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THE MONTREAL CONVENTION'S STATUTE OF LIMITATIONS—A FAILED ATTEMPT AT CONSISTENCY

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I. INTRODUCTION

IN *NARAYANAN V. BRITISH AIRWAYS*, the Ninth Circuit interpreted, as a matter of first impression, Article 35 or the “Limitations Clause” of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) as it applies to injuries or deaths occurring after a flight’s arrival at its destination and as a result of an accident committed by the airline.¹ The court found that Article 35 and Article 29 (Basis of Claims Article) together unmistakably confirm that the Montreal Convention’s two-year statute of limitations is strict and that there is no room for triggering events not listed in the Convention.² The court’s decision in this case will undoubtedly serve as an influence to other courts applying the Montreal Convention’s statute of limitations to cases involving victims of airline or aircraft accidents, and it will ultimately limit the remedies available to those victims subject to circumstances not considered by the Convention. In other words, the Montreal Convention does not account for injuries suffered by airline passengers that are treated and minimized due to modern medicine. The appropriate action in this case would have been to deny the airline’s motion to dismiss and allow the two-year limitation to be used as an affirmative defense by British Airways instead of a condition precedent that had to be met by the plaintiffs before the case was truly heard by the court. Had the court taken this approach, the

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¹ *Narayanan v. British Airways*, 747 F.3d 1125 (9th Cir. 2014); Convention for the Unification of Certain Rules for International Carriage by Air art. 35, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

² *Narayanan*, 747 F.3d at 1132.

claim would have survived and the true merits of the case could have been considered.

The plaintiffs, survivors of Panpansam Narayanan, filed a complaint against British Airways under the Montreal Convention, alleging that the airline's refusal to supply Narayanan with necessary oxygen aboard an international flight hastened his death.³ Narayanan suffered from a severe lung disease and required supplemental oxygen while on board a flight from Los Angeles to India on December 26, 2008.⁴ British Airways denied Narayanan access to his supplemental oxygen while onboard the flight, and he required medical attention upon arriving at the stopover destination in London.⁵ After returning to the United States on January 16, 2009, and receiving further medical treatment, his health "continued to deteriorate and, on June 11, 2009, Narayanan died."⁶

The plaintiffs filed their suit on March 7, 2011, less than two years after the death of Narayanan but roughly two years and three months after his international flight arrived at its destination.⁷ British Airways moved to dismiss the suit under Rule 12(b)(6) of the Federal Rules of Civil Procedure, stating that the claim was "time-barred under the two-year limitation period established by Article 35(1) of the Convention"⁸ The lower court granted the motion to dismiss, and the plaintiffs appealed to the Ninth Circuit.⁹

II. THE MONTREAL CONVENTION EXAMINED

The Montreal Convention was adopted in 1999 and serves as the successor to the Warsaw Convention, a very similar treaty introduced in 1934.¹⁰ The Montreal Convention "governs international carrier liability for flights between the United States and foreign states that are parties to the Convention, and for international flights having both their origin and destination in

³ *Id.* at 1126.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1127.

¹⁰ Beverly L. Jacklin, *Construction and Application of Warsaw Convention Provision (U.S.C.A. Conventions, Warsaw Convention Art 29(1) Establishing a 2-year Limitation Period for Damage Action*, 103 A.L.R. FED. 286, § 2[a] (1991).

the United States.”¹¹ The purpose of the Montreal Convention was and continues to be (1) “to establish some degree of uniformity in the manner in which claims arising in the course of international travel are handled”; and (2) “to limit the potential liability of the air carrier so as to aid in the development of international air transportation, to provide a definite basis for insurance rates for airlines, and, thereby, to reduce operating expenses, with subsequent savings to the airline industry and its passengers.”¹²

Article 29 of the Montreal Convention states that “any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention”¹³ One such limitation is Article 35, which states that “[t]he right to damages shall be extinguished if an action is not brought *within a period of 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 aircraft on which the carriage stopped.”¹⁴

III. PLAINTIFFS’ ARGUMENTS AND THE NINTH CIRCUIT’S RESPONSE

The statute of limitations section, Article 35, was the central issue in *Narayanan*, particularly “whether Article 35(1) applies irrespective of when a claim actually accrues, or whether local law governs the timeliness of any claims which were not in existence when the aircraft arrived at its destination.”¹⁵ The court began by looking at the plain text of Article 35(1), concluding that it “leaves no room for flexibility as to the commencement of the limitations period.”¹⁶ The court viewed the plaintiffs’ request to construe the timeliness of their claim under California law as a request “to write an implied fourth trigger into the Convention’s terms,” and ultimately refused to do so.¹⁷ The court relied on the U.S. Supreme Court’s opinion in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* to emphasize that the terms in the Montreal Convention are those terms that the “drafters settled

¹¹ DeJoseph v. Cont’l Airlines, Inc., 18 F. Supp. 3d 595, 600 (D.N.J. 2014).

¹² Jacklin, *supra* note 10, § 2[a].

¹³ Montreal Convention, *supra* note 1, art. 29.

¹⁴ *Id.* art. 35(1) (emphasis added).

¹⁵ *Narayanan v. British Airways*, 747 F.3d 1125, 1128 (9th Cir. 2014).

¹⁶ *Id.*

¹⁷ *Id.* at 1129.

on—and that 103 separate signatory nations agreed to—in their efforts ‘to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability.’”¹⁸

The court next evaluated, then rejected, the plaintiffs’ argument that use of the words “the” and “an” in Article 35 only refers to a cause of action that exists *at the time* the aircraft arrived at its destination or else the drafters of the Montreal Convention would have used “any” when referring to a claim for damages.¹⁹ The court dismissed this “faulty logic” by citing to Article 29 of the Convention, which does use the term “any” and thereby requires that *all* causes of action be subject to the limitations period.²⁰

The plaintiffs later asserted that under *Zicherman v. Korean Air Lines Co.*, “where the Convention is silent or ambiguous on a key point . . . a ‘pass through’ to local law is permissible, if not mandatory.”²¹ The plaintiffs argued that this kind of pass-through is appropriate in their case because the Montreal Convention is silent on claims that accrue after the aircraft has arrived at its destination.²² Again the court rejected the argument by explaining “[t]he more natural interpretation of Article 35 is that it was intended to operate without reference to when a particular claim actually accrued.”²³ The court clarified that the “pass-through” position pronounced in *Zicherman* is not applicable to the instant case because it was meant only to apply to issues of compensatory damages.²⁴

Finally, the plaintiffs argued that Article 35(2) of the Montreal Convention is actually consistent with California law.²⁵ Article 35(2) states “[t]he method of calculating [the two-year] period shall be determined by the law of the court seized of the case.”²⁶ The court offered precedent to support its position that this part of the treaty has never been construed to mean anything beyond the invocation of “the power of the forum court to determine whether the plaintiff accomplished the filing within

¹⁸ *Id.* (quoting *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 170 (1999)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996)).

²² *Id.* at 1129.

²³ *Id.* at 1130.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Montreal Convention, *supra* note 1, art. 35(2).

the limitation period . . . —in other words, matters bearing on when an action has been ‘brought.’”²⁷

The court finalized its opinion by emphasizing that the drafters of the Montreal Convention rejected “a proposal that would have allowed the limitations period to be tolled in accordance with the law of the forum court.”²⁸ The dissent countered the majority’s opinion by stressing the outdated tendencies of the Convention,²⁹ particularly the fact that the Warsaw Convention was adopted at a time when the airline industry was new and needed protection from litigation.³⁰ The dissent determined that the retention of the Warsaw Convention’s “rigid statute of limitations . . . continues to protect international airline carriers at the expense of its passengers, and bars Mr. Narayanan’s family from holding British Airways accountable for its misconduct.”³¹

IV. ANALYSIS

A. NINTH CIRCUIT’S FAULTY INTERPRETATION OF THE LIMITATIONS RULE

The Ninth Circuit applied the limitations rule of the Montreal Convention as a condition precedent that the plaintiffs had to meet before they were able to properly bring a claim instead of viewing the rule as an affirmative defense or an ordinary statute of limitations defense to be asserted by the airline. This type of interpretation places the burden on plaintiffs from the beginning, and its long-term effect is a prevention that would keep plaintiffs from filing suit if they did not meet the narrow criteria laid out in the Montreal Convention. Many courts have taken the latter approach of viewing the statute of limitations as a defense to protect plaintiffs (usually individuals) instead of granting further protection to major airlines.³²

²⁷ *Narayanan*, 747 F.3d at 1130 (quoting *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 144 (2d Cir. 1998)).

²⁸ *Id.* at 1131.

²⁹ *Id.* at 1132–33.

³⁰ *Id.*

³¹ *Id.* at 1133.

³² *See Wolgel v. Mexicana Airlines*, 821 F.2d 442, 443–44 (7th Cir. 1987) (interpreting the statute of limitations in the Warsaw Convention to be *just* a statute of limitations, not a condition precedent, although ultimately the Convention was inapplicable); *see also Flanagan v. McDonnell Douglas Corp.*, 428 F. Supp. 770, 777 (C.D. Cal. 1977) (suspending the tolling of the statute of limitations based on California law and the instruction to do so in Article 29(2) of the Warsaw Convention, which is identical to Article 35(2) of the Montreal Convention).

The court's two key points in concluding the statute of limitations barred the plaintiffs' action were that (1) a plain reading of the text instructs them to do so, and (2) the instructions given to the court by Article 35(2) do not allow them to use state law as a calculating method for alleged time-barred actions. As to the first point, the court inappropriately ignored the second portion of Article 35 when analyzing the plain meaning of the text. The court merely concluded that the Montreal Convention only allows for the three triggering events pronounced in Article 35(1), without even mentioning Article 35(2).³³ Article 35(2) is critical when applying the Montreal Convention's statute of limitations, and it was not until later in the opinion that the court addressed, and then swiftly dismissed, the impact this section of the Convention could have had on its decision. A plain reading of Article 35 in its entirety would have allowed the court to apply California law when calculating whether the plaintiffs' claim was brought in time. Article 35(2) plainly instructs that "[t]he method of calculating [the two-year] period shall be determined by the law of the court seized of the case."³⁴ Here, the plaintiffs brought their action in the state of California.³⁵ Thus, the court should have used California law to conclude that the action had not accrued until six months after the flight arrived at its destination. This is when the tolling should have begun for statute of limitations purposes.

This is precisely the approach taken by the U.S. District Court for the Central District of California years earlier in *Flanagan v. McDonnell Douglas Corp.*³⁶ Flanagan held that the statute of limitations of the Warsaw Convention was tolled because the Montreal Convention adopted the statute of limitations of the court to which the case was submitted.³⁷ This reading of Article 35 is logical and provides greater protection for families like the Narayanans who lose loved ones at a time when their window for bringing an action is closing.

³³ *Narayanan*, 747 F.3d at 1128–29.

³⁴ Montreal Convention, *supra* note 1, art. 35(2).

³⁵ *Narayanan*, 747 F.3d at 1126.

³⁶ Note that the U.S. District Court for the Central District of California is the same court where the plaintiffs in *Narayanan* brought their claim.

³⁷ *Flanagan*, 428 F. Supp. at 775–76. Note that this analysis and conclusion were based on the exact same language that still exists in the Montreal Convention. *See id.*

B. PASS-THROUGH TO STATE LAW

The court could have also construed the Montreal Convention as lacking an instruction or a remedy for conditions (injuries and deaths) accruing anytime after the plane has arrived at its destination, therefore allowing a pass-through to state law.³⁸ This would have been an appropriate response to Article 35 because it only accounts for accidents that occur on the date of arrival, the intended arrival date, or the date on which the aircraft stopped.³⁹ Increasingly courts are finding that the Montreal Convention and/or its statute of limitations article are inapplicable because the Convention does not cover *every* cause of action that can be brought against an airline, and consequently state law must be used to fill in the gaps.⁴⁰ This trend could result in added attempts by plaintiffs to bring only state law actions and to generally avoid the Montreal Convention. For example, if the Narayanans had only brought a state law action, British Airways would have had to begin its defense by successfully arguing that the Montreal Convention preempted the action and then move to dismiss based on the statute of limitations. There is a greater dispute as to whether the Montreal Convention completely preempts state law actions than there is over the interpretation of the Convention's statute of limitations. The plaintiffs could have chosen the battle about the Montreal Convention's preemptive effect over the battle with the interpretation of the statute of limitations and likely had a better chance of their claim surviving.⁴¹ Ultimately, future plaintiffs with statute of limitations issues could read the court's

³⁸ See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629 (1996).

³⁹ Montreal Convention, *supra* note 1, art. 35(1).

⁴⁰ *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1026 (9th Cir. 2011) (noting that the Montreal Convention and its statute of limitations do not apply to suits brought by one carrier against another); *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 443 (7th Cir. 1987) (stating that the Convention is inapplicable to actions for "bumping"); *DeJoseph v. Cont'l Airlines, Inc.*, 18 F. Supp. 3d 595, 604 (D.N.J. 2014) (stating that the Montreal Convention does not preempt state law claims for personal injury obtained on an airplane); *Pennington v. British Airways*, 275 F. Supp. 2d 601, 602 (E.D. Pa. 2003) (stating that local procedural rule "applied in calculating the last date on which [a] complaint could have been filed under [the] Convention"); *Dasrath v. Cont'l Airlines, Inc.*, 228 F. Supp. 2d 531, 543 (D.N.J. 2002) (stating that the Convention is inapplicable to claims seeking only injunctive relief).

⁴¹ See *Akrami v. British Airways PLC*, No. C 01-02882 SC, 2002 WL 31031324, at *4 (N.D. Cal. Sept. 10, 2002) ("The plaintiff is considered the master of her complaint, and she is free to choose to avoid federal court by relying exclusively on state law causes of action.").

decision in *Narayanan* as a deterrent for bringing their action under the Montreal Convention and only file state law actions to benefit from the more advantageous limitations period. This type of strategy to avoid the rules of the Montreal Convention creates inconsistency and in turn affronts one of the Convention's most central goals. Eventually, all participating nations could take notice and amend the treaty if plaintiffs increasingly decide not to bring their claims under the Montreal Convention.

C. DISSENT'S ARGUMENT

Based on an acknowledgement of the outdated nature of the Montreal Convention and its failed attempt at providing equal protection for airlines and passengers, the dissent in *Narayanan* concluded that the motion to dismiss should have been denied and the court should have heard the plaintiffs' claim. The dissent argued, and this author agrees, that "[t]he Warsaw Convention was written when the airline industry was in its vulnerable infancy . . . [and] air travel was considered risky," and thus the Montreal Convention is unsuitable for modern times when "international air travel [has become] a multi-billion dollar industry, and the risks of flying [have] decreased exponentially."⁴² While the Montreal Convention was amended just fifteen years ago, a lot of impactful changes have taken place in that time, especially in the area of air travel. This treaty, like any area of the law, should be reevaluated on a more regular basis to ensure that the rights of passengers and airlines do not become one-sided, and that the remaining goals of the Montreal Convention continue to be met.

V. CONCLUSION

The court in *Narayanan* took a strict approach to the Montreal Convention's statute of limitations by interpreting it as a condition precedent to be met by the plaintiffs as opposed to an affirmative defense or ordinary statute of limitations. The court reasoned that the Montreal Convention would not allow for an additional triggering event or circumstance where tolling of the limitations period would become necessary. Some courts could and do read the Montreal Convention, particularly Article 35(2), as specifically allowing such a method of tolling or calcu-

⁴² *Narayanan v. British Airways*, 747 F.3d 1125, 1133 (9th Cir. 2014) (Pregeron, J., dissenting).

lation based on local law, but the court in *Narayanan* refused to do so. Even if the court believed the Montreal Convention did not allow for such an exception, it could have interpreted the lack of instruction in this case as a gap in the Convention and thus required a “pass-through” to local law. Had the court either initially applied local law by using Article 35(2) of the Montreal Convention, or applied local law after recognizing the Convention inadequately directs the court on the issue of the statute of limitations calculation, the plaintiffs claim would have survived the motion to dismiss. The Ninth Circuit’s decision will have an impact for years to come for plaintiffs attempting to assert a claim they believe to be timely under their local rules and will ultimately prevent such plaintiffs from receiving justice under the law.

