

## Client Alert

---

March 24, 2013

### ***Narayanan v. British Airways*: Ninth Circuit Says the Montreal Convention's Statute of Limitations May Begin to Run Before Claim Accrues**

**By Joanna L. Simon and William V. O'Connor, Jr.**

On March 19, 2014, the Ninth Circuit issued its ruling in *Narayanan v. British Airways*, No. 11-55870 (9th Cir. 2014), holding that the two-year statute of limitations set forth in Article 35(1) of the Montreal Convention begins to run when an aircraft arrives (or ought to have arrived) at its destination, even if the claim to which the statute is being applied has not yet accrued at that time. The ruling—which decided an issue of first impression in the Ninth Circuit—provides greater certainty for air carriers and effectuates the Montreal Convention's purpose of uniformity.

#### BACKGROUND

On December 26, 2008, Panansam Narayanan boarded a British Airways flight from Los Angeles, California, to Bangalore, India, with an intermediate stop in London, England. Mr. Narayanan, who suffered from terminal lung disease, was assured prior to boarding that should he need it, supplemental oxygen would be provided to him during the flight. During the flight, however, Narayanan was denied access to this oxygen. He received medical treatment in both London and Bangalore, and received further treatment upon his return to the United States in January 2009. Nonetheless, his health deteriorated, and on June 11, 2009, he passed away.

On March 7, 2011, Mr. Narayanan's widow and two adult children filed a claim against British Airways under Article 17(1) of the Montreal Convention, alleging that the airline's denial of supplemental oxygen hastened Mr. Narayanan's death. British Airways moved to dismiss, arguing that the Complaint was time-barred under the two-year limitations period established by Article 35(1) of the Convention. The District Court agreed, dismissing the complaint with prejudice, and the plaintiffs appealed.

#### THE MONTREAL CONVENTION

The Montreal Convention governs "all international carriage of persons . . . performed by aircraft" and provides the exclusive remedy for international passengers seeking damages against an airline. See Article 1(1). Article 17(1) provides that a 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[.]" As used in Article 17(1), an "accident" means a happening that is external to the passenger. *Air France v. Saks*, 470 U.S. 392, 405 (1985).

Article 29 of the Convention set forth limits on such claims, providing that "any action for damages . . . can only be brought subject to the conditions and such limits of liability as are set out in this Convention[.]" Article 35(1) sets forth one such limit, stating that the "right to damages shall be extinguished in an action is not brought within a

## Client Alert

---

period of two years, reckoned from the date of arrival at the destination[.]” Article 35(2) provides that the method for calculating the limitations period set forth in Article 35(1) “shall be determined by the law of the court seized of the case.”

### THE NINTH CIRCUIT'S DECISION

The court performed a straight-forward statute of limitations analysis, ultimately finding that the complaint was time-barred. The court started with the proposition that, because the complaint “arises under the convention,” it was “subject to Article 35(1).” This meant that the plaintiffs’ “right to damages for their wrongful death claim would be extinguished if their action was not brought within a period of two years, reckoned from the date of arrival at the destination.” (Internal citations and quotations omitted.) Because the flight arrived on December 26, 2008, the plaintiffs had until December 26, 2010, to file their claim. But they waited until March 7, 2011 to file, which the court found to be “approximately three months too late.”

Although the court stated that this analysis “seem[ed] straight-forward enough,” it recognized a “factual wrinkle”: that even though the accident giving rise to liability under the Convention occurred on December 26, 2008, Plaintiffs’ wrongful death claim did not exist until six months later when Mr. Narayanan died. Thus, the question became “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.”

After carefully considering the Montreal Convention’s text, drafting history, and relevant case law, the court found the former: Article 35(1)’s limitation applied regardless of when the plaintiffs’ claim actually accrued. With regards to the Convention’s text, the court found that “Article 35(1) leaves no room for flexibility as to the commencement of the limitations period.” Moreover, the court noted that 103 signatory nations agreed to the text and to the Convention’s “cardinal purpose” of “achieving uniformity of rules governing claims arising from international air transportation.” Permitting a workaround for the plaintiffs in this case would thus disrupt a primary initiative of the Convention: certainty for signatory nations.

The court rejected the plaintiffs’ argument that Article 35(2) offered the plaintiffs a state law based alternative to the strictures of Article 35(1). Relying on the Second Circuit’s decision in *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138, 144 (2d Cir. 1998), the court found that Article 35(2) merely “invoke[s] the power of the forum court to determine whether the plaintiff accomplished the filing within the limitation period, a question that may involve. . . the proper party or agent for receipt of process, and the means of service” – in other words, matters bearing on when an action has been “brought.” The court was “not persuaded that Article 35(2) allows for an end-run around Article 35(1).

The entire panel, however, was not convinced. Judge Pregerson filed a dissent, noting his dismay with what he perceived to be an “unfair and unconscionable result.” He urged that the Montreal Convention be “revisited and revised to protect families like the Narayanans.”

\* \* \*

Recognized as being among the top aviation litigation practices in the United States, we have more than three decades of complex aviation case experience. Many of our attorneys have military or civil aviation backgrounds,

## Client Alert

---

and know and understand the technical aspects of aviation litigation. This firsthand experience helps us devise creative and innovative approaches to extraordinarily complex matters, and deliver winning results. For more information regarding our aviation practice, [click here](#).

To read our other aviation-related client alerts, [please click here](#).

### Contact:

**William V. O'Connor, Jr.**

(858) 720-7932

[woconnor@mofo.com](mailto:woconnor@mofo.com)

### About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*