.”<sup>13</sup> For instance, if a passenger's cause of action falls within the substantive scope of Article 17, any relief must come under the terms of the Convention; all other claims are preempted, even if the carrier is not liable under Article 17.<sup>14</sup>

The Convention also contains limitations on when a lawsuit may be brought and the amount of recovery.

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It is a condition precedent to Convention liability that an action be commenced 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.”<sup>15</sup> The Convention limits liability by reference to special drawing rights (SDR) of the International Monetary Fund. The maximum amounts set out in the Convention, as negotiated in 1999, are subject to adjustment and at present are as follows:

- For damages caused by delay in the carriage of passengers: 4,694 SDRs per passenger;
- For damage in the case of destruction, loss, damage, or delay in the carriage of baggage: 1,131 SDRs per passenger; and
- For damage in the case of destruction, loss, damage, or delay in the carriage of cargo: 19 SDRs per kilogram.

The Montreal Convention does not impose a limitation on the amount that can be recovered in the case of bodily injury or death, but when damages are sought in excess of 113,000 SDRs,<sup>16</sup> the Convention permits the carrier to prove that the damage was not due to the negligence of the carrier or was solely due to the negligence of another party. Without doubt, despite the more passenger-friendly nature of Montreal, there are circumstances in which an air carrier would want the treaty to apply.

### Article 17

Two of the most extensively litigated issues related to the Montreal Convention arise from the language of Article 17, section 1, which provides as follows:

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.<sup>17</sup>

A cause of action for bodily injury falls within the substantive scope of Article 17 so long as (1) the flight was international and (2) the accident that caused the injury occurred during the flight, or while embarking or disembarking.<sup>18</sup> So long as these two conditions are met, Article 17 is the exclusive remedy available to plaintiffs.<sup>19</sup> In some cases, simply determining whether Article 17 applies can present challenges.

### *Embarking and Disembarking*

The Convention does not define the terms “embarking” and “disembarking.” Courts have struggled to determine when a passenger begins embarking, and completes disembarking, for purposes of Article 17. Courts that have examined the issue focus on several factors, including (1) the passenger’s activity at the time of the injury; (2) the restrictions, if any, on the passenger’s movement; (3) the imminence of actual

boarding; and (4) the physical proximity of the passengers to the gate.<sup>20</sup> For instance, if the injury occurs over an hour before departure at a time when the passenger is free to roam the airport, a court likely would conclude that the passenger was not “embarking.”<sup>21</sup>

Courts tend to construe the acts of embarking and disembarking narrowly, and tend to require close spatial and temporal proximity to the flight.<sup>22</sup> In *Walsh v. Koninklijke Luchtvaart Maatschappij N.V.*, the court found that a passenger who tripped and fell on a low-lying metal bar near the departure gate was “embarking” at the time of his injury.<sup>23</sup> The court explained that, “[a]lthough he had yet to surrender his boarding pass, he was taking steps toward doing so by approaching the group of people assembled near the gate.”<sup>24</sup>

Even where an airline attempts to prevent a passenger from boarding a plane, the passenger could still be “embarking” under Montreal.<sup>25</sup> In another case, the plaintiff passenger and her daughter were informed that they could not board the aircraft after a dispute arose concerning baggage fees. She attempted to board anyway but was prevented from doing so by airline employees. When police were called to the gate, the passenger fainted and was taken to a local hospital. The court concluded that the passenger was embarking because, “according to [the passenger’s] testimony, she was at the gate ready to board the plane and only failed to board the plane because she was physically blocked by someone either in the gateway or at the aircraft door.”<sup>26</sup> As such, the Montreal Convention applied and consequently extinguished her right to claim because she had not commenced her action within two years.<sup>27</sup>

Determining whether a passenger is “disembarking” can be equally challenging. Certainly, a passenger who trips on a step stool at the end of a staircase designated for passengers to use is injured while disembarking.<sup>28</sup> As one court has explained, descent from the aircraft is “the commonly understood meaning of disembarkation.”<sup>29</sup>

However, a passenger who fell while walking up an inoperable escalator shortly after her flight arrived at the airport was also disembarking.<sup>30</sup> In that case, the passenger was climbing the escalator “under the direction of the airline, who maintained the gate area and directed passengers to customs and immigration.”<sup>31</sup> Thus, the court explained that the passenger “was not a free agent roaming at will throughout the terminal, which several other courts have found to be a persuasive factor.”<sup>32</sup> There was also a close temporal and spatial relationship to the flight because she had only recently exited the jetway.

Cases involving issues of embarking and disembarking tend to be very fact-sensitive. Courts typically examine each of the four factors listed above. Physical boundaries are not necessarily determinative; rather, the timing of the injury in relation to the flight and the

physical distance between the location of the injury and the aircraft appear to be the most determinative factors.

### *Carriers Are Only Liable for "Accidents"*

When a passenger is injured during an international flight, or while embarking or disembarking, Article 17 imposes strict liability on the carrier, subject to an important qualification. Carriers are only liable under Article 17(1) if the injury was caused by an "accident."<sup>33</sup> And "[n]ot every identifiable incident or occurrence during a flight is an accident within the meaning of Article 17 even if the incident gives rise to injury."<sup>34</sup> If the injury was not caused by an "accident," then the treaty still applies but affords no relief to the injured party. As such, whether a passenger's injury was caused by an "accident" is often a pivotal issue in a Montreal case involving bodily injury or death.

The language of Article 17 is not a model of clarity, and courts have often struggled with the meaning of the term "accident." The U.S. Supreme Court first examined the scope of an Article 17 "accident" in 1985 and defined the term as "an unexpected or unusual event or happening that is external to the passenger."<sup>35</sup> Although the Supreme Court interpreted "accident" as found in the Warsaw Convention, Article 17 of the Montreal Convention is virtually identical to its counterpart in Warsaw. The Supreme Court explained that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident."<sup>36</sup> Courts continue to apply the *Saks* definition, although there is some variation on how the definition is framed.<sup>37</sup>

As one might expect, the *Saks* definition does not completely resolve the ambiguity posed by Article 17. In fact, the Supreme Court encouraged its definition to be "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."<sup>38</sup> As with interpretation of the concepts "embarking" and "disembarking," determining whether an "accident" has occurred entails a fact-sensitive analysis.

Courts have applied the definition of "accident" to specific circumstances and several patterns emerge from the case law. For most cases, the primary dividing line is whether the injury-causing event was a usual or expected feature of air travel. For instance, in *Rafailov v. El Al Israel Airlines, Ltd.*, the court ruled that a passenger's slip-and-fall on a plastic blanket bag was not caused by an accident.<sup>39</sup> The court reasoned that, "[a]fter four hours in flight, it would seem customary to encounter a certain amount of refuse on an airplane floor, including blanket bags discarded by passengers who had removed the bag's contents in order to use the blanket."<sup>40</sup>

Similarly, in *Ugaz*, a passenger's fall while walking up an inoperable escalator shortly after her flight arrived at the airport was not an Article 17 accident.<sup>41</sup> The court

concluded that "there is simply no evidence whatsoever that an inoperable escalator is an unusual or unexpected event sufficient to constitute an accident."<sup>42</sup>

Interestingly, in *Wipranik v. Air Canada*, the court ruled that a "jolt" from a passenger seated in front of the plaintiff, which caused the tray table to shake and tea to spill on the plaintiff, did constitute an "accident."<sup>43</sup> The court explained that, "[a]lthough it may be common for an airline seat to shake when its occupant moves around, it is not common for beverages placed on the tray table behind that seat to be so jolted by the movement that they fall onto another passenger."<sup>44</sup> It is the tray's failure to securely hold the beverage "that is *unexpected*."<sup>45</sup>

Where injuries are caused by physical collisions with other passengers, courts tend to find that the circumstances causing the injury were unusual or unexpected. In this line of cases, however, some courts consider not only whether the event was unusual or unexpected, but also whether the circumstances relate to the operation of the aircraft. The rationale is that "[t]he carrier does not guarantee safety; he is only obliged to take all the measures which a good carrier would take for the safety of his passengers."<sup>46</sup>

In *Garcia Ramos*, the plaintiff suffered a broken arm when another passenger lost his balance and fell on her while attempting to get to his seat on the aircraft.<sup>47</sup> The court concluded that the injury was caused by an unusual or unexpected event because "a reasonable passenger would not expect a fellow passenger to fall on top of him."<sup>48</sup> However, because "[t]he passenger stepping over [p]laintiff had no relation to the operation of the aircraft, nor did it require the aid of any flight crew personnel," the plaintiff's injury was not caused by an Article 17 accident.<sup>49</sup>

On the other hand, where a passenger was injured by liquor bottles that fell from an overhead bin when a fellow passenger opened the compartment, the court held that the injury was caused by an Article 17 accident.<sup>50</sup> In addition to concluding that the event was unusual or unexpected, the court concluded that the event was related to the aircraft's operation.<sup>51</sup> The court reasoned that, "[w]hile passengers are permitted, and in most instances required, to place these items in the overhead bins, this is done under the supervision of the cabin crew who are responsible for securing the bins before takeoff."<sup>52</sup> Carriers routinely caution passengers about the safe storage of overhead items and urge them to use caution when opening the bins. The court, however, suggested that such warnings would, at most, only "insulate the carrier from liability for an injury caused by a passenger's own negligence" and would "not immunize it when the injury is caused by the negligence of another passenger."<sup>53</sup>

Another line of cases addresses whether a flight crew's failure to act constitutes an Article 17 accident. Generally, an airline's refusal to assist with

a passenger's medical emergency constitutes an "accident."<sup>54</sup>

Many of these failure-to-act cases rely on the U.S. Supreme Court's decision in *Olympic Airways v. Husain*.<sup>55</sup> In *Husain*, an asthmatic passenger died after a stewardess refused to move his seat away from the smoking section on an international flight, despite the fact that the passenger explained his health problems and repeatedly asked to be moved.<sup>56</sup> The Supreme Court found that the airline's rejection of an explicit request for assistance is an unusual or unexpected event.<sup>57</sup> The Court dismissed the notion that inaction could never be the basis of an Article 17 "accident."<sup>58</sup> Consistent with most states' common law tort theories, both malfeasance and nonfeasance can be a basis for liability under the Convention.

When defending a bodily injury or death claim under Article 17 of the Montreal Convention, the airline must consider whether the event causing the injury or death was an "accident." Although the term is somewhat elusively defined, the extensive body of case law on the topic offers insights into judicial understanding of what is—and is not—an Article 17 accident. Claims for injuries that do not arise from an "accident," but fall within the substantive scope of Article 17, cannot succeed as all other claims arising out of the events causing the injury are preempted by Montreal.

### Article 19: Defining "Delay"

No airline experience rivals flight delays and cancellations in terms of the level of frustration induced in the traveling public. Article 19 of the Montreal Convention, entitled "Delay," addresses an airline's potential liability in such circumstances:

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.<sup>59</sup>

The key word in Article 19 is "delay." Flight cancellations, following which passengers are not given another opportunity to reach their destination with the airline, are not considered delays and thus do not fall within the substantive scope of Article 19 or any other provision within Montreal. Claims based on flight cancellations are considered claims for nonperformance of a contract (i.e., breach of contract) and are governed by state contract law.

On the surface, the difference between a delay and a cancellation may seem obvious. However, there are gray areas. For instance, in *Fangbeng Fuondjing v. American Airlines, Inc.*, plaintiffs purchased roundtrip airfare from Washington, D.C., to Cameroon for the purpose of attending memorial services for a deceased relative.<sup>60</sup> Plaintiffs' flight, which was scheduled to leave at 4:00 p.m., did not depart until 5:30 p.m.

Consequently, the plaintiffs missed their connecting flight and spent four nights, without access to their luggage, in hotel rooms in New York and Brussels. They eventually arrived in Cameroon, but not until after the memorial services had concluded.

The *Fangbeng* court held that the plaintiffs' complaint involved "delay," subject to Article 19 of the Montreal Convention. Plaintiffs had no claim for nonperformance of a contract. The critical point for the court was the fact that the airline "did ultimately transport plaintiffs to Cameroon, albeit later than plaintiffs had planned."<sup>61</sup>

If the airline does not ultimately transport the plaintiff, courts typically find that the claim is for nonperformance rather than delay. However, a passenger cannot convert a delay in transportation into a common law claim for contractual nonperformance simply by choosing to obtain more punctual conveyance.<sup>62</sup> In *Paradis*, when the plaintiffs' return flight was canceled, they were informed that there were no other flights leaving that day and that they should make arrangements with the airline's office the next business day.<sup>63</sup> Because the plaintiffs were anxious to return to the United States for various prior commitments, they made reservations with another airline that had a return flight that night.<sup>64</sup>

The *Paradis* court held that the Montreal Convention preempted the plaintiffs' breach of contract claim.<sup>65</sup> The court explained that the plaintiffs "did not afford the airline an opportunity to perform its remaining obligations pursuant to the contract."<sup>66</sup> Further, "there was no indication that [the airline] intended to repudiate its contractual obligations."<sup>67</sup>

Another, and related, issue is whether being bumped from an overbooked flight constitutes a claim for delay under Article 19. Courts are divided on the issue. Some have turned to the drafting history of the Warsaw Convention for guidance.<sup>68</sup> One court noted that courts in other signatory countries have almost uniformly held that bumping constitutes contractual nonperformance redressable under local law and not delay under Article 19.<sup>69</sup>

The analysis for bumped flights is the same as for all other circumstances presented under Article 19: if the airline ultimately transports the passenger or the passenger refuses the airline's offer of a later flight, the claim will be for delay, governed by Montreal. Where the airline simply refuses to fly passengers, without offering alternate transportation, then the claim will likely be for nonperformance.<sup>70</sup>

Whether a claim is based in delay or nonperformance is a critical determination that often dictates whether the suit can be heard in federal court. If the claim is based on state contract law, then Montreal does not preempt the claim and federal question jurisdiction is not available. As such, an air carrier defending a claim that appears to be based on delay or nonperformance must be prepared to address this issue.

## Conclusion

Since the Montreal Convention entered into force in the United States in 2003, courts have interpreted and applied—and in some cases have declined to apply—the treaty’s terms. The three issues addressed in this article—interpreting the scope of embarking/disembarking, accidents, and delay—are certainly among the most frequently litigated. Understanding the way in which courts have approached these contentious issues is critical to the defense of any claim arising from an international flight.

## Endnotes

1. The Montreal Convention is formally titled The Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada, on May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).
2. *Byrd v. Comair, Inc. (In re Air Crash at Lexington, Ky.)*, 501 F. Supp. 2d 902, 907 (E.D. Ky. 2007) (citing *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 371 n.4 (2d Cir. 2004)).
3. *Ehrlich*, 360 F.3d at 371 n.4.
4. *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 364–65 (S.D.N.Y. 2006).
5. *Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co.*, 522 F.3d 776, 781 (7th Cir. 2008).
6. *Baah v. Virgin Atl. Airways Ltd.*, 473 F. Supp. 2d 591, 596 n.7 (S.D.N.Y. 2007).
7. *Id.*
8. Montreal Convention arts. 17–19.
9. *Id.* art. 17.
10. *Id.*
11. *Id.* arts. 18–19.
12. *Id.* art. 29.
13. *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006).
14. *See King v. Am. Airlines, Inc.*, 284 F.3d 352, 358 (2d Cir. 2002).
15. Montreal Convention art. 35.
16. The liability limits set forth in the Montreal Convention are subject to periodic review by ICAO. Following the first such review, the limits were increased, effective December 30, 2009, to the amounts set out in the text. The original limits were 4,150 SDRs (delay), 1,000 SDRs (baggage), 17 SDRs per kilo (cargo), and 100,000 SDRs (bodily injury).
17. Montreal Convention art. 17(1).
18. *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 162 (1999); *Okeke v. Nw. Airlines, Inc.*, 2010 WL 780167 (M.D.N.C. Feb. 26, 2010).
19. *Cardoza v. Spirit Airlines, Inc.*, 2011 WL 2447523 (S.D. Fla. June 15, 2011) (quoting *Tseng*, 525 U.S. at 162).
20. *Ramos v. Am. Airlines, Inc.*, 2011 WL 5075674 (W.D.N.C. Oct. 25, 2011) (citing *Day v. Trans World Airlines, Inc.*, 528 F. 2d 31, 33–34 (2d Cir. 1975)).
21. *Ramos*, 2011 WL 5075674.
22. *Fedelich v. Am. Airlines*, 724 F. Supp. 2d 274 (D.P.R. 2010).
23. 2011 WL 4344158, at \*3 (S.D.N.Y. Sept. 12, 2011).
24. *Id.*
25. *Okeke v. Nw. Airlines, Inc.*, 2010 WL 780167, at \*5 (M.D.N.C. Feb. 26, 2010).
26. *Id.*
27. *Id.* at \*6.
28. *See Findlay v. Alaska Air Group, Inc.*, 2011 WL 2710499 (D. Nev. July 12, 2011).
29. *Fedelich v. Am. Airlines*, 724 F. Supp. 2d 274, 284 (D.P.R. 2010).
30. *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354 (S.D. Fla. 2008).
31. *Id.* at 1363.
32. *Id.*
33. Montreal Convention art. 17(1).
34. *Air France v. Saks*, 470 U.S. 392, 403 (1985).
35. *Id.* at 405.
36. *Id.* at 406.
37. *See, e.g., Garcia Ramos v. Transmeridian Airlines, Inc.*, 385 F. Supp. 2d 137, 141 (D.P.R. 2005) (an accident is “(1) an unusual or unexpected event that was external to the Plaintiff . . . and (2) the event was a malfunction or abnormality in the aircraft’s operation”); *Phifer v. Icelandair*, 652 F.3d 1222, 1224 (9th Cir. 2011) (an accident must be “(1) an unexpected or unusual event or happening that (2) was external to Phifer and (3) caused her injuries”).
38. *Saks*, 470 U.S. at 405.
39. 2008 WL 2047610, at \*2 (S.D.N.Y. May 13, 2008).
40. *Id.*
41. *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1366 (S.D. Fla. 2008).
42. *Id.* (internal quotations omitted).
43. 2007 WL 2441066, at \*5 (C.D. Cal. May 15, 2007).
44. *Id.*
45. *Id.* (emphasis in original).
46. *Goodwin v. British Airways PLC*, 2011 WL 3475420, at \*5 (D. Mass. Aug. 8, 2011) (quoting D. GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (The Hague 1937)).
47. *Garcia Ramos v. Transmeridian Airlines, Inc.*, 385 F. Supp. 2d 137, 141 (D.P.R. 2005).
48. *Id.*
49. *Id.* at 143; *see also Goodwin*, 2011 WL 3475420, at \*2 (when an airline failed to prevent a passenger from bumping into the plaintiff passenger as she was exiting the aircraft, the injury was not related to operation of the aircraft).
50. *Maxwell v. Aer Lingus Ltd.*, 122 F. Supp. 2d 210 (D. Mass. 2000).
51. *Id.*
52. *Id.* at 213.
53. *Id.*
54. *See, e.g., Yahya v. Yemenia-Yemen Airways*, 2009 WL 3424192 (E.D. Mich. Oct. 20, 2009); *Watts v. Am. Airlines, Inc.*, 2007 WL 3019344 (S.D. Ind. Oct. 10, 2007); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001).
55. 540 U.S. 644 (2004).
56. *Id.* at 646–47.
57. *Id.* at 653.
58. *Id.* at 656.
59. Montreal Convention art. 19.
60. 2011 WL 1375606 (D. Md. Apr. 12, 2011).
61. *Id.* at \*4.
62. *See Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106 (S.D.N.Y. 2004).
63. *Id.*
64. *Id.*
65. *Id.* at 114.
66. *Id.*
67. *Id.*; *see also Oparaji v. Virgin Atl. Airways, Ltd.*, 2006 WL 2708034, at \*3–4 (E.D.N.Y. Sept. 19, 2006) (where plaintiff is faced with a delay on his original airline, and chooses to purchase a ticket on another airline for an earlier flight, his claim concerns delay within the scope of Article 19 because a passenger cannot convert delay into nonperformance by unilateral action).
68. *See Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444 (7th Cir. 1987).
69. *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 368 (S.D.N.Y. 2006).
70. *See In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 454 (E.D.N.Y. 2007).