



by Anna Gatova

***Ontario Superior Court of Justice stays an action arising out of the international carriage by air because Ontario Court did not have jurisdiction under the Warsaw Convention***

In a recent decision, *Ashad v. Deutsche Lufthansa Aktiengesellschaft (c.o.b. Lufthansa German Airlines)*, [2009] O.J. No. 4979, the Ontario Superior Court of Justice allowed the airline's motion to stay the passenger's action on the ground that Ontario Courts did not have jurisdiction over the subject matter of the action under the Warsaw Convention.

The plaintiff passenger alleged that he suffered personal injuries when he unintentionally swallowed pieces of shredded glass that were in a fruit bowl served to him on board the defendant's flight from Sao Paulo, Brazil to Frankfurt, Germany.

The plaintiff purchased his ticket from the defendant's office in Tripoli, Libya for travel from Tripoli to Sao Paulo and back to Tripoli. The return flight to Tripoli was rerouted, however, and a new ticket was issued to the plaintiff in Sao Paulo for travel to Tripoli via Frankfurt and Geneva.

The defendant airline was incorporated under the laws of the Federal Republic of Germany with its corporate headquarters located in Cologne. It was served with the plaintiff's Claim at its Toronto office.

The Court considered two alternatives: (a) the place of the plaintiff's departure was Brazil, where the new ticket was issued, and the place of destination was Libya; or (b) alternatively, the place of departure and the place of destination was Libya.

In both of these instances, however, the travel was an international carriage governed by the Warsaw Convention, which is incorporated into the laws of Canada by the Carriage by Air Act, R.S.C. 1985, c. C-26, because in (a) both countries were High Contracting parties to the Warsaw Convention and in (b) Libya was a High Contracting Party and there were agreed stopping places in other states.

Pursuant to the mandatory language of Article 28 of the Warsaw Convention, the plaintiff must bring his action in either: (1) the place where the carrier is ordinarily resident, (2) the place where the carrier has its principal place of business, (3) the place where the carrier has an establishment by which the contract has been made, or (4) the place of destination.

The Court found that the place where Lufthansa had its principal place of business and where it was ordinarily resident was Germany and the place where Lufthansa had an establishment by which the contract was made was either Brazil or Libya.

Accordingly, the Court held that the only options available to the plaintiff in these circumstances were to bring his action in Germany, Brazil, or Libya.

The Plaintiff raised a number of arguments in support of his position that Ontario Courts had jurisdiction over the subject matter of his action. Among these was an argument that Ontario had jurisdiction because of the application of the Montreal Convention. This Treaty was developed in an effort to modernize the Warsaw Convention and has also been incorporated into the laws of Canada by the Carriage by Air Act.

One of the significant developments brought about by the Montreal Convention was an addition of the so called "fifth jurisdiction" in Article 33(2), which provides that a passenger may bring an action "in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air ....".

Although the plaintiff stated that he was a resident of Ontario, the Court found no evidence that his principal and permanent place of residence was Canada at the date of the accident. More significantly, the Court held that the Montreal Convention did not apply because Brazil was not a State Party to this Convention at the date of the accident (note that as of today, Libya is also not a Party to the Montreal Convention). The applicable treaty in this case was the Warsaw Convention.