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## WARSAW CONVENTION

### **U.S. Court Honors Swiss Court Bankruptcy Stay In *Djordjevic v. Swissair Transport Co., Ltd.*, 2004 WL 2914070 (S.D.N.Y. Dec. 15, 2004)**

Plaintiff, representing himself, commenced an action in January 2001 in New York state court seeking damages arising from Swissair's refusal to transport plaintiff and banning him indefinitely from Swissair flights as a result of statements made to security personnel that he had a bomb in his baggage. Swissair removed the case to federal court on the ground that plaintiff's breach of contract and tort claims were governed by the Warsaw Convention, and thereafter moved for summary judgment on the pleadings.

Swissair also filed a Notice of Injunction issued by the U.S. Bankruptcy Court for the Southern District of New York based on liquidation proceedings taking place in Switzerland. Under U.S. bankruptcy law,<sup>1</sup> bankruptcy courts are authorized to enjoin the commencement or continuation of any action against a debtor with respect to property involved in a foreign bankruptcy proceeding. Plaintiff's previous application to the bankruptcy court for relief from that injunction had been rejected, but his claim was registered by Swissair's bankruptcy trustee in Switzerland, which would permit him recovery in accordance with whatever percentage the Swiss court awards to unsecured creditors like plaintiff.

Dissatisfied with the prospect of litigating his claims in Switzerland, plaintiff sought to lift the stay, claiming that the Bankruptcy Code denies an American citizen access to an American court contrary to his constitutional rights. The court disagreed, recognizing that the Code expressly authorizes and directs the bankruptcy courts to issue these injunctions to protect the administration of foreign proceedings and prevent piecemeal distribution of assets in U.S. legal proceedings by U.S. creditors.<sup>2</sup> Although sympathetic to plaintiff's plight, the court concluded that its holding is "in accordance with a valid act of Congress."

The court also denied plaintiff's motion for leave to amend his pleadings to assert a negligence claim against Swissair's bankruptcy trustee. There was no personal jurisdiction over the trustee (a Swiss resident) and the trustee's conduct in registering plaintiff's claim as an allowed claim showed no negligence.

### **Alliance Partner Held Not Liable For Actual Carrier's Actions Under Common Law Or The Convention In *Orova v. Northwest Airlines Inc.*, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005)**

Plaintiffs mother and son brought an action against Northwest Airlines seeking compensatory and punitive damages for breach of contract and intentional infliction of emotional distress arising

out of an alleged incident with a KLM Cityhopper Captain while plaintiffs were passengers on a KLM flight from Geneva, Switzerland, to Amsterdam, The Netherlands. Plaintiffs also complained that they were improperly off-loaded and not allowed to travel on two subsequent KLM Royal Dutch Airlines flights from Amsterdam to the United States after becoming involved in a dispute with KLM employees at Schiphol Airport in Amsterdam.

Northwest, the only named defendant, moved for summary judgment on the basis that it was not the proper party to the action because: (1) Northwest was not involved in the operation of the KLM flights in dispute; (2) Northwest employees had no contact with plaintiffs during any of their flights or at the airport in Amsterdam; (3) Northwest's issuance of plaintiffs' tickets (through its agent Travelocity) had no causal relationship to the incidents with KLM; and (4) under the Warsaw Convention, only the actual carrier, KLM, could properly be named as a defendant for the damages being sought by plaintiffs. Northwest acknowledged its alliance relationship with KLM, but maintained that the two air carriers are separate corporate entities.

In response, plaintiffs contended that Northwest should be held liable for the conduct of KLM employees because of the close alliance relationship between the two carriers, which includes code-sharing, joint advertising and customer claims handling in the United States on behalf of both carriers. In addition, plaintiffs' tickets were printed on Northwest ticket stock. Based on this relationship, plaintiffs claimed that the court should treat Northwest and KLM as a single corporate entity, and thereby hold Northwest responsible for the actions of its alliance partner KLM.

In analyzing the alliance relationship, the court stated that a corporation may be liable for another corporation's actions only if the plaintiff presents sufficient facts to "pierce the corporate veil."<sup>3</sup> The party seeking to do this must establish that the controlling corporation wholly ignored the separate status of the other corporation and controlled its affairs.<sup>4</sup>

In this case, plaintiffs' allegations regarding the carriers' alliance relationship did not establish that Northwest controlled KLM's affairs or ignored its separate corporate status. Northwest, thus, could not be held liable for claims arising strictly from the alleged conduct of KLM employees. The court concluded that to hold otherwise "would wholly ignore KLM's corporate entity" and inappropriately "impose liability on an undeserving corporation."

The court also determined that plaintiffs' only available causes of action arose under Articles 17 and 19 of the Warsaw Convention. Under the Convention, only the carrier which "actually transport[s] the passenger or baggage" can be held liable.<sup>5</sup> Although Northwest issued the tickets, Northwest was not the actual carrier during any of the events which gave rise to plaintiffs' claims. Accordingly, the court granted Northwest's motion for summary judgment and dismissed the Complaint.

**Denied Boarding Claims Arising Out Of Security Problems With Passport Held Governed by Article 19 In *Ikekpeazu v. Air France*, 2004 WL 2810063 (D. Conn. Dec. 6, 2004)**

Plaintiff, a busy surgeon, sued Air France for negligence, negligent infliction of emotional distress and breach of contract arising from Air France's refusal to permit plaintiff to board a flight from Nigeria to the United States due to alleged security problems with his passport. Plaintiff was compelled to travel to the American Embassy in Lagos (an 8-hour journey), where he was advised that there was no problem. The delay caused plaintiff to cancel several surgeries and consultations, and he finally returned 6 days later to the United States.

Defendant moved to dismiss the action on the ground that plaintiff's claims were exclusively governed and preempted by the Warsaw Convention. Plaintiff sought leave to amend his complaint to assert claims under the Convention. The court granted dismissal of plaintiff's damages for emotional injury as barred by Article 17, but held that plaintiff could assert claims under Article 19 of the Convention for "financial injury" resulting from the delay in his transportation.

**Breach Of Contract Claim For Alleged Nonperformance Held Preempted By Warsaw Convention In *Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106 (S.D.N.Y. 2004)**

Plaintiff, representing himself, asserted claims for common law breach of contract and delay under the Warsaw Convention in a state court action seeking damages incurred by himself and his traveling companions as a result of cancellation of their return flight from Sierra Leone to New York. Concerned that they could be stranded in Sierra Leone (the next flight was scheduled a week later and their seats were not guaranteed) and desiring to return to the United States as soon as possible, plaintiff's group decided to purchase tickets on other carriers at a cost of approximately \$1,500 per person. Plaintiff claimed that an agent at Ghana's New York office advised them that they would only receive \$559 per ticket (1/2 the original ticket price) as reimbursement for alternative travel arrangements and that returning to New York on their own was of no concern to the carrier.

Ghana Airways promptly removed the case to federal court, and plaintiff then sought to amend the complaint to drop his Warsaw Convention claim. Ghana thereafter sought to dismiss the Amended Complaint for failure to state a claim on the grounds that plaintiff's state law claim was preempted by the Montreal Convention and that plaintiff lacked standing to recover for losses allegedly sustained by his traveling companions.

Although the parties disputed whether the Montreal Convention or Warsaw Convention (the treaty identified on the passenger ticket) applied to the transportation, the district court held that plaintiff's action was preempted by the respective articles under both treaties. Plaintiff argued that there is a distinction between cases of mere delay, which are governed by Article 19 of the Convention, and cases of contract nonperformance to which state law applies. Plaintiff claimed that the latter situation arose here.

The district court disagreed, noting that plaintiff reacted to the delay by immediately obtaining substitute transportation and demanding reimbursement from the defendant before it had an

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opportunity to perform the contract. As held by the court, "[a] passenger cannot convert mere delay into contractual non-performance by choosing to obtain more punctual conveyance." While plaintiff's group may have had good reasons to fear being stranded and needing to return to the United States, at the time they procured their alternative transportation, Ghana Airways had not yet failed to perform its contract obligations (which required only that it use its best efforts to carry passengers and baggage with reasonable dispatch).

The court also rejected plaintiff's argument that the carrier had repudiated any future performance based on the comments of the carrier's agent in New York. The agent was responding to plaintiff's request for reimbursement of the more punctual, alternative transportation, not repudiating Ghana's obligation to transport them at some future time.

The court distinguished *Wolgel v. Mexicana Airlines*,<sup>6</sup> in which the Wolgels were denied boarding and the carrier refused to provide compensation. Here, plaintiff failed to provide any evidence that Ghana Airways did not offer substitute transportation; indeed, the staff at the airport and the agent in New York had instructed plaintiff to make arrangements with the Ghana Airways office in Freetown the following day.

By making immediate alternative arrangements, plaintiff had not given defendant a reasonable opportunity to perform. Other courts similarly have denied recovery under breach of contract where plaintiffs responded to delays by booking alternative flights.<sup>7</sup> The several hours that plaintiff and his companions spent in Ghana, therefore, did not expose Ghana Airways to liability for contractual nonperformance.

**Claims Of Inadequate Flight Scheduling Held Not Covered By Article 19 In *Flamenbaum v. Orient Lines, Inc.*, 2004 WL 1773207 (S.D. Fla. July 20, 2004)**

Plaintiffs sued the travel agency, cruise line and air carriers involved in plaintiffs' cruise package that provided for air transportation from New York to Venice (the embarkation point of the

cruise) via Paris, and return travel from Nice (the disembarkation point of the cruise) to New York. Plaintiffs sought damages arising from the alleged irresponsible scheduling of connecting flights, which caused them to miss their connecting flight in Paris and resulted in the mishandling and delay of their checked baggage.

Plaintiffs asserted negligence claims against the carriers. They contended, and the court agreed, that Article 19 of the Convention did not apply to the flight scheduling claims since any resulting damages were incurred before the course of embarkation to the flights. Some courts have held that under Article 19 a passenger's transportation simply must have been delayed, and there is no requirement that the acts on which the delay claims are based must occur during the actual transportation by air.<sup>8</sup> Other courts have determined that where the alleged conduct does not occur during performance of the contract of carriage but rather days before, the damages did not arise from a delay in transportation by air.<sup>9</sup> The court adopted the latter approach and held that "claims regarding scheduling of inadequate flight connections are sufficiently removed from 'air transportation' to escape coverage under Article 19." Therefore, plaintiffs' scheduling claims were properly brought as state law negligence claims. Although properly brought, the court nevertheless held that the claims were barred by the economic loss rule.

With respect to the baggage claims, the court held that the Convention preempted plaintiffs' state law negligence claims and dismissed them with prejudice. Plaintiffs, however, were granted leave to amend the complaint to assert claims for loss and/or delay of their baggage under the Convention. The court also rejected plaintiffs' argument that the Convention did not apply because the defendants acted in a reckless matter since Article 25 does not concern applicability of the Convention, but only the potential lifting of the limitation on the amount of recoverable damages.

### Endnotes

<sup>1</sup> 11 U.S.C. § 304 (b)(1)(A)(I).

<sup>2</sup> See *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 348 (2d Cir. 1992).

<sup>3</sup> "Judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts. Also termed *disregarding the corporate entity*." *Black's Law Dictionary* 1184 (8th ed. 2004).

<sup>4</sup> See *Culbreth v. Amosa (PTY) Ltd.*, 898 F.2d 13 (3d Cir. 1990).

<sup>5</sup> See *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100 (D.C. Cir. 1988).

<sup>6</sup> 821 F.2d 442 (7th Cir. 1987).

<sup>7</sup> Citing, e.g., *Minhas v. Biman Bangladesh Airlines*, 1999 WL 447445 (S.D.N.Y. June 30, 1999); *Ratnaswamy v. Air Afrique*, 1998 WL 111652 (N.D. Ill. March 3, 1998).

<sup>8</sup> Compare *Weston v. Federal Express Corp.*, 29 Fed. Appx. 795, 797 (2d Cir. 2002) (Article 18 definition of "transportation by air" only applies to Article 18).

<sup>9</sup> See, e.g., *Lathigra v. British Airways PLC*, 41 F.3d 535, 538 (9th Cir. 1994).

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