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Airline Liability - The Warsaw Convention - Fifth Circuit Rules That Holding a Passenger's Baggage for Ransom Is Not Actionable under the Warsaw Convention: *MBABA v. Societe Air France*

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AIRLINE LIABILITY—THE WARSAW CONVENTION—FIFTH CIRCUIT RULES THAT HOLDING A PASSENGER'S BAGGAGE FOR RANSOM IS NOT ACTIONABLE UNDER THE WARSAW CONVENTION: *MBABA V. SOCIETE AIR FRANCE*

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THE WARSAW CONVENTION governs the liability of airlines and the potential passengers' remedies for damages incurred in the course of international air travel,[1] with a purpose to establish a uniform set of legal rules "governing claims arising from international air transportation."[2] In order to satisfy this goal, the Convention attempts to shield international air carriers from the decidedly non-uniform liability rules of individual nations by preempting these local laws and substituting itself as the sole source of remedies for injured passengers.[3] For passengers, the effect of this preemption is to provide them with a restricted set of claims they can pursue against an air carrier and to limit the carrier's liability under those claims, in exchange for near-absolute liability of the carrier on claims that fall within the Convention.[4] The Convention's limitation on available claims has the effect of providing air carriers a nearly impenetrable defense, as the Supreme Court has held that injuries falling within the scope of the Convention, but not specifically actionable under the Convention, are not actionable at all.[5] The Fifth Cir-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C.A. § 40105 (West 1997) [hereinafter Warsaw Convention].

[2] Mbaba v. Societe Air Fr., 457 F.3d 496, 497 (5th Cir. 2006) (quoting El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 169 (1999)).

[3] *See* Paul Stephen Dempsey, *International Air Cargo & Baggage Liability and the Tower of Babel*, 36 GEO. WASH. INT'L L. REV. 239, 245–47 (2004).

[4] *Id.* at 247.

[5] *Tseng*, 525 U.S. at 161.

cuit recently relied on this holding to prevent a passenger from bringing breach of contract and deceptive trade practice claims against an air carrier.[6] Unfortunately, the court failed to consider whether the passenger's injuries actually occurred within the scope of the Convention, and assumed without specifically deciding that the Convention was applicable.[7] Consequently, the court erroneously found that the Convention's preemptive effect precluded all of the passenger's claims.[8]

Edo Mbaba (Mbaba) purchased a ticket on Air France for travel from Houston, Texas to Lagos, Nigeria, leaving on June 15, 2002 with a layover in Paris, France.[9] Upon checking in for his flight, Air France charged him $520.00 in excess baggage fees and issued a baggage ticket indicating the bags would be transported from Houston to Lagos.[10] When Mbaba arrived in Paris, the airline unloaded his bags, causing him to miss his connection.[11] He reclaimed his bags, and the next morning when he checked in for his new connecting flight to Lagos, Air France charged him an additional $4048.66 in excess baggage fees for these same bags, due to a different method of calculating excess baggage fees in Paris.[12] Mbaba alleged that Air France refused to send his bags back to Houston, and informed him that if he did not pay the fee his bags would be "taken out and burned."[13]

Mbaba filed "suit against Air France in Texas state court, alleging breach of contract, violation of the Texas Deceptive Trade Practices Act, and common law fraud."[14] Air France removed the case to the United States District Court for the Southern District of Texas and promptly moved for summary judgment, arguing that the Warsaw Convention preempted all of Mbaba's state law claims.[15] The district court granted Air France's motion, and Mbaba appealed to the United States Court of Appeals for the Fifth Circuit.[16]

On appeal, Mbaba argued that his claims were not preempted because his injuries are not included in the language of the

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[6] *Mbaba*, 457 F.3d at 496–97.
[7] *See id.*
[8] *See id.*
[9] *Id.* at 497.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 496–97.
[16] *Id.*

Convention—specifically language in Article 24 stating that claims "can only be brought subject to the conditions and limits set out in this Convention."[17] To support this proposition, he relied on a discussion in *Tseng v. El Al Israel Airlines, Ltd.*, where the Supreme Court addressed a hypothetical offered by the Second Circuit.[18] The Second Circuit feared that construing the Convention to be the sole source of relief available to passengers would give rise to situations not desired by the drafters, such as a lack of recourse against an airline when a passenger suffers an injury on an escalator in the airport terminal.[19] In response to this hypothetical, the Supreme Court stated that "[t]he Convention's preemptive effect on local law extends no further than the Convention's own substantive scope."[20] Mbaba asked the Fifth Circuit to interpret "scope" in *Tseng* to mean the type of claims contemplated by the Convention.[21] The Fifth Circuit rejected Mbaba's arguments and affirmed the district court's grant of summary judgment.[22] This holding relied on the court's determination that allowing the claims would defeat the Convention's goal of uniformity, based on the text of the Convention and the Supreme Court's opinion in *Tseng*.[23]

The Fifth Circuit reasoned that paragraph one of Article 24 of the Convention, as amended by Montreal Protocol No. 4, states that "[i]n the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."[24] While not directly applicable under the facts at hand, the Fifth Circuit also looked to paragraph two of Article 24, which in pertinent part reads, "[i]n the carriage of cargo, 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 limits of liability set out in this Convention."[25] The court placed great emphasis on the phrase "however founded" contained in both of these paragraphs, stating that this phrase in paragraph one of Article 24 "specifically preempts claims re-

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[17] *Id.* at 499 (quoting Warsaw Convention, *supra* note 1, art. 24).

[18] *Id.* (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 171–72 (1999)).

[19] *See* Tseng v. El Al Isr. Airlines, Ltd., 122 F.3d 99, 106–07 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

[20] *Tseng*, 525 U.S. at 172.

[21] *Mbaba*, 457 F.3d at 500 n.1.

[22] *Id.* at 500–01.

[23] *Id.* at 500.

[24] Warsaw Convention, *supra* note 1, art. 24; *Mbaba*, 457 F.3d at 497–98.

[25] *See* Warsaw Convention, *supra* note 1, art. 24; *Mbaba*, 457 F.3d at 498.

sulting from the carriage of baggage."[26] In interpreting this language, the Fifth Circuit relied heavily on the Supreme Court's analysis of the pre-Montreal Protocol No. 4 Article 24 language in *Tseng*.[27] The Montreal Protocol No. 4 language made an apparent scope change to Article 24 by substituting "[i]n the carriage of passengers and baggage" for the previous language of "[i]n the cases covered by articles 18 and 19," among other changes.[28] The court concluded that this was not a substantive change, and that it merely clarified the earlier language[29]—thus allowing the Fifth Circuit to rely upon the holding in interpretation of the modified language. The Court ultimately held that the "Convention precludes a passenger from maintaining an action . . . under local law when her claim does not satisfy the conditions for liability under the Convention."[30] The Fifth Circuit found that this holding was dispositive of the present case.[31]

In addition to the Convention's plain language and the holding in *Tseng*, the court found support in a Second Circuit case, where that circuit—also applying *Tseng*—found that the Convention's preemptive effect extended to all causes of action, regardless of whether a particular claim could actually be maintained under the provisions of the Convention.[32] Finally, the Fifth Circuit supported its holding on the policy ground that the Convention's ultimate goal was to provide uniformity of rules for international travel, and allowing Mbaba to pursue his claims would violate this underlying precept.[33]

The Fifth Circuit erroneously affirmed the district court's grant of summary judgment to Air France. The court should review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party.[34] In affirming the district court's grant of summary judgment, the Fifth Circuit evaluated the Convention's language and supporting precedents in isolation, ignoring the elements of those hold-

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[26] *Mbaba*, 457 F.3d at 500.

[27] *Id.* at 499–500.

[28] El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 174–75 (1999); *Mbaba*, 457 F.3d at 500 n.2.

[29] *Tseng*, 525 U.S. at 175.

[30] *Id.* at 176.

[31] *Mbaba*, 457 F.3d at 500.

[32] *Id.* (quoting King v. Am. Airlines, Inc., 284 F.3d 352, 357–58 (2d Cir. 2002)).

[33] *Id.* (citing *Tseng*, 525 U.S. at 169).

[34] *See id.* at 497 (citing Am. Home Assurance Co. v. United Space Alliance, 378 F.3d 482, 486 (5th Cir. 2004)).

ings that define the outer scope of the Convention's applicability and preemption.

The Fifth Circuit evaluated paragraph one of Article 24 of the amended Convention and concluded that the text specifically preempts all claims related to the carriage of baggage, relying on the phrase "however founded" to support the conclusion that the preemption was expansive.[35] The court failed to evaluate that language within the broader scope of the Convention itself. In *Tseng*, the Supreme Court stated that "the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope."[36] Mbaba asked the court to interpret "scope" to pertain to the types of claims contemplated by the Convention, but the court chose to interpret "scope" to describe the actual boundaries of the Convention itself—that the injury must occur on board the airplane or in the process of embarking or disembarking.[37] The court's analysis, then, leads to the inevitable conclusion that the Convention's preemptive effect on local law does not extend beyond injuries that are incurred on board the aircraft or during the process of embarking or disembarking—a statement that was made by the Supreme Court in *Tseng* and quoted by the Fifth Circuit in its decision in the present case.[38] This overriding statement of scope serves as a qualification to the "however founded" language relied upon by the Fifth Circuit to show preemption of Mbaba's claims.[39] The Fifth Circuit ignores this scope statement and concludes that the plain language of Article 24 makes it clear that all causes of action in the carriage of baggage are preempted by the Convention.[40] The court never considers whether Mbaba's injuries fall within the overriding scope of the Convention described by the Supreme Court in *Tseng*: Did the injuries occur on board the aircraft, during the process of embarking or disembarking, or at some other time? The court simply ignores this fundamental question.[41]

In the Fifth Circuit's discussion of "scope" as the term was defined by the Supreme Court in *Tseng*, it cites the First Circuit

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[35] *Id.* at 500.

[36] *Tseng*, 525 U.S. at 172.

[37] *Mbaba*, 457 F.3d at 500 n.1.

[38] *Id.* at 499–500 (quoting *Tseng*, 525 U.S. at 172).

[39] *See id.* at 500.

[40] *See id.*

[41] *See id.*

decision in *Acevedo-Reinoso v. Iberia Líneas Aéreas de España S.A.*[42] to support the conclusion that "scope" refers to the Convention's limit of applicability to injuries that occur in the air or during the process of embarking or disembarking.[43] In *Acevedo-Reinoso*, the plaintiff was a citizen of Cuba, residing in the United States but carrying a Cuban passport and traveling from Puerto Rico to Spain.[44] The Iberia agent informed the plaintiff that all immigration documents were properly in place and allowed him to board the plane, but upon arrival in Spain the plaintiff was immediately detained by Spanish authorities because he held a Cuban passport.[45] After threats of deportation to Cuba and other humiliating experiences, the plaintiff was sent back to Puerto Rico where he filed suit against the airline in federal court, alleging the non-Convention claim of negligence.[46] The district court granted Iberia's motion to dismiss, but this ruling was vacated by the First Circuit, which held that the district court "erroneously conflated the applicability of the Convention with liability under the Convention."[47] The same mistake was made by the Fifth Circuit in its analysis of Air France's motion for summary judgment.

Much like the Fifth Circuit in the present case, the district court in *Acevedo-Reinoso* relied on *Tseng* to support the proposition that that plaintiff's only basis for recovery is the Convention.[48] The First Circuit distinguished *Tseng*, however, stating that it did not support such an assumption because in *Tseng*, the applicability of the Convention was not at issue, as the parties stipulated that the injuries occurred in the course of embarking during international travel.[49] The parties made no such stipulation in *Acevedo-Reinoso*, nor does the record show any stipulation by Mbaba. The First Circuit properly vacated the district court's decision and remanded the case for determination of whether the plaintiff's injuries occurred "in the course of any of the operations of embarking or disembarking."[50] The Fifth Circuit

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[42] 449 F.3d 7, 14 (1st Cir. 2006).

[43] *Mbaba*, 457 F.3d at 500 n.1 (citing *Acevedo-Reinoso*, 449 F.3d at 14).

[44] *Acevedo-Reinoso*, 449 F.3d at 9.

[45] *Id.*

[46] *Id.* at 10.

[47] *Id.* at 13–14.

[48] *Id.* at 13.

[49] *Id.* (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 167 (1999)).

[50] *Id.* at 16.

cites *Acevedo-Reinoso* in support of its definition of "scope," but then ignores the implications of this definition.

The Fifth Circuit drew additional support from the Second Circuit's decision in *King v. American Airlines, Inc.*[51] In *King*, the plaintiffs held confirmed tickets on a flight but were "bumped" after having boarded the vehicle that transported passengers from the terminal to the aircraft.[52] The plaintiffs alleged that they had been discriminated against due to their race, and brought suit under various federal and state laws.[53] The Second Circuit, also relying on *Tseng*, held that the Convention preempted all local law causes of action, regardless of whether the Convention offered a remedy.[54] This case is factually distinguishable from the present case, however. While both cases involved plaintiffs bringing claims that are not specifically available under the Convention, the plaintiffs in *King* had begun the process of embarking. They had left the terminal itself and were under the control of the airline, in a restricted area, on the airline vehicle that transported passengers to the actual aircraft[55]—a situation that is analogous to a passenger walking down the jetbridge to the aircraft. Conversely, Mbaba was in the airport terminal, had reclaimed his bags, and had spent the previous night sleeping in the airport out of the airline's control.[56] *King* did not present an issue as to the broad scope of the Convention, but rather one of individual causes of action relating to an injury that was within the Convention's scope.

Finally, in light of the court's failure to consider the threshold question of whether the Convention itself was applicable to the dispute at all, its policy argument that allowing Mbaba's claims would undermine the Convention's goal of uniformity is not convincing. The Convention's goal is to provide uniformity of legal rules within the boundaries of applicability established by the drafters—those boundaries state that the Convention applies to physical injuries suffered on board the aircraft or during the process of embarking or disembarking.[57] Outside of this

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[51] Mbaba v. Societe Air Fr., 457 F.3d 496, 500 (5th Cir. 2006) (citing King v. Am. Airlines, Inc., 284 F.3d 352, 357–58 (2d Cir. 2002)).

[52] *King*, 284 F.3d at 355.

[53] *Id.*

[54] *Id.* at 357.

[55] *Id.* at 355.

[56] *Mbaba*, 457 F.3d at 497.

[57] *See* Warsaw Convention, *supra* note 1, art. 17; El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999).

scope, the Convention no longer applies, and the goal of international uniformity is inapplicable. Since the court ignored the fundamental question of whether Mbaba's injuries were suffered within the defined scope of the Convention, the court's concern for international uniformity of law is unfounded.

The Fifth Circuit ignored the gating requirement for applicability of the Warsaw Convention. In doing so, the court has created uncertainty as to the breadth of claims that may be preempted by the Convention, and has potentially broadened that preemption to include passenger claims for fundamental services. Under the court's analysis, a passenger who purchased a $520 ticket for travel from Houston to Lagos, connecting through Paris, and when in Paris, was charged an additional $4,000 to complete the trip, would have no recourse against the airline because the Convention offers no cause of action for this injury. Taken to its logical conclusion, this holding makes airlines essentially immune from deceptive trade practices actions brought by traveling passengers, since the Convention itself provides no remedy for these injuries. The Convention's drafters desired uniformity of legal rules, not immunity from them. By ignoring the scope of the Convention's applicability, the Fifth Circuit has come dangerously close to giving both.