

# Asiana Flight 214 Disaster and the Montreal Convention

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New York Law Journal  
Sep 17, 2013



The July 6, 2013, crash of Asiana Airlines Flight 214 is the first major airline accident in the United States to invoke the Montreal Convention,<sup>1</sup> the 1999 treaty that establishes rules governing suits involving injuries and deaths aboard international flights. The Asiana flight was carrying 291 passengers and 16 crew members when it crashed on a sunny and clear day while attempting to land at San Francisco International Airport. The wide-body Boeing 777 airplane struck a seawall at the approach end of the runway and broke apart, causing the main fuselage, including the passenger cabin, to spin down the runway until it came to rest about 2,000 feet away. The crash killed three passengers and injured numerous other passengers and crew members.



The Montreal Convention alters the tort landscape in several significant respects: It establishes a presumptive rule making airlines liable for unlimited damages; bars punitive damages and damages for purely emotional injuries unaccompanied by physical harm; and it imposes strict jurisdictional requirements. The convention applies only to actions against airlines and not to other potentially responsible actors, such as aviation manufacturers or air traffic control.

Asiana flight 214 originated in Shanghai, China, had a stopover in Incheon, Korea, and then headed across the Pacific to San Francisco. The passengers were from various countries: 141 were from China, 77 from South Korea, 64 from the United States, three from Canada, three from India, one from France, one from Japan and one from Vietnam.<sup>2</sup>

## Presumptive Liability

Under the treaty, Asiana is liable for unlimited damages in the event of death or bodily injury suffered in an accident, unless the airline can prove that it was not negligent. If the airline can prove that it was not negligent, damages are limited to approximately US\$150,000.<sup>3</sup> But given the circumstances of the disaster with the Asiana pilots crash-landing the plane well short of the runway it seems clear that the airline cannot escape its liability even if an airplane defect, for example problems associated with the airplane's autopilot or autothrottles, contributed to the crash.

## Recoverable Damages

No matter how egregious the conduct of Asiana in causing the crash, there is no recourse for punitive damages: they are expressly barred by the Montreal Convention.<sup>4</sup>

In addition, the treaty bars recovery of damages for purely psychic injuries unaccompanied by physical harm. Over two decades ago, the Supreme Court held with regard to the predecessor treaty, the Warsaw Convention, that passengers could not recover damages absent physical harm or a physical manifestation of harm.<sup>5</sup> The Montreal Convention did not alter this rule.

Some of the passengers managed to escape the Asiana aircraft without any physical injury, and the airline will likely raise a treaty defense that there can be no recovery for emotional pain and suffering an element of damages ordinarily available in a non-treaty accident case.

## Jurisdiction

Under the Montreal Convention, as with its predecessor the Warsaw Convention, the location of the crash is

not a relevant factor for jurisdictional purposes. Thus, the fact that the crash and injuries occurred in San Francisco has no bearing on jurisdiction in a case against the airline. This is true even though Asiana regularly flies to California and the critical piloting errors that allegedly led to the crash necessarily occurred in California air space. The traditional minimum contacts jurisdictional analysis simply has no bearing under the treaty.

Article 33 of the Montreal Convention provides that an action for damages against Asiana Airlines must be brought at the plaintiff's option before a court:

- (1) where Asiana is domiciled;
- (2) where Asiana has its principal place of business;
- (3) where Asiana has a place of business through which the contract of carriage was entered into (where the ticket was bought);
- (4) the final place of destination of the passenger's travel itinerary; or
- (5) where the passenger has his or her principal and permanent residence and to and from which the carrier operates (commonly referred to as the "Fifth Jurisdiction").

All of the cases against the airline may be brought in Korea, which is Asiana's domicile and principal place of business.

A case can be brought against Asiana in the United States for any passenger who purchased their ticket here. This basis of jurisdiction can be highly technical. For example, a Chinese passenger who purchases her round trip ticket to and from China from Asiana in China may not be able to sue in the United States, but if the same passenger purchased her ticket from Asiana in the United States, then she would have the jurisdiction to sue in the United States. This appears to be the case for at least one passenger. According to the allegations in a recently filed complaint, a Canadian citizen who was living and working in China was on a round trip ticket to and from China which his son bought in the United States.<sup>6</sup>

The Montreal Convention also permits all passengers with a U.S. destination to bring suit against Asiana in the United States. Determining a particular passenger's "destination," however, is not as simple as it may seem. While Flight 214's destination was San Francisco, the Montreal Convention's jurisdictional analysis looks to what the parties the passenger and Asiana Airlines understood to be the passenger's final destination.

The Montreal Convention applies to international carriage, which it defines 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 is a break in the carriage are situated within the territories of two States Parties."<sup>7</sup> So even though Flight 214's destination was San Francisco, it would not be a passenger's "destination" for Montreal Convention jurisdiction purposes if the passenger was on a round trip ticket or some other international journey with a final destination outside the United States.

Ultimately, it is the mutual intent of the airline and the passenger that controls. In analyzing whether several tickets are part of one undivided package courts first look to the tickets. If the tickets are cross-referenced, this is evidence that the parties considered all of the tickets and flights to be part of one, undivided, international journey. Courts have also looked at whether the tickets were issued at the same time and by the same airline or ticket agent in order to determine the parties' intent.

The Montreal Convention's "fifth jurisdiction" means that every injured passenger who has a principal and permanent U.S. residence will be able to bring a claim against Asiana in the United States even if he purchased the ticket overseas and the United States was not their final destination.

The "fifth jurisdiction" the passenger's residence is a major advance of the Montreal Convention. Under the prior Warsaw Convention, numerous American passengers were denied the right to bring suit against a foreign airline in the United States even for accidents within our borders because they happened to purchase their ticket overseas and the United States was not their "final destination." The Montreal Convention removed this hurdle for injured passengers while ensuring that a carrier would only be subject to jurisdiction based on the "fifth jurisdiction" if it operates flights to and from the jurisdiction.

## Forum Non Conveniens

Asiana may seek to have some of the cases dismissed in the United States based on the forum non conveniens doctrine. While several U.S. courts have recently dismissed Montreal Convention cases on forum non conveniens grounds, the decisions all involved airline crashes that occurred outside the United States. We know of no decision where a properly brought Montreal Convention claim arising from a crash in the United States was dismissed on forum non conveniens grounds, and we may see a decision of first impression in the Asiana litigation.

Courts in the United States had rejected the dismissal of cases under the forum non conveniens doctrine where the cases had been properly brought in the United States under the Warsaw Convention. For example, in *Hosaka v. United Airlines*,<sup>8</sup> the U.S. Court of Appeals for the Ninth Circuit ruled that Warsaw Convention jurisdiction in the United States "overrides" the discretionary power of the federal courts to dismiss an action on forum non conveniens grounds.

Courts have thus far taken a contrary view regarding the forum non conveniens doctrine and the Montreal Convention. In cases arising out of the 2009 Air France 447 crash the Northern District of California found that the existence of U.S. jurisdiction under the Montreal Convention did not preclude the court's application of forum non conveniens. The court concluded that the Montreal Convention, unlike the Warsaw Convention, was drafted during a time when forum non conveniens was a well-known and widely applied doctrine and noted that the Montreal Convention expressly permits application of a state's procedural laws. The U.S. Department of State had filed an official Statement of Interest in an earlier post-Montreal Convention case making clear that the United States did not relinquish the ability of its courts to invoke the forum non conveniens doctrine.<sup>9</sup>

## Third-Party Claims

The Montreal Convention clearly does not apply to suits by a passenger against a non-airline party such as a manufacturer, but does the treaty govern a contribution and indemnity suit by a manufacturer against the airline? If a passenger barred by the treaty from suing the airline in the United States decides to bring suit against a manufacturer in our courts, may the manufacturer add the airline as a third party in the suit? Or can a manufacturer liable to pay damages for a passenger's emotional losses seek recourse against an airline which has no treaty obligation to pay such damages to the passenger? The convention is silent on these issues.

The Boeing 777 used for Asiana Flight 214 was designed and manufactured in the United States, and Boeing has its principal place of business in Illinois.

The preliminary accident reports indicate that while the pilots believed that the plane's auto throttle was engaged to maintain necessary flying speed, this was not the case. The accident investigation may identify defects in the plane's equipment or warning systems that contributed to the crash and provide a basis for suit against Boeing. If Boeing is sued, it would likely bring third-party claims against Asiana Airlines for contribution.

In a past case involving an international crash pending in the United States, Boeing successfully brought a third-party suit against a foreign airline where the passengers' claims were governed by the Warsaw Convention.<sup>10</sup> A New York federal court held that the Warsaw Convention only governed death and injury claims between a passenger and an airline:

The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.<sup>11</sup>

The contribution and indemnity issue, however, is not settled, and has never been heard before an appellate court.

## Conclusion

The Asiana litigation will present some complicated issues regarding the Montreal Convention. Asiana will likely succeed in limiting the number of direct claims that can be brought against it by passengers in the

United States and will seek to limit its exposure to only those passengers with provable physical injuries. The Montreal Convention creates an incentive for passengers to explore whether suit can be brought against Boeing or another U.S. defendant to permit the recovery of their full damages, including mental pain and suffering, before a U.S. court. Despite the Montreal Convention's jurisdictional limitations, the Asiana Flight 214 litigation is likely to be centered in the United States.

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**Endnotes:**

1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (1999), 2242 U.N.T.S. 309 (entered into force Nov. 4, 2003).

2. [http://flyasiana.com/notice/notice\\_en.asp](http://flyasiana.com/notice/notice_en.asp).

3. The convention's limitation is defined as 100,000 "Special Drawing Rights," which comprises a basket of four different currencies. The current value of 100,000 SDRs is about \$150,000.

4. Montreal Convention Art. 29.

5. *Eastern Airlines v. Floyd*, 499 U.S. 530, 553 (U.S. 1991).

6. *Xie v. Asiana Airlines*, 4:13-cv-03489-YGR (N.D. Ca.).

7. Montreal Convention Art. 1.2.

8. 305 F.3d 989 (9th Cir. 2002).

9. See *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 760 F.Supp.2d 832, 840 n.5 (N.D. Ca. 2009).

10. See, e.g., *In re Air Crash Near Nantucket Island, Massachusetts, on Oct. 31, 1999*, 340 F. Supp.2d 240 (E.D.N.Y.2004).

11. *Id.* at 244.

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