A PRIMER ON REPRESENTING CRUISE SHIPS AND BEACHFRONT HOTELS

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REPRESENTATION OF CRUISE LINES IN PASSENGER AND CREW CLAIMS AND POTENTIAL MARITIME ISSUES/IMPLICATIONS FACING BEACHFRONT HOTELS

PRESENTOR

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AND BEACHFRONT HOTELS

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I. SCOPE OF ARTICLE

This article addresses three distinct areas: (1) passenger claims, (2) crew claims and (3) claims arising at the oceans of beachfront hotels and resorts. The article seeks to provide the reader with a basic understanding of these three areas and the potential areas and pitfalls.

II. PASSENGER CLAIMS

A. Who is a Passenger

A passenger has been defined a one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent. *The Vueltabajo*, 163 F. 594, 596 (S.D. Ala. 1908). The traditional basis for a passenger-carrier relationship has been the existence of a contract of carriage between a fare-paying traveler and a person-transporting shipowner, or their respective agents. Those on board a vessel in a capacity of other than seaman could be passengers, pirates, visitors, invitees, trespassers, licensees or permittees. Each status is distinct.

B. What Law Applies

Generally, when an injury occurs on navigable waters, federal general maritime law governs the substantive legal issues in the case. *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355, 1358 (11th Cir.1990). Federal maritime law exclusively sets substantive liability standards, superseding state substantive liability standards. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959). However, state law may be used to supplement the federal general maritime law as long as it does not alter or overrule maritime law. *Pope & Talbot Inc. v. Hawn*, 336 U.S. 406 (1953).

C. Standard of Care Owed to Passengers

It is well established under the federal general maritime law that that a carrier by sea is not liable to passengers as an insurer, but only for its negligence. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984). The benchmark against which a shipowner's behavior must be measured is ordinary reasonable care under the circumstances, a standard that requires as a prerequisite to imposing liability that the carrier have actual or constructive notice of the risk-creating condition. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). It is not sufficient for liability purposes that the defective or risk creating condition exists on the vessel. A passenger must prove the ship owner had notice of the defective condition that caused the passenger's injury. *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355, 1358 (11th Cir.1990).

Moreover, a ship owner must give notice of dangers to the passenger that are not apparent and obvious. *Luby v. Carnival Cruises, Inc.*, 633 F. Supp. 40 (S.D. Fla.1986). Maritime law recognizes that a shipowner has no duty to warn of an open and obvious condition. *Gemp v. United States*, 684 F.2d 404 (6th Cir. 1982).

Similarly, a ship owner's has a duty to warn passengers only of "dangers known to the carrier in places where the passenger is invited to, or may reasonably be expected to visit." *Carlisle v. Ulysses Line Ltd, SA.,* 475 So. 2d 248, 251 (Fla. 3d DCA 1985).

D. Comparative Negligence

Comparative negligence principles are applicable to admiralty actions. *See United States v. Reliable Transfer Co.,* 421 U.S. 397, 411 (1975). Under comparative negligence principles, a passenger's own negligence proportionally reduces the damages recoverable by him, if any.

E. Time for Filing Suit

There is a uniform three year statute of limitations in suits "for recovery of damages for personal injury or death, or both, arising out of a maritime tort." *See* 46 U.S.C. § 30106.

However, Congress specifically authorized cruise lines to shorten the limitations periods for providing notice of suits and for filing suits by inserting a reasonable limitation period into their passage contracts. Pursuant to 46 U.S.C. § 30508, the owner, manager, or agent of a vessel transferring passengers between ports in the United States, or between a port in the United States and a port in a foreign country, must allow a claimant at least one year from the date of injury to file a civil action for personal injury or death. As such, courts have held that a sea carrier may contractually limit the time period in which passengers can file suit for injury, provided that the time period is at least one year and the carrier provided the passenger with reasonably adequate notice that the limit existed and formed part of the passenger contract. *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1566 (11th Cir. 1990). Courts have repeatedly found that failure to file suit within a one year time for suit limitation in the passenger ticket contract warrants dismissal of the action.

Whether the notice to passengers was reasonably adequate is a question of law. *See id.* Under "reasonable communicativeness test" for contractual terms of a common carrier's passenger ticket, courts first focuses on the physical characteristics of the ticket and assesses features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question; courts then evaluate the circumstances surrounding the passenger's purchase and subsequent retention of the ticket, including the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket. *See Oltman v. Holland America Line, Inc.*, 538 F.3d 1271, 1276 (9th Cir. 2008).

F. Forum Selection Clauses

A common carrier's passenger ticket and its terms are considered a maritime contract to be analyzed under the federal general maritime law. *The Moses Taylor*, 71 U.S. 411, 427 (1886). In admiralty cases, federal law governs the enforceability of forum selection clauses contained in passenger cruise contracts. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991). The

United States Supreme Court has held that forum selection clauses in admiralty cases are presumptively valid and enforceable and should be given controlling weight in all but the most exceptional cases. *Id.* A party contesting enforcement of a forum selection clause bears the heavy burden of demonstrating why enforcement would be unreasonable. *Shute* directs that forum selection clauses be scrutinized under a fundamental fairness standard. *Id*. at 595. This fundamental fairness standard requires that the provision at issue be "reasonably communicated" to the passenger.

G. Exculpatory Clauses

Federal maritime statute 46 U.S.C. § 30509 bars vessel owners from attempting to limit their negligence liability in connection with transportation of passengers. The statute, however, allows the vessel owner in its contracts of carriage, to relieve its liability for emotional distress, mental suffering, or psychological injury as long as it was not intentionally inflicted, the result of actual physical injury to the claimant, or the result of the claimant having been in actual risk of physical injury caused by negligence or fault of the person released. However, section 30509 does not apply to wholly foreign voyages.

Ship owners can include disclaimers of liability within their passenger ticket contracts providing that they cannot be held liable for harm caused by the negligence of providers of shore excursion services. Many courts have found such liability waivers enforceable. Generally, enforceable disclaimers communicative that the shore excursions are run by independent contractors. The disclaimers are found to support the lack of any agreement or warranty on the part of the ship owner to guarantee the safety of the passenger while on the shore excursions.

H. Passenger Assaults

The standard which governs a ship owner's liability to its passenger for crew member assaults is strict liability. *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 913 (11th Cir. 2004). The ship owner owes a non-delegable duty to protect their passengers from crew member assaults and thereby safely transport their passengers. *Id.* The reasonable care standard does not apply to a crew member's assault on a passenger. *Id.* Ship owners have a non-delegable duty to protect and safely transport passengers during the voyage, and thus are liable if a crew member assaults a passenger during the voyage. *Id*.

I. Liability for Shipboard Physicians

Failure to provide adequate medical care cannot constitute negligence on a ship owner's part because the shipowner has no legal duty under the majority rule among federal courts to provide a passenger with medical services. *See Walsh v. NCL (Bahamas) Ltd.*, 466 F. Supp. 2d 1271 (S.D. Fla. 2006). Similarly, cruise lines have no duty to promulgate policies and procedures dictating the operations of the treatment of passengers as medical patients. *Hajtman v. NCL (Bahamas) Ltd.*, 526 F. Supp. 2d 1324 (S.D. Fla. 2007).

Doctors carried onboard a ship are there as a convenience to passengers. It is well settled that a cruise ship operator cannot be held vicariously liable for the negligence of its ship's

medical staff in the care and treatment of passengers. *See Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988). More than 100 years of admiralty precedent precludes passengers from pursuing this cause of action. Even if a passenger could establish negligence on the part of the physician, that negligence could not be imputed to the shipowner. The courts reason that in the case of a ship's doctor, the carrier or ship owner lack both (1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients and (2) the power, even if it had the knowledge, to intrude into the physician-patient relationship. *Id.* at 1371.

However, when a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the carrier has a duty to employ a doctor who is competent and duly qualified, and is responsible for its own negligence if the carrier breaches that duty. *Id.* at 1369.

J. Personal Injury Damages

Injured passengers are generally entitled to damages for past and future lost wages, past and future medical expenses, past and future pain and suffering, disability, disfigurement, and loss of enjoyment of life. Maritime law permits damages for emotional injuries but the passenger must have been in the zone of danger to potentially recover if the passenger has not suffered a physical impact. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 554 – 56 (1994). Loss of consortium and society are not recoverable under the general maritime law. *Doyle v. Graske*, 579 F.3d 898, 906 (8th Cir. 2009).

Furthermore, the court's decision in *In re Amtrack "Sunset Limited" Train Crash in Bayou Canot,* 121 F.3d 1421 (11th Cir.1997) unquestionably prevented passengers from asserting a claim for punitive damages. Recently, the United States Supreme Court decided *Atlantic Southern Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009), and noted that punitive damages have historically been available under general maritime law and suggested that punitive damages are available in general maritime claims unless Congress has expressed otherwise. Accordingly, the area of punitive damage recovery in passenger claims is unsettled.

K. Wrongful Death

In 1920, Congress enacted the Death on the High Seas Act ("DOHSA"), providing the exclusive damages remedy "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state." The present day statute states:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C. § 30302. DOHSA applies whenever the initial wrongful act or neglect is alleged to have occurred on the high seas beyond 3 nautical miles from a U.S. shore, even where the eventual death occurs ashore and not aboard a vessel. *See Howard v. Crystal Cruises*, 41 F.3d 527 (9th Cir. 1994). Within the three nautical miles, state wrongful death statutes and the federal general maritime law apply. *See Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (1996). When DOHSA applies it provides the exclusive remedy and neither state wrongful death statutes nor the general maritime law may supplement DOHSA remedies. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

Section 30303 of the Death on the High Seas Act authorizes recovery for pecuniary damages only. Pecuniary losses may include, if proved and reasonably certain, loss of support, loss of the services of the deceased, loss of inheritance, and recovery of funeral expenses. 46 U.S.C. § 30303. The statute does not, however, permit for recovery of the non-pecuniary losses of survivors, such as "love and affection" or "pain and suffering." Moreover, DOHSA pecuniary losses may not be supplemented by remedies under the general maritime law. *Ford v. Wooten*, 681 F.2d 712, 714 (11th Cir. 1982).

III. CREW CLAIMS

A. The Jones Act

In 1920, Congress created a right for seamen to sue their employers for negligence as a part of legislation commonly referred to as the Jones Act. In part, the relevant section provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in cases of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States confirming or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be in the court of the district in which his principal office is located.

See 46 U.S.C. § 30104. This statutory scheme creates the right of an injured seaman employed aboard a vessel in navigation (or his personal representative, in the case of death) to sue the employer under the legal theory of negligence for compensatory damages, where such injury (or death) occurs in the scope of the seaman's employment and arises from the negligence of the employer, its officers, agents, or employees, including fellow crew members. The Jones Act claim may be brought against the employer in state or federal court within three years from the moment the cause of action accrues. The Jones Act grants seamen the right to trial by jury.

1. Who is a Seaman

The essential requirements for seaman status are twofold. First, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. The Jones Act's protections, like the other admiralty protections for seamen, only extend to those maritime employees who do the ship's work. But this threshold requirement is very broad: All who work at sea in the service of a ship are eligible for seaman status.

Second, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

The Fifth Circuit utilizes as a rule of thumb that if a worker spends less than about 30 percent of his time in the service of a vessel in navigation, he should not qualify as a seaman under the Jones Act. This figure serves as no more than a guideline and departure from it may be justified by a court in appropriate cases. The inquiry into seaman status is fact specific and depends on the nature of the vessel and the employee's precise relation to it.

The Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not.

2. Standard of Care Under the Jones Act

The standard of care in a Jones Act action requires the shipowner/employer to provide the seamen with a reasonably safe place to work. This duty, however, is not absolute; it is a duty to take reasonable care under the circumstances. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Chapter 4-22 (3rd ed. 2001); *see also Gautreaux v. Scurlock Marine, Inc*., 107 F.3d 331, 339 (5th Cir. 1997) (en banc). Equally, a seaman is required to exercise ordinary prudence for his own safety. *Gautreaux*, 107 F.3d at 339.

In order to recover on a Jones Act cause of action, a plaintiff has the burden of proving the defendant was negligent and that this negligence contributed to plaintiff's injury. *Traupman v. American Dredging Co.*, 470 F.2d 736, 737 (2d Cir. 1972). The mere fact an accident occurs aboard a ship does not, standing alone, give rise to a Jones Act claim. It is an indispensable element of recovery under the Jones Act that the employer be at "fault." *See Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). To be negligent, the employer must have had knowledge of the problem that created the dangerous situation. *See Perry v. Morgan Guaranty Trust Company of New York*, 528 F.2d 1378, 1380 (5th Cir. 1976); *Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318, 1320 (2d Cir. 1973). The basis of liability under the Jones Act remains grounded in negligence and not merely on "the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

The standard for causation in Jones Act claims is very low, and requires only that the negligence be a cause, however slight, of the injury. *Rogers v. Missouri Pacific Railway Co.,* 352 U.S. 500, 506 (1957).

Furthermore, the Primary Duty Rule can also serve as an absolute bar to a seaman's Jones Act claim (and Unseaworthiness claim). The Primary Duty Rule states that "a seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment." *Bernard v. Maersk Lines, Ltd.,* 22 F.3d 903, 905 (9th Cir.1994). Under this rule, a seaman cannot recover for his injuries when he breaches a duty which the injured person has consciously assumed as a term of his employment.

The seaman's comparative negligence can serve to reduce any damage award.

3. Damages Recoverable

In Jones Act personal injury cases, courts have awarded seaman compensatory damages for past and future medical care, lost earnings, physical and mental pain and suffering, and other expenses reasonably incurred by reason of the injury sustained, loss of earning capacity, disability, and loss of capacity to enjoy life.

B. Unseaworthiness

1. Background

The warranty of seaworthiness is separate and distinct from other statutory and common law maritime remedies. It should not be confused with the duty owed by Jones Act employers to exercise reasonable care to furnish a reasonably safe place to work. *Usner v Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). A claim for unseaworthiness arises out of general maritime law and the recoverable damages is similar to that under the Jones Act.

2. Scope of the Unseaworthiness Cause of Action

The warranty of seaworthiness is owed to all Jones Act seaman. The warranty is also extended to workers who are not true Jones Act seamen but who nonetheless perform traditional seamen's duties (i.e. longshoremen, harbor workers, a cargo tank cleaner injured on the high seas). However, the warranty of unseaworthiness does not extend to passengers, invitees, or guest who are aboard a vessel for purposes unrelated to work *Kermarec v. Companie Generale Transatlantique,* 358 U.S. 625 (1959).

In order to state a cause of action for unseaworthiness, a seaman must allege that his injury was caused by a defective condition of the ship, its equipment, appurtenances or the ship's unfit crew. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). The test for an unseaworthy condition is whether the vessel, equipment, or *appurtenances* were reasonably fit for their intended use. *See Jordan v. United States Lines, Inc.*, 738 F.2d 48, 49 (1st Cir. 1984). "Reasonable fitness" is determined according to the reasonable man standard and not the stricter Jones Act standard. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374-377 (5th Cir. 1969). While

the warranty of seaworthiness creates an absolute non-delegable duty to provide a seaworthy vessel, it does not obligate the owners to furnish an accident free ship.

3. Conditions Giving Rise to Unseaworthiness

The conditions and circumstances constituting breaches of the warranty of seaworthiness are far too numerous to list in their entirety. The following, however, provide some basic illustrations: improper methods of operation, failure of equipment under regular use, improper manning, crew assaults, slippery and obstructed decks, insufficient supplies and equipment, improper cargo storage, and safety equipment and training.

Over the years the concept of unseaworthiness has been interpreted to include an increasingly broad range of conditions. The duty now seems limited only by the creativity of those seeking damages under its broad coverage. As an example, it has been held a loose plastic sleeve on a carton of soft drinks in a ship's stores could render the vessel unseaworthy. *Martinez v. Sealand Services, Inc*. 763 F.2d 26 (1st Cir. 1985).

4. Damages Recoverable

The damages recoverable to a seaman for personal injuries for an Unseaworthiness claim include: past and future loss of earning capacity, pain and suffering, mental anguish, discomfort and inconvenience and loss of capacity for the enjoyment of life.

C. Maintenance and Cure

An injured seaman may also have a claim for maintenance and cure against his employer. This claim is completely separate from both the Jones Act and Unseaworthiness claims. Generally, a seaman's employer has a duty to pay maintenance, cure and unearned wages when a seaman falls ill while in the ship's service. *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943) and *Calmar S.S. Corp v. Taylor*, 303 U.S. 525 (1938). If the seaman is in ship's service, the duty may arise even when the injury or illness occurs while the seaman is on shore leave. *Warren v. United States*, 340 U.S. 523 (1951).

1. Maintenance and Cure Defined

Under traditional maritime jurisprudence, "maintenance" is defined as the living allowance that must be provided to a seaman while he or she is ashore recovering from an injury or illness, *see, e.g., Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962), while "cure" is defined as the employer's obligation to pay the medical expenses incurred in treating the seaman for such an injury or illness. *See, e.g., Clamar S.S. Corp.*, 303 U.S. 525. The duty of the employer is to provide "cure," which by definition cannot include "non-curative" treatment.

The seaman's employer's duty to provide maintenance and cure continues until the seaman has reached maximum medical improvement, sometimes referred as maximum medical cure, or MMI. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975). Maximum cure is reached when the seaman's condition will not further improve with additional medical treatment. *Id.* at 6.

Furthermore, where "future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved." *Id.* A seaman who has reached MMI but nevertheless continues to receive palliative treatment is not entitled to maintenance and cure benefits. *See Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979).

A seaman may release his employer from liability from past and future maintenance and cure. However, like all releases executed by seaman, these releases are zealously scrutinized for over-reaching, deception or coercion until it is clear the seaman executed the release with a full understanding of his rights. *Simpson v. Lykes Bros., Inc*., 22 F.3d 601 (5th Cir. 1994). The shipowner bears the burden of proof to establish the validity of a seaman's release. *Id.*

2. Maintenance and Cure Defenses

There are few defenses to maintenance and cure claims. Contributory negligence of the seaman will not serve to reduce his entitlement to maintenance and cure from his employer. All a seaman needs to do, is again, to prove that his injury or illness occurred during his employment.

The seaman's willful misconduct can serve as a defense and the burden rest with the employer to prove this defense. Examples of "traditional" willful misconduct on the seaman's part include fighting, intoxication, and venereal diseases. Also, a seaman's willful concealment from his employer of his pre-existing medical condition may serve as a bar to maintenance and cure claim.

Moreover, the seaman's employer is entitled to indemnification from an independent tortfeasor whose fault was the cause of the seaman's injury giving rise to the maintenance and cure payments.

The failure to provide maintenance and cure benefits may result in an award consisting of compensatory damages, attorneys' fees, and punitive damages. Recently, the Supreme Court in *Atlantic Southern Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009) held that seaman are entitled to an award of punitive damages for his employer's willful and wanton disregard of its maintenance and cure obligation.

D. Maritime Arbitration.

1. Generally

Prior to 1925, federal courts would not enforce arbitration clauses on the grounds that the common law did not recognize a right of arbitration and that public policy against limiting access to the courts forbade specific performance of arbitration clauses.

Congress responded with The Maritime Arbitration Act, 9 U.S.C. §§ 1 – 14, which requires liberal construction of arbitration provisions in maritime contracts in favor of enforcing arbitration. *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962). Though normally an arbitration

agreement must be in writing to be enforceable, 9 U.S.C. § 1 provides that an agreement to arbitrate may be implied from the conduct of the parties: a party who voluntarily participated in an arbitration agreement waives its right to contest the arbitrator's jurisdiction and is bound by the award. *International Longshoremen's Ass'm v. Hanjin Container Lines, Ltd.,* 727 F. Supp. 818 (S.D.N.Y. 1989).

Title 9 U.S.C. § 3 requires that a federal court, on application of one of the parties, stay the trial of any issue referable to arbitration under an agreement in writing for such arbitration, until the arbitration has been completed in accordance with the terms of the agreement.

The provisions of 9 U.S.C. §3 for a stay of judicial proceedings pending conclusion of arbitration and an agreement to arbitrate do not oust a court of jurisdiction of the action, and a plaintiff may commence an action in admiralty including *in rem* and quasi *in rem* actions by arrest or attachment, subject to stay pending arbitration. *The Anaconda v. American Sugar Refining Co.,* 322 U.S. 42 (1944); *Sumikin Transport Service Co. Ltd. V. Rose Knot*, 1988 A.M.C. 1588 (W.D. Wa. 1988). Courts also have authority to compel arbitration**.** 9 U.S.C. § 4 provides authority to federal courts to compel arbitration in the manner provided for in a written arbitration agreement. The court has authority to conduct a summary trial to determine the enforceability of the arbitration agreement.

Some recent case law decisions regarding arbitration of crew member claims have held certain arbitration clauses unenforceable as contrary to public policy. In *Thomas v Carnival Corporation* 573 F.3d 1113 (11th Cir. 2009) a seaman sued for negligence under the Jones Act, Unseaworthiness, Failure to Provide Prompt and Adequate Cure and Failure to Pay Wages under the Penalty Wage Act. The seaman argued it was against public policy to arbitrate in a forum that would apply non-U.S. law because it was a prospective waiver of his U.S. statutory rights. The agreement that governed stated "all disputes arising under or in connection with this Agreement….shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to the principals of conflicts of laws there under." The court held the provision of the seaman's employment contract requiring arbitration of all claims in the Philippines under Panamanian law constituted a waiver of a seaman's rights and thus was not enforceable as it was contrary to public policy.

Challenges to the existence of a contract containing an arbitration agreement are to be determined by a court, not the arbitrators. The Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), held that fraud in the inducement of the making of a contract is a question for the arbitrators, not for the court, unless the fraud was concerned with the arbitration agreement itself. *Three Valleys Mun. Water Dist, v. E.F. Hutton & Co.,* 925 F.2d 1136 (9th Cir. 1991), found that a court, not the arbitrators, must interpret the contract to determine whether the parties are bound by an arbitration agreement.

In absence of agreement or statute, parties are jointly and severally liable for payment of arbitrators' fees. *Theofano Maritime Co. Ltd. v. 9,551.19 Long Tons of Chrome Ore,* 122 F. Supp. 853 (D. Md. 1954). Arbitrators generally have no obligation to give their reasons for award. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962).

IV. MARITIME ISSUES/IMPLICATIONS OF BEACHFRONT HOTELS

A. Generally

Lodging establishments often provide amenities and services that go beyond renting hotel rooms. These services include, jet ski and boat rentals and tours. The hotels may own and operate these services, or they may enter into a contractual relationship with an independent company. Certainly lodging establishments face exposure to liability if they directly own and/or operate the additional service.

If the service is provided by an independent company/contractor, however, the lodging establishment's liability exposure may be eliminated or reduced. First, it is extremely important that the establishment provide written notice to its guests that these amenities are being provided by third parties and not by the establishment. This fact should also be incorporated into the independent contractor's agreements with the guest.

There should also be a contractual relationship established in writing between these independent companies and the lodging establishment. If there is such a contract, it is important to determine if there are additional insured, indemnification and/or contribution clauses within it. The language of that contract will control the direction of indemnity and exactly what is covered – it must be precise to provide the broadest protection.

The contract may also serve as a basis for "additional insured" status to be claimed by the lodging establishment if such a liability insurance provision is contained in the written agreement. Whether the lodging establishment is alleged to have itself been negligent in causing the injury, as opposed to simply being vicariously liable for the actual tortfeasor's actions, will play a part in determining whether the lodging establishment can reduce its exposure through actions for contribution, indemnity or equitable subrogation.

B. Liability Arising From Adjacent Beach

Courts have ruled that property owners such as hotels and resorts have no duty to protect guests from naturally occurring swimming hazards associated with nearby pubic beaches. *See Poleyeff v. Seville Beach Hotel Corp.*, 782 So. 2d 422 (Fla. 3d DCA 2001); *Sperka v. Little Sabine Bay, Inc.*, 642 So. 2d 654 (Fla. 1st DCA 1994); *Adika v. Beekman Towers, Inc.*, 633 So. 2d 1170 (Fla. 3d DCA 1994).

The courts have however noted that if the innkeeper or concessionaire it hired was selling equipment for use in boating or swimming or otherwise exercising a degree of supervision or control over the beach area, then a potential duty of care to guests might arise. For example, in *Lienhart v. Caribbean Hospitality Serv., Inc.*, 426 F. 3d 1337 (11th Cir. 2005), guest was sunbathing in a guest chair on the beach next to his hotel, when he was hit by a vehicle driven by a scuba company, which was a tenant of the hotel. The court concluded that the hotel placed the guest chairs close to the area where these vehicles were routinely driven, and therefore, created a foreseeable zone of risk.

A case in point for potential liability arising from personal injuries sustained while swimming in the ocean in front of a resort is *Campbell v. Starwood Hotels and Resorts Worldwide, Inc.*, No. No. 07-61744, 2008 WL 4609986 (S.D. Fla. Oct. 14, 2008). The case arose out of personal injuries plaintiff, Colin Campbell, sustained on May 11, 2007, while swimming in the ocean in front of the Westin Grand Bahama resort ("Grand Bahama"). Plaintiff was struck by a motorboat operated by Ocean Motion, Ltd. Ocean Motion provides water sports and beachfront activities to the guests of the Grand Bahama and guests may reserve "all-inclusive" packages that include Ocean Motion services and amenities. Ocean Motion services were not restricted to guests of the Grand Bahama and were also offered to the general public.

Plaintiff was not a registered guest of the Grand Bahama and did not purchase any goods or services from the Grand Bahama or Ocean Motion. Rather plaintiff was a passenger on a Discovery Cruise Line ship. Discovery Cruise Line passengers arrive at the port directly across from the Grand Bahama and are routinely transported to the Resort, which offers amenities including beach and water sports activities to guests and visitors.

The court found that under these circumstances, plaintiff was a licensee (a person that enters the occupier's land with merely the occupier's permission) because at the time he was injured, he was not engaging in an activity in which defendants had a material interest (swimming in front of the resort). As such, the duty owed to a licensee is to warn him of any concealed danger or trap of which the occupier actually knew.

The court applied the "sphere of control" test. Under the "sphere of control" test, an innkeeper must take protective measures to reduce the risk of injury on property adjacent to his premises where the innkeeper possesses or exercises sufficient control over such property. In order to determine whether sufficient control exists, courts generally examine who is responsible for the safety of guests, who has the authority to dictate who may use the property, and whether the guests were invited by the property owners to use the adjacent land. *Id.* Significantly, a beach may be under a hotel's "sphere of control" if the hotel had the legal right to control the conditions and use of the area, or possessed the area and evidenced an intent to control it even absent clear legal authority. In this case, the court held that the Grand Bahama expressed an intent to control the swimming area by promulgating regulations concerning the area, installing buoys to mark the area, employing lifeguards, and installing warning signs before and after the incident.

C. Limitation of Liability and Shore Based Releases of Liability

The Limitation of Liability Act, 46 U.S.C. § 30503, ("Limitation Act") provides in relevant part that: "[t]he liability of the owner of any vessel ... for any ... loss ... incurred, without the privity or knowledge of such owner ... shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." In an exoneration proceeding the court must conduct a two-step analysis. First, the court must ascertain what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the vessel owner had knowledge or privity of those acts of negligence or conditions of unseaworthiness.

For example, in *In re Complaint of Royal Caribbean Cruises Ltd.*, 459 F. Supp. 2d 1284 (S.D. Fla. 2006), RCL brought an action seeking exoneration from, or limitation of, liability, under the Limitation Act, as to a passenger who suffered injuries while aboard an RCL Wave Runner while participating in an RCL sponsored island tour as part of a day trip. The court found that the passengers were unable to show that RCL failed to (1) exercise reasonable care under the circumstances, as would shift burden to cruise line operator to prove lack of knowledge or privity, and (2) show that the Wave Runner was defective and thus unseaworthy. The court adjudged that RCL's liability was limited to the amount or value of its interest in the wave runner.

While 46 U.S.C. § 30509 bars vessel owners from attempting to limit their negligence in connection with transportation of passengers, there are instances where a ship owner (and non-ship owner alike) may use a release of liability to bar potential claims. For example, courts have enforced releases in the scuba diving context and held that they completely barred lawsuits grounded on the dive company's negligence.

While exculpatory clauses are not looked upon with favor, they are valid and enforceable when clear and unequivocal. *See Thesis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. 2d DCA 1990).

In a diving case, a pre-accident waiver or release will absolve a defendant from liability if he can show the following three factors: 1) the clause was knowingly agreed to and explained the dangers of diving (i.e., there was informed consent); 2) the clause was not inconsistent with public policy; and 3) the clause does not constitute an invalid adhesion contract. *Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc.*, No. 98-1679, 1999 WL 33232277, *3 (S.D. Fla. Feb. 8, 1999).

Also, a pre-injury release executed by a minor or a parent on behalf of a minor child is unenforceable against the minor or the minor's estate in a tort action arising from injuries resulting from participation in a commercial activity. *See Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

A PRIMER ON REPRESENTING AIRLINES

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LAWRENCE MENTZ

Larry Mentz is a member in the New York office. Mr. Mentz has a significant depth of experience in the aviation and related travel and tourism industries. He has represented international airlines and their insurers in state and federal trial and appellate courts, as well as in arbitrations, throughout the United States. Mr. Mentz has also represented major airlines before the Judicial Panel on Multidistrict Litigation to seek the transfer of numerous cases arising from major air crash disasters to a single forum where wrongful death, personal injury, and cargo claims can be litigated in a uniform manner.

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I. INTRODUCTION

To state the obvious, the airline industry is an integral part of the hospitality industry. In the vast majority of situations, airlines get your customers to your property ready to sleep, to enjoy themselves or to conduct their business. When your customer's travel does not go smoothly, however, the result in today's world is often a claim to compensate for the aggravation experienced or for the lost, delayed or damaged bag. Rarely, fortunately, the traveler may be seriously injured and litigation almost invariably follows.

Representing an airline involves representing a large corporation certainly operating in a multitude of states and often in many countries. Airlines conducting domestic operation in the U.S. must be incorporated in the U.S. International airlines operating into the U.S. must be incorporated outside the U.S. and, for a variety of reasons, they do not form separate U.S. subsidiaries. They all have the same needs for legal services as any other corporation operating here.

The legal framework that applies to claims made in the airline industry is not based upon the familiar common law heritage of innkeeper's liability many of us learned about in law school. Because of the fact that an airline's service spans great swaths of ground, flies over lakes, rivers and oceans, and would arguably be subject to the perhaps confusing and inconsistent legal standards of a number of jurisdictions, many of the day-to-day claims against airlines are governed by federal law and regulations when domestic travel is involved,[1] and by international treaties when international travel is involved.[2]

Differences in the legal framework applicable to airlines and the legal framework applicable to ground-based components of the hospitality industry extend beyond the area of claims. For example, the National Labor Relations Act[3] does not apply to airline employer-employee relationships and the National Labor Relations Board[4] has no jurisdiction over such relationships. Because of an historical anomaly, the Railway Labor Act[5] and the

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[1] See, e.g., Section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b) (preempts state law and regulations "related to a price, route or service of an air carrier"); 14 C.F.R. Part 250 (Oversales) (governs liability and compensation for bumping); 14 C.F.R. Part 253 (Notice of Terms of Contract of Carriage) (preempts state law on incorporation by reference); Air Carrier Access Act, 49 U.S.C. § 41705 (applies in lieu of the Americans with Disabilities Act); 14 C.F.R. Part 382 (Nondiscrimination on the Basis of Disability in Air Travel).

[2] Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal, May 28, 1999, S. TREATY DOC. NO. 106-45, 1999 WL 33292734 (hereinafter "1999 Montreal Convention" or the "Convention").

[3] 29 U.S.C. §§ 151-69.

[4] 29 U.S.C. § 153.

National Mediation Board[6] have jurisdiction over those relationships.

Another significant difference flowing from the respective legal frameworks is related to the factors influencing investment decisions and to how operations are conducted. Theoretically, a company investing in hotel properties can choose to invest in a property anywhere in this country, or in the world for that matter. Not so an airline. Where it can operate is limited to locations that have, or are near, an airport and the type of operations that can be economically conducted are influenced, if not mandated, by the size and capacity of that airport. With that limiting factor in mind, as a result of deregulation in the United States an airline can commence commercial operations whenever and wherever it wants and fly whatever routes it wants within the U.S. If an airline wants to operate internationally, however, the right to operate commercially is subject to the approval of the Department of Transportation[7] and to bilateral international agreements between the United States and the destination country.[8] Although an investor building a new property has to comply with local building codes when constructing a property, the hotel is designed and essentially can be operated however the asset manager chooses. Not only does an airline have to purchase an aircraft certified as airworthy by the Federal Aviation Administration ("FAA"),[9] the airline has to hire pilots and mechanics with licenses issued by the FAA[10] and meet management qualification and experience requirements specified by the FAA.[11] The airline must also operate its aircraft as required by the FAA for domestic flights[12] and, for international flights, as required by the International Civil Aviation Organization ("ICAO")[13] and the aeronautical authorities of the other countries to which it operates.[14]

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[5] 45 U.S.C. §§ 151-88.

[6] 45 U.S.C. § 154.

[7] 49 U.S.C. §§ 41101, 41301.

[8] E.g., Aviation Transport Services Agreement, Feb. 25, 1994, U.S.-Brazil, T.I.A.S. 12175, 1994 WL 907591.

[9] 14 C.F.R. Part 25.

[10] 14 C.F.R. Part 61 (pilots); 14 C.F.R. Part 65 (mechanics, dispatchers).

[11] 14 C.F.R. Part 121.

[12] 14 C.F.R. Part 91.

[13] Convention on International Civil Aviation, done at Chicago, December 7, 1944, art. 37, http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf.

[14] E.g., U.K. Civil Aviation Authority, AIR NAVIGATION: THE ORDER AND THE REGULATIONS, http://www.caa.co.uk/docs/33/CAP393.pdf.

Additionally, the safety of a hotel's operations are governed by local law and regulations promulgated by the Occupational Safety and Health Administration ("OSHA").[15] Although most of an airline's ground-based operations will also be governed by the same laws, the safety and maintenance of aircraft are highly regulated by the FAA[16] and airlines are subject to investigation by the FAA and/or the National Transportation Safety Board ("NTSB")[17] in the event of an accident or incident. If an accident involving serious injury of a domestic airline occurs outside the United States, or of a foreign airline occurs in the United States, an international treaty is also implicated and applies to the conduct of the investigation.[18]

II. SCOPE OF ARTICLE

This article will not cover the (i) airline employer-employee relationship, (ii) FAA requirements for airline operations or related to safety or (iii) DOT and international requirements for conducting domestic or international commercial operations. Airline distribution and marketing[19] is similarly beyond the scope of this article as are airline - airport relationships. Catastrophic losses as a result of an aircraft accident can involve complex issues of, to name a few, government liability for air traffic control services, airport liability, product liability, choice-of-law and, not infrequently, maritime and international law. Any one of those topics would merit its own presentation and will be left for another time and place. Finally, this article will not cover the extremely detailed regulations applicable to airlines for handling passengers with disabilities. Those regulations deal with the entire interaction between the passenger and airline, ranging from the initial telephone call or reservation made on the Internet, to the supply of medical oxygen on board the aircraft, and to disembarking from the aircraft in a foreign country when a wheelchair is required by the passenger.[20]

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[15] 29 U.S.C. § 651

[16] 14 C.F.R. Part 43.

[17] 49 U.S.C. § 1101 *et seq.*

[18] Convention on International Civil Aviation, done at Chicago, December 7, 1944, art. 26, http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf.

[19] Agreements between airlines and Internet distributors are very similar to agreements between hotels and Internet distributors. Consequently, the information provided at this Conference by Stephen Barth in his presentation, "Negotiating Online Travel Agreements: Where Are We in Light of Choice-Expedia" is very useful for dealing with airline Internet distribution agreements. Airline marketing practices are not subject to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. Instead, airline advertising practices are subject to the requirements of 49 U.S.C. § 41712, which prohibits unfair and deceptive practices, and 14 C.F.R. Part 399, subpart G, which provides specific guidelines as to what practices are considered unfair or deceptive with respect to particular advertising scenarios common to participants in the aviation industry.

[20] *See* 14 C.F.R. Part 382 - Nondiscrimination on the Basis of Disability in Air Travel; DOT

This article will focus on the types of issues and claims that people are more likely to face in their own encounters with airlines: delay of flights, "bumping", damage to, delay and loss of baggage, and personal injury. In doing so, the article will touch upon the differences in dealing with claims between domestic and international air transportation.

III. LEGAL FRAMEWORK FOR CONSIDERING AIRLINE CLAIMS

The successor to the Federal Aviation Act of 1958[21] essentially defined two major categories of airlines: the "air carrier" and the "foreign air carrier." An air carrier is a citizen of the United States, i.e., an individual, corporation or other entity, engaging in interstate or foreign air transportation, which is transportation between the U.S. and a foreign country.[22] A foreign air carrier is a non-citizen of the United States engaging in foreign air transportation.[23] Foreign air carriers are not permitted to provide domestic air transportation within the U.S.[24]

Regardless of whether you are representing an air carrier or a foreign air carrier, the primary legal relationship between the passenger and the airline is one of contract. When you purchase a ticket you enter into a contract with the airline or airlines providing the transportation.[25] And the airline ticket, with its accompanying notices, incorporate by reference the terms of the airline's conditions of contract. Depending upon whether the ticket involves domestic or international transportation, however, different legal regimes apply to the airline-passenger contract, what terms are or may be incorporated into it, and their interpretation.

Technical Assistance Manual, 70 Fed. Reg. 41482 (Jul. 19, 2005).

[21] 49 U.S.C.A. § 40101 *et seq.*

[22] 49 U.S.C.A. § 40102(a)(2).

[23] 49 U.S.C.A. § 40102(a)(21).

[24] This rule is nearly universal. Except within the European Union, generally airlines incorporated in one country are not permitted to provide domestic air transportation within another country.

[25] See, e.g., American Airlines Conditions of Carriage, http://www.aa.com/i18n/customerService/customerCommitment/conditionsOfCarriage.jsp; British Airways General Conditions of Carriage, http://www.britishairways.com/travel/genconcarr1/public/en_us; Continental Airlines Contract of Carriage, http://www.continental.com/web/en-US/content/contract.aspx. Throughout this paper the contracts of carriage of American Airlines, Continental Airlines and British Airways are used as generally representative examples of the airline-passenger contract. No representation is made, however, that every airline has equivalent provisions in its contract of carriage. A carrier's own contract of carriage must be consulted when dealing with a claim involving that carrier.

A. Domestic

When the airline ticket only involves interstate air transportation,[26] the legal rules governing application and interpretation of the contract of carriage are provided by federal law and regulation and by state law. DOT regulations preempt state law disclosure requirements for incorporation by reference.[27] And the DOT regulations permit the incorporated terms to contain: (i) limits on the airline's liability for personal injury or death; (ii) limits for loss, damage or delay of baggage; (iii) claim restrictions on the time periods for filing a claim or bringing an action; (iv) rules about reconfirmation of reservations, check-in times and refusal to carry; and, (v) rights of the carrier and limitations concerning delay or failure to perform service.[28] Provided the DOT notice requirements are met, the passenger is bound by the incorporated terms.[29]

Where the airline's conditions of contract do not cover a specific situation, state law may be applicable.[30] The extent to which a particular aspect of state law may be applicable to a claim, for example a state's negligence or consumer law, is often the subject of great dispute. The Airline Deregulation Act preempts any state law or regulation "related to a price, route or service of an air carrier."[31] What is a "service" and, therefore, preempted is dependent on the particular facts forming the basis of the claim, some examples of which are discussed later in this paper.

From a hierarchical standpoint and generally speaking, an airline's conditions of carriage apply to the airline-passenger relationship to the extent not inconsistent with specific federal law and regulations.

B. International

1. The 1999 Montreal Convention

The United States is party to a number of multilateral international treaties that apply to

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[26] If the airline ticket includes international transportation, the international legal regime applies even though the particular flight concerned only involves domestic air transportation.

[27] 14 C.F.R. § 253.1.

[28] 14 C.F.R. § 253.5.

[29] 14 C.F.R. § 253.4.

[30] Which state's law is applicable to a particular issue, e.g., liability or damages, often involves complex choice-of-law analysis since the state of incorporation of the airline and its principal place of business, the domicile of the passenger, the place where the accident occurred and the place where the ticket was purchased may all be in different states.

[31] 49 U.S.C. § 41713(b).

"international carriage." The most recent treaty ratified by the United States dealing with airline liability is the 1999 Montreal Convention.[32] As of June 30, 2009, 92 countries had ratified that Convention, making it fairly ubiquitous.[33] Since November 4, 2003, the Convention applies to every flight segment, even domestic, of any ticket for round trip international air transportation that originates in the U.S. For example, if you purchase a ticket for a flight beginning in Kansas City, with a stop in New York, for onward transportation to London, England and return to Kansas City, the 1999 Montreal Convention applies not only to the New York to London and London to New York flights, but also to the Kansas City to New York and New York to Kansas City flights.

As a treaty of the United States, the Convention is the supreme law of the land.[34] The Montreal Convention is the exclusive remedy in an action for damages arising from international transportation and preempts the application of state law.[35] The Montreal Convention specifies the circumstances under which an airline can be liable for delay in transportation,[36] for personal injury or death[37] and for loss or damage to luggage[38] and cargo.[39] It also delineates the defenses available to airlines for such claims,[40] and provides for limitations of liability in the case of delay for passengers,[41] baggage[42] and cargo,[43] and in the case of damage to or loss of baggage[44] or

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[32] Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal, May 28, 1999, S. TREATY DOC. NO. 106-45, 1999 WL 33292734.

[33] *See* http://www.icao.int/icao/en/leb/mtl99.pdf.

[34] U.S. Const. art. VI, cl. 2; *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (predecessor to Montreal Convention is supreme law of the land).

[35] *See* 1999 Montreal Convention, Article 29 ("In the carriage of passengers, baggage and 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 such limits of liability as are set out in this Convention...."); *El Al Israel Airlines, Ltd. v. Tseng*, *supra*; *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 371 (2d Cir. 2004).

[36] 1999 Montreal Convention, Article 19.

[37] 1999 Montreal Convention, Article 17.

[38] *Id.*

[39] 1999 Montreal Convention, Article 18.

[40] 1999 Montreal Convention, Article 20.

[41] 1999 Montreal Convention, Article 22(1).

[42] 1999 Montreal Convention, Article 22(2).

cargo.[45] There is no limitation of liability for damages in the case of personal injury or death.[46] Although there are specific requirements in the Convention for providing notice of application of the Convention on the ticket,[47] the liability rules and limitations of the Convention will nevertheless be applicable even if no such notice is provided.[48]

2. Tariffs

Before the advent of deregulation introduced by the Carter and Reagan administrations, air carriers and foreign air carriers were required by statute to file comprehensive tariffs for all interstate and international transportation[49] setting out both the fares they charged for particular transportation and detailed rules, including liability and limitation rules. In 1999, however, the DOT issued a rule exempting air carriers and foreign air carriers from the statutory requirement to file most fare and rules tariffs.[50] The rule also permitted carriers to incorporate by reference conditions of contract with respect to foreign air transportation.[51]

Certain governing rules for foreign air transportation are still required to be filed as tariffs, however.[52] Those rules deal with, *inter alia*, the application of the tariff, baggage, carriage of handicapped and nonambulatory passengers, definitions, liability of carriers, refusal

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[43] 1999 Montreal Convention, Article 22(3).

[44] 1999 Montreal Convention, Article 22(2).

[45] 1999 Montreal Convention, Article 22(3).

[46] 1999 Montreal Convention, Article 21.

[47] 1999 Montreal Convention, Article 3(4).

[48] 1999 Montreal Convention, Articles 3(5), 9. DOT regulations also require that notice of application of the Convention's limits be provided to the passenger. 14 C.F.R. §§ 221.105 to 221.107. Although an airline's failure to provide such notice may subject the airline to civil penalties, the failure will not expose the airline to liability to the passenger. *See Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 371 (S.D.N.Y. 2006) (no private right of action for violation of notice regulations related to bumping).

[49] *See* 49 U.S.C. § 1373 (repealed).

[50] 14 C.F.R. § 293.10.

[51] 14 C.F.R. § 293.20.

[52] Notice of Exemption from the Department's Tariff-Filing Requirements (DOT Oct. 7, 1999), 1999 WL 820444, at *10.

to transport and the limitations of the carrier.[53] And since those tariff rules are required to be filed by law, they have the force and effect of law, notice of which is not required to be provided to the passenger.[54] Tariffs take precedence over inconsistent provisions in an airline's conditions of contract.[55]

To summarize for foreign air transportation and generally speaking, therefore, from a hierarchical standpoint the airline's conditions of contract apply to the extent not inconsistent with the 1999 Montreal Convention, federal law and regulations, and filed tariffs. The 1999 Montreal Convention is co-equal with federal law, both of which take precedence over federal regulation and which preempt state law in many circumstances. Rules tariffs required to be filed by law have the force and effect of law but must not be inconsistent with the 1999 Montreal Convention or federal law.

IV. AIRLINE CLAIMS

A. Flight Delays

1. Domestic

Unfortunately, many of us have experienced lengthy flight delays. In some cases, the passengers are either not permitted to board the aircraft or no aircraft is available to board at the scheduled time. In other cases, passengers are timely boarded but the aircraft is not permitted to take off. Somewhat less frequently, we arrive at our original destination or at a diverted destination and cannot disembark for various reasons. The longer the delay, the greater the likelihood passengers will make claims.

Until recently, there was no federal law or regulation covering delays suffered by passengers.[56] A number of states attempted to step into that vacuum and had proposed laws

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[53] *Id.*

[54] *Wolf v. Trans World Airlines, Inc.*, 544 F.2d 134, 137 (3d Cir. 1976); *Tishman & Lipp v. Delta Air Lines, Inc.*, 413 F.2d 1401 (2d Cir. 1969).

[55] *See Crosby & Co. v. Compagnie Nationale Air France*, 352 N.Y.S.2d 75, 86-87, 76 Misc. 2d 990, 1001-02 (N.Y. Sup. 1973).

[56] Despite the lack of a specific regulation, however, in a series of Consent Orders last November, the DOT imposed significant civil penalties on Continental Airlines, Express Jet and Mesaba Airlines for failing to permit passengers to disembark an aircraft after it was diverted to the Rochester, Minnesota airport because of bad weather at the intended destination of Minneapolis. The passengers were kept on the aircraft for almost six hours and the DOT argued that there was a violation of 49 U.S.C. § 41712 which prohibits unfair and deceptive practices. *See Mesaba Airlines Consent Order*, DOT Order 2009-11-16 (Nov. 24, 2009); *Continental Airlines Consent Order*, DOT Order 2009-11-17 (Nov. 24, 2009); *Express Jet Consent Order*,

styled as a passenger bill of rights.[57] New York enacted such a law that required airlines to provide minimum amenities, including water and functioning lavatories for extended ground delays.[58] The New York law was challenged by the Air Transport Association and the Second Circuit found that the law related to the "services" of an airline and was expressly preempted by the Airline Deregulation Act and, therefore, unenforceable.[59]

As a result of a number of highly publicized incidents, and after considering comments for over a year, however, on December 21, 2009 the DOT adopted a new regulation entitled "Enhanced Protections for Airline Passengers" which dealt with, *inter alia*, lengthy ground delays. Domestic airlines (but not foreign air carriers) are required to adopt a Contingency Plan providing that (i) the airline will not permit an aircraft to remain on the tarmac for more than 3 hours for domestic flights or a specified number of hours for international flights, except in certain very limited circumstances, (ii) adequate food and potable water will be made available for any flight on the tarmac for more than 2 hours and (iii) operable lavatory facilities.[60] In addition, the new regulation also requires the airline to adopt a Customer Service Plan that must cover the airline's policies addressing "bumped" passengers, refunds, cancellation, lengthy flight delays and responsiveness to customer complaints, etc.[61] Although a number of consumer groups argued that the DOT should require the airlines to incorporate the Contingency Plan and the Customer Service Plan into the airline's contract of carriage, the DOT did not do so, only encouraging the airlines to do so and merely requiring that it make the Contingency Plan and Customer Service Plan available on the airline's web site.[62]

Accordingly, the airline is entitled to rely on the provisions of its contract of carriage when confronted with a passenger claim involving delay. Unless the airline has incorporated the Contingency Plan or the Customer Service Plan in its conditions of contract, that contract invariably provides that the airline's schedules do not form any part of the contract of carriage and may be changed at any time.[63] Likewise, the conditions of carriage will specify that it is not

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DOT Order 2009-11-18 (Nov. 24, 2009).

[57] *See Air Transport Association v. Cuomo*, 520 F.3d 218, 224 n.1 (2d Cir. 2008).

[58] N.Y. GEN. BUS. LAW § 251-g (McKinney 2009).

[59] *Air Transport Association v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008).

[60] See http://www.regulations.gov - DOT-OST-2007-0022-0255, *to be codified at* 14 C.F.R. Part 259.

[61] *Id.*, 14 C.F.R. § 259.5.

[62] *Id.*, 14 C.F.R. § 259.6.

[63] E.g., Continental Airlines Contract of Carriage, Rule 24(A)(3) - Schedules are Subject to Change without Notice; American Airlines Conditions of Carriage, *Responsibility for Schedules and Operation*,

liable except to the extent provided in the contract of carriage.[64] And depending on the cause for and length of the delay, the airline may not have any liability or may provide for a substitute flight, a refund, meals or overnight accommodation as the only remedy.[65] The contract of carriage may also specify stringent time limits, which could be as short as 30 days, for submitting a claim for compensation resulting from delays.[66]

2. International

Article 19 of the Montreal Convention deals with delay claims. It provides as follows:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable if it proves that it and its servants and agents 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.

Under Article 19 the carrier is only liable for provable compensatory damages caused by the delay. Such damages, however, do not encompass mental anguish or inconvenience resulting from the cancellation of a flight or the lack of food, water or restroom facilities during the delay.[67] In addition, the carrier's liability for delay is limited by Article 22(1) of the Convention to the sum of 4,150 SDRs.[68]

B. "Bumping"

1. Domestic

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http://www.aa.com/i18n/customerService/customerCommitment/conditionsOfCarriage.jsp.

[64] *See*, e.g., Continental Airlines Contract of Carriage, Rule 24(E)(1) - Liability; American Airlines Conditions of Carriage, *Responsibility for Schedules and Operation*, *supra*.

[65] *See*, e.g., Continental Airlines Contract of Carriage, Rule 24(F) - Amenities for Delayed Passengers; American Airlines Conditions of Carriage, *Delays, Cancellations and Diversions*, *supra*.

[66] *See*, e.g., American Airlines Conditions of Carriage, *Claims - Loss/Delay*, *supra*

[67] *Lee v. American Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004); *Onwuteaka v. Northwest Airlines, Inc.*, 2007 WL 1406419, at *1 (S.D. Tex. 2007).

[68] An SDR is a Special Drawing Right as defined by the International Monetary Fund. All limitations in the Montreal Convention are expressed in terms of SDRs. As of December 14, 2009, the value of the SDR was $1.58628 and the 4,150 SDR limitation was equivalent to $6,583.05. *See* http://www.imf.org/external/index.htm.

Bumping is the equivalent to "walking" a hotel guest who has a confirmed reservation. The passenger arrives at the airport with a ticket and, perhaps, even a boarding pass for a particular seat on the plane. He finds out during the boarding process, however, that the flight has more confirmed reservations than there are seats on the aircraft. The announcement by the airline requests volunteers who are willing to take a later flight in exchange for compensation, usually a voucher with a specified value for a future flight on the airline. When there are not enough volunteers, some passengers are involuntarily denied boarding even though they have that boarding pass in their hand - they are "bumped."

The response of a hotel to a guest who is "walked" is based primarily on the hotel's policy and perhaps on a contractual obligation contained in a marketing agreement with an on-line distributor. In contrast, the response of an airline to a bumping is highly regulated. The DOT regulations apply and govern when bumping occurs in interstate air transportation and for flights in foreign air transportation originating in the U.S.[69] The regulations require the airline to seek volunteers in order to minimize the number of passengers who are involuntarily bumped.[70] The carrier must also establish and follow boarding priority rules for bumped passengers that are non-discriminatory.[71] The factors establishing those priority rules may include the passenger's check-in time, whether the passenger had an assigned seat, the fare paid, frequent flyer status, and a passenger's disability, if any, and status as an unaccompanied minor.[72]

The amount of denied boarding compensation required to be paid is twice the value of ticket for the flight from which the passenger is bumped, up to a maximum of $800.[73] If the airline can arrange for comparable transportation that is scheduled to arrive less than 2 hours after the scheduled arrival time of the flight from which the passenger was bumped in the case of interstate transportation, or 4 hours in the case of foreign air transportation, the amount of compensation is the value of the ticket for the flight, up to a maximum of $400.[74] No compensation at all is due in certain circumstances, including when the passenger fails to comply with check-in time requirements, when the denied boarding is due to substitution of an aircraft with fewer seats, or when the airline is able to arrange comparable transportation scheduled to arrive within an hour of the scheduled time of arrival of the passenger's original

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[69] 14 C.F.R. § 250.2.

[70] 24 C.F.R. §§ 250.2a, 250.2b.

[71] 14 C.F.R. § 250.3(a). Some airlines may include their boarding priority rules in their contract of carriage. *See, e.g.*, Continental Airlines Contract of Carriage, Rule 25(A)(2) - Boarding Priorities.

[72] 14 C.F.R. § 250.3(b).

[73] 14 C.F.R. 250.5(a).

[74] *Id.*

flight.[75]

The airline is required to pay the denied boarding compensation in cash or check, unless the passenger is willing to accept a travel voucher equal to or greater than the amount required to be paid.[76] If the denied boarding compensation is accepted, the contract of carriage will specify that the passenger waives any right to sue for compensation as a result of being denied boarding.[77]

2. International

The DOT rules for denied boarding compensation do not apply to flights originating outside the United States. For such flights there may be an equivalent law or rule applicable in similar circumstances in the country where the flight originates, and airlines will be required to compensate a passenger in accordance with applicable law. Oftentimes, the airline's contract of carriage contains a provision confirming that it will pay denied boarding compensation required by applicable law.[78] One example of an equivalent law or regulation was adopted by the European Union in 2004. It is applicable to flights originating within the EU, and is similar in scope and operation to the DOT regulations. The amount of denied boarding compensation under the EU regulation for a particular flight is dependent on the distance involved and the maximum amount is €600, which maximum is reduced to €300 if a passenger is offered an alternative flight that is scheduled to arrive no more than 2 hours after the original flight.[79]

Rather than accept denied boarding compensation, in some instances the passenger will sue the carrier for damages. When this occurs with respect to foreign air transportation, the airline can raise the 1999 Montreal Convention limitation on delay damages as a basis for preempting state-based claims and as a partial defense to any such claim. Whether such defenses are effective may depend on when and where the denied boarding takes place, however, and the differing interpretations of when preemption occurs or when the limitation is applicable can not easily be reconciled. The facts of the case must be carefully considered to develop an appropriate

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[75] 14 C.F.R. 250.6.

[76] 14 C.F.R. § 250.5(b). The airline's contract of carriage will limit the use of the travel voucher to its own routes and may impose a limit on the period of time the voucher is valid. *See, e.g.*, American Airlines Conditions of Carriage, *Oversales* (voucher must be used within 1 year), *supra*.

[77] *See, e.g.*, Continental Airlines Contract of Carriage, Rule 25(A)(6) - Limitation of Liability; American Airlines Conditions of Carriage, *Oversales*, *supra*.

[78] *See, e.g.*, Continental Airlines Contract of Carriage, Rule 25(B) - Denied Boarding Non-U.S.A. Flight Origin; British Airways General Conditions of Carriage, Rule 9(c), *supra*.

[79] Regulation (EC) 261/04, 2004 O.J. 46, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:046:0001:0007:EN:PDF.

response to a bumping claim.[80]

C. Baggage

Although the percentage of mishandled baggage is almost minuscule,[81] baggage claims are probably the most prevalent type presented to an airline. Airline employees handle a very high proportion of those claims in an efficient and professional manner. If litigated, the claims are usually brought in small claims court unless the passenger attempts to enhance the claim by seeking damages for aggravation, inconvenience or emotional distress. The responsibility of the airline for baggage is covered in great detail in the contract of carriage and familiarity with those details is required when representing a carrier, regardless of whether interstate or foreign air transportation is concerned. When foreign air transportation is involved, you must also be familiar with the baggage liability rules of the 1999 Montreal Convention.

1. Domestic

An airline's contract of carriage provisions dealing with baggage often exceed 4 pages. For example, Continental Airline's provisions run for 13 pages.[82] The topics dealt with include but are not limited to: what may be accepted as baggage, under what circumstances the airline will carry baggage, how much baggage will be carried for free, the charges for additional pieces of baggage or for baggage whose value exceeds $3,300, weight and size limitations, special items (e.g., bassinets, antlers, duffel bags), firearms, perishable items, sporting equipment (e.g., golf clubs, bicycles), wheelchairs and pets.[83] This paper will not go into any detail regarding those provisions.

What is of primary importance in the contract of carriage are the baggage limitation of liability provisions and any notice of claim requirements. The DOT specifies what limitations of liability are permissible as follows:

> ...an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property,

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[80] *Compare Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d, 361, 364-69 (S.D.N.Y. 2006), *with Igwe v. Northwest Airlines, Inc.*, 2007 WL 43811, at *3-4 (S.D. Tex. 2007).

[81] E.g., Press Release, Bureau of Transportation Statistics, Flight Delays, Complaints, Baggage Mishandling Decline in May (Jul. 2, 2001) (mishandled baggage rate .379%), http://www.bts.gov/press_releases/2001/dot6901.html.

[82] Continental Airlines Contract of Carriage, Rule 23 - Baggage (13 pages), *supra*; American Airlines Conditions of Carriage, *Baggage* (5 pages), *supra*; British Airways General Conditions of Carriage, Rule 8 - Baggage (5 pages), *supra*.

[83] *See* Continental Airlines Contract of Carriage, Rule 23 - Baggage, *supra*.

> including baggage, in its custody to an amount less than $3,300 for each passenger.

14 C.F.R. Part 254 - Domestic Baggage Liability, § 254.4.[84] Accordingly, airlines invariably limit their liability for baggage claims to $3,300, the minimum permitted by DOT regulation, unless a higher valuation charge has been paid before the passenger's travel commences.[85]

Most airlines will require that a preliminary notice of claim be submitted in a very short time frame, often only a few hours after a flight arrives.[86] A formal, written claim must thereafter be submitted on the carrier's claim form, usually within 30 to 60 days, or no action may be commenced against the carrier.[87]

2. International

The 1999 Montreal Convention provides the exclusive remedy for baggage claims against a carrier when international transportation is involved.[88] The carrier's contract of carriage provisions, including those concerning baggage are subject to the rules of the 1999 Montreal Convention, which prohibits any "provision tending to relieve the carrier of liability or to fix a lower limit of liability than that which is laid down in [the] Convention,"[89] although the carrier is permitted to have contract of carriage provisions "which do not conflict with the provisions of [the] Convention."[90] Not to be outdone by the case of domestic transportation, therefore, airlines have detailed contract of carriage provisions concerning the international transportation of baggage that are similar, and similarly lengthy, to the provisions applicable to domestic air transportation. The baggage liability and notice of claim rules for international transportation are considerably different than for domestic transportation, however.

Under Article 17 of the Montreal Convention, a carrier is liable for damage to or loss of

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[84] The limitation amount of $3,300 is subject to revision every other year. 14 C.F.R. § 254.6.

[85] *E.g.*, Continental Airlines Contract of Carriage, Rule 28(D)(6) - Domestic Carriage Limitation of Liability for Baggage, *supra*; American Airlines Conditions of Carriage, *Baggage*, Liability, *supra*.

[86] Continental Airlines Contract of Carriage, Rule 28(D)(6)(c) (four hours), *supra*; American Airlines Conditions of Carriage, *Claims* (four hours), *supra*.

[87] Continental Airlines Contract of Carriage, Rule 28(D)(6)(e) (45 days), *supra*; American Airlines Conditions of Carriage, *Claims* (30 days), *supra*

[88] 1999 Montreal Convention, Article 29.

[89] 1999 Montreal Convention, Article 26.

[90] 1999 Montreal Convention, Article 27.

baggage if,

> the event which caused the...loss or damage took place on board the aircraft or during any period within which the checked baggage was in charge of the carrier...[unless] and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage.

1999 Montreal Convention, Article 17(2).

The carrier's liability for the destruction, loss, damage or delay in the case of baggage is limited to the sum of 1,000 SDRs[91] for each passenger unless a higher value is declared,[92] or the passenger can prove that the carrier engaged in willful misconduct.[93] The limitation also applies to the carrier's servants and agents acting within the scope of their employment.[94] And a written notice of claim must be presented to the carrier within 7 days in the event of damage to the baggage and within 21 days in the case of delay in delivery of the baggage. Otherwise, no action may be maintained against the carrier.[95]

D. Personal Injury

1. Domestic

Generally speaking, the liability of an airline for personal injury to a passenger is governed by negligence law. Which state's negligence law will be applicable, however, is often disputed and will be subject to the choice-of-law analysis of the state in which the lawsuit is commenced. Depending upon the forum state's choice-of-law jurisprudence, moreover, such an analysis may result in the law of one state applying to the issue of liability and the law of another state applying to the issue of damages. For domestic transportation, an airline may not limit its liability for personal injury by any provision in the contract of carriage or tariff.[96]

In some cases, a claim for some types of "personal injury" may be preempted by the express preemption provision of the Airline Deregulation Act, which has been held to preempt state-based claims as being "related to the...service of an air carrier," 49 U.S.C. § 41713(b), even

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[91] Equivalent to $1,586.28 on December 14, 2009.

[92] 1999 Montreal Convention, Article 22(2)

[93] 1999 Montreal Convention, Article 22(5).

[94] 1999 Montreal Convention, Article 30.

[95] 1999 Montreal Convention, Article 31.

[96] 14 C.F.R. § 221.40(5).

though the claim also could be characterized as involving personal injury. The precise scope of the Federal preemption provision is not settled, although a trend appears to be developing that personal injury claims of physical injury and based on tort are not preempted.[97]

2. International

The 1999 Montreal Convention provides the exclusive basis for personal injury claims in those instances where it applies. Article 17 of the Convention provides:

> The carrier is liable of 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 operations of embarking or disembarking.

The carrier may be wholly or partly exonerated from liability to the extent the carrier proves the damage was caused or contributed to by the negligence of the injured party.[98] There are no other defenses available to the carrier for provable damages up to the sum of 100,000 SDRs.[99] Above that amount the carrier may attempt to prove that the damage was not due to its negligence or that the "damage was solely due to the negligence or other wrongful act or omission of a third party.[100]

No punitive damages are recoverable under the Convention.[101] As interpreted by the Supreme Court, the term "bodily injury" in Article 17 does not encompass mental injury unless the mental injury results from physical injury caused by an accident. Emotional distress and mental anguish, therefore, are generally not recoverable.[102] The U.S. Supreme Court has also has held that in the absence of an "accident" causing damages, the carrier is not liable to a passenger even if injury is sustained aboard the aircraft. For example, a passenger sustaining a ruptured

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[97] E.g., *Montalvo v. Spirit Airlines, Inc.*, 508 F.3d 464 (9th Cir. 2007) (state based duty to warn of potential for deep vein thrombosis on lengthy flights not preempted); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995 (tort claim for personal injury when baggage fell from overhead bin not preempted); *Weiss v. El Al Israel Airlines, Ltd.*, 471 F. Supp. 2d 356 (S.D.N.Y. 2006) (tort claim for emotional distress based on deliberate overbooking preempted).

[98] 1999 Montreal Convention, Article 20.

[99] $158,628 as of December 14, 2009.

[100] 1999 Montreal Convention, Article 21(2).

[101] 1999 Montreal Convention, Article 29 ("punitive, exemplary or any other non-compensatory damages shall not be recoverable").

[102] *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552-53 (1991); *Carey v. United Airlines*, 255 F.3d 1044, 1051-52 (9th Cir. 2001).

eardrum on the plane as the result of pressure changes accompanying the normal operation of the aircraft may not recover from the airline.[103]

Although the Montreal Convention does not limit the liability of the airline for bodily injury and there is essentially no defense for damages of less than 100,000 SDRs, the type of damages recoverable and the circumstances when they can be recovered are significantly different than what is common when an injury is sustained during interstate air transportation. Since the application of the Convention is dependent on the transportation contracted for on the passenger's ticket, moreover, if an accident occurs on a domestic segment the airline may be presented with claims that are governed by applicable state law for some passengers and by the Montreal Convention for other passengers whose ticket includes international transportation.

[103] *Air France v. Saks*, 472 U.S. 392, 405 (1985).

V. CONCLUSION

You don't have to be a pilot or have a degree in aeronautical engineering to represent an airline. You do have to be aware of the differences between the legal regimes that govern the airline industry and the legal regimes that apply to other components of the hospitality industry. Hopefully, this paper will thrust you in the right direction.