

November, 2005
No. 2

Aviation and Space Law

In This Issue

Mike Holland is a partner in the firm of Condon & Forsyth LLP in New York, and Chair of the Aviation and Space Law Committee.

Code-Share Partner Liability Under Warsaw and Montreal Conventions

By Michael J. Holland

In *Shirobokova v. CSA Czech Airlines, Inc.*, 2005 WL 1618764 (S.D.N.Y. Jul. 8, 2005) a New York federal court held that a code-share partner cannot be liable under the Warsaw Convention for passenger injuries sustained onboard an operating carrier's flight.

Ms. Shirobokova brought an action against CSA Czech Airlines, Inc. ("CSA") and Delta Airlines seeking damages for injuries she allegedly suffered on a CSA flight from New York to Prague in February 2002.

Ms. Shirobokova's journey began when she flew from Minneapolis to Cincinnati and then from Cincinnati to New York on Delta flights. In New York, she transferred to Delta's code-share partner, CSA, to fly to Prague and then on to St. Petersburg. During the New York to Prague sector, the aircraft experienced turbulence and Shirobokova suffered injuries including "a traumatic brain injury, damaged and bulging discs in her spine [and] a fractured rib."

Shirobokova claimed that at the time she was injured she was a passenger of both Delta and CSA. She based her claim on the fact that the flight had multiple flight numbers, CSA flight 051 and Delta flight 7300, as a result of the code-sharing agreement between the airlines. Shirobokova acknowledged that CSA operated the flight. Shirobokova asserted state law claims against both defendants for negligence, breach of warranty and negligent misrepresentation along with claims under the Warsaw Convention.

The airlines moved to dismiss the state law claims as

The IADC

The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

preempted by the Warsaw Convention. Additionally, Delta moved for dismissal of the Warsaw Convention claim on the grounds that as a non-operating carrier, it could not be liable.

The court dismissed plaintiff's state law claims as preempted by the Warsaw Convention which creates a comprehensive liability system "to serve as the exclusive mechanism for remedying injuries suffered in the course of international transportation of persons, baggage or goods performed by aircraft." *King v. American Airlines, Inc.*, 284 F.3d 352, 356-57 (2d Cir. 2002).

With respect to Delta's motion to dismiss Shirobokova's Warsaw Convention claim, the court analyzed Article 30 of the Convention which specifies that an injured party may "take action only against the carrier who performed the carriage during which the accident...occurred, save in the case whereby express agreement, the first carrier has assumed liability for the whole journey."

Despite the Convention's failure to define "carrier," the court concluded that the term's usage throughout the Convention, in particular the Chapter entitled "Liability of the Carrier," makes it clear that the Convention's drafters were referring to the "carrier" as the airline that actually transported the passenger. *See e.g., Pflug v. EgyptAir Corp.*, 961 F.2d 26, 31 (2d Cir. 1992). The Complaint expressly stated that Shirobokova was onboard a CSA flight at the time of her injury. The Complaint did not allege that Delta was the operating carrier, rather it simply stated that Delta and CSA "had an identity of interest and were alter egos of one another through the eyes of the traveling public due to their codesharing agreement."

The court decided that Delta, as a code-share partner for a flight operated by CSA, could not be considered a carrier under the Convention. Furthermore, the court stated that a code-share agreement is simply "an arrangement

whereby a carrier's designated code is used to identify a flight operated by another carrier." *See also* 14 CFR § 257.3 (c).

The court concluded that, as the Complaint alleged CSA was the operating carrier of the flight between New York and Prague on which she sustained injuries and that there was no express agreement made by Delta to assume any liability for the entire journey, Delta could not be liable as a carrier under the Warsaw Convention.

This decision, while helpful to the airlines and consistent with other recent cases involving code-sharing and the Warsaw Convention, *e.g. Orova v. Northwest Airlines Inc.*, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005), will have limited application due to the recently enacted Montreal Convention (formally known as the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999, *reprinted in* S. Treaty Doc. No 106-45, 1999 WL 33292734 (2000)).

The Montreal Convention is not an amendment to the Warsaw Convention. *See Schopenhauer v. Compagnie Nationale Air France*, 255 F. Supp. 2d 81, 87 (E.D.N.Y. 2003). Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention. *See Schopenhauer*, 255 F. Supp. 2d at 87; *see also* J.C. Batra, *Modernization Of The Warsaw System--Montreal 1999*, 65 J. Air. L. & Com. 429, 433 (2000). The Montreal Convention entered into effect on November 4, 2003 and only governs international transportation between signatories after the effective date. *See Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004).

A principal feature of the Montreal Convention is its recognition of code-sharing. Chapter 5 of the Montreal Convention, Articles 39 through 48, deals with this issue and provides that a passenger injured or killed in international air transportation can bring suit against both the

carrier that issued the ticket (often a code-share partner) and the operating carrier, *i.e.*, the carrier who actually performed the transportation. While a passenger or his representative is only entitled to one recovery as a result of injuries or death sustained in an accident, the suit may be brought against either the operating or contracting carrier.

In short, under Montreal, a code-share partner or a carrier that simply sells an airline ticket is responsible for passenger injuries and deaths arising from the actions of the operating carrier. One might say that this pro-passenger language further burdens airlines with additional liability exposure for acts over which they have minimal or no control in an already struggling industry.