

Defendants Attempt to Limit U.S. Jurisdiction in International Aviation Cases

Aviation Law columnists Steven R. Pounian and Justin T. Green write: A major goal of the Montreal Convention was to expand the jurisdiction provisions of the Warsaw Convention to provide victims of international aviation disasters up to five jurisdictions in which to bring their lawsuits. Airlines have recently attempted to restrict these choices.

By Steven R. Pounian and Justin T. Green November 15, 2017 at 02:45 PM



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A major goal of the Montreal Convention was to expand the jurisdiction provisions of the Warsaw Convention to provide victims of international aviation disasters up to five jurisdictions in which to bring their lawsuits. Airlines have recently attempted to restrict these choices. In a recent decision, a district court rebuffed an attempt by Germanwings, a foreign air carrier, to avoid jurisdiction in the United States even though the carrier had authorized another airline to sell in the United States the Germanwings tickets on which the victims were traveling. A second rising issue is whether the Foreign Sovereign Immunities Act (FSIA) may protect foreign government owned airlines from subject matter jurisdiction in the United States even where subject matter jurisdiction is proper under the Montreal Convention.

Subject Matter Jurisdiction Under the Montreal Convention. The Montreal Convention is the successor to the Warsaw Convention. See Convention for the Unification of Certain Rules for International Carriage by Air Concluded at Montreal, 2242 U.N.T.S. 309, S. Treaty Doc. No. 106-45; Convention for the Unification of Certain Rules Relating to International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. The Warsaw Convention provided four jurisdiction choices to a plaintiff: where the air carrier was domiciled, where the air carrier has its principal place of business, where the air carrier has a place of business through which the contract for carriage (the ticket) was made, and the passenger's destination. *Id.*, Art. 28. The drafters of the Montreal Convention created a "fifth jurisdiction" as a way to cure the perceived injustice of injured parties not having the ability, under the Warsaw Convention, to bring suit in their own home jurisdiction. Montreal Convention, Art. 33.2. The "fifth jurisdiction" is the passenger's "principal and permanent residence" at the time of the accident if the carrier operates to the jurisdiction and has a physical presence in the jurisdiction. *Id.*

Defendants have recently attempted to limit the ability of plaintiffs to take advantage of the jurisdiction choices provided by the Montreal Convention by

arguing (1) there is no personal jurisdiction in the United States; and (2) that where the carrier is government owned, jurisdiction under the Montreal Convention is meaningless if plaintiff is not able to also satisfy the FSIA subject matter jurisdiction requirements.

District Court Rejects Airline's Attempt to Avoid U.S. Jurisdiction Where Airline Sold Ticket in U.S. through Authorized Agent. In *Selke v. Germanwings*, __F. Supp. 3d__, No. 1:17-cv-00121-GBL-TCB, 2017 WL 3095911 (E.D.VA. July 20, 2017), Virginia family members were passengers on Germanwings Flight 9525, a scheduled flight from Barcelona, Spain to Düsseldorf, Germany, on March 24, 2015. On the flight, the Germanwings co-pilot Andreas Lubitz locked the captain out of the cockpit and intentionally crashed the airplane, murdering everyone onboard. *Id.* at *3.

The *Selke* decedents purchased tickets Flight 9525 from United Airlines on its website as part of a five-flight transaction: a United flight from Virginia's Washington Dulles International Airport (Dulles) to Munich, Germany; a Deutsche Lufthansa AG (Lufthansa) flight from Munich to Barcelona, Spain; a Germanwings GmbH (Germanwings) flight from Barcelona to Düsseldorf, Germany; a Germanwings flight from Düsseldorf to Manchester, England; and finally a United flight from Manchester to Dulles. *Id.* Defendant Germanwings, Lufthansa, and Eurowings maintained separate codeshare agreements with United, which authorized United to sell tickets for the airlines. *Id.*

There was no dispute that the Montreal Convention provided subject matter jurisdiction against Germanwings in the United States. The plaintiffs purchased those tickets in the United States and their final destination was the United States. Germanwings, however, argued that it was not subject to personal jurisdiction in Virginia because it did not have physical presence in Virginia and the sale of the ticket in the jurisdiction by its agent United Airlines could not form the basis for specific personal jurisdiction. *Id.* at*7.

The court denied Germanwings motion to dismiss for lack of personal

jurisdiction. The court found the same regarding Lufthansa, which permitted United to sell tickets for Lufthansa flights in Virginia and also operated to Virginia and had employees there. *Id.* at *9-10. The court granted Lufthansa summary judgment motion because it did not operate the Germanwings flight and its status as a successive carrier did not provide a basis of liability under the Montreal Convention. *Id.* at *10. The court granted Eurowings' motion finding that it did not have minimum contacts with Virginia. *Id.* at *13.

Germanwings argued that personal jurisdiction cannot be established in Virginia because the substantial connection with the forum state must arise out of contacts that the defendant itself makes with the forum state and not the contacts of an agent to the forum. The court, however, found that by expressly authorizing United Airlines to sell tickets to Virginia residents, it was Germanwings itself that established contacts in Virginia. *Id.* at *5-7. The court further noted that because the plaintiffs were citizens of Virginia and because the litigation proceeding in the jurisdiction would not "unduly inconvenience Germanwings" that asserting personal jurisdiction comported with the reasonableness requirements of the Due Process Clause. *Id.* at *8

Germanwings further argued that the sale of the tickets was its only contact within Virginia and the tickets sales cannot provide a basis for personal jurisdiction because the accident did not arise out of the sale of the ticket, but rather from the actions of the Germanwings copilot in crashing the airplane in Europe. Germanwings relied on the recent Supreme Court decision *OBB Personenverkehr AG. v. Sachs*, 136 S. Ct 390 (2015).

In *Sachs*, a U.S. citizen purchased a Eurail pass in the United States through a travel agent. While using the Eurail pass to board a train operated defendant, an Austrian state-owned railway, she suffered personal injuries when she fell to the tracks at a station in Innsbruck, Austria. *Id.* at 343. Plaintiff sued in the United States and the defendant railway moved to dismiss arguing that the court did not have subject matter jurisdiction to hear the case because the

government owned railway was entitled to sovereign immunity under FSIA. Id.

FSIA provides the sole basis to establish subject matter jurisdiction against a foreign state in U.S. courts. Id. The Act defines “foreign state” to include a state “agency or instrumentality” (see 28 U.S.C. §1603(a)) and the parties agreed that the carrier qualified as a foreign state under FSIA. *Sachs*, 136 S. Ct. 393.

Under the FSIA, a foreign state is immune from jurisdiction unless one of the Act’s exceptions to sovereign immunity applies. Id. The *Sachs* plaintiff argued her suit fell within FSIA’s commercial activity exception, which permits jurisdiction over cases that are based on a commercial activity carried on in the United States by the foreign state. Id. at 394.

At issue in *Sachs* was whether the sale of the Eurail pass in the United States, certainly a “commercial activity,” can be the basis of subject matter jurisdiction in the United States under FSIA’s commercial activities exception. Id. at 395. The Supreme Court concluded that the sale of the ticket in the United States was not sufficient because the case did not arise out of the sale of the ticket, but rather from the allegedly unsafe boarding conditions in Austria that lead to the plaintiff’s fall and injuries. Id. at 396.

Germanwings, which is not government owned and is therefore not entitled to any FSIA protection, tried to use *Sachs* to argue that the sale of the ticket in Virginia could not form the basis for personal jurisdiction because the action arose from the murderous actions of its co-pilot, not from the sale of the ticket. *Selke*, 2017 WL 3095911 at 7. The court rejected this argument because *Sachs* turned on the interpretation of the phrase “based on” in FSIA’s commercial activities exception. Id. *Sachs*, the court noted did not address the Virginia long-arm statute or Virginia causation standard and even within FISA was restricted to the FSIA commercial activities exception, which includes the “based on” language and did not apply to other FSIA’s exceptions, such as the noncommercial tort exception. Id. The court

concluded that under Virginia law, the sale of the ticket could form the basis for personal jurisdiction because the sale was the “catalyst” for the cause of action. *Id.* Germanwings’ activities in Virginia proximately resulted in Plaintiffs’ cause of action, which supported personal jurisdiction. *Id.*

Montreal Convention Jurisdiction at Issue in Malaysia Airlines Flight 370 Disappearance. Malaysia Airlines Flight 370 disappeared on March 8, 2014 and remains missing. Flight 370 was scheduled to fly from Kuala Lumpur International Airport to Beijing Capital International Airport. The aircraft is presumed to have crashed somewhere in the Southern Indian Ocean.

Some MH370 victim families have filed Montreal Convention cases in the United States against Malaysian Airline System Berhad (MAS), the carrier, and Malaysia Airlines Berhad (MAB), which was established after the disappearance by special legislature in Malaysia and now operates Malaysia Airlines. The plaintiffs rely on the Montreal Convention’s “fifth jurisdiction”—the victims’ principal and permanent residence and/or the alleged purchase of the tickets in the United States. See *In re: Aircrash over the Southern Indian Ocean on Mar 8th, 2014*, No.1:16-mc-01184, defendants Memorandum in Support of its Motion To Dismiss, Docket 39-1, Oct 1, 2016.

The airline defendants filed a motion to dismiss claiming they are presumptively immune from jurisdiction in the United States, because they qualify as “agencies or instrumentalities” of Malaysia, under FISA. Furthermore, defendants claim that plaintiffs cannot satisfy their burden of proving any exception to or waiver of immunity applies. According to the motion, even if there is subject matter jurisdiction under the Montreal Convention in the United States, plaintiffs still cannot sue in the United States because there is no FSIA subject matter jurisdiction. (Defendants further argue the plaintiffs do not satisfy any jurisdiction under the Montreal Convention. *Id.* at 25.) Defendants rely on *Sachs* in arguing that FSIA subject matter jurisdiction cannot be based on the sale of a ticket in the United

States. Id.

In response, plaintiffs argue that that defendants have waived their right to immunity when they applied for and obtained a foreign air carrier permit from the U.S. Department of Transportation and that Malaysia waived sovereign immunity when it adhered to the Montreal Convention.

Conclusion

The Montreal Convention's goal was to expand the jurisdiction choices of parties injured during international flights. The *Selke* decision is a good sign that courts will not permit airlines to profit from selling tickets in the United States yet avoid the jurisdiction of the U.S. courts where passengers are injured or killed while flying on those tickets.

The anticipated *Malaysia Airlines* ruling may have ramifications on the ability of injured parties to bring Montreal Convention claims suit against foreign government owned airlines in the United States.

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