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EXPERT ANALYSIS

Disharmony in Montreal Convention Injury Cases

When Does a Departure From Airline Policy or Industry Standards Give Rise to an 'Accident'?

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Last year alone, more than 181 million passengers flew on international flights into and out of the United States.[1] The Montreal Convention is the preemptive federal treaty governing the rights of those passengers.[2] But divergent standards govern the inquiry of whether an event was "unexpected or unusual" for purposes of establishing that an "accident" occurred under Article 17 of the Montreal Convention, depending upon the U.S. gateway city involved.

The 11th U.S. Circuit Court of Appeals recently held that an airline's departure from its own policies or industry standards is irrelevant to the accident inquiry,[3] but the 2nd and 5th circuits have held those considerations to be relevant, and the 9th Circuit has assumed that they may be. At least one federal district court in New York recently compounded the cacophony by holding that only "significant" departures from airline or industry policies may give rise to an "accident."[4]

As a result, different standards now exist for international air travel at many of the nation's busiest airports. Four of the top 15 U.S. passenger gateways to the world are located within the 11th Circuit, while the 2nd, 5th and 9th circuits account for six others.[5] The inquiry into determining whether an accident occurred in connection with a covered international flight into or out of New York City, Houston or Dallas, for instance, now differs from identical flights to or from Atlanta, Miami, Fort Lauderdale or Orlando, Fla.

Injured passengers in the 11th Circuit may be deprived of an important mode of proof that the airline's conduct gave rise to a compensable accident, but passengers who sue in venues such as Texas or California do not face the same evidentiary restriction. Passengers flying through New York presently face a distinct evidentiary hurdle. This divergence of opinion also presents air carriers with uncertainty. The applicable standard is presently dependent in large part upon the happenstance of which U.S. airport was on the injured passenger's itinerary.

This divergence of standards may create incentives for forum-shopping by plaintiffs, and it undoubtedly affects the predictability of airlines' exposure to liability. Both concerns chafe at the purpose of the Montreal Convention: to establish a uniform and predictable legal regime for accidents in international air travel. This commentary canvasses the law in this area.

ARTICLE 17(1) OF THE MONTREAL CONVENTION

Article 17(1) of the Montreal Convention provides:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[6]

The Montreal Convention, like its predecessor, the Warsaw Convention, was designed to "achiev[e] uniformity of rules governing claims arising from international air transportation."[7] The treaty seeks to balance the rights of passengers injured in connection with air travel to and from the United States with air carriers' interests in having clear and defined rules of liability governing bodily injuries caused by Article 17 accidents.[8]

Nearly 30 years ago, when the U.S. Supreme Court definitively established that an "accident" under Article 17 of the Warsaw Convention is "an unexpected or unusual event or happening that is external to the passenger," it cautioned courts that "[t]his definition should be *flexibly applied* after assessment *of all the circumstances surrounding a passenger's injuries*."[9]

Then, 10 years ago, in *Olympic Airways v. Husain*,[10] the Supreme Court's most recent foray into Article 17, it left open a significant issue: whether an international air carrier's departure from industry standards or its own policies is relevant to determining if an event was "unexpected or unusual" for purposes of determining whether an accident occurred under Article 17.[11]

In the decade since *Husain*, a circuit split has opened over this question, implicating significant federal concerns.

A PREVIEW FROM THE SUPREME COURT?

The 2nd Circuit appears to have been the first to hold that departures from an airline's own policy may be relevant to the accident inquiry.

When the Supreme Court decided *Husain* in 2004, it expressly declined to address the unpreserved issue of whether a flight attendant's conduct — refusing a severely asthmatic passenger's repeated requests to be moved away from the smoking section — was "unusual or unexpected in light of the relevant industry standards or [the carrier's] own company policy."[12]

Although the Supreme Court did not confront this issue, some of the language in *Husain* suggests a consensus among the court's members that industry standards and airline policy can be relevant considerations to the "accident" inquiry.

Justice Clarence Thomas' opinion for a six-member majority used the following hypothetical to illustrate why an airline crew's inaction might constitute an "event" or "happening" sufficient to give rise to an Article 17 accident:

> Suppose that a passenger on a flight inexplicably collapses and stops breathing and that a medical doctor informs the flight crew that the passenger's life could be saved only if the plane lands within one hour. *Suppose further that it is industry standard and airline policy to divert a flight to the nearest airport when a passenger otherwise faces imminent death.* If the plane is within 30 minutes of a suitable airport, but the crew chooses to continue its cross-country flight, "[t]he notion that this is not an unusual event is staggering."[13]

This passage bespeaks a tacit recognition that all kinds of departures from industry standards and airline policies may well form part of the necessary context of an assessment of whether an air carrier's conduct was unusual or unexpected for purposes of Article 17. Furthermore, two of the dissenters seemed predisposed to treat airline policy and industry standards as germane to the accident inquiry.[14] Four members of the court that decided *Husain* — Justices Antonin Scalia, Anthony Kennedy, Thomas and Ruth Bader Ginsburg — remain on the court today. Justice Stephen Breyer did not participate in the decision.

THE CIRCUIT SPLIT

Prior to the 11th Circuit's recent decision in *Campbell v. Air Jamaica Ltd.*,[15] the circuits that had squarely ruled on the issue had held that an air carrier's departure from its own policies or industry standards could be relevant to determining whether an event was "unexpected or unusual" for purposes of the Article 17 accident inquiry. Those courts have articulated in different ways the circumstances in which a departure from airline or industry standards may bear on the "accident" inquiry.

The 2nd Circuit

The 2nd Circuit appears to have been the first to hold that departures from an airline's own policy may be relevant to the accident inquiry.

In the case, a flight attendant dripped scalding water on a young child while attempting to apply a hot compress to her ear. The 2nd Circuit concluded that the air carrier's deviation from a routine and expected procedure could give rise to an accident under Article 17 of the Warsaw Convention.[16] It set a flexible standard regarding whether the manner in which the airline carried out its procedure was "unreasonable," such that a court could find the procedure was "not expected, usual, normal, or routine."[17]

District courts within the 2nd Circuit have thus permitted inquiry into such deviations, but recently the U.S. District Court for the Eastern District of New York in *Safa v. Deutsche Lufthansa AG Inc.*[18] fashioned a narrower aperture, only permitting Article 17 claims when the injury was caused by a "significant departure" from airline policy or industry standards.[19]

This heightened standard is the subject of an ongoing appeal of the *Safa* case in the 2nd Circuit, inquiring whether it can be squared with circuit precedent and seeking clarification of the proper formulation of the inquiry.

The 5th Circuit

Similar to the 2nd Circuit, the 5th Circuit has twice held that departures from industry standards or company policies may be relevant to whether an event was unexpected or unusual for purposes of Article 17 claims.

It first so held in the immediate wake of *Husain*, where the issue was whether the airline's failure to warn passengers of the risk of developing deep vein thrombosis, or DVT, could constitute an unusual or unexpected event giving rise to Article 17 liability for the passenger's resulting stroke aboard a flight from Houston to London, which was governed by the Warsaw Convention.[20]

Two years ago, a subsequent panel of the 5th Circuit extended the court's prior holding to the context of a Montreal Convention case involving a flight crew's response to an in-flight medical emergency.[21]

The 9th Circuit

The 9th Circuit has avoided deciding the issue, although its pronounce-ments seem to share *Husain*'s seeming hospitableness to the notion that industry standards and company policies are relevant to the accident inquiry.

In 2004 the 9th Circuit declined to decide whether a failure to warn of DVT on a flight from Los Angeles could constitute an accident because the plaintiff did not introduce competent evidence establishing the existence of an industry standard to issue such warnings.[22] Implicit in the 9th Circuit's apparent receptiveness to such evidence is the recognition that it might be relevant to the Article 17 inquiry in certain circumstances.

In two subsequent cases that did not require the court to address the issue, the 9th Circuit observed that the question of "whether an air carrier's departure from either industry standard or its own company policy are the appropriate benchmark for determining whether an event is 'unexpected or unusual' under Article 17" is "salient to ... [the Article 17] inquiry" but remained "unresolved."[23]

Most recently, the 9th Circuit suggested even greater solicitude toward the relevance of this kind of evidence by holding that Federal Aviation Administration require-ments "may be relevant to the ... 'accident' analysis" for Article 17 claims under the Montreal Convention.[24]

The 11th Circuit

Since its *Campbell* decision in July 2014, the 11th Circuit stands in stark contrast to the other circuits to have considered the issue. In affirming the dismissal of an Article 17 injury claim, the

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Campbell involved a passenger who said he was called to board the plane but was then denied boarding, apparently in direct contravention of the air carrier's own policies and industry standards. Soon after, he became ill and ultimately had a heart attack.[26]

Although the case arose from what the 11th Circuit ultimately characterized as a mere bumping situation, the court nonetheless used broad language to hold that an airline's alleged failure "to follow standard procedures" is "*irrelevant* to Article 17 analysis."[27] Its additional pronouncement that the "Article 17 analysis ... measures only whether the event was unusual from the viewpoint of the passenger, not the carrier"[28] seems to have further broadened the scope of its holding. That novel point-of-view test might preclude a passenger's resort to "internal airline records" or other evidence of noncompliance with company policy, which the Court of Appeals intimated "in no way" bears on the Article 17 accident analysis.[29]

Notwithstanding the new circuit split, the U.S. Supreme Court denied *certiorari* in *Campbell*.[30] Perhaps the split needs to deepen before the high court will agree to provide further guidance.

THE PENDING APPEAL IN THE 2ND CIRCUIT

As noted above, the 2nd Circuit currently has before it a case that squarely presents the question of what the proper standard is for assessing when a departure from airline policy or industry standards gives rise to an "accident" under Article 17.

The District Court in *Safa v. Deutsche Lufthansa* required a heightened showing of a "significant departure" from airline policy or industry standards as a prerequisite to proceeding to trial on an "accident" claim. The court drew on language to this effect in the U.S. District Court for the Southern District of New York's scholarly opinion of *Fulop v. Malev Hungarian Airlines*.[31]

Although the *Fulop* court used the term "significant departure" amid a fulsome discussion of the considerations at issue in the Article 17 accident inquiry, it is not clear that the court intended that language to create a heightened standard for plaintiffs.[32]

The *Safa* court nonetheless adopted this stricter standard, and thereby rejected the plaintiff's arguments that disputed issues of fact concerning whether Lufthansa flight and cabin crew departed from company policy precluded summary judgment for the airline. The plaintiff had a heart attack aboard an international flight and argued that the Lufthansa purser's and captain's failures to respond to the medical emergency in accordance with company policy and to divert the flight to a closer airport caused the plaintiff's injuries.[33]

The case is presently on appeal to the 2nd Circuit. The passenger's primary legal argument is that the heightened "significant departure" standard is inconsistent with the flexible approach the Supreme Court has emphasized should be applied to the "accident" inquiry, as well as with the standard the 2nd Circuit articulated in *Fishman v. Delta Air Lines*: whether the airline carried out its procedures in a manner that "was not expected, usual, normal, or routine."[34] How the 2nd Circuit decides this legal question could either harmonize some discordant standards among different courts or deepen the circuit split.

Until the Supreme Court steps in to resolve this disharmony, disparate standards will continue to govern the claims regarding passengers' bodily injuries on covered international flights, depending upon which American airport is involved. These divergent standards threaten the uniformity of interpretation of important international treaty rights and liabilities.

NOTES

[1] U.S. Dep't of Transp., U.S. Int'l Air Passenger & Freight Statistics 3 (December 2013), *available at* http://1.usa.gov/1zRcQoe.

[2] Montreal Convention for the Unification of Certain Rules for International Carriage by Air, art. 17(1), May 28, 1999, reprinted in S. Treaty Doc. No. 106-45 (2000), 2242 U.N.T.S. 309.

[3] *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165 (11th Cir. 2014).

[4] *Safa v. Deutsche Lufthansa AG Inc.*, No. 2:12-cv-02950-ADS-SIL, 2014 WL 4274071 (E.D.N.Y. Aug. 28, 2014).

[5] U.S. Dep't of Transp., U.S. Int'l Air Passenger & Freight Statistics (December 2013), at Table 6 (listing rankings as (1) New York City, (2) Miami, (3) Los Angeles, (6) Atlanta, (7) San Francisco, (8) Houston, (10) Dallas, (14) Orlando, (15) Fort Lauderdale and (16) Seattle).

[6] Montreal Convention, art. 17(1), at *33.

[7] *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

[8] *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155, 170 (1999).

[9] *Air France v. Saks*, 470 U.S. 392, 405 (1985) (emphasis added). Fourteen years later, the court reiterated that admonition. *Tseng*, [10] 540 U.S. 644 (2004).

[11] *Husain* involved the predecessor Warsaw Convention, but Article 17 of the Montreal Convention, which entered into force in the United States on Nov. 4, 2003, is substantively identical. *Phifer v. Icelandair*, 652 F.3d 1222, 1224 n.1 (9th Cir. 2011); S. Treaty Doc. No. 106-45, 1999 WL 33292734, at *16; *White v. Emirates Airlines Inc.*, 493 Fed. App'x 526, 529 (5th Cir. 2012).

[12] 540 U.S. at 652.

[13] *Id.* at 656 (emphasis added) (quoting *McCaskey v. Cont'l Airlines Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)).

[14] *See id.* at 665-66 (Scalia, J., dissenting) (faulting the District Court for failing to make sufficiently contextual "findings as to airline and industry policy" and suggesting that more particularized evidence concerning "company policy" would have been relevant).

[15] 760 F.3d 1165 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 759 (Dec. 8, 2014).

[16] *Fishman v. Delta Air Lines Inc.*, 132 F.3d 138, 142-43 (2d Cir. 1998).

[17] *Id.* at 143.

[18] *Safa*, 2014 WL 4274071, *appeal filed*, No. 14-3714 (2d Cir.). The *Safa* decision was the subject of recent commentary from defense counsel in the case. *See* Joseph J. Ortego, & Thomas M. Mealiffe, *The Montreal Convention: Assessing flight crew response to medical emergencies*, 21 WESTLAW J. AVIATION 3, 4-5 (Jan. 14, 2015).

[19] *Safa,* 2014 WL 4274071 at *7 (citing *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001)).

[20] *Blansett v. Cont'l Airlines Inc.*, 379 F.3d 177, 181-82 (5th Cir. 2004).

[21] *White v. Emirates Airlines Inc.*, 493 Fed. App'x 526, 534 (5th Cir. 2012).

[22] *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914, 918-19 (9th Cir. 2004), *cert. denied,* 125 S. Ct. 1665 (2005).

[23] *Caman v. Cont'l Airlines Inc.*, 455 F.3d 1087, 1091 & n.4 (9th Cir. 2006), *cert. denied,* 127 S. Ct. 1333 (2007); *see also Twardowksi v. American Airlines*, 535 F.3d 952, 961 (9th Cir. 2008).

[24] *Phifer*, 652 F.3d at 1224.

[25] *Campbell*, 760 F.3d at 1173 (citing *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521 (11th Cir. 1997)).

[26] *See Campbell v. Air Jamaica Ltd.*, No. 12-14860, at *2-*7, *appellant's additional brief filed* (11th Cir. Sept. 3, 2013), 2013 WL 4965486).

[27] *Campbell*, 760 F.3d at 1173 (citing *Krys*, 119 F.3d at 1521) (emphasis added).

[28] *Id.* (citing *Krys*, 119 F.3d at 1521).

[29] *Id.*

[30] *Campbell v. Air Jamaica Ltd.*, No. 14-411, *cert. denied*, 135 S. Ct. 759 (Dec. 8, 2014).

[31] *Fulop*, 175 F. Supp. 2d at 665 ("[I]njuries possibly resulting from an air carrier's significant departure from applicable procedures in responding to passenger emergencies relates to aircraft or airline operations and may have a sufficient causal bearing to the circumstances surrounding a resultant injury to support liability under the Warsaw Convention.").

[32] *See generally id.* Immediately after its use of the "significant departure" language, the court broadly held: "[the airline's] alleged deviation from its own rules and standards that were in place to deal with passengers stricken by medical emergencies may be sufficient to support a determination that such an event ... was unusual or unexpected, and thus an accident." *See id.* at 665.

[33] *Safa*, 2014 WL 4274071, at *5, *7, *9.

[34] *See Safa v. Deutsche Lufthansa Aktiengesellschaft Inc.*, No. 14-3714, *appellant's brief filed* (2d Cir. Dec. 19, 2014), 2014 WL 7405070, at *26-27 (citing *Saks*, 470 U.S. at 405; *El Al*, 525 U.S. at 165 n.9; and quoting *Fishman*, 132 F.3d at 142-43).

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