

Update

Who is a contracting carrier? The French Courts decide

This article reviews the recent decisions of the French superior courts as to who may be considered a contracting carrier under the Montreal Convention 1999. The Montreal Convention 1999 allows passengers to bring claims for compensation against either a contracting carrier and/or an actual carrier. A “contracting carrier” is a carrier which, as a principal, makes a contract for international carriage by air with a passenger, whilst another carrier (the “actual carrier”) performs the whole or part of the carriage by virtue of authority from the contracting carrier. In two recent cases, the French courts have arrived at what some will consider rather surprising decisions.

***Kuate v Air France, Kenya Airways and others* Paris Court of Appeal [2011]**

In this case, Mrs Kuate (a Cameroon resident) bought a return ticket in Cameroon to fly from Douala to Guangzhou in China on Kenya Airways. She paid for the ticket, in part, with air miles collected on her Air France “Flying Blue” card. The passenger died in an accident during take off from Douala on 5 May 2007.

In an interlocutory application to decide whether a claim could be brought before the French Courts, the claimants argued that Mrs Kuate’s electronic ticket was printed on Air France headed paper and stated “issued by Air France”; that Mrs Kuate had bought the ticket using her air miles from the “Skyteam” loyalty network of which both Kenya Airways and Air France are members; that the

ticket was partly paid for in cash at Air France’s offices; and that whilst the passenger was informed that Kenya Airways would fly these sectors, Air France should be considered the contracting carrier.

The airlines argued that Air France acted only as agent for Kenya Airways – the ticket showed Kenya Airways as carrier; the IATA rules governing the Multilateral Interline Traffic Agreement provide that if an airline sells its carrier services on the services of another airline, it does so as agent for the other carrier; and accordingly, Kenya Airways, not Air France, was both contracting and actual carrier.

The Court of Appeal held that the only contractual evidence was an Air France document in the form of a boarding card, referring to an electronic ticket and bearing the airline’s design and mentioning “Skyteam”, the means

of payment and the different flights being undertaken by Kenya Airways. The IATA conditions and/or the Multilateral Interline Traffic Agreement were not referred to. The Court said Air France could not base its arguments on agreements entered into by Air France but unknown to the passenger.

Thus, the Court held Air France to be the contracting carrier and, therefore, the claimants could bring their claim before the courts in France, under Article 33 of the Montreal Convention.

Marsans International v Air France Supreme Court in France [2012]

Here, a husband and wife had bought a package holiday through a tour operator, Marsans International, including flights from Toulouse to St Petersburg and from Moscow to Toulouse. The tickets were marketed by Air France, but the flights were intended to be operated by KLM. In fact, the carriage from Toulouse to St Petersburg was undertaken by Aeroflot due to a technical breakdown of the KLM aircraft. All three airlines are members of "Skyteam".

The passengers' bags were lost during the outbound flight, which was also delayed, leading to them missing part of their holiday in Russia. They sued and Marsans was ordered to pay compensation to the passengers. Marsans claimed the costs from Air France as the contracting carrier.

The French Court had to decide whether, by marketing the tickets via its computerised reservation system, Air France had acted only as agent of KLM, or as a contracting carrier.

The Supreme Court concluded that Air France was the contracting carrier. It ruled that the contract for carriage took the form of electronic tickets which mentioned Air France and were issued by Air France, even though the flight itself was to be undertaken by KLM, as was shown by the flight numbers endorsed on the booking. These documents also stated that carriage was governed by terms and conditions which could be obtained from the airline issuing the ticket. As the contracting carrier, Air France was therefore liable to indemnify Marsans both for the delay and baggage claims.

Many observers will find these decisions surprising given the position as it was previously understood regarding carriers that issue tickets or make reservations for flights on another carrier's services only as agent. The rulings will clearly have implications for contracting carriers' liability in these situations and may well lead to jurisdiction arising where otherwise it would not. Carriers should check their code share agreements to ensure that in circumstances such as these, airlines issuing tickets on other carriers' flights are entitled to an indemnity from the operating carrier.

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Montreal in the Court of Appeal

Stott v Thomas Cook and Tony Hook v BA PLC EWCA [2012] Civ 66

The June 2011 edition of the Clyde & Co Aviation Bulletin carried an article on the High Court decision in *Hook v BA* [2011] EWHC 379 which became the first Montreal Convention authority supporting the principle of the Convention's exclusivity against rights considered to be fundamental under European law. Mr Hook was not satisfied to leave his defeated disability claim at the High Court and has challenged the decision in the Court of Appeal. His cause was joined with an appeal carrying similar facts: *Stott v Thomas Cook Tour Operations Limited*. To underline the significance of the appeal, the Secretary of State for Transport also decided to participate as an intervener. The exclusivity principle - that domestic law cannot override the provisions of the Convention - is well established in the law of many jurisdictions and has survived another test as both appeals were unanimously rejected.

Common Appeals - Background

Both appellants were disabled. The facts of their appeals arise from the failure of their respective airlines to provide seating adequate for their needs as had been arranged prior to travel. This failure caused distress to both passengers and both brought actions seeking a declaration that the airlines had breached their rights under the EC

Disability Regulation (EC Reg. 1107/2006) and the United Kingdom's enactment - Civil Aviation (Access to Air Travel For Disabled Person and Persons with Reduced Mobility) Regulations 2007 SI 2007/1895. The UK Regulations purport to create a cause of action for damages including in relation to injury to feelings.

Mr Hook's claim fell at the first hurdle, on BA's application to strike out his claim where the judge held that the Convention provided Mr Hook's exclusive remedy against British Airways and that its provisions did not encompass damages of the type claimed. Mr Stott at least achieved a declaration that Thomas Cook had breached his rights under the Disability Regulation but also failed to derive compensation because the Convention prevented it. Both appeals focussed on the pre-emptive nature of the Convention to causes of action under both European and domestic law.

"R (IATA) v Sidhu": The Battle Lines

Although several cases were cited in argument, the Court noted that two well known cases enshrined the arguments on each side.

The appellants' case sought to expose a conflict between international law on air carrier liability and European law providing fundamental rights for disabled passengers. They argued that such disability rights – including the provision for damages under the UK disability Regulation - were supplementary to the Convention. They relied on the decision of the Grand Chamber of the ECJ in *R (IATA) v Department of Transport* [2006], in which the ECJ dismissed a challenge to the legality of EC Reg. 261/2004 (commonly known as the 'denied boarding regulation'), holding that the Regulation was not inconsistent with the Montreal Convention rules imposing liability for delay. The reasoning was that the provision of "standardised and immediate assistance and care measures do not themselves prevent ... additional actions" under the Montreal Convention. Accordingly, the appellants should be able to derive a cause of action under the EC Disability Regulation (and the UK Regulations providing a remedy for damage to feelings) as well as the Montreal Convention if the same facts give rise to a cause of action supported by the Convention. It was argued that the exclusivity principle had been over-extended or, as Counsel for the Dept. of Transport put it, the Disability Regulation "occupies a different legal space" and is complementary to the Convention.

The airlines' case highlighted that the Montreal Convention is an integral part of European law and focussed on the exclusivity of the Convention as set out in Article 29, providing that "any action for damages, however founded ... can only be brought subject to the conditions and such limits of liability as are set out in this Convention...". When taken together with provisions of Article 17, the Convention limits the circumstances in which carriers may be liable to passengers for death and bodily injury to 'accidents'. They relied on the House of Lords decision in *Sidhu v British Airways* [1997], wherein claims for negligence were rejected as being outside the

two year limitation period and thus forever extinguished, since no alternative cause of action existed. Lord Hope's speech recognised that the Convention provides a "uniform international code" and was designed "to define those circumstances in which compensation was to be available". That 'code' had uniformly been interpreted - in many jurisdictions - not to provide damages for injury to feelings absent bodily injury.

Court of Appeal Judgment

The Court had no difficulty in accepting the need for the Montreal Convention to be applied exclusively, accepting also the limitation expressed by Lord Hope in *Sidhu* that the Convention was limited to "those cases with which it deals". Lord Justice Maurice Kay stated that "once one is within the timeline and space governed by the Convention, it is the governing instrument in International, European and domestic law".

The crucial question was one of time. Noting that the IATA case upheld the assistance and compensation scheme of EC Reg. 261/2004 by distinguishing circumstances which "operate at an earlier stage than the system which results from the Montreal Convention", the Court recognised that it was permissible for European Union to provide for circumstances related to air travel that falls outside the period with which the Convention does not deal.

Were the acts complained of within the concept of boarding? The US Supreme Court decision in *Tseng v El Al* [1999] was particularly instructive in giving the concept of boarding a meaning broader than merely the physical act of entering the aircraft. In that case the claimant complained of assault, but no bodily injury, during an intrusive security search. Despite the search taking place in a room away from the standard checks, the Supreme Court held that this formed part of the boarding process and that the Convention applied to defeat the claim. Given that Mr Hook's and Mr Stott's incident manifested through the process of checking-in and on board the aircraft, their claims failed.

Discussion

The decision should provide some comfort to airlines and insurers that the protective regime of the Convention still operates effectively.

Since there has been no change to the law, why is this case significant? First, this decision replaces the earlier decision in *Hook v BA* as higher English authority for the exclusivity of the Montreal Convention.

Second, it provides helpful additional clarity in an increasingly complex legal environment. Previous authorities, such as *Tseng* and *Sidhu*, did not have to contend with the tension created by EU Regulations. They are a primary source of law within the European Union and the United Kingdom and provide rights that, in some instances, individuals can rely on directly. The use of EU Regulations to develop social mobility laws intended, in this instance, to provide access to the air transport system creates an understandable expectation that such European

standards will be met. These are people who may not otherwise choose to fly and therefore put themselves in an unfamiliar and physically compromising environment. The Court was rightly sympathetic to the ill-treatment of the passengers but robustly rejected a claim for damages in relation to injury to feelings.

A threshold question arises for those seeking to claim for injury to feelings and benefit from the European disability regime: when was the injury sustained? A claim may be brought if the injury was sustained before boarding and after embarkation, when the Convention does not apply. However, when the Convention does apply, it cannot be overridden.

Even though the Convention system (Warsaw and Montreal) has been controversial almost since it came into being in 1929 – for example the values of the limits of liability quickly became unacceptable in the United States – it has achieved remarkable international success. Two things in particular underpin

this - its uniformity and the balance struck between protection of the passenger – who benefits from the strict liability imposed on the airline – and *quid quo pro* protection for airlines by limiting that liability. Under the Montreal Convention, the amount of liability is no longer so tightly capped as strict liability applies only for loss sustained up to SDRs 113,100, above which a carrier may benefit from negligence based tests. However, the circumstances in which liability arises are securely limited.

The appeals attempted to undermine this balance by broadening the scope of liability in line with the EC Disability Regulation and eroding the international uniformity in favour of additional passenger protection specific to Europe. It is submitted that the decision of the Court of Appeal is a welcome and cogent reaffirmation of the scope of the Convention.

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Further information

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