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Recent Developments in Montreal Convention Litigation

Christopher E. Cotter

RECENT DEVELOPMENTS IN MONTREAL CONVENTION LITIGATION

CHRISTOPHER E. COTTER*

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* Christopher E. Cotter is an attorney with Roetzel & Andress in Akron, Ohio. His national practice focuses on providing business counsel, litigation strategy, and trial capabilities to transportation companies such as airlines, for-hire motor carriers, manufacturers, and retail establishments. He serves on Roetzel's Emergency Response team, to immediately address the issues that may arise as a result of industrial accidents, personal injuries, or other catastrophes.

I. INTRODUCTION

THE MONTREAL CONVENTION is a comprehensive international treaty that addresses private international air law.[1] "In 1999, the International Civil Aviation Organization convened an international conference in Montreal to negotiate and adopt [the Montreal Convention] to replace the Warsaw Convention,"[2] a treaty drafted in 1929 when "the airline industry was [still] in its infancy."[3] The Montreal Convention entered into force in the United States on November 4, 2003.[4]

Since that time, U.S. courts have issued numerous opinions analyzing and applying various portions of the Montreal Con-

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[1] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

[2] *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, 501 F. Supp. 2d 902, 907 (E.D. Ky. 2007).

[3] *Id.* at 906 (quoting Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 370 (2d Cir. 2004)) (internal quotation marks omitted).

[4] *Id.* at 905 n.2.

vention. This article examines the key opinions from this past year, organized by topic.[5] As in years past, whether a particular incident constitutes an "accident" for purposes of Article 17 of the Montreal Convention continues to be a frequent focus of litigation.[6] Preemption issues also continue to be an area of focus. Opinions discussing the Montreal Convention can sometimes have colorful facts, and this year's opinions were certainly no exception.

II. "ACCIDENT" UNDER ARTICLE 17

A. Can a Heart Attack Constitute an "Accident" Under Article 17?

In *Siddiq v. Saudi Arabian Airlines Corp.*, a passenger suffered cardiac arrest while on a flight between Jeddah, Saudi Arabia, and Dulles International Airport in Virginia.[7] "Although [he] survived the heart attack, he allegedly suffered 'serious irreversible' bodily injuries and other damages due to unnecessary and unexpected delay in obtaining necessary medical treatment."[8] The passenger asserted a claim against the airline under Article 17 of the Montreal Convention.[9] The plaintiff argued that the "'accident' was '[the d]efendant's failure to land to get Mr. Siddiq help' since such failure 'represents [the defendant's] unexpected and unusual break from its own policies, . . . passenger safety considerations[,] and airline industry standards.'"[10]

The plaintiff moved for summary judgment, arguing that the incident was clearly an "accident" under the Montreal Convention.[11] The court denied the motion, concluding that there were genuine issues of material fact on the issue.[12] The court acknowledged that "[w]hile a passenger's heart attack is not an 'accident' because it is not 'external' to the passenger, a defendant air carrier's response to a passenger's heart attack may con-

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[5] This article examines opinions from January 2013 through February 2014.

[6] Paragraph 1 of Article 17 "provides for carrier liability for death or bodily injury of a passenger caused by an *accident* on board the aircraft or in the course of embarking or disembarking." Montreal Convention, *supra* note 1, art. 17(1).

[7] Siddiq v. Saudi Arabian Airlines Corp., No. 6:11-cv-69-Orl-19GJK, 2013 WL 2152566, at *1 (M.D. Fla. Jan. 9, 2013).

[8] *Id.* (citation omitted).

[9] *Id.* at *2.

[10] *Id.* at *6 (citation omitted).

[11] *Id.*

[12] *Id.* at *6–7.

stitute an 'accident' if it is sufficiently unexpected or unusual."[13] It also acknowledged that "[o]nce all available evidence is presented at trial, it may very well be apparent that Pilot Zarie's failure to divert was both unexpected and unusual, but no such determination can be made at this time on the record presented as a matter of law."[14]

B. Can a Disagreement and Subsequent Altercation Between a Passenger and a Flight Attendant Constitute an "Accident" Under Article 17?

In *Dogbe v. Delta Air Lines, Inc.*, the seventy-one-year-old plaintiff was scheduled to travel from Norfolk, Virginia, to Accra, Ghana, via a connecting flight at John F. Kennedy Airport (JFK) in New York City.[15] The flight from Norfolk to JFK was delayed, which caused the plaintiff to miss his connecting flight from JFK to Accra.[16] While Delta attempted to reassign him to a new flight to Accra, the plaintiff stood in line for approximately three hours at JFK.[17] During this waiting time, he "experienced pain and discomfort in his legs that was exacerbated by Delta's failure to offer [him] a place to sit and the day's cold weather."[18] Delta eventually sent the plaintiff back to Norfolk and scheduled him on a new flight from Norfolk to Accra via JFK three days later: Flight 166 on January 2, 2011.[19]

"Due to lingering pain in his legs as the result of his three-hour wait in line on December 29th, on January 2nd [the] plaintiff requested and received wheelchair assistance from Delta at Norfolk and JFK."[20] Seated aboard the 4:15 p.m. Delta flight to Accra, he "continued to experience discomfort in his legs due to the December 29th wait and the extended period during which [the] plaintiff sat in a wheelchair prior to boarding the flight to Accra."[21] He asked a crewmember if he could have a seat with more leg room in order to "stretch his legs so that his 'blood

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[13] *Id.* at *5 (citations omitted).

[14] *Id.* at *6.

[15] Dogbe v. Delta Air Lines, Inc., 969 F. Supp. 2d 261, 264 (E.D.N.Y. 2013).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

could flow properly.' However, the male crewmember advised [the] plaintiff that no such seating was available."[22]

After another passenger pointed out certain empty seats with more legroom, the plaintiff asked the crewmember whether he could use one of those seats. The crewmember did not respond and turned and walked away.[23] "Shortly thereafter, an unidentified female Delta crewmember approached [the] plaintiff and stated, 'If you can't sit in your assigned seat, you may have to get off the plane,' before walking away without further explanation. [The p]laintiff was confused by the female crewmember's warning."[24]

Then a third Delta employee approached the plaintiff.[25] He "demanded that [the] plaintiff follow him on foot to the front of the plane, despite . . . having been aware that [the] plaintiff boarded the plane by wheelchair. Despite his discomfort, [the] plaintiff complied with [this] demand and walked to the front of the plane."[26] There, the Delta employee said, "'I agree [100%] with the female crewmember.'"[27] When the plaintiff attempted to clarify what he did wrong, the Delta employee told him to "get off the plane."[28] The plaintiff was confused and explained "that he did not understand why he was being asked to deplane, to which [the Delta employee] stated that it was because of [the] plaintiff's 'attitude.'"[29] The Delta employee summoned the Port Authority Police and several ground crew employees, who "began to gather into a mob and proceeded to rankle and yell at [the] plaintiff, trying to chide him into leaving the plane without explanation or cause."[30] In fact, a ground crew employee "boarded the plane, grabbed [the] plaintiff's arm, and began physically assaulting him."[31]

The situation continued to escalate.

> Soon thereafter, two female Port Authority Police Officers, identified in the Amended Complaint as "Jane Doe 1" and "Jane Doe 2," approached [the] plaintiff in an "unreasonably frightening, hostile[,] and aggressive manner" that made [the] plaintiff be-

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22 *Id.* (citations omitted).
23 *Id.*
24 *Id.* at 264–65 (citations omitted).
25 *Id.* at 265.
26 *Id.* (citations omitted).
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* (citations and internal quotation marks omitted).
31 *Id.* (citations omitted).

> lieve that he was not free to leave the area. As the officers approached, [the] plaintiff attempted to calm the Delta employees by advising them that he merely wanted a seating accommodation for his disability.
>
> [The p]laintiff then stated that he was a loyal Delta customer and member of Delta's "Sky Miles Club." [The p]laintiff next attempted to display his Sky Miles Club membership card, at which point either Jane Doe 1 or Jane Doe 2 forcefully struck [the] plaintiff's hand in an apparent attempt to knock the membership card out of his hand. While remaining calm, [the] plaintiff asked the police officers why his hand had been struck. One or both of the police officers then forcefully tackled [the] plaintiff to the ground. While [the] plaintiff was lying face-down on the ground, one or both of the police officers sat on [the] plaintiff, which caused his rib to fracture, and a neck injury.[32]

The police officers handcuffed the plaintiff and ignored the plaintiff's pleas that they loosen his handcuffs, which had become tight and were causing "pain and suffering."[33] While still handcuffed, the plaintiff was dragged out of the plane, interrogated, "repeatedly asked if he had been drinking or using drugs," and told "that he was 'banned' from flying on Delta for one year."[34]

Eventually, the Port Authority Police released the plaintiff so that an ambulance could take him to the emergency room of Jamaica Hospital in Queens, where the plaintiff "was examined, treated, and released that same day."[35] "[The p]laintiff continued to suffer great pain from his injuries after being released from the hospital."[36] The plaintiff's family physician examined the plaintiff on a later day and diagnosed the plaintiff "with a fractured rib and a 'serious' neck injury."[37] In addition to these physical injuries, the plaintiff's "clothing and personal items were soiled, torn, or otherwise damaged, and he suffered embarrassment, humiliation, anxiety, stress, and emotional distress."[38] During the pendency of the lawsuit, the plaintiff continued to receive medical treatment and therapy for his injuries.[39]

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[32] *Id.* (citations omitted).

[33] *Id.* at 265 (citations omitted).

[34] *Id.* at 266 (citations omitted).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (citations omitted).

[39] *Id.*

After the lawsuit was filed, Delta filed a motion to dismiss the claims, "argu[ing] that [the] plaintiff [could not] state viable injury claims against Delta under [the Montreal Convention] because [the] plaintiff's injuries were not caused by an 'accident,' as that term is understood in the context of Article 17 of [the C]onvention."[40] The court agreed and granted the motion.[41] The court employed the common definition of "accident": "an unexpected or unusual event or happening that is external to the passenger"—which is to be applied "flexibly[—] . . . after assessment of all the circumstances surrounding a passenger's injuries."[42] "The [Supreme] Court further explained that 'any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event *external to* the passenger.'"[43] "Thus, 'courts apply proximate cause analysis in determining whether an unusual event is a link in the chain that led to an accident . . . .'"[44]

The plaintiff contended that "(1) Delta's failure to accommodate [his] medical condition and disability, (2) Delta's giving false information to the Port Authority Police, and (3) the Port Authority Police's use of excessive force" combined together to cause his injuries.[45] However, the court concluded that none of these alleged events satisfy the Article 17 definition of an accident:[46]

> First, [the] plaintiff does not allege that he has any disability for which accommodation was necessary. Rather, the Amended Complaint contains only a single passing reference to [the] plaintiff's "leg pain disability," which [the] plaintiff himself attributes to having stood and sat for a long period of time on December 29, 2010, and January 2, 2011. . . . Second, an airline employee's giving of false information about a passenger to the police might, in certain circumstances, give rise to liability by the airline for passenger injuries caused by the police. Here, however, the Amended Complaint fails to allege any false statement to the Port Authority Police by . . . any . . . Delta employee . . . . Third, the court makes no determination at this time as to the

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[40] *Id.* at 271, 274 (citations omitted).

[41] *Id.*

[42] *Id.* at 271–72 (quoting Air Fr. v. Saks, 470 U.S. 392, 405 (1985)).

[43] *Id.* at 272 (quoting *Saks*, 470 U.S. at 406).

[44] *Id.* (quoting Cush v. BWIA Int'l Airways, Ltd., 175 F. Supp. 2d 483, 487 (E.D.N.Y. 2001)) (internal quotation marks omitted).

[45] *Id.*

[46] *Id.*

> reasonableness of the force used against [the] plaintiff by Jane Doe 1 and Jane Doe 2 on behalf of the Port Authority. It is clear, however, that [the] plaintiff has failed to allege plausible facts that John Doe or any other Delta employee exercised control over Jane Doe 1, Jane Doe 2, and the Port Authority, each of whom are separately named defendants in this case.[47]

Summarizing, the court explained that "[f]or purposes of the instant motions to dismiss, only [the] plaintiff's refusal to disembark from the plane can be said to have proximately caused his alleged injuries."[48] "Because [the] plaintiff chose to so refuse, his subsequent injuries were not caused by an 'accident' for which Delta is liable under Article 17 of the Conventions."[49] The "[p]laintiff's Article 17 claim against Delta [was] therefore dismissed."[50]

C. Can a Push from Another Passenger While Deplaning Constitute an "Accident" Under Article 17?

The Buckwalters flew from Philadelphia, Pennsylvania to St. Maarten on U.S. Airways Flight 1209.[51] "Upon arrival in St. Maarten, [the p]laintiffs disembarked using air stairs. When Mrs. Buckwalter stepped onto the landing at the top of the air stairs, she was carrying only her purse, and she held onto the railing. [She] did not request assistance from the crew during the deplaning process."[52]

There was an incident on the air stairs.

> Another passenger on the flight, M. Hallsted Christ, departed the plane after Mrs. Buckwalter but before Mr. Buckwalter . . . . As Mr. Christ was descending the air stairs behind Mrs. Buckwalter, he fell into her and knocked her onto the tarmac. Mr. Christ does not know what caused him to fall, but testified that "I believe that if anything it was that I was just overloaded with my luggage." Mrs. Buckwalter has no memory of her fall, nor did Mr. Buckwalter observe her fall. The air stairs were observed to be in "working condition," with no defects or abnormalities. Mr. Buckwalter did not observe anything unusual about the stairs as he descended them behind his wife and Mr. Christ.[53]

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[47] *Id.* at 272–73 (citations omitted).

[48] *Id.* at 274.

[49] *Id.*

[50] *Id.*

[51] Buckwalter v. U.S. Airways, Inc., No. 12-2586, 2014 WL 116264, at *1 (E.D. Pa. Jan. 13, 2014) (citations omitted).

[52] *Id.* (citations omitted).

[53] *Id.* (citations omitted).

Defendant U.S. Airways moved for summary judgment, arguing that "the incident at issue . . . was not caused by an 'accident' under the Montreal Convention, which presents the sole cause of action available to [the p]laintiffs."[54] U.S. Airways "argue[d] that, in addition to the requirement that the accident be an unexpected or unusual event external to the plaintiff, the Supreme Court's definition of 'accident' also includes a requirement that the event result from some malfunction or abnormality in the aircraft's operation."[55] The plaintiff pointed out the split in authority on whether there is a second aircraft operation prong to the definition of "accident," and argued there was no such second requirement.[56]

The court decided the debate was irrelevant, as there were genuine issues of material fact as to whether Mrs. Buckwalter's fall was "related in any way to the operation of the aircraft or any act of the crew."[57] Specifically, the court concluded that "Mr. Christ's fall into Mrs. Buckwalter could very well relate to 'an act of the crew,' thereby satisfying the 'aircraft operation prong.'"[58] The court first reasoned that there was a factual dispute regarding whether the deplaning process was disorderly:

> Mr. Christ testified that "there were a lot of people all pushing to try to get off the plane. And it was sort of disorderly frankly . . ." Mr. Christ also testified that as he was lining up and exiting the plane, he felt as if he were being 'hurried.' Similarly, Mrs. Buckwalter testified that there was crowding as she was exiting the plane . . . .[59]

Mr. Buckwalter described the people as "kind of inching toward the door[,] and [that] there was what [he would] probably call a polite pushing."[60] "Mr. Buckwalter stated that he felt 'uncomfortable' because 'there was not kind of an orderly single-file type of deplaning.' However, Flight Attendant Lela Sours testified that it was a 'very routine deplaning process.'"[61] In light of this testimony, the court explained that "[i]f it is true that there was a disorderly deplaning process that involved pushing by the passengers, and the flight crew took no action to ensure

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54 *Id.* at *2.
55 *Id.*
56 *Id.*
57 *Id.* at *3.
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.* (citations omitted).

an organized deplaning process, then an omission of the flight crew may have occurred."[62] The court further explained its reasoning:

> [T]here is a dispute as to whether or not, just prior to deplaning, the flight crew read the warnings required by Defendant's policies and procedures that inform passengers that air stairs are going to be used in the disembarking process. Mrs. Buckwalter, Mr. Buckwalter, and Mr. Christ all testified that no warnings were given prior to deplaning. However, Flight Attendant Jackie Stallman testified that she "read the standard announcement on [the] flight" which included text regarding the air stairs. Flight Attendant Sours also testified that Stallman had made "the arrival announcement that [they] would be deplaning by air stairs, please be careful, please hold the handrail." Whether the announcement regarding the use of air stairs was made or not is a fact for the jury to determine. If it is true that the flight crew was required by Defendant's policies to make an announcement warning the passengers that they were going to deplane via air stairs and failed to make that announcement, an omission of the flight crew occurred and Mrs. Buckwalter's fall may be related to the operation of the aircraft.[63]

As such, the court denied U.S. Airways' Motion for Summary Judgment.[64]

D. Can an Altercation with a Flight Attendant Constitute an "Accident" Under Article 17?

In *Kruger v. Virgin Atlantic Airways, Ltd.*, the "[p]laintiffs bought four non-refundable round-trip tickets for a family vacation" to India.[65] When the family arrived in Delhi where they would catch a connecting flight, Mrs. Kruger asked a flight attendant if she could disembark before first class passengers so that she would not miss her connecting flight, but the flight attendant said no.[66] "Finally, the [first] class passengers had all departed, and [the flight attendant] stood aside to let the economy and premium economy passengers through."[67] As she exited the airplane, Mrs. Kruger's shoulder made contact with the flight attendant's chest.[68] The flight attendant "claims to have

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62 *Id.*

63 *Id.* (citations omitted).

64 *Id.* at *4.

65 Kruger v. Virgin Atl. Airways, Ltd., 976 F. Supp. 2d 290, 294 (E.D.N.Y. 2013).

66 *Id.*

67 *Id.*

68 *Id.*

been in pain and that she sat down while the rest of the passengers left the plane."[69] The flight attendant requested that the captain of the aircraft call the police and accused Mrs. Kruger of "intentionally 'barg[ing]' into [her] and calling her a 'bitch.'"[70] However, "Mrs. Kruger maintains that she tripped, and she believes that she may have been intentionally tripped by [the flight attendant]. . . . After the incident, Mrs. Kruger joined her family heading towards Gate 22 for their connecting flight."[71]

The court explained that the plaintiffs were embarking when the incident occurred.

> Plaintiffs made their way directly to Gate 22. To reach Gate 22, they went to the end of a dead-end corridor. There, they got in line to enter a special glass-enclosed area at the entrance to the Gate. Mrs. Kruger was waiting to board when she was arrested. There were severe restrictions on her movement, both because airline personnel had possession of her passport and boarding pass for part of the time and because she was trying to catch a flight that was about to leave. And she was arrested at the check in desk to the area around the Gate.[72]

The plaintiffs filed suit against the airline asserting claims for "breach of contract, negligence, loss of consortium, intentional infliction of emotional distress, false arrest, and false imprisonment."[73] The airline filed a motion for summary judgment, which was granted in a Report and Recommendations of the Magistrate Judge.[74] The district court upheld the Report and Recommendations.[75]

The first issue was whether the incident with the flight attendant was an "accident" under the Montreal Convention.[76] The court noted that "[t]he 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.'"[77] The court concluded that "Mrs. Kruger's arrest as she was about to board her

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69 *Id.*

70 *Id.*

71 *Id.* at 294–95 (citations omitted).

72 *Id.* at 303.

73 *Id.* at 296.

74 *Id.*

75 *Id.*

76 *Id.* at 300–01.

77 *Id.* at 301.

next flight was certainly an 'unexpected and unusual event' and something courts have fairly characterized as an accident."[78]

However, "[t]he other component of personal liability under the Montreal Convention is the location of the accident . . . . [The plaintiff argued that] Mrs. Kruger was not in the process of embarking the aircraft within the meaning of the Montreal Convention."[79] The court applied the Second Circuit's "four-prong test to determine whether a passenger was embarking on the aircraft within the meaning of the Montreal Convention: (1) the activity of the passengers, (2) restrictions on the passengers' movement, (3) imminence of actual boarding, (4) proximity of passengers to the gate."[80] The court analyzed each of these factors and concluded that the Krugers were in the process of embarking.[81] The court contrasted the facts of its case to other situations in which boarding is not imminent, where passengers have relatively unrestricted movement at a terminal, and where the connecting flight is with another airline.[82] Because the altercation was an "accident" under Article 17 that occurred while embarking, the Montreal Convention applied to the plaintiff's injury.[83] As such, the Montreal Convention preempted the plaintiffs' state law claims.[84]

III. PREEMPTION

A. Are State Law Claims Arising Out of Baggage Claim Shenanigans Preempted by the Montreal Convention?

In *Bridgeman v. United Continental Holdings, Inc.*, the plaintiffs were returning to Norfolk, Virginia from Costa Rica.[85] As the plaintiffs' bags came around the carousel in the baggage-claim area of the Norfolk airport, "they discovered, to their surprise and horror, that a sex toy had been removed from one of their bags, covered in a greasy foul-smelling substance, and taped

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78 *Id.*

79 *Id.*

80 *Id.* (citing Buonocore v. Trans World Airlines, Inc., 900 F.2d 8, 10 (2d Cir. 1990)).

81 *Id.* at 302–03.

82 *Id.*

83 *Id.* at 303.

84 *Id.*

85 Bridgeman v. United Cont'l Holdings, Inc., 552 F. App'x 294, 295 (5th Cir. 2013).

atop the bag."[86] The plaintiffs were so "extremely embarrassed by the surprised and laughing faces of onlookers," that they called two friends to assist them home.[87]

The plaintiffs filed claims of intentional infliction of emotional distress, invasion of privacy, and negligence in Texas state court.

> They asserted that the bag at all times . . . was in the custody of United and that, during this time, one or more of United's employees had searched their bag, removed the toy, defiled it, and then taped it to the top of the bag. [The p]laintiffs alleged that these acts were directed towards them because they are homosexuals and male. Finally, [the p]laintiffs alleged that, as a result of these actions, they suffered severe emotional distress and mental anguish requiring the help of mental health care professionals. [The p]laintiffs did not allege that they suffered any physical injuries. Nor did [the p]laintiffs seek to recover for damage to their bags.[88]

United removed the case to the U.S. District Court for the Southern District of Texas and then filed a motion to dismiss, arguing "that (1) [the p]laintiffs' claims are preempted by Article 17 of the Montreal Convention[,] . . . and that (2) because the Montreal Convention does not provide a remedy for claims alleging only emotional damages, [the p]laintiffs have no basis for relief."[89]

United argued that one or both of two provisions of the Montreal Convention preempted the plaintiffs' claims: Article 17(1), which "imposes liability on carriers for injuries to passengers" when the alleged misconduct takes place "on board the aircraft or in the course of any of the operations of embarking or disembarking;" and Article 17(2), which imposes liability "for damage to baggage."[90] The court rejected both bases for preemption.[91]

As for Article 17(1), the court explained that "any connection between the alleged misconduct—the display of [the p]laintiffs' bag in the baggage-claim area—and the 'operations of embarking or disembarking' is tenuous at best."[92] The court relied on a

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[86] *Id.*
[87] *Id.*
[88] *Id.* at 295–96.
[89] *Id.* at 296.
[90] *Id.* at 297.
[91] *Id.* at 298.
[92] *Id.* at 297.

decision from the First Circuit, which explained that "the phrase 'in the course of any of the operations of embarking' 'strongly suggests that there must be *a tight tie* between an accident and the physical act of entering an aircraft.'"[93] The court found "no such tight tie here: the events occurred in the baggage-claim area and were wholly unconnected to [the p]laintiffs' physical act of exiting the aircraft."[94]

As for Article 17(2), "[the p]laintiffs' state-law claims rel[ied] on the fact that their bag was 'in the charge of the carrier,' and it [was] clear that their bag was not destroyed or lost."[95] The court explained that the claim was not preempted by Article 17(2), reasoning as follows:

> The alleged misconduct in this case simply does not relate to any damage to [the p]laintiffs' duffel bag, which they admit is "just fine" and undamaged; rather, [the p]laintiffs seek a remedy for the way in which their bag was utilized to inflict personal injury. Accordingly, we decline to shoehorn [the p]laintiffs' claims into the substantive scope of Article 17(2) merely because a bag is central to their factual basis. Instead, we reach our conclusion based on a natural reading of Article 17(2)'s text.[96]

As a result, the plaintiffs' state law claims were not preempted by the Montreal Convention.[97]

B. Are Claims for Assault, Battery, Negligent Hiring and Supervision, and Intentional Infliction of Emotional Distress That Arise Out of an Incident That Occurs on an International Flight Preempted by the Montreal Convention?

In *Fadhliah v. Société Air France*, the plaintiffs, a family that included minor children, purchased "tickets provid[ing] for transportation originating and terminating in Riyadh, Saudi Arabia, with agreed stops in Paris, France, and Los Angeles, California."[98] When the Fadhliah family boarded the Air France flight in Los Angeles, the mother, Sarah, believed that another passen-

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[93] *Id.* (emphasis added) (quoting McCarthy v. Nw. Airlines, Inc., 56 F.3d 313, 317 (1st Cir. 1995)).

[94] *Id.* at 298.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Fadhliah v. Société Air Fr., No. 2:13-CV-06142-ODW, 2013 WL 6571601, at *1 (C.D. Cal. Oct. 1, 2013).

ger was occupying the seat assigned to her son and attempted to resolve the issue, but she was unsuccessful.

> [Sarah] asked a flight attendant to assist [her]. Chief Steward Rudolph van der Schraaf then approached [Sarah] and allegedly demanded that [Sarah]'s family move to accommodate a French family that wanted to sit together. When [Sarah] asked van der Schraaf whether the seats assigned to her family on their boarding passes were correct, van der Schraaf allegedly grabbed [Sarah] by the arm to physically move her. Van der Schraaf also allegedly demanded that Sarah move [her] two-year-old [son] Abdullah to another seat. When no one moved Abdullah, van der Schraaf allegedly unbuckled the boy and attempted to pick him up. During the affray, the aircraft's captain . . . allegedly shouted at several of the family members to "shut up and sit down." [One of Sarah's daughters] then got up from her seat, and the captain shouted, "You, go back to your seat." Van der Schraaf then allegedly pulled [the girl] by the arm back to her seat. Security personnel allegedly boarded the plane and forced the family to disembark. The captain allegedly followed the family through the jetway into the terminal, clapping at them to hurry along.[99]

The plaintiffs filed suit in Los Angeles County Superior Court, "alleging state common-law claims for assault, battery, negligent hiring and supervision, and intentional infliction of emotional distress" against Air France and van der Schraaf.[100] Air France removed the case to federal court, arguing that the Montreal Convention completely preempts all state-law claims in the context of international carriage as applied to this case.[101]

The court found that the complete-preemption doctrine applied in this case, explaining that "[s]everal considerations compel [the c]ourt to conclude that the preemptive force of the Montreal Convention is so strong that it transmutes [the p]laintiffs' facially state-law claims into federal ones under the complete-preemption doctrine."[102] First, the court relied on "the preemptive effect of the Warsaw Convention's exclusivity provision, albeit not in the context of the jurisdictional doctrine of complete preemption," discussed by the U.S. Supreme Court in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*.[103] Second, the

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[99] *Id.* at *1–2 (citations omitted).

[100] *Id.* at *2.

[101] *Id.*

[102] *Id.* at *3.

[103] *Id.* (citing 525 U.S. 155 (1999)).

court acknowledged the "striking divide among federal courts over the Montreal Convention's preemptive effect" and attributed it to "Article 29's abstruseness."[104]

As such, the court resorted to the treaty's drafting history, in particular the following statement from the Montreal Conference's Chairman:

> The purpose behind Article 2[9] was to ensure that, in circumstances in which the Convention applied, it was not possible to circumvent its provisions by bringing an action for damages in the carriage of passengers, baggage and cargo in contract or in tort or otherwise. Once the Convention applied, its conditions and limits of liability were applicable.[105]

The court found that "[t]his statement elucidates that the additional 'in contract or in tort or otherwise' language simply bolsters—not dilutes—the Convention's preemptive effect once one establishes that an agreement relates to 'international carriage' under Article 1."[106]

The plaintiffs "argue[d] that there are certain actions to which the Montreal Convention does not apply and therefore the Convention cannot completely preempt state common-law claims."[107] The court responded to that argument by explaining that "the fact that some causes of action might fall outside the Convention's scope does not prove that the Convention is not supreme within the context of 'international carriage.' Of course every treaty is going to have its limits, so some actions necessarily will not come within the treaty's grasp."[108] For instance, when "[i]nterpreting the term 'air carrier,' . . . the [Ninth Circuit] concluded that the Convention only began to apply when a passenger presented herself to the airline for travel. But the court did not find that there was an exception to the Convention itself."[109] As a result, the court found "that the Montreal Convention does provide the exclusive cause of action against Air France and that the [c]ourt thus has federal-question jurisdiction under the complete-preemption doctrine."[110]

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104 *Id.* at *5.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* (citations omitted).

110 *Id.* at *6.

C. Do All Judges in the Central District of California Agree with the *Fadhliah* Holding?

Oganesyan v. American Airlines Cargo involved removal of a small claims complaint to federal court.[111] The plaintiff filed suit against the defendant in the Small Claims Division of the Los Angeles County Superior Court "to recover damages for cargo allegedly damaged during international shipment. [The d]efendant transported 44 cartons of brandy from Armenia to Los Angeles in December 2012. . . . On January 11, 2013, [the] plaintiff faxed a claim form to [the] defendant asserting that seventeen bottles were broken during shipment and requesting $4,730.80 in compensation."[112] The defendant removed the action on the basis of federal question jurisdiction under the Montreal Convention.[113] "[The d]efendant subsequently moved for summary judgment on the ground that [the] plaintiff's claim form was untimely under Article 31 of the Convention, and alternatively that [the] defendant's liability is limited by Article 22(3) to . . . $381.52."[114]

"[The p]laintiff, who [wa]s proceeding pro se, did not move to remand and did not file an opposition to the motion for summary judgment."[115] Nevertheless, the court remanded the case back to the Small Claims Division of the Los Angeles County Superior Court.[116] Relying on other district court opinions on the preemptive effect of the Montreal Convention, the court held that "the exclusivity provisions of the Montreal Convention operate as an affirmative defense but do not completely preempt state law causes of action."[117] The court further explained:

> The Montreal Convention places conditions on determinations of liability "under local law," but it does not follow that the Treaty completely supplants all causes of action founded on local law. The fact that individual claims may be preempted does not mean the entire field is preempted, and the defense of claim preemp-

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[111] Oganesyan v. Am. Airlines Cargo, No. CV 13-6190 SVW, 2013 WL 6229173, at *1 (C.D. Cal. Nov. 26, 2013).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at *3 (quoting Jensen v. Virgin Atl., No. 12-CV-6227 YGR, 2013 WL 1207962, at *3 (N.D. Cal. Mar. 25, 2013)).

tion does not convert a complaint brought under state law into one "arising under" federal law.[118]

D. What About the Eastern District of New York?

According to the complaint and amended complaint in *Certain Underwriters at Lloyd's London v. Art Crating, Inc.*, the plaintiff, David Smith, was a "renowned American sculptor, painter, draftsman and photographer."[119] His estate allowed Horizontal 9/4/52 (the Sculpture) "to be exhibited by the Institut Valencia d'Art Modern in Valencia, Spain."[120] One defendant, Art Crating, was hired to crate and to transport the Sculpture from New York City to Valencia.[121] Another defendant, Masterpiece International, Ltd., (Masterpiece) was hired "to provide professional consulting services related to transporting the Sculpture."[122] A third defendant, Delta Airlines, provided the air travel portion of the shipment.[123] "At some point between November 2010 and January 2011, the Sculpture was damaged in transport, while in its crate. . . . [The plaintiff alleged] the Sculpture 'wasn't packed properly' by Art Crating, that the packing was not properly overseen by Masterpiece, and that 'all that happened in New York.'"[124] The court noted that "prior to being damaged, the Sculpture was valued at $3.5 million. The Sculpture's value decreased by 75% after the damage."[125]

The complaint, which was filed in the Supreme Court of New York, Kings County, asserted exclusively state law claims.[126] The defendants removed the case to the Eastern District of New York on the basis of complete preemption of federal law.[127] In opposition to the plaintiff's motion for remand, Art Crating argued that "removal based on federal question jurisdiction was proper

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[118] *Id.* (citing 28 U.S.C. § 1331; Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit [and as such] does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.")).

[119] Certain Underwriters at Lloyd's London v. Art Crating, Inc., No. 12-CV-5078 (N66) (VMS), 2014 WL 123488, at *3 (E.D.N.Y. Jan. 10, 2014).

[120] *Id.*

[121] *Id.*

[122] *Id.* (citations omitted).

[123] *See id.* at *11.

[124] *Id.* at *3 (citations omitted).

[125] *Id.* (citations omitted).

[126] *See id.* at *3–4.

[127] *Id.* at *4.

because [the p]laintiff's state common law claims implicated damage to cargo during international air travel and are therefore completely preempted by the . . . Montreal Convention."[128]

The court rejected this argument.[129] The court first explained that "[t]he Montreal Convention's preemptive scope does not encompass every injury arising during international transportation, and it is limited to the terms of the treaty."[130] Moreover, the court concluded that "[i]t [could not] be determined from the pleadings that, as a matter of law, the injury-causing event occurred while the Sculpture was 'in the charge of' Delta, and not while it was being packed or unpacked or while it was being transported to or from the airport."[131] This is because the "[p]laintiff allege[d] only that the Sculpture was damaged during transport, while in its crate, at some point between November 2010 and January 2011[,]" which encompasses periods before and after the Sculpture was in Delta's control.[132] As such, the court remanded the case to the Supreme Court of New York.[133]

IV. STANDING

A. Do Non-Passengers Have Standing to Sue Under the Montreal Convention? (What If Their Names are Thankgod and Loveth?)

In *Ekufu v. Iberia Airlines*, Gladys Agbasi flew from Lagos, Nigeria to O'Hare International Airport in Chicago, Illinois.[134] One of her checked bags arrived a week later and was missing some of its contents.[135] "The parties dispute the full list of missing items, though both agree that certain nutritional supplements and dried herbs and spices were among the missing contents. [Gladys] contends that pieces of traditional Nigerian clothing and jewelry were also missing when her bag was returned."[136]

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128 *Id.* at *11.

129 *Id.*

130 *Id.* at *10.

131 *Id.* at *11.

132 *Id.*

133 *Id.* at *22.

134 Ekufu v. Iberia Airlines, No. 12-CV-6669, 2014 WL 87502, at *1 (N.D. Ill. Jan. 9, 2014).

135 *See id.*

136 *Id.*

Gladys, her daughter Loveth, and her son-in-law Thankgod, brought suit pro se against the airline.[137] Loveth and Thankgod were not passengers on the flight but argued that because "the allegedly stolen items were purchased with their money, they have standing to raise the claims."[138] The court held that Loveth and Thankgod did not have standing to sue, explaining that Gladys "was a party to the agreement between herself and Iberia Airlines that she entered into when she purchased her ticket, and she *personally* suffered when *her* bag was searched and its contents were removed."[139] However, Loveth and Thankgod "were not passengers, nor parties to the agreement, nor directly harmed by Iberia."[140] As such, "[t]hey cannot demonstrate that they have a legally protected interest in [Gladys's] luggage arriving with all of its contents intact, which violates one of the Constitutional requirements for standing."[141] Moreover, the non-passengers could not "clear the prudential boundaries for standing, because [they] are not asserting their own legal rights and interests, but rather those of [Gladys]."[142]

V. INTERNATIONAL CARRIAGE

A. When Considering Whether a Flight is an "International" Flight, is the Passenger's *Intent* Important?

In *Richards v. Singapore Airlines Ltd.*, the plaintiff alleged that he purchased two first-class tickets for a flight from Bangkok to Los Angeles via Singapore because the airline "promised an internet connection, and [the p]laintiff intended to work during the flight. The internet connection, however, was inoperable throughout the . . . flight, due to a faulty component."[143] The plaintiff alleged that "he would not have purchased the tickets had he known the internet would not be available. Therefore,

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[137] *Id.* at *1–2.

[138] *Id.* at *2.

[139] *Id.* at *3.

[140] *Id.*

[141] *Id.* (citing Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co., 733 F.3d 761, 771 (7th Cir. 2013)) (noting that a party must allege "an invasion of a legally protected interest").

[142] *Id.*

[143] Richards v. Sing. Airlines Ltd., No. CV 13-06771 BRO (JCGx), 2013 WL 6405868, at *1 (C.D. Cal. Dec. 4, 2013) (citations omitted).

he [sought] to recover the full $16,442.20 cost of the two tickets plus $6,500 in lost billings."[144]

In answers to interrogatories, the plaintiff described the route of his flight as follows: "Los Angeles to San Francisco to Hong Kong to Macau, to Bangkok, Thailand, to Singapore, back to Los Angeles."[145] Thereafter, the defendant removed the case to federal court, arguing the Montreal Convention completely preempted the plaintiff's state law claims.[146] The plaintiff subsequently moved to remand.[147]

The court examined Article 1(1) of the Montreal Convention, which provides the treaty "encompasses 'all international carriage of persons, baggage or cargo performed by aircraft for reward.'"[148] Under the Convention, "international carriage" is defined as:

> any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage . . . are situated either [1] within the territories of two States Parties or [2] within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party.[149]

The court noted that "[the p]laintiff asserts that the only basis for his complaint—and by extension, [the d]efendant's removal—is his one-way flight from Bangkok to Los Angeles via Singapore."[150] The court disagreed, explaining:

> [The plaintiff's answer to the interrogatory] makes clear that the place of departure and place of destination were within the territory of a single state party—the United States—and his flight stopped within the territory of another state—Hong Kong, Macau, Bangkok, and Singapore. Plaintiff's flight, therefore, appears, at this point, to be "international carriage" as defined by article 1(2) of the Montreal Convention.[151]

Yet the court's analysis did not stop there.[152] The plaintiff relied on Ninth Circuit precedent to argue that answers to inter-

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144 *Id.*

145 *Id.* (quotation marks omitted).

146 *Id.*

147 *Id.*

148 *Id.* at *3 (quoting Montreal Convention, *supra* note 1, art 1(1)).

149 *Id.* (quoting Montreal Convention, *supra* note 1, art. 1(2)).

150 *Id.*

151 *Id.* at *4.

152 *Id.* at *4–5.

rogatories cannot be considered in the removal decision.[153] The plaintiff cited *Coyle v. P.T. Garuda Indonesia*, which holds:

> Absent an objective showing of actual knowledge by the air carrier of the passengers' overall itinerary—that is, an admission that the airline . . . actually understood the disputed flight to have been part of the decedent's international journey—. . . other kinds of extrinsic evidence are not appropriately introduced to contradict what the tickets (and the objective facts of the ticketing) unambiguously reveal.[154]

The court explained:

> In *Coyle*, the Ninth Circuit made clear that when determining whether a flight is "international carriage" under the Treaty, the intent of the parties is dispositive. The court explained, moreover, that the parties' intent is established "by reference to [its] expression in the contract of transportation, i.e., the ticket or other instrument." Extrinsic evidence may be "call[ed] upon . . . to make sense of the objective indicia presented by those tickets" and "*to a limited degree* . . . [to] connect flights together as, or rule out the possibility that certain flights were, part of an undivided transportation even when the flight coupons do not *themselves* evince such a connection (or its absence)."[155]

Applying these principles, the *Richards* court looked to the "Passenger Name Record" for the plaintiff, which "show[ed] only transportation 'from Bangkok to Los Angeles with an intermediate stopping point in Singapore.'"[156] The "Passenger Name Record" had been supplied to the court by the airline, attested to by an airline employee.[157] The court concluded that the evidence did not support a finding that the defendant was aware of the plaintiff's full itinerary.[158] Because "the place of departure, Thailand, is not a signatory to the Montreal Convention, the [c]ourt [found that the p]laintiff's flight is not subject to the Treaty's provisions."[159]

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[153] *Id.* at *4.

[154] *Id.* (quoting Coyle v. P.T. Garuda Indon., 363 F.3d 979, 989 (9th Cir. 2004)).

[155] *Id.* (citations omitted) (quoting *Coyle*, 363 F.3d at 987).

[156] Id. at *5.

[157] *See id.*

[158] *See id.*

[159] *Id.*

VI. DAMAGES

A. ARE EMOTIONAL INJURIES, INCLUDING A DIAGNOSIS OF PTSD, RECOVERABLE UNDER THE MONTREAL CONVENTION?

The *Kruger* case discussed earlier involved an altercation between a passenger and a flight attendant and the passenger's later arrest while boarding a connecting flight.[160] The plaintiff claimed that she was seriously psychologically affected by the arrest and that "she felt 'shock, express[ed] fear, and [became] traumatized.'"[161] Moreover, "[s]he was humiliated and forever mentally scarred."[162] As a result, she claimed "[s]he has incurred expenses for psychiatric treatment and 'continues to have nightmares and fear, anxiety panic attacks, and has been adversely and materially affected mentally' by [the d]efendant's acts."[163]

The court held that "[t]hese types of injuries, standing alone, are not recoverable under the Convention."[164] This is because courts "have consistently read the Convention to preclude recovery for purely psychic injuries."[165] Rather, "[r]ecovery for mental injuries is limited to situations in which the mental injuries resulted from a physical injury to the plaintiff."[166]

The plaintiff "also assert[ed] that she suffers from Post–Traumatic Stress Disorder (PTSD) and that PTSD can cause physical changes to the brain's structure."[167] The court explained that "[b]odily injury can include 'a change in the structure of an organ.'"[168] The court was "willing to entertain the possibility that this might be so in some cases;" however, it found that in this particular case there was a "paucity of evidence of physical injury."[169] As such, it concluded "that Mrs. Kruger's injuries were purely mental and therefor[e], not recoverable under the Montreal Convention."[170]

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160 Kruger v. Virgin Atl. Airways, Ltd., 976 F. Supp. 2d 290, 295 (E.D.N.Y. 2013).

161 *Id.* at 303.

162 *Id.* at 303–04.

163 *Id.* at 304.

164 *Id.*

165 *Id.* at 303.

166 *Id.* (citing Ehrlich v. Am. Airlines, Inc., 360 F.3d 366 (2d Cir. 2004)).

167 *Id.* at 304.

168 *Id.* at 303 (quoting E. Airlines, Inc. v. Floyd, 499 U.S. 530, 541 (1991)).

169 *Id.* at 304.

170 *Id.*

B. Do the Convention's Limitations Apply to Allege Intentional Conduct and What Substantive Law Applies to That Determination?

1. *Article 22 (Damage Limitation)*

In *Ekufu*, discussed earlier, "[the d]efendants also argue[d] that Article 22 of the Montreal Convention governs the limits of [Gladys] Agbasi's damages" related to items allegedly missing from her luggage.[171] Article 22 limits damages as follows:

> [I]n the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.[172]

The defendants argued that the airline's liability was limited to the amount of the Special Drawing Rights (SDR).[173] The plaintiff, on the other hand, "argue[d] that because the items in her bag were 'intentionally stolen,' th[e] [c]ourt ha[d] the power to grant 'any suitable judgment.'"[174] In support of her argument, the plaintiff pointed to Article 22(5) of the Montreal Convention, which states:

> [The limitations on liability] shall *not* apply if it is proved that damage resulted from any act or omission of the carrier, its servants or agents, done with the intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such an act or omission of a servant or agent, it is also proved that such servant or agent was acting *within the scope of its employment.*[175]

The court focused its attention on whether the employees who allegedly committed the intentional acts were within the scope of their employment.[176] To that end, the court "researched the issue on its own" and found no instructive opin-

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[171] Ekufu v. Iberia Airlines, No. 12-CV-6669, 2014 WL 87502, at *4 (N.D. Ill. Jan. 9, 2014).

[172] *Id.* (quoting Montreal Convention, *supra* note 1, art. 22(2)).

[173] *Id.*

[174] *Id.*

[175] *Id.* (quoting Montreal Convention, *supra* note 1, art. 22(5)).

[176] *See id.*

ions from the Seventh Circuit.[177] Instead, it relied on a decision from the Second Circuit that held the liability limitation in Article 22(5) applied and "remanded the case so the district court could decide [what substantive law should be] applied in determining the issue of whether an employee's alleged theft qualifies as intentional misconduct that could be imputed to the air carrier under the Montreal Convention."[178]

Because "neither party ha[d] asserted which substantive law should apply to this question," the court applied Illinois law.[179] "Under Illinois law, courts look to the Restatement (Second) of Agency . . . to determine whether an employee's action took place outside the scope of his employment."[180] The court concluded:

> [The p]laintiff failed to come forth with sufficient proof that the Iberia employees who allegedly stole the items from her baggage were acting within the scope of their employment. No reasonable juror could conclude that security forces at the Nigerian airport are employed to steal items from passengers as part of their service to Iberia. Nor could a reasonable juror find that theft of passengers' personal items serves the goals of Iberia, who presumably strives to offer customer service that makes passengers want to become repeat customers. Having failed to produce evidence that theft of her personal items falls within the scope of Iberia's agents' employment, the limitations on liability provided in Article 22(2) will apply."[181]

VII. CONCLUSION

Courts across the country continue to assess, interpret and apply—or not apply—the Montreal Convention to claims that arise out of international carriage of passengers and property. The case law from this past year 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.

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177 *Id.*

178 *Id.* (citing Shah v. Kuwait Airways Corp., 387 F. App'x 13, 14 (2d Cir. 2010).

179 *Id.* at *5.

180 *Id.*

181 *Id.*


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS