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Passenger Compensation Claims under Wet Lease and Code Sharing

The European Court of Justice (**ECJ**) and the German High Court of Justice (*Bundesgerichtshof* – **BGH**) passed judgments with respect to the question of who is the relevant "operating air carrier" in the meaning of Regulation (EC) No 261/2004[1] (the **Regulation**) and, as a result, who is responsible for compensation claims of passengers in cases where the aircraft operator operated the aircraft under a wet lease arrangement or a code sharing agreement.

Background

Wet lease

Under a wet lease agreement one air carrier (the **lessor**) temporarily provides the aircraft, complete crew, insurance and maintenance to another air carrier (the **lessee**) who bears the operational responsibility for the time of the wet lease. All direct operating costs, such as fuel, catering, airport fees, handling and navigation fees are paid for direct by the lessee to the respective service providers. The flight is operated under the lessee's flight numbers.

Code Sharing

Under a code sharing agreement two (or more) air carriers "share a flight". An air carrier (the **marketing carrier**) receives from the other air carrier (the **code-share-partner**) the right to publish and market a part of the seats available on the flight of the code-share-partner in its own name and under its own flight number. The code-share-partner actually performs and bears the operational responsibility for the flight.

The Judgments

The Regulation stipulates, *inter alia*, that flight passengers are to be indemnified in cases of flight delay, cancellation or denied boarding by the "operating air carrier". In cases where two or more air carriers are involved in the performance of a flight, eg, by way of wet lease or code sharing arrangements, the question of which air carrier is the responsible "operating air carrier" within the meaning of the Regulation is decisive in order to determine to which of these air carriers passengers can look for damages compensation.

A recent judgment of the ECJ[2] involved a wet lease arrangement pursuant to which the lessee was responsible for "ground handling including passenger handling, passenger welfare at all times, cargo handling, security in respect of passenger and baggage, arranging on board services, etc". The booking confirmation stated that the bookings were issued by the lessee but that the flight was "operated" by the lessor. Since the flight in question was significantly delayed, compensation claims against the lessor were brought forward. The ECJ held that the lessor who merely leases the aircraft and crew to

another air carrier under a wet lease is not to be regarded as the "operating air carrier" within the meaning of the Regulation. The Court emphasised that the air carrier which actually decides to perform a particular flight, including fixing the itinerary, makes an offer for air transport to interested third parties. Thereby it assumes responsibility for performing the flight, including with respect to any cancellation or significant delay of arrival. Under a wet lease arrangement this applies to the lessee. Hence, the lessee is to be considered the "operating air carrier" and, therefore, the party responsible for the compensation claims of passengers.

In a similar recent case the BGH[3] rendered the same judgment, ie the lessee under the wet lease is to be considered as the party liable for damages under the Regulation with the argument that it is the lessee who actually performs the air transportation service and is in direct contact with the passengers at the airport with its own personnel. The lessee is, therefore, in a better position to assist the passengers with respect to their rights under the Regulation. It is not decisive that the aircraft and crew belong to another air carrier.

The BGH[4] also considered the question of the "operating air carrier" in the context of a code sharing agreement. There the Court held that the "operating air carrier" is the air carrier which actually performs the flight with its own aircraft and crew. This is the code-share-partner, not the marketing-carrier since the latter does not bear any operational responsibility with respect to the flight but simply concludes the transportation agreement with the passenger. Therefore, the code-share-partner is the party responsible for the compensation claims of passengers under the Regulation. This allocation of responsibility does not change even if the marketing carrier has not notified the passengers of the identity of the "operating air carrier" at the time of the flight booking as required pursuant to Art. 11 of the Regulation (EC) No 2111/2005 of European Parliament and the Council of 14 December 2005.

[1] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on the compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46/1, 17.02.2004.

[2] EuGH, C-532/17, 4 July 2018 – Wolfgang Wirth, Theodor, Mülder, Ruth Mülder, Gisela Wirth v. Thomson Airways Ltd.

[3] BGH, NJW 2018, 1251, X ZR 102/16, 12 September 2017.

[4] BGH, NJW 17/2018, X ZR 64/16, 24 October 2017.

CONCLUSION

Under both a wet lease agreement and a code sharing arrangement the passenger enters into a transportation agreement regarding a flight which is marketed by one air carrier but performed by another air carrier. However, regarding the question which of the two air carriers is liable to the passenger pursuant to the Regulation in the case of delay, cancellation or denied boarding one has to distinguish between these arrangements. Under a wet lease, the lessee is the responsible "operating air carrier" since the lessor's aircraft and crew are temporarily integrated into the lessee's flight operations who is thereby actually performing the flight and is available to passengers on the ground regarding the requirements of the Regulation. Under a code share arrangement, the code-share-partner who actually performs the flight with its own aircraft and crew is the responsible "operating air carrier", and not the marketing carrier who has the contractual relationship with the passenger.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

Wolfgang Melzer
Partner – Asset Finance
Germany – Frankfurt

Contact
Tel +49 69 2648 5724
wolfgang.melzer@allenovery.com

Dr Tobias Wintermantel
Senior Associate – Asset Finance
Germany – Frankfurt

Contact
Tel +49 69 2648 5826
tobias.wintermantel@allenovery.com

FR:29626670.3