

Client Alert

April 2009

DOT Issues Notice Calling on Carriers to Update Tariffs on Baggage and Code-Share Liability

On March 26, 2009, the U.S. Department of Transportation (“DOT”) issued a Notice, “Providing Guidance on Airline Baggage Liability and Responsibilities of Code Share Partners Involving International Itineraries,” which calls on carriers to clarify their General Conditions of Carriage (“GCC”) and tariffs regarding baggage and code-share liability. According to the Notice, carriers should update their GCC and tariffs to be in compliance with the DOT’s guidance within 90 days of the notice, to avoid potential liability from an enforcement action.

Many carriers currently have provisions in their GCC and tariffs that limit liability for damage to or loss of jewelry, money, fragile or perishable items, etc., transported in checked baggage. While such exclusions of liability may be enforceable in some countries, U.S. courts generally will not enforce such provisions in claims arising under the Montreal Convention. Article 26 of the Montreal Convention states that “[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void.”

A carrier’s liability for the loss or delay of baggage is limited under the Montreal Convention to 1,000 SDRs (approximately \$1,500). A carrier’s liability generally cannot be limited based upon the contents of the baggage under the Convention once the baggage has been accepted for transportation, other than for the “inherent defect, quality or vice of the baggage.”

The DOT Notice opines that the inclusion of such liability exclusion provisions (without reference to its limited applicability to domestic

transportation) amounts to an unfair or deceptive business practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

Some carriers include provisions in their GCC or tariffs which state that their terms and conditions are applicable only to the extent that they are consistent with the Convention or other applicable law. Nevertheless, based on the tone of the DOT’s April 1 Notice, the DOT may take the position that this limiting language is not sufficient and insist that either the liability exclusions for the carriage of jewelry, etc., be stricken or that additional language be added which makes clear that such provisions do not apply to international transportation to or from the United States.

As for code-share liability, the DOT Notice states that as a condition to its approval of code-share arrangements, the contracting carrier (the carrier selling the ticket for transportation) must assume responsibility for the entirety of the code-share journey. The DOT objects to tariffs of contracting carriers which state that in a code-share arrangement the terms and conditions of the operating carrier’s contract of carriage apply without stating the operating carrier’s terms and conditions. The DOT also objects to tariffs that are silent as to which carrier’s contract of carriage applies in a code-share arrangement.

The DOT’s Notice on this point, however, is somewhat vague and appears to be partially inconsistent with code-share liability under the Montreal Convention. Under the Convention, a contracting carrier (which issues the ticket but does not perform any segment of carriage in the transportation), as well as the operating carrier, are responsible for injuries that occur during any part of the code-share journey. If, on the other hand, the contracting carrier performs a leg of the transportation, it is considered a “successive carrier” under Article 36 of the Convention and, as such, is only liable if it is the operating carrier when the injury occurs. (*See Best v. BWIA West Indies Airways Limited*, 581 F. Supp. 2d 359

(E.D.N.Y. 2008), discussed in October 2008 Condon & Forsyth LLP Client Bulletin).

Condon & Forsyth LLP has brought this ambiguity and possible inconsistency with the Convention to the DOT's attention and is currently in communications with the DOT on this point. Because the DOT's Notice affects many carriers, we anticipate that the DOT will issue more information on the Notice clarifying how carriers should comply before the enforcement date.



If you have any questions or would like more information on the DOT Notice, assistance in amending a tariff on file with the DOT, or other topics discussed in this Client Alert, please contact:

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