

**TRAVEL LAW: CHINA AND OTHER EMERGING DESTINATIONS NEED
TO RAISE LIABILITY LIMITS FOR AVIATION ACCIDENTS**

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This week's article explores the value of a vacationer's life while traveling outside the U.S. on the domestic airlines of emerging destination countries such as China, among others. I use the U.S. as the benchmark because, perhaps, nowhere on this earth is life more valuable, at least, in terms of the compensation that may be recovered in Court for wrongful death or physical and emotional injuries suffered by a traveler [see our earlier ETN article *Duty to Warn...the case of the Chinese tick* (2/6/2014) (jury award of \$41.75 million for minor who developed TBE after being bitten by a tick while on tour in China)]. Most travelers may have little understanding of their rights and remedies before they board commercial aircraft.

As I noted in *Travel Abroad, Sue At Home 2013*, 32 Pace Law Review 407 (2012) "Travelers assume that should they have an

accident in a foreign country they will be protected by the same safety standards, high quality medical care [see our earlier ETN article, *Immediate post-accident medical care* ("What should be done to assist the injured or seriously ill tourist and by whom?...Such assistance runs the spectrum from the very minimum...to the catastrophic involving involuntary medical disembarkation in a foreign country with uncertain standards of medical care...and misdiagnosing diseases" (2/20/2014)], consumer protection laws and user-friendly legal system available in the United States. The reality, however, is quite the opposite".

Airlines: Liability And Damages Limitations

Let's start our analysis of the value of your life abroad with a study of commercial aviation accidents and liability and damages limitations. First, the rules in the U.S. As noted in *Travel Law* § 2.05[2] "(Commercial) [a]ir carriers cannot disclaim liability for their own negligence and they cannot limit negligence liability (damages) in cases involving (wrongful death or) physical injuries, although they may do so regarding flight delays [*Travel Law* §§ 2.04[5], 2.06[5] (bumping, denied boarding compensation), 2.06[7] (tarmac delays)], the carriage of baggage

[*Travel Law* §§ 2.04[], 2.07[1],[2] (Domestic Baggage Liability Rule) and within the context of high risk activity such as aerial sightseeing [see e.g., *Booth v. Santa Barbara Biplanes* (High Risk Activity Release enforced)]].

Montreal Convention

As we leave the U.S. aboard an air carrier delivering "international carriage" then the Montreal Convention (previously the Warsaw Convention) should apply. The Warsaw and Montreal Conventions seek to balance the interests of passengers and air carriers [see *El Al Israel Airlines v. Tseng*]. The Montreal Convention states that "international carriage means any carriage in which...the place of departure and the place of destination... are situated either within the territories of two State parties (signatories to Montreal Convention) or 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. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of a State is not international carriage for the purposes of this Convention...Carriage to be performed by several

successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation" (see e.g., *Weinberg v. Grand Circle Travel* (U.S. citizens killed and burned in hot air balloon crash in Tanzania accidentally swept by wind "did not include an 'agreed stopping place within the territory of another State' and is therefore not covered by the Montreal Convention'")...both the air carrier and the passenger must intend that the air transportation be international in nature" (*Travel Law* § 2A.03[1])).

Preemption And Venue

The Montreal Convention preempts common or statutory law regarding the rights, responsibilities and liability of the parties unless the Convention provides for the application of local law regarding contributory negligence and wilful misconduct and the nature and quality of recoverable damages. An action may be brought in (1) the carrier's domicile, (2) the carrier's place of business, (3) the place of business where the contract of carriage was entered into, (4) the place of destination and (5) in certain situations the state of principal and permanent

residence of the passenger.

Article 17 Liability And Damages

The Montreal Convention provides in Article 17 that "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking". There has been much litigation over the years regarding what constitutes an accident [see *Saks v. Air France*], bodily injury [see *Eastern Airlines Inc. V. Floyd*] and embarking or disembarking [see *Acevedos-Reinoso v. Iberia*]. The maximum amount of recoverable damages is dependent upon whether the harm suffered was due to personal injury, a flight delay, or lost, stolen or damaged baggage. Punitive damages are not recoverable under the Montreal Convention and neither are damages for emotional injuries in the absence of physical injury. The Montreal Convention further provides "For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights [SDRs] for each passenger, the carrier shall not be able to exclude or limit its liability". For damages that exceed

100,000 SDRs the carrier will not be liable if the carrier proves it took "all necessary measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures". The value of SDRs can be determined by reference to the International Monetary Fund website. The Montreal Convention provides an inflation factor and presently the limit is 113,000 SDRs or about \$175,800. As of February 2014, 105 countries including the EU [see EU Reg 889/2002 which brought member States in line with the Montreal Convention "irrespective of whether the accident happens on an internal, intra-community or international flight" (see *Airline Liability* report at www.citizensinformation.ie/en/travel (Last visited 2/7/2014); http://www.citizensinformation.ie/en/travel_and_recreation/air_travel/ China (see Wang, *Commentary on Air Law in China* (2002), *China civil aviation laws show good promise* (2009) at www.forwarderlaw.com/library (Last visited 2/7/2014); [www.en.Wikipedia.org, *Montreal Convention, Ratifications* (last visited 3/1/2014) have signed the Montreal Convention.

Domestic Air Transportation

The danger and uncertainty for U.S. travelers is when they

book flights on airlines banned by the EU [see list of airlines at www.ec.europa.eu/transport/modes/air/safety/air-ban] [For example, as reported in Wikipedia (last visited 3/7/2014) in an article discussing Air Astana, it is stated that "In April 2009, an audit by the International Civil Aviation Organization (ICAO), found the Kazakhstan Civil Aviation Authority (CAC) to be non-compliant in key areas of regulatory oversight. This resulted in a blanket ban on all Kazakhstan-registered airlines from flying to, from or within the European Union by the EU's Air Safety Committee (ASC). Air Astana was the sole exception, exempted from the ban...However it was, and remains, included on the ASC's Annex B. Restricting its EU operations to the level of frequencies operated at the time of imposition of the ban in July 2009"] or on foreign airlines providing domestic or intra-country air transportation. In this regard some countries such as China [see *China wants more budget airlines*, www.eturbonews.com (3/2/2014), Kazakhstan [see *Bombardier to supply planes to new Kazakh domestic airline*, www.eturbonews.com (2/28/2014); and many others are vigorously promoting themselves as new and exciting travel destinations and rapidly building up their internal air transportation capabilities. While new aircraft are being purchased and new airports being built what is not clear is the

commitment of some countries to properly compensating foreign airline passengers killed or injured in internal aviation accidents as was done by the EU. For example, China still appears to limit liability for wrongful death in internal aviation accidents to 400,000rmb [see *Provisions on the Limited Compensation Liabilities of Carriers in Civil Aviation Transport* (2006) at www.lawinfochina.com] or about \$66,666 at an exchange rate of \$1=6 rmb which is a little better, but not by much, than the \$20,000 maximum damages allowed by Chinese law to two Americans killed in a crash of a Chinese plane en route from Nanking to Beijing in 1985 (see *Barkanic v. General Administration of Civil Aviation* ("Chinese law, which limits an airline's liability for wrongful death of a non-citizen to \$20,000"); see also: *Sullivan v. Starwood Hotels and Resorts Worldwide* (slip and fall in Chinese hotel parking garage and underwent surgery in Beijing United Family Hospital; *forum non conveniens* motion denied; China not an adequate alternative forum)].

Travelers Beware

As I pointed out in my Tulane Maritime Law Journal article,

Twenty First Century Cruise Ships, Nineteenth Century Passenger Rights (2010), it is one thing for travel suppliers (and countries) to equip themselves with modern travel technology (airplanes, cruiseships, hotels) but quite another to bring their consumer protection statutes, if any, into the 21st Century as well. China and other emerging travel destinations need to accept responsibility for aviation accidents and bring their compensation levels up to, at least, EU standards if not the standards in the U.S. Before booking a flight outside of the U.S. travelers are well advised to investigate the liability and damages limits imposed for foreign countries, particularly, for internal aviation accidents.

Justice Dickerson been writing about *Travel Law* for 38 years including his annually updated law books, *Travel Law*, Law Journal Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles many of which are available at

www.nycourts.gov/courts/9jd/taxcertatd.shtml.

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