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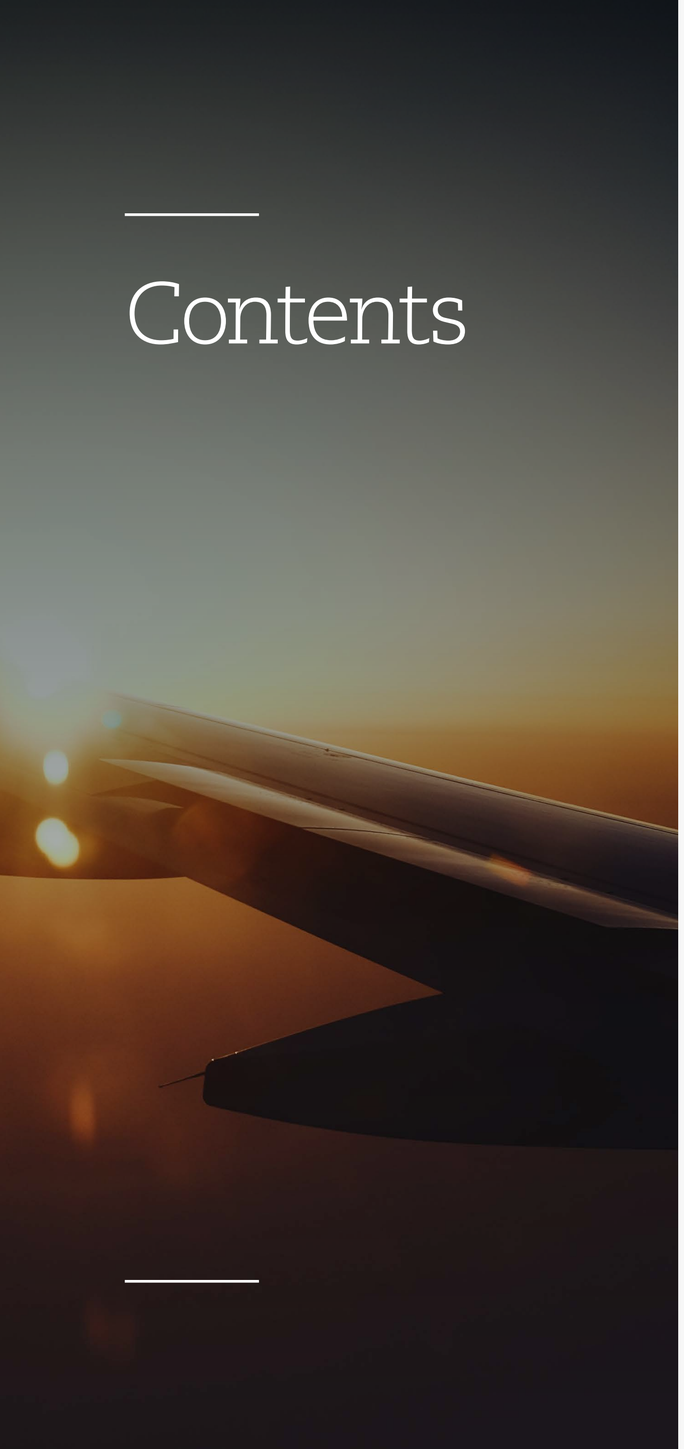
Aviation newsletter

Winter 2021



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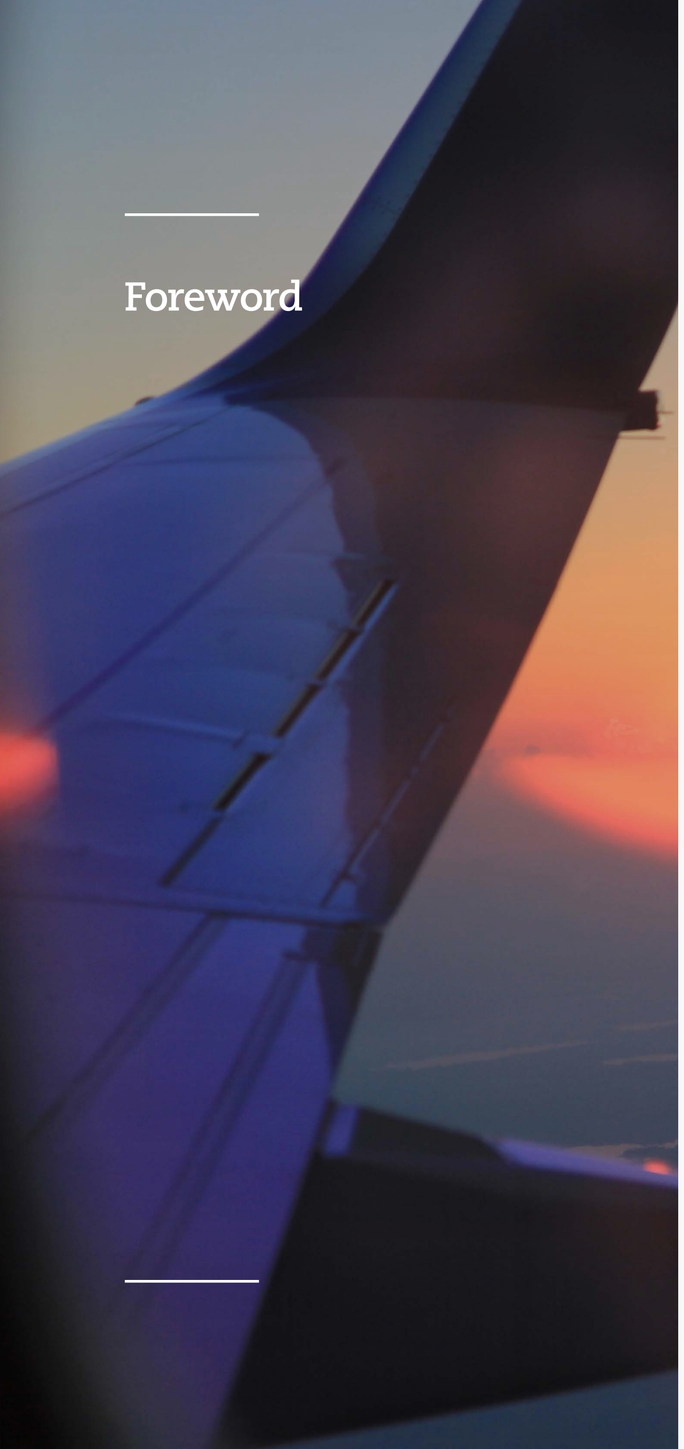

Foreword

Since the Summer 2020 edition of our Aviation Newsletter, two significant things have happened affecting the aviation industry. First, the world has continued to reel from the effects of the COVID-19 pandemic, with the aviation industry suffering considerably from the extended impact of widespread travel restrictions.

Although various vaccines have now begun to be approved and distributed, it remains far from clear how long until a meaningful recovery gets under way, but a decent return for at least some of the forthcoming summer season must currently be in doubt – let's all hope the picture is more positive by the time of our next edition! Second, the UK has finally completed its 'Brexit' from the European Union, and with it the new legal order as it affects aviation has been confirmed, thus ending an distracting saga affecting flights into, out of and within the UK.

In this edition our newsletter we have articles that touch on both of these topics, together with others on a wide variety of subjects of current interest. The spread reflects the breadth of our global aviation practice and the diverse capability and experience within our aviation team. I am grateful to those of my colleagues who have contributed to this edition. We all hope you will find it of interest and of use. If you have any issues arising, or suggestions as to what we should cover in the future, please do not hesitate to contact us.

Lastly, I am pleased to report that our aviation team has received recognition from a number of leading independent sources since our last newsletter. Within this newsletter we share this news with you. I congratulate all in our team for the hard work and dedication that has made this possible, and thank those outside who have contributed to this recognition by speaking of us in kind terms.

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Handling Air Pharma

With up to half of the ‘cold chain’ breakages occurring at the airport, Air Pharma handling disputes risk heating up faster than vials of vaccine on the tarmac in the hot sun. We explore whether the IATA Standard Ground Handling Agreement (SGHA) is fit for purpose to deal with some complex logistics contract liability arguments now and in the future.

Introduction

Are the key liability provisions of the SGHA able to protect ground handlers adequately in light of planned large scale vaccine distribution or should it be revised to provide better clarity and protection given the changing face of ground operations brought about by global travel disruption and operational challenges arising from the COVID-19 pandemic?

The Airline Industry Economic Performance report published by IATA on 24 November 2020 stated that COVID-19 has decimated air connectivity, with full recovery for passenger air travel set to take several years. The IATA report also provides that air cargo has supported global supply chains in 2020 and it is projected that vaccines and testing will continue to support global travel at 50% of 2019 levels in 2021.

The steady roll out of the Pfizer-BioNTech, Moderna, Sinopharm and Oxford-AstraZeneca vaccines to start the COVID-19 inoculation process have raised hopes that the end of the pandemic is in sight, despite the emergence of more contagious strains of the virus. The UK Medicines & Healthcare Products Regulatory Agency was the first of the worldwide regulators to approve the use of the Pfizer-BioNTech vaccine and has since approved the Oxford-AstraZeneca and Moderna ones. According to WHO, there are currently more than 59 COVID-19 vaccines in clinical development. Developing a vaccine is only half the challenge. Distributing the COVID-19 vaccines worldwide at the high volumes projected across the world is a logistical challenge and pharmaceutical companies such as Pfizer have been working closely with the industry to address the safe transportation of its vaccines. Although transportation of time and temperature sensitive cargo such as vaccines, pharmaceutical, life science and medical products (**Air Pharma**) is not new to the ground handling industry, handling large scale Air Pharma will undoubtedly bring its own set of distinctive operational challenges especially in a COVID-19 environment.

The IATA’s eponymous SGHA providing the contractual framework for ground handling services has stood the test of time despite earlier crises that have engulfed the industry, 9/11 and SARs being key examples. However, given the unique challenges faced by the ground handling industry with diminishing passenger travel on the one hand and the projected demand to distribute COVID-19 vaccines on the other, whether the contractual framework remains fit for purpose and protects ground handlers adequately will need to be considered carefully.

The complex vaccine cold chain landscape

The cargo supply chain is complex. Cargo is handled along the chain by multiple parties with varying responsibilities, including consignors, freight forwarders, carriers (both actual and contracting airlines), ground handling agents, terminal operators, haulage companies, consolidators and consignees. It frequently involves several modes of transport, using road, rail and air, with several different flights and storage arrangements used before it reaches its final destination. Air cargo is highly diverse in its physical characteristics and value.

The transportation of Air Pharma cargo adds even more complexity to the supply chain. Vaccines are sensitive biological products and have specific handling and storage requirements. Once vaccines are exposed to inappropriate temperatures, their potency cannot be regained and will not provide protection against the target disease. To ensure the quality of vaccines are preserved, they must be transported and stored from their point of manufacture to end patients using a cold chain that meets specific temperature requirements. Preserving the COVID-19 vaccine cold chain is challenging due to three primary factors: the scale of vaccines required, the timing of vaccines required and the varying storage temperature requirements (from ultra-low and frozen) of the various vaccines being manufactured.

Given the scale of the COVID-19 pandemic, all countries are impacted and it is clear that as and when vaccines are approved for use by various regulators, urgent worldwide delivery of all available vaccine doses will be required to support early immunisation efforts. Various first world governments have already reportedly signed advance purchase deals to secure early doses of successful vaccines with various pharmaceutical companies, which are likely to be accompanied with onerous delivery obligations in the sales contracts. Accommodating global demand with severely reduced air cargo capacity (from acute loss of belly hold cargo capacity) will be hugely challenging.

Air Pharma and the SGHA contractual framework

Given the precise nature and complexity of Air Pharma therefore, it is reasonable to question whether the SGHA contains enough to provide a proper contractual framework for parties to assume the requisite risks. For example, there has always been a lot of debate around the viability of Article 8 and the SGHA's liability provisions. Some parties love it, some hate it. Most agree that it could be clearer. A common theme raised by industry, both carriers and handlers alike, when discussing the current version of Article 8 is that the standard form document should not be negotiated and amended, on the basis that it is a standard form agreement born out of careful industry negotiations.

Such comments were made before the COVID-19 pandemic and divorced from the fact that ground handling industry and airline carriers alike are collectively affected by operational challenges brought on by pain points such as furloughed or retrenchment of workforce, and the obligation to provide services in a way that safeguards the safety and well-being of employees and passengers while preserving much needed cash flow.

As a starting point, a key function of contracts is to allocate commercial risk between parties. Standard form contracts across various industries are intended to provide a convenient starting point for the negotiation of desired allocation of risk.

The underlying principle of Article 8.1 is that airlines are responsible for damage to their aircraft (or other property) or any other liability in respect of passengers, employees, baggage or cargo unless these have arisen "from an act or omission of the ground handler done with intent to cause damage or recklessly and with the knowledge that such damage would probably result". To withdraw the indemnity and therefore pass on the contractual responsibility to ground handling agents, there must be actual proof of this conduct. What remains problematic is the actual standard applicable to determine recklessness (i.e. whether this should be interpreted as subjective actual recklessness or objective recklessness based on what a reasonable person would perceive to be the case).

Subject to the individual requirements of each vaccine under development, the COVID-19 cold chain will require specialised capabilities to handle, store, transport and deliver the current and future COVID-19 vaccines. Building temperature controlled facilities and sourcing additional infrastructure is expensive and requires time. In times of an economic downturn, this may not be a viable option for most businesses including handling companies. The reality is that some businesses will be adapting existing infrastructure to assist with the distribution of COVID-19 vaccines and shipments of vaccines will be handled by airports, airlines and ground handlers who are not IATA CEIV Pharma certified, equipped to handle Air Pharma with different temperature requirements or short of training to handle Air Pharma.

No margin for error

While there are still many unknowns in terms of the temperature sensitivities of the vaccines (whether to be handled as cold or ultra-cold) and the manufacturing and distribution locations, handling and getting the vaccines to the right destination and within optimal conditions is not straightforward.

According to IATA's latest CEIV Pharma Guide, 25% of vaccines reach their destination degraded due to incorrect shipping conditions and 20% of temperature-sensitive Air Pharma is damaged during transportation due to a broken cold chain. Losses associated with temperature excursions are estimated at USD34.1 billion. More worryingly, IATA also indicated that 30% of the scrapped pharmaceutical can be attributed to logistics issues alone. Given the current global consequences of COVID-19, safe and rapid transportation of COVID-19 vaccines is essential and the loss of spoilt vaccines due to cold chain issues would be problematic and costly. There may not always be a secondary market for the COVID-19 vaccine or for Air Pharma more generally. That means a consignee might not be able to mitigate its loss by selling any remaining stock that has not perished. The consignee may therefore seek to recover all of these losses from the ground handler. The questions are therefore how easy it will be to trigger liability against a ground handler for much bigger amounts and what protection will SGHA Article 8 afford the ground handler in relation to its handling of Air Pharma?

CEIV Pharma certified ground handlers may be more prepared to handle COVID-19 vaccines. According to the recent Sunrays Air Cargo Readiness Survey released in September 2020 (commissioned by Pharma.Aero), handlers and airports feel less prepared than freight forwarders and airlines overall. In the case of ground handlers who are not accustomed to handling temperature-sensitive Air Pharma and may not have the cool chain infrastructure such as temperature controlled cool dollies to mitigate the risk of temperature deviations and contamination, especially in local stations that traditionally may have focused on passenger handling, the potential for errors and risk exposure is high.

The loss potentially recoverable from ground handling agents is high if the indemnity protection of Article 8.1 is lost. If the ground handler's conduct is to be assessed objectively, then any evidence showing that spoilage of a batch of Air Pharma was caused by the company's handling measures or other actions and omissions of the employee of the agent will be judged on the basis of what a reasonable handling agent ought to have done in similar circumstances. For example, if standard operating procedures for handling of Air Pharma cargo is not updated or followed, or if there was congestion at the airport and COVID-19 shipments were temporarily stored in containers that did not maintain the vaccines in allowable temperature ranges, then the ground handler risks being liable for failing to have done what any reasonable industry peer would have done.

Risk in bulk

The projected high volumes and the urgency in which the high value, time and temperature sensitive vaccines are to be transported only exacerbate the risk of things going wrong. According to IATA, over 50% of all temperature excursions occur while products are in the hands of airports and airlines, with airlines and cargo handlers being considered as high risk parties.

Without specific equipment, storage facilities, cool chain ground equipment and containers, appropriate handling processes and adequately trained staff, the risk of damage and spoilage of the vaccines is extremely high, with consequential liability potentially falling on ground handlers. Furthermore, with so many parties involved in the vaccine cold chain, temperature excursions, unexpected delays, possible customs clearance approval issues, lack of adequate infrastructure by any one party and skills to handle the vaccine all further add to the risk of spoilage and liability exposure to ground handlers.

COVID-19 vaccines are high value commodities and the risk of theft is also extremely high and should be mitigated. Ground handling companies must therefore ensure that they put in place robust operational standards to ensure that processes are in place to keep the shipments of COVID-19 vaccine secure.

Chilling exposure

It is also important to bear in mind that even if the actions of the ground handler has not caused the loss, undoubtedly in the case of high value vaccines (as has been the case with high value commodities), consignees or shippers (or their insurers) who have suffered loss will be actively seeking to identify different parties against whom a claim can be brought in order to maximise recovery. It is therefore prudent for ground handlers to ensure that their contractual framework is in good shape. A carefully drafted contract which takes into consideration various operational risks and potential liability across the supply chain (for example, ensuring that both upstream and downstream liability is appropriately aligned to reduce exposure) will assist in reducing potential recovery claims against handlers at the outset. With so much riding on it, contractual clarity is essential.

Furthermore, Article 8.6 overrides the ground handler's protection for direct loss of damage to the carrier's cargo by the handler's negligent act or omission, with the ground handler to indemnify the carrier for compensation, subject to the limits of liability for cargo under the Montreal Convention 1999 and total liability not to exceed USD1 million (unless amended by the parties). The use of the word 'direct' loss is misleading. Cargo is either lost or it isn't. 'Direct' implies that it concerns the damages related to that loss and the definition of 'Direct Loss' in the SGHA means "a loss arising naturally or directly from an occurrence and which excludes remote, indirect, consequential, or special losses or damages, such as loss of revenue or loss of profit". Whilst ground handlers can derive some comfort from this language, it should be noted that national courts do not have a universal definition for the meaning of 'consequential loss'. Under English law at least indirect and consequential loss can be indistinguishable and far more losses fall into the 'direct' camp than many people realise. Loss of profit has been held to be direct or indirect depending on the circumstances and reasonable foreseeability. Although the limits of liability do afford ground handlers a measure of protection against claims, the financial exposure in the event of multiple claims will quickly add up.

If 25% of vaccines reach their destination degraded due to incorrect shipping conditions as indicated above, then this type of issue, if viewed under the transportation of COVID-19 vaccines, could potentially lead to a new category of cargo claim under SGHA. Here, the degraded batch of vaccine would still be transported and delivered to the consignee, but with a lower quality and efficacy due to temperature excursion during delivery. There is a possibility that consignees may initiate a claim for the loss of value for the degraded vaccine which is directly caused by the failure of the cargo handlers to keep the temperature-sensitive vaccines in a cold chain facility. This could lead to liability under Article 8.6, particularly when the shipment concerned is equipped with temperature logger which records the point in time where the shipment is exposed to an inappropriate temperature.

Self-administered protection

COVID-19 vaccines are high value commodities. Damage and loss and the risk of theft are all extremely high. Whilst ground handlers are able to rely on insurance to protect against liability exposure arising out of their handling work as a risk management tool, it is possible that not all risks are covered under the terms of the insurance policy. Where the policy of insurance responds to a third party claim, the costs incurred by insurers to defend the claim and the compensation paid may have a detrimental impact on their loss record and influence how premiums are priced. Ground handlers' insurers will also be concerned with any successful recovery against third parties and the impact of this on their own cash flow and loss ratios.

In our view it would be better to proactively control and manage risks by identifying and defining the types of loss likely to occur and for the risks that should not be assumed, if these risks could be allocated by contract through the use of contractual indemnities, exclusions or limitation of liability. It avoids having to determine them in a dispute. Of course, it is difficult to predict all types of losses that might arise. But handling operations are mature enough for the industry to identify the major pain points and apportion responsibility accordingly. Air Pharma handling for a pandemic will be likely throw up new logistical challenges above and beyond what has occurred to date.

However, in what we fervently hope is the aftermath of COVID-19, it would be a good time to address liability and other unanswered questions, gaps and shortfalls in the SGHA's drafting and implementation. More importantly, the opportunity should be taken to ensure that it is fit for purpose in time for the next pandemic or global crisis on the horizon.

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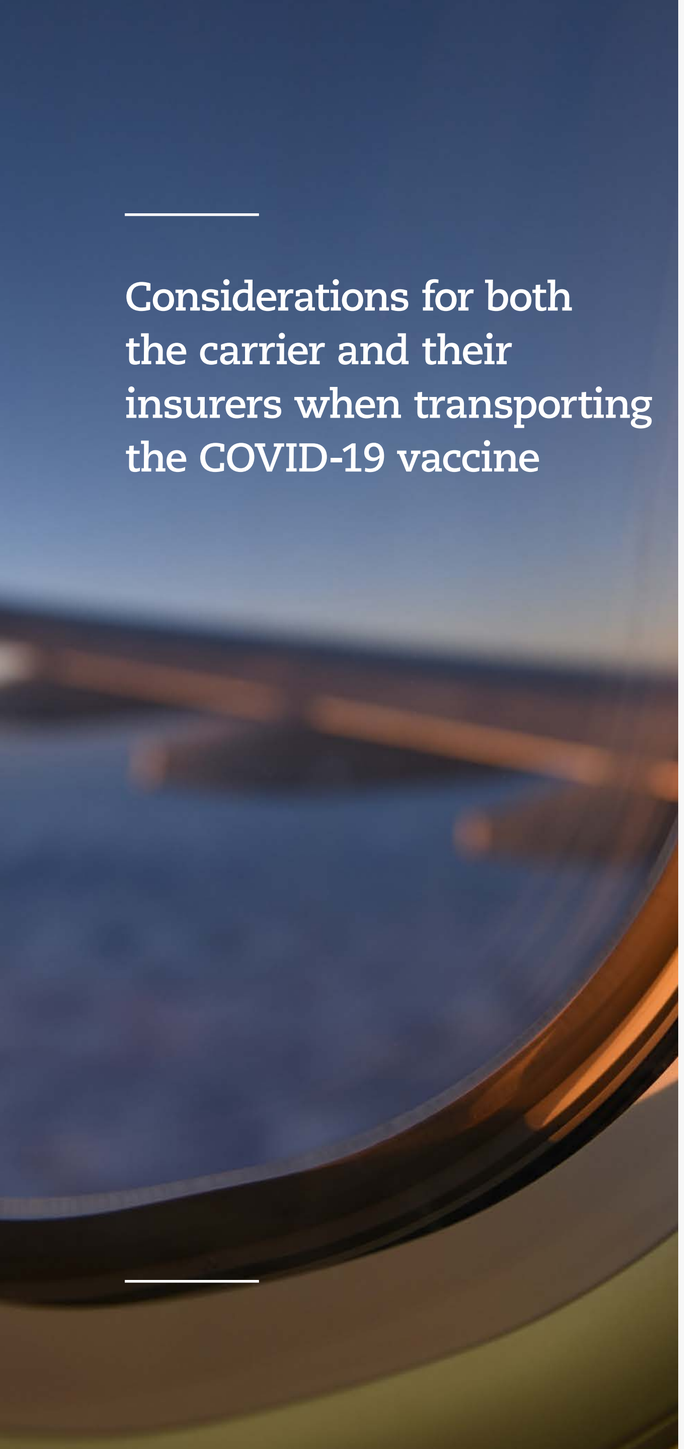

Considerations for both the carrier and their insurers when transporting the COVID-19 vaccine

According to the Public Health England, COVID-19 infections and hospital admissions are once again on the rise with an estimated 3,647,463 people in the UK having tested positive for the virus as at 25 January 2021. The COVID-19 pandemic is a global issue which has caused significant disruption to many industries, including the aviation industry.

In response to the global closure of borders and quarantine of most countries and territories, many pharmaceutical companies across the world have sought to create a vaccine to fight the virus. In recent weeks, the UK have approved the use of three vaccines (Pfizer, AstraZeneca and Moderna), and its government has taken action to secure millions of doses in order to inoculate the population as soon as possible. With the Pfizer and Moderna vaccination being produced in America, an unprecedented challenge is now faced by cargo carrying airlines and their insurers to ensure that these vaccines can be rolled out globally with minimal losses.

As all three UK approved vaccines require strict temperature controls to enable transportation from the point of origin to its final destination, airlines and their insurers must give consideration to the risks associated with carrying the vaccine and whether or not they are prepared, logistically, for the same. As we know, perishables account for a large volume of the claims received by cargo carriers and it is understood that the COVID-19 vaccine has a relatively short life once it has defrosted. Degradation of perishables can be caused by many factors including any breakdown in the supply chain, inadequate ground handling, delays on the ramp etc. Whatever the reason for the loss, the airline will likely be responsible for the losses to its client under their strict liability obligations imposed by the Montreal Convention 1999 (**Convention**).

Pursuant to Article 18 of the Convention, if cargo is lost, damaged or destroyed by an event taking place during its carriage by air then the carrier is liable for the same. Given that the liability imposed by the Convention is strict, a shipper would be likely to pursue the carrier for any losses (which could be significant) should any damage, destruction or loss occur to a shipment of the vaccine. It would then be down to the carrier to investigate where the damage or loss occurred and to seek a recovery of its outlay from any service provider who may have caused the loss or damage (or invoke any defence it may have). It is therefore vital that all carriers evaluate and assess the risks of their infrastructure and contracts with their service providers to ensure that the option of a recovery is available to them and their insurers in the event that the need arises. It would be prudent to ensure that any service providers being utilised are fully trained in the handling of temperature controlled and sensitive cargo.

The Air Waybill

When considering whether or not to accept a consignment for transport, a review of the air waybill and the comments on it must be undertaken by the carrier in order to ensure all requirements can be met. Whether or not these requirements become contractual terms will largely depend on the jurisdiction in which the claim is brought, but cargo carriers and their insurers must be prepared to accept that these terms, if stated on the air waybill and accepted by the carrier, will form part of the contract of carriage and liability may therefore engage for any ensuing loss, damage or destruction.

Before accepting any consignment, a carrier should inspect the air waybill and inform the shipper if it is unable to meet any of the requirements stated by the shipper. This is particularly relevant for temperature requirements when handling the COVID-19 vaccine as the same must be transported at very low temperatures. If the vaccine is not maintained at the correct temperatures from its point of origin to its final destination, this would be likely to result in the vaccine losing its integrity and a claim may be made against the carrier for the value of the loss. Whilst we have not seen it yet, and it is far too early to consider in any depth, there is the possibility that personal injury claims could also be made against cargo carriers for death or serious injury as a result of delays causing spoliation of the vaccine.

Another consideration is whether or not any special declaration of interest in delivery at destination has been made by the shipper. With such a high value being placed on the COVID-19 vaccine, it would be foolish on the part of a shipper not to make a special declaration of value to protect themselves in the event of loss, damage or destruction, unless they are in receipt of their own cargo insurance. Obtaining such insurance would allow the shipper to claim directly from their own cargo insurance policy for the full invoice value of the cargo (in contract to the sum determined according to the applicable Convention limit). This does of course open cargo carriers up to subrogated claims by the cargo insurer, although it is worth noting that they are not exempt from the notification requirements under Article 31(2) and (3) of the Convention, and a claim can be denied on the basis of Article 31(4) if time limits are not adhered to.

Given the relatively low weight of the vaccine, and the high invoice value, no declaration of value being stated on the air waybill is the best case scenario for the carrier as this limits liability to the shipper to 22 SDR per kilo of the shipment. In most jurisdictions, calculation of these limits is based on the gross weight of the consignment. However in the USA and Israel, calculation is based on the chargeable weight. Interestingly, in some South American countries, the limits are calculated on the entire weight of the shipment. The jurisdiction in which the claim can be brought will therefore have a direct impact on the limit of liability.

Before a carrier accepts a high value shipment with a special declaration, it would be prudent to seek authority from insurers that there is sufficient coverage on their policy should a claim arise. In order to avoid potential high value settlements becoming necessary, a cargo carrier should also require the shipper to have a cargo insurance policy covering the value of their shipment. This will negate the need for a special declaration of value from the shipper's perspective. If a claim is made against a cargo insurer and they in turn seek a recovery from the carrier's insurer, they will only then be entitled to recover the maximum limits of liability under the Convention. Cargo carriers should also refuse to accept any consignments which are not adequately packaged; and any consignment which the shipper seeks to transport as general cargo, to avoid higher shipping fees. This is important when shipping the vaccine. IATA requires that all time and temperature sensitive consignments are packaged and labelled correctly.

It is equally important that when accepting the vaccine, cargo carriers are fully aware of the content of the packages. The requirement for the vaccine to be kept at very low temperatures may require the use of dry ice and/or temperature loggers with lithium batteries. Pursuant to the Dangerous Goods Regulations, limited quantities of these items are allowed on board an aircraft at any time and this could result in temperature controlled cargo being delayed in order to comply with these regulations.
In order to make the global roll out of the vaccine effective, communication between shippers and cargo carriers is going to be key. This will enable the carrier and its service providers to ensure that there are no unnecessary issues which could lead to damage or loss to these vital life-saving vaccines.

Defences to claims being made for damage

Should a claim be presented against the cargo carrier and its insurers in accordance with Article 31, there are defences which can be raised in order to dispute the claim. Article 18(2) of the Convention states that:

> "… the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
>
> (a) inherent defect, quality or vice of that cargo; (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents; (c) an act of war or an armed conflict; (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo. "

The evidential burden of proof in each of these defences rests with the carrier and to the extent that it can meet this burden, no action will lie against it. It is therefore imperative for cargo carriers to thoroughly inspect all packaging where the vaccine is concerned. Processes must be put in place to ensure that packaging of the vaccine is adequate for transportation. Defective packaging may not only cause damage to the vaccine, but could also cause damage to any other consignments on the flight. This could give rise to further claims being presented by other shippers, where the strict liability provisions will engage for damage to their goods.

Customs can also present challenges to the importation of goods and historically has been part of the problem where perishables are concerned. There is US case law to support the position that loss, defect or damage to perishables as a result of delays at the customs borders, is a defence and absolves the cargo carriers and their insurers of any liability for the loss.

Whilst the shipment of the vaccine will create unprecedented challenges to the aviation industry, if the cargo carrier is taking all necessary steps to ensure that cargo is handled correctly and takes steps to ensure that it and its insurers' positions are protected, the transportation of the vaccine globally can be achieved with minimal losses. Information sharing and clear communication along the entire supply chain will be key to ensuring that dissemination of the vaccine globally is achieved safely, hopefully bringing an end to the restrictions imposed on us by the COVID-19 virus and allowing the restoration of the aviation industry to its pre-COVID position.

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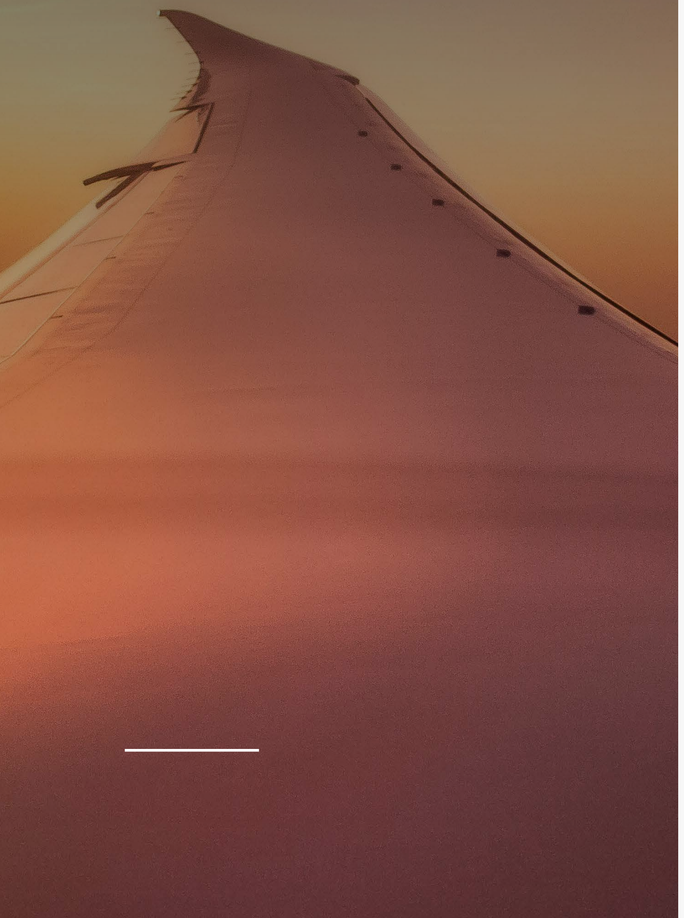
English law and jurisdiction clauses in aircraft finance agreements



For as long as anyone who works in aircraft finance can remember, it has been standard for the vast majority of aircraft finance and lease contracts to be governed by either English or New York law. It has also been standard for such contracts to be subject to English or New York court jurisdiction, either exclusively or (more commonly) under a one-sided clause which allows the lessor/financier to proceed in another jurisdiction if it decides to (e.g. where an aircraft is physically located when repossessing, or in the jurisdiction of the debtor).

This might be considered anomalous when (as is commonly the case in international aircraft finance) the contract otherwise has no connection at all with England or the USA (other than being drafted by English or New York lawyers...). However, there are many sound reasons in support of why this has become standard practice – to name but a few: consistency, predictability, familiarity, systems of laws allowing for much to be left to agreement by the contracting parties, reliable (and creditor friendly) commercial courts supported by an extensive body of relevant case law.

But what is the position now following Brexit? Does Brexit make the parties' choice of English law/jurisdiction less attractive in respect of any transaction with an EU element (such as a lessee based in the EU)? At the risk of sounding self-serving coming from English lawyers, this article aims to provide the answer "no" to this question, whilst not avoiding the fact that there are certainly issues that will need to be ironed out.

Brexit

As is well known, the UK formally left the EU on 31 January 2020, but continued to apply EU law as if it was a Member State until the end of a transitional 'implementation period', which expired on 31 December 2020. Negotiations as to what would happen thereafter continued up to the wire, resulting in a Trade and Cooperation Agreement announced on 24 December 2020 (**TCA**).

The TCA has been signed by the UK's Prime Minister and the President of the EU Commission, and approved by the UK Parliament. It now awaits formal approval by the EU Parliament and the Member States. Assuming that the TCA does represent the new reality, the question arises as to what it means in respect of choice of law/jurisdiction?

Choice of English law

The position in relation to choice of English law is very straightforward. Parties will find that a choice of English law clause will continue to be respected in the EU, not because of any agreement reached during Brexit negotiations, but because European rules on governing law do not discriminate between systems of law originating within or outside the EU. The choice of English law to govern contracts will continue to be respected in the EU because the Rome I Regulation (EC 593/2008) Art 2 and Rome II Regulation (EC 864/2007) both articulate the principle of 'universal application', which ensures that parties are free to choose any country's laws to govern their contracts, whether or not that country is an EU Member State.

English jurisdiction clauses and proceedings

Will English jurisdiction clauses continue to be respected and enforced in the EU after 31 December 2020?

Proceedings prior to 31 December 2020

The first point to make is that the status quo prior to Brexit will continue to apply where proceedings were commenced before the end of 2020, and any resulting English judgment in those proceedings will be enforceable in the EU regardless of when it is given. But what of proceedings commenced thereafter?

Brussels Regulation

The UK government had long sought a bespoke post-Brexit agreement with the EU replicating the comprehensive provisions of the Brussels Regulation Recast (EU 1215/2012). In theory this would have benefited both parties, but the EU never showed much enthusiasm for the idea. Like all EU Regulations, the Brussels Regulation Recast therefore ceased to apply to the UK when the Brexit transition period ended.

Hague Convention

For matters of jurisdiction in civil and commercial matters, the 2005 Hague Convention on Choice of Court Agreements (**Hague Convention**) is relevant. The Hague Convention has been in force in the UK since 1 October 2015, when the EU acceded to it. However, following Brexit, the UK has acceded to the Hague Convention in its own right (effective from 1 January 2021) such that it now has the force of law in the UK.

Accession to the Hague Convention preserves the status quo between the UK and the EU in many respects as to matters of jurisdiction and enforcement. However, the Hague Convention will only support new jurisdiction agreements and judgments arising from them, and it has other limitations too. Of concern to financiers/lessors, the jurisdiction agreement must be exclusive: an asymmetric/one-sided jurisdiction agreement is not generally 'exclusive' for these purposes - Arts 3 and 6. Contracting States may choose to extend Hague's scope to non-exclusive jurisdiction agreements, as far as they are concerned (Art 22), but none has chosen to do so to date.

There is also some uncertainty about whether courts of EU member States will consider the UK as being a "Contracting State" under the Hague Convention when considering exclusive jurisdiction clauses agreed between 1 October 2015 and 1 January 2021.

Lugano Convention

The UK made an application in April 2020 to re-join the Lugano Convention 2017 (**Lugano**) as an independent contracting State. Lugano currently extends EU jurisdiction and enforcement principles to three of the European Free Trade Association (**EFTA**) States, but does not actually require its members to be a member of EFTA or any other European organisation (the fourth member of EFTA, Liechtenstein, is not party to Lugano. All that is needed to join Lugano is for the existing Lugano parties to agree to the applicant's accession; the three EFTA members (Iceland, Norway and Switzerland) have indicated their agreement, but the EU has not yet given its consent, and neither has Denmark, which is also a contracting party. It takes at least three months to join Lugano.

Lugano Convention - pros and cons

To start with, the positives. Lugano replicates an earlier version of the Brussels Regulation Recast that served the EU well up until 2015 after replacing the earlier Brussels Convention 1968. So, unlike the Hague Convention, it contains a full set of European jurisdiction and enforcement rules covering most civil and commercial matters and taking in contractual, tortious and other non-contractual claims. It also covers protective measures as well as final judgments, and jurisdiction agreements of all kinds, in addition to disputes where no such agreement has been entered into. However, Lugano is limited in two key respects.

First, it does not support jurisdiction agreements unless at least one of the parties is domiciled in a Lugano State. It is not sufficient for the chosen courts to be located in a Lugano State, although that is a requirement too. This means that the English jurisdiction clauses in many international aircraft finance/leasing agreements will be outside the scope of Lugano, whether the UK re-joins it or not.

Second, Lugano allows parties to employ an abusive procedural tactic known (rather politically incorrectly…) as the 'Italian torpedo'. This is an attempt to prevent the chosen court from trying a case, at least in the short term, by commencing proceedings in another Lugano State first - preferably one where the wheels of justice turn slowly and/or jurisdiction questions are not dealt with as a preliminary issue. The tactic works because Lugano (like the Brussels Regulation) prevents parallel litigation by requiring all other courts to stay proceedings while the 'court first seised' decides whether or not ithas jurisdiction.

In a recent English case, Etihad Airways PJSC v Flöther [2020] EWCA Civ 1707, the Court of Appeal decided that an asymmetric jurisdiction clause can be construed as conferring exclusive jurisdiction on the English court in respect of claims brought by the borrower, for the purposes of Article 31(2) of the Recast Brussels Regulation. In support, the Court of Appeal noted that an asymmetric jurisdiction clause can be read as containing two distinct jurisdiction agreements: (i) an exclusive jurisdiction agreement in which the borrower (or lessee) agrees only to bring claims in the English court, and (ii) a distinct non-exclusive jurisdiction agreement by which the lender (or lessor) is entitled to bring its claims in the English courts or any other court with jurisdiction. If Air Berlin were not held to its agreement only to bring its claims in the English courts, then the 'Italian torpedo', which the Recast Brussels Regulation was intended to confine to history within the EU, would have been available again.

The current default position

Pending the UK joining Lugano, and in cases falling outside the Hague Convention, English common law rules apply. This may have advantages as well as disadvantages for financiers/lessors looking to enforce their contractual rights. Under the common law rules, English court jurisdiction will in principle be available in a wider range of circumstances, but the English courts will also have the discretion to reject proceedings that have a much closer connection to another country under the doctrine of *forum non conveniens*.

A positive is that under the common law rules English courts will have an array of powerful tools at their disposal that are restricted under the Brussels Recast regime — notably, the anti-suit injunction and damages for breach of a jurisdiction clause — that are likely to ensure that jurisdiction clauses in favour of English courts and tribunals are complied with.

Enforcement

In respect of enforcement, if the Hague or Lugano treaties do not apply (or historical treaties referred to below do not apply) then the fall-back position is recognition and/or enforcement under the common law. Where enforcement of a judgment is concerned, it is often sufficient to rely on the national law of the country where enforcement is sought. The procedure may be cumbersome and there might be traps for the unwary, but in most jurisdictions it is possible to enforce a foreign judgment without relying on a Regulation, Convention or other international instrument, provided there is an element of reciprocity, i.e. each country is generally willing to enforce the other's judgments. In this way US judgments are enforceable in England, for example, without the need for any formal arrangements, simply on the basis of the common law.

In addition, there are historic bilateral arrangements between the UK and the major jurisdictions of the EU which could be relied on in this context. Opinion is divided as to whether they are still in force or not, since they have been dormant for many years. However, they might prove useful in practice if a judgment falls within their scope and EU courts are willing to apply them.

Arbitration

Choosing arbitration rather than litigation neatly side-steps Brexit issues because international arbitration is independent of the EU. The choice of arbitration is increasingly easy to make now, because some of the procedures that used to be exclusive to court proceedings are now available in arbitration too. The LCIA, for example, has just updated its arbitration rules to allow 'early determination' - similar to summary judgment, but ordered by an arbitrator rather than a judge. Arbitral awards can be enforced across borders relatively easily under the New York Convention 1958, which is not a creature of the EU. However, arbitration is not for everybody. Each institution's rules have their advantages and disadvantages, and there are certain things that arbitrators cannot (or will not) do that judges have the power to do - for example, striking out parties' cases for breach of procedural orders. Default judgment is also not available in arbitration, whereas in the English courts it is available through a simple bureaucratic procedure (though a point to be wary of is that a default judgment which is obtained by submission of a simple request might not be recognised overseas). It is quite common for a financier/lessor to include arbitration as an option in addition to its rights to commence court proceedings, especially when dealing with a jurisdiction that recognises enforcement of an arbitration award under the New York Convention but does not recognise English court judgments – for example, the Russian Federation. This can be problematic however as many jurisdictions don't recognise an option to arbitrate as a valid arbitration clause, at least if it is only enforceable on one party (e.g. the Russian Federation and the UAE.

Cape Town convention / aircraft protocol

The UK Government has taken the view is that, as a matter of international law, the UK is a contracting State under the Cape Town Convention and Aircraft Protocol, and that this is not affected by the UK leaving the EU. Therefore, it believes that there will be no question of the UK needing to ratify these instruments again.

However, certain elements of the Convention fell under EU competence whilst the UK was a member of the EU, most notably the provisions on insolvency. Following Brexit, the UK has no longer made the "qualifying declarations" under the OECD Aircraft Sector Understanding. In particular, it has not made the required declarations under Articles VIII (Choice of Law) and XI (selecting Alternative A) of the Protocol. Those declarations are easy to make because they reflect English law anyway, and should be made as a matter of some urgency.

Conclusion

Needless to say, all of these issues are limited to Europe, and the EU and EFTA in particular. Even when they arise, they do not make English jurisdiction agreements and judgments less forceful there than they were in the world generally pre-Brexit. They only mean that certain rules that English lawyers are used to relying upon will no longer be applicable, and other (potentially less certain?) rules and procedures will have to be relied upon instead. It is hoped, and anticipated, that in practice market participants will notice little difference.

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EU Regulation 261/2004 and the validity of exclusive jurisdiction clauses

On 18 November 2020, the European Court of Justice (**CJEU**) gave judgment in the case of ***Ryanair DAC v. DelayFix, formerly Passenger Rights sp. z o.o.***, in which it held that, where appropriate, an exclusive jurisdiction clause incorporated in the contract of carriage concluded between an airline and a passenger must be regarded as abusive. In other words, an airline cannot force a passenger to sue in its preferred jurisdiction.

Background

A passenger who was booked to fly between Milan and Warsaw with Ryanair had his flight cancelled. The passenger assigned his claim to a company specialising in the recovery of air passengers' claims called DelayFix at the time of the decision. DelayFix issued proceedings in Poland and asked the first instance District Court for Warsaw (**District Court**) to order Ryanair to pay the sum of EUR 250 in compensation for the cancellation pursuant to EU Regulation 261/2004.

Section 2.4 of Ryanair's General Terms and Conditions of Carriage, to which the passenger had agreed when he purchased his ticket online, provided that those terms and conditions are subject to the jurisdiction of the Irish courts, where the airline has its headquarters (**Jurisdiction Clause**). Ryanair raised a plea in the first instance action that DelayFix, as the assignee of that passenger's claim, was bound by the Jurisdiction Clause.

On 15 February 2019, the District Court rejected Ryanair's plea of lack of jurisdiction, considering that, first, the clause attributing jurisdiction in the contract of transport between that passenger and the airline was unfair, within the meaning of Directive 93/13/EEC on unfair terms in consumer contracts (**Directive 93/13**), and second, DelayFix, as the assignee of the passenger's claim following the cancellation of the flight, could not be bound by such a clause.

Ryanair brought an appeal before the Regional Court of Warsaw, 23rd Commercial Appeals Division, Poland (**Referring Court**). The airline contended that, as DelayFix was not a consumer, it could not benefit from the jurisdictional protection provided for consumer contracts.

The Referring Court decided to stay the proceedings and to refer the matter to the CJEU for a preliminary ruling concerning the interpretation of Article 25(1) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Recast Brussels Regulation**) and of Directive 93/13. The question was posed in the following terms:

> 'Should Articles 2(b), 3(1) and (2) and 6(1) of Directive 93/13 … and Article 25 of Regulation [No 1215/2012], as regards examination of the validity of an agreement conferring jurisdiction, be interpreted as meaning that the final purchaser of a claim acquired by way of assignment from a consumer, which final purchaser is not a consumer himself, may rely on the absence of individual negotiation of contractual terms and on unfair contractual terms arising from a jurisdiction clause?'

Consideration of the issues by the CJEU

Firstly, the CJEU noted that Directive 93/13 is a general regulation for consumer protection, intended to apply in all sectors of economic activity, including in the air transport sector and the rights of air passengers such as those stemming from Regulation 261/2004.

Secondly, the CJEU noted that the fact that the disputes in those proceedings were between only sellers or suppliers would not preclude the application of a relevant instrument of EU consumer law, in so far as the scope of that directive is not dependent on the identity of the parties to the dispute, but on the capacity of the parties to the agreement.

Thirdly, the CJEU noted that, under Article 3(1) of Directive 93/13, a term is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and the obligations arising under the contract in question. It noted therefore that, it is for the national courts, when applying the legislation of a Member State whose courts are designated in a jurisdiction clause, and when interpreting that legislation in accordance with the requirements of Directive 93/13, to draw legal conclusions from the potential unfairness of such a clause, given that it follows from the wording of Article 6(1) of that directive that the national courts are bound to disapply an unfair term in order that it does not produce binding effects. The CJEU recalled that it had repeatedly held that:

> "a jurisdiction clause, incorporated in a contract between a consumer and a seller or supplier, that was not subject to an individual negotiation and which confers exclusive jurisdiction to the courts in whose territory that seller or supplier is based, must be considered as unfair under Article 3(1) of Directive 93/13 if, contrary to requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Such a term falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in paragraph 1(q) of the Annex to that directive."

Finally, it held that in accordance with the CJEU's settled case-law, under Article 7(1)(b) of the Recast Brussels Regulation and with regard to direct flights, both the place of departure and that of arrival must be considered, in the same respect, as the principal places of provision of the services which are the subject of a contract for transport by air, thus giving the person bringing a claim for compensation on the basis of Regulation 261/2004 the choice of bringing that claim before the court or tribunal which has territorial jurisdiction over either the place of departure or the place of arrival of the aircraft, as those places are agreed in that contract.

Decision

Based on the above rationale, the CJEU concluded that, in order to contest the jurisdiction of a court to hear and determine an action for compensation brought under Regulation 261/2004 and against an airline, a jurisdiction clause incorporated in a contract of carriage concluded between a passenger and that airline cannot be enforced by the airline against a collection agency to which the passenger has assigned the claim, unless, under the legislation of the Member State whose courts are designated in that clause, that collection agency is the successor to all the initial contracting party's rights and obligations (which it is for the referring court to determine). The CJEU crucially came to the conclusion that:

> "where appropriate, such a clause, incorporated, without having been subject to an individual negotiation, in a contract concluded between a consumer, that is to say, the air passenger, and a seller or supplier, that is to say, the airline, and which confers exclusive jurisdiction on the courts which have jurisdiction over the territory in which that airline is based, must be considered as being unfair within the meaning of Article 3(1) of Directive 93/13".

Comment and the impact of Brexit

This decision is consistent with the CJEU's jurisprudence and in line with its propensity to place passenger rights above airlines' interests. Whilst the move from Ryanair to include an exclusive jurisdiction clause was a clever one, it was always likely to fail the test of the CJEU. Arguably, it is a bizarre judicial construction to say that forcing a passenger to use an Irish court rather than their local court would be "unfair", especially since both an Irish and a Polish court would apply the same EU law. Of course, allowing Ryanair to enforce its Jurisdiction Clause would have amounted to forcing passengers to issue proceedings in a country with a different language and legal system to their own and would arguably have led to a much less user-friendly experience for individuals. Perhaps this was the determining factor here. In any event, it is now well established that the CJEU would very rarely favour airlines to the detriment of consumers' rights and to this extent the decision is might have been expected.

Now that Brexit has been completed, the UK has transposed Regulation 261/2004 into its domestic law (amongst other provisions of EU law) and it has further enacted that the jurisprudence of CJEU will continue to form part of the UK's law, although CJEU decisions made after Brexit was completed will not. Therefore, no sea change is anticipated in terms of what we have known for many years as Regulation 261/2004 claims. Of course, the UK will be at liberty to choose whether to follow any future CJEU judgment in this area, or any other for that matter.

What muddies the waters slightly is that this CJEU decision is based on the Recast Brussels Regulation and Directive 93/13. It is important to note that firstly, the UK is no longer part of and subject to the Recast Brussels Regulation where proceedings are commenced after the end of the implementation period (i.e. 31 December 2020). Secondly, since EU Directives were never directly applicable in the UK, Directive 93/13 no longer has any authority under UK law. Instead, the domestic Consumer Rights Act 2015 ("CRA") is now the only source of law dealing with the issue. Part 2 (Unfair Terms) of the current CRA is very similar to EU law. However, as with any domestic Act of Parliament, this Unfair Terms legislation is now subject to change if Parliament decides to amend it. Now that the UK has transposed Regulation 261/2004 into its domestic law, but is no longer part of the Recast Brussels Regulation and applies its own consumer rights legislation which could be amended in the years to come, the authority of this pre-Brexit decision is could well be challenged before UK courts in due course.

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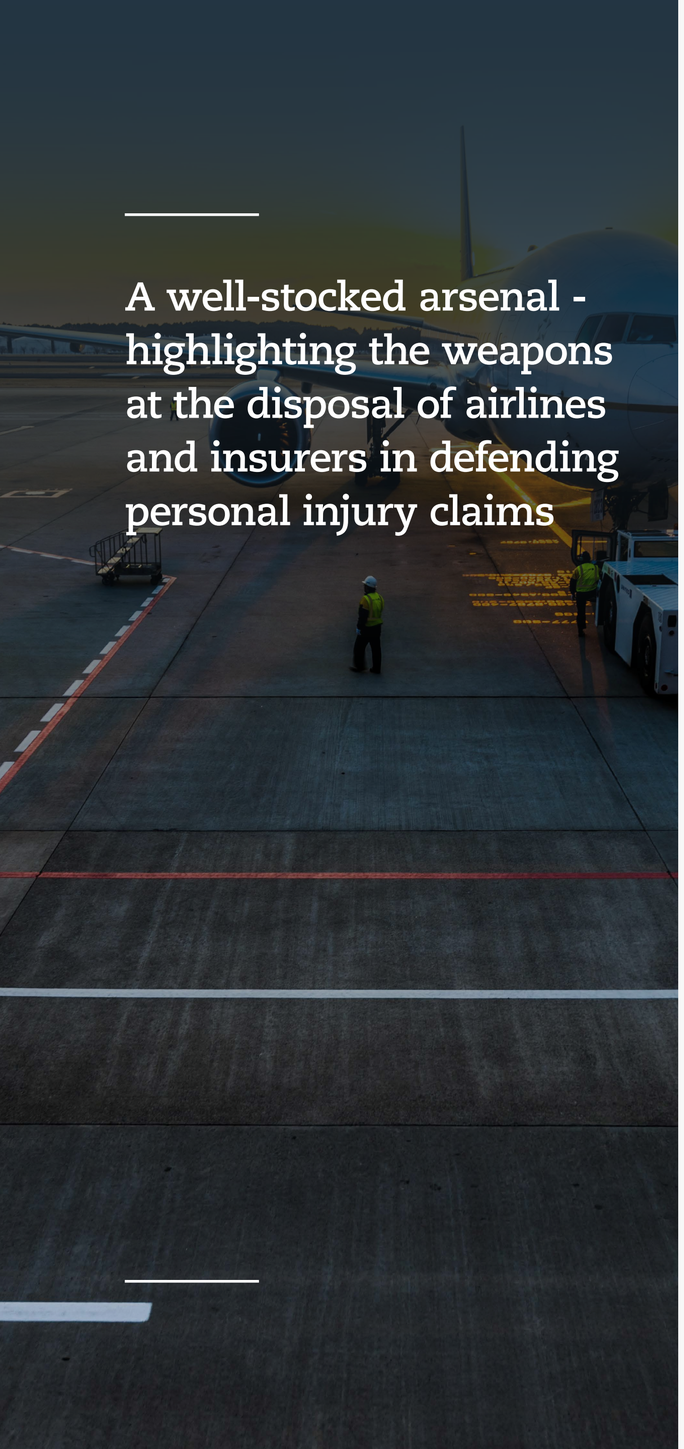

A well-stocked arsenal - highlighting the weapons at the disposal of airlines and insurers in defending personal injury claims

Qualified one-way cost shifting (**QOCS**) poses a new challenge in the efficient management of personal injury cases in England & Wales. Whilst CPR Part 36 offers remain a useful tool, s57 of the Criminal Justice and Courts Act 2015 has developed into the most potent instrument available to defendants. Here we examine the development of s57 'fundamental dishonesty', in addition to how effective Part 36 offers and Strike out Applications can defeat claims.

What does an effective counter-fraud strategy look like in practice?

No one wants to say that they tolerate fraud; it's a weak message to put out there. Does anyone really have a zero tolerance approach though?

Well, if a truly zero tolerance approach was taken every case would be fought to the death and then contempt proceedings launched to send the fraudsters to prison.

However, contempt proceedings are a rarity. They are brought in one in every 1000 cases. Fraud is not. So, why are people not adopting a "zero tolerance" strategy?

The answer is quite simply because it would be ridiculously expensive and, frankly, because compensators aren't Batman – it's not their job to fight crime in their spare time. Companies have limited resources and bandwidth and it's frankly immature to pretend that they don't.

So, what does the sensible strategy look like? It's likely to be one that achieves the biggest return on investment whilst exploiting any potential opportunities for "big hit" headline cases that might discourage other potential claimants.

Where can we get the highest return on investment in fraud cases? If there was any doubt before, it should now have been removed entirely – it's s57 of the Criminal Justice and Courts Act 2015.

S57 of the Criminal Justice and Courts Act 2015

It has been almost five years since the introduction of s57 of the Criminal Justice and Courts Act. Prior to s57, legislative gaps left a court frustrated when dealing incidences of fraud, namely:

- The very, very limited circumstances in which action could be taken when a claimant exaggerates or makes up elements of a genuine claim (see Summers –v- Fairclough and the "very exception circumstances" test)
- The inability to dismiss a claim for other types of conduct (for example when a genuine claimant supports a knowingly fraudulent claim from another claimant – see *Ul-haq*)

In contrast, S57 allows a defendant to apply for a claim to be dismissed by asking a court to determine a claimant was 'fundamentally dishonest'. With a finding of fundamental dishonesty, a defendant is allowed to recoup costs from a claimant, circumventing QOCS rules which usually bar a cost recovery in personal injury cases (though in the case of s57 costs are offset against "genuine" damages with a dishonest claimant being liable for any excess).

What exactly is s57 fundamental dishonesty and how is it useful?

Post s57 the "test" for dismissal of a claim has changed from the *Summers* position of "very exceptional circumstances" to whether or not the claimant has been "fundamentally dishonest."

The very exceptional circumstance test was so exceptional that no known example of it exists. Lord Clarke, who dealt with *Summers* imagined a scenario where a person whose claim was only worth £5K in reality attempted to claim GBP 1m as fitting the definition.

The question of whether or not the bar for dismissal has been lowered in s57 has been definitely answered in a number of cases, two of which are worth mention:

- *Gosling –v- Screwfix*, where HHJ Maloney talked about the dishonesty going to the "root" or "heart" of the claim. His thinking seemed to be that if the dishonesty related to a substantial head of loss and the claim was dishonest (or overall if the claim was more dishonest than not) then that would comfortably fit within the definition
- *LOCOG –v- Sinfield*, where on appeal Mr Justice Knowles concluded that if a head of loss was "substantial" (in this instance a care for gardening assistance for approximately £14,000.00) but that claim was dishonest (Mr Sinfield had always had a gardener and the fees were nothing to do with the accident) then even though it only represented 28% of the whole claim it would be sufficient to trigger the dismissal of the whole claim

In practical terms, if you can show that a head of loss is both substantial and dishonest you can get rid of the whole claim in its entirety.

This is quite clearly a far lower bar than defendants previously faced in Summers.

In the aviation sector, this should be considered a welcome addition for airlines, and especially claims brought under the Montreal Convention 1999 (**Convention**). This is because previous legislation simply dealt with completely fabricated claims, as opposed to s57, which allows dismissal based on the conduct of the claimant when bringing a genuine claim. Fraud-related cases which fall under the umbrella of the Convention usually relate to exaggeration rather than staged incidents.

What is dishonesty?

Having established that the concept of "fundamental" appears in the eyes of judges to relate to the value of the claim, we should then give some thought as to the question of what a claimant needs to do to be considered "dishonest".

In *Ivey –v- Genting*, the claimant was playing Punto Banco which is very much like Blackjack except that the player is not allowed to see his cards. It's a game of pure luck because the player is betting on something that is hidden from view. The claimant knowingly misled a croupier when playing which resulted in him winning several million pounds. The Supreme Court developed a test relating to what dishonesty actually is. In simple terms, it is to be determined according to an objective test, based on what an average person would consider 'dishonest'.

Of course, that does not necessarily help us all that much because two judges can look at the same set of facts and draw different conclusions about whether or not a claimant has been dishonest. The case of Ivey –v- Genting is interesting because it was about a game and a game has rules. The fact that Ivey was not open about how he was playing outside of those rules was enough for the Supreme Court to find that he was dishonest. To err on the side of caution, a practical approach for assessing whether or not a court will find a claimant to be dishonest is probably best summarised as this: If you can show that a claimant has lied and knows that he has lied (ie: he couldn't have been mistaken) then it is going to be very difficult for a Court to decide he has been honest.

Put another way, if the claimant can be shown to "know the rules of the game" at the point he breaks them, then it is highly likely a Court will find him to be dishonest.

Curiously, the game of Punto Banco is very similar to a case where there is gross exaggeration on the part of the claimant. The compensator can see the claimant's evidence but in the case of the fundamentally dishonest claimant, that is a false picture and so any offer made on the basis of what can be "seen" is going to over compensate the dishonest man.

When a compensator has strong intelligence evidence that shows a claimant is not as injured as he purports to be, a skilled and experienced lawyer can assess what it is actually worth and make an offer on that basis.

The claimant who is lying will not be aware that the compensator knows he is lying about the value of his claim and will proceed to run up costs which will ultimately be offset against his recoverable damages once the cards are 'flipped over'.

That approach can work extremely well and if executed properly can easily result in reducing an injured (but exaggerating) claimant's damages to nil.

When to make an 'effective' Part 36 offer?

Whilst initial letters of claim are very rarely served with medical evidence, in some instances some background information regarding the claimant's injury and losses may be apparent. For example, witness statements and safety reports combined with photographs may provide a sufficient grounding to enable a realistic view to be taken with regard to potential damages.

There appears to be a shift in claimant attitudes in relation to early Part 36 offers. Whereas a claimant would previously perhaps have a more cavalier attitude in relation to rejecting an early offer, with the development of QOCS and the risks involved we are seeing more claimants willing to accept an early part 36 offer.

There is a tension between the tactic of making early Part 36 offers and a robust counter-fraud strategy and it is not sensible to pretend that there isn't. Further, getting rid of claims earlier is desirable in that, broadly speaking, you reduce costs and probably buy them off cheaper in terms of damages.

How can we make sure we take advantage of these benefits whilst avoiding paying fraudulently exaggerated claims? The answer is simple:

- Front load the litigation by running intelligence early;
- Seek assistance from an experienced and trusted practitioner who can provide guidance on whether or not you have or are likely to have strong prospects of a total knockout on a case; and
- If you are going to make an offer, make sure it's one that you can live with the claimant accepting. In a sense, the ideal offer in a s57 case is pitched as high as possible but at a level the claimant will nott accept because that gives you two ways to win: either by knocking the claim out entirely or down below the level it is actually worth and providing you with strong cost protection for almost the entirety of the case.

There is no hard and fast rule, simply broad principles that can be tailored depending on the risk appetite of a particular compensator. The key is knowing what those rules are, agreeing them and apply them consistently to ensure that your outcomes are your best outcomes.

Strike out and QOCS

Prior to the introduction of QOCS, if a claimant lost (either through discontinuance or a strike out) he would have to pay the defendant's costs (unless he agreed a "drop hands" with the defendant).

After QOCS, a defendant now has to show fundamental dishonesty to dis-apply QOCS (unless a claim has been struck out). Unsurprisingly, this has led to more discontinuances as claimants try to avoid automatically having to pay costs.

The ability to set aside QOCS following discontinuance is going to depend on the facts of the case, but some instances where it will be more likely to succeed than others would be:

- If it's fairly clear a claimant has discontinued simply to avoid the strike out;
- Instances where you can show a claimant has positively lied about something (past medical or accident history for instance);
- Instances where a claimant has invented a witness;
- Instances where you can show a head of special damages is dishonest (for example, claiming for an item which has not been damaged or for care that has not been given for instance).

The list is non-exhaustive and each case will turn on its own merits, but as a general rule of thumb:

- It is going to be easier to get a finding if the claimant does not contest it – so if he is no longer taking an active part in the litigation, you are going to struggle *not* to get QOCS set aside as long as you have some sort of evidence; and
- Before embarking on a quest to set QOCS aside, make sure you run the necessary intelligence searches to ensure that it is actually worth doing. Getting a paper judgment saying someone is fundamentally dishonest is all well and good, but if you cannot cash it in then why are you actually doing it? That's not to say there may not be a good reason, but you would want to be really clear about what that good reason is.

Conclusion

The development of fundamental dishonesty provides a potent weapon to combat claims fraud and inflation, but it must be coupled with an agreed and consistent strategy. With an aggressive, speedy approach, claims for personal injury can be targeted at the outset resulting in significant savings on indemnity spend.

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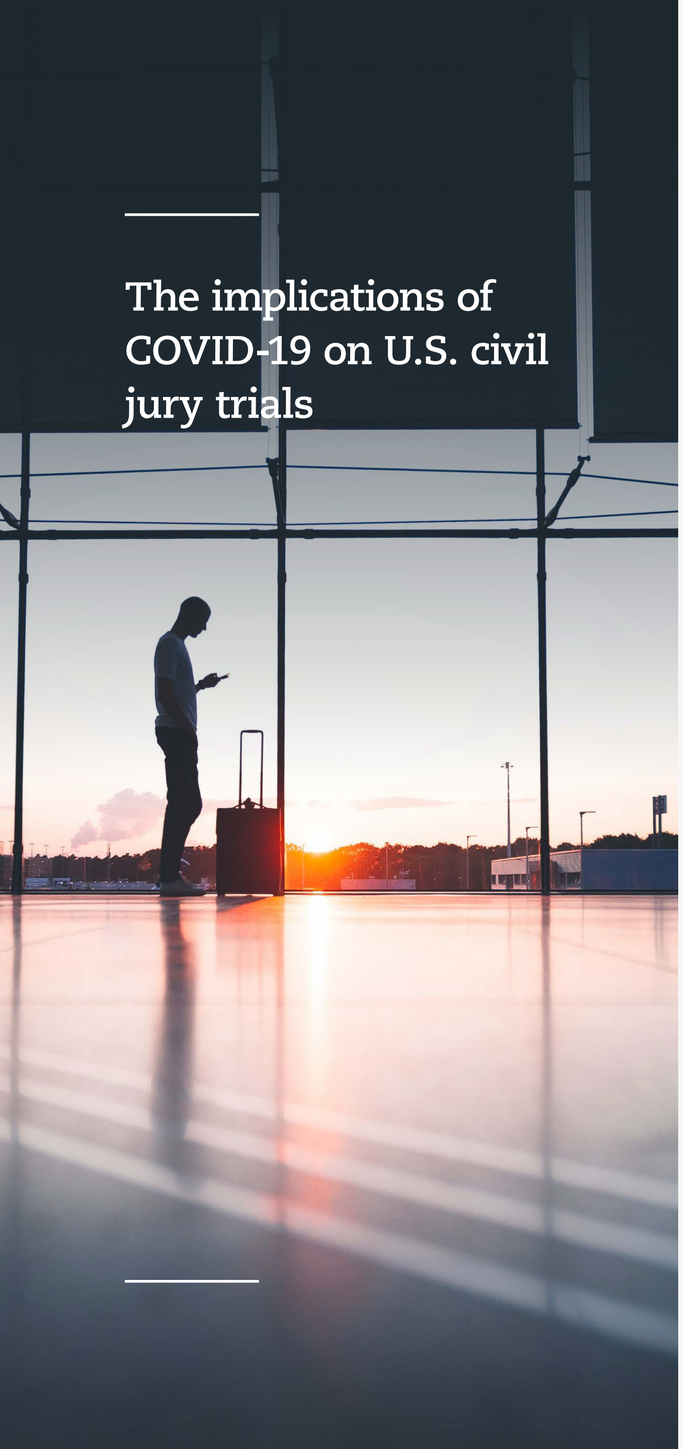
The implications of COVID-19 on U.S. civil jury trials



The COVID-19 pandemic has disrupted nearly every aspect of personal and professional life, with the legal profession bearing no exception. Courts across the United States continue to struggle with advancing legal proceedings in a manner that is both safe and not prejudicial to the rights of its litigants.

In order to ensure that legal proceedings did not come to a complete halt, many courts have encouraged, and in some instances required, the use of video conferencing platforms not only with respect to out of court discovery matters, but in-court proceedings, including hearings and trials. Despite this technology having long been available to the general public, the sudden transition to remote legal proceedings has not been seamless and the ongoing struggles, especially with respect to jury trials, are far from resolved.

U.S. Courts being unable to conduct in person jury trials due to social distancing mandates has forced many to resort to remote jury trials, but as noted above, doing so has led to its own unique challenges. In conducting traditional, in-person, jury trials, it is envisioned that by summoning potential jury members to the court at random, the jurors will represent a cross section of the community in which that court sits, without regard to race, gender, age, or income. (see Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861—74). However, with computers and high speed internet access both being prerequisites to participation in a remote trial, credible concerns have been raised as to whether juries would truly be representative of the community. Specifically, Pew Research Center studies have shown broad correlations between access to computers and high-speed internet on the one hand, and education, age, income, and to a lesser degree, race on the other. (see **https://www.pewresearch.org/internet/fact-sheet/mobile/** and **https://www.pewresearch.org/internet/fact-sheet/internet-broadband/**)

In short, individuals with lower levels of education, lower incomes and/or that are older in age are far less likely to have a computer and high speed internet. Thus, inherent in the remote jury trial selection process is the potential to indirectly and arbitrarily exclude individuals based on their income, education, age and/or other non-relevant factors, thus prompting the question of whether a verdict reached under such circumstances can truly be fair within the current U.S. legal framework.

Further, logistical concerns have caused many in the legal profession to be wary of the process. For example, in the event that a juror's computer freezes, their internet fails, or they have other technical difficulties, they may miss the opportunity to hear or see critical evidence. While in some instances this can be remedied by a simple repeating of a question and answer, it is foreseeable that large portions of testimony may be missed raising a valid question as to whether a juror, having been charged to render a verdict based solely on the evidence presented, can actually discharge of their duty having not heard or seen the entirety of the evidence, and furthermore, whether under such circumstances a verdict reached can or should be overturned on appeal.

Acknowledging the logistical and fairness obstacles surrounding remote jury trials, as well the uncertainties of when in-person jury trials will resume, litigants have grown more willing adjudicate matters via remote bench trials, i.e. where the judge, and not a jury, serves as the ultimate fact finder. Indeed, judges continue to encourage litigants to do so as remote bench trials eliminate the logistical and fairness issues discussed above and by disposing of the jury, substantially reduce the possibility of technical issues impeding the progress of the trial. Thus, as we move forward in these unsettled times, in addition to the traditional considerations associated with electing jury or bench trials, it is imperative to also take into account the issues raised above and their potential impact on the resolution of a matter. Understanding that judges tend to be less persuaded by emotionally charged evidence, that judges are better able to apply the law to the facts than juries, and that bench trials are usually shorter and less expensive, lawyers and their clients should become more acquainted with and receptive to bench trials.

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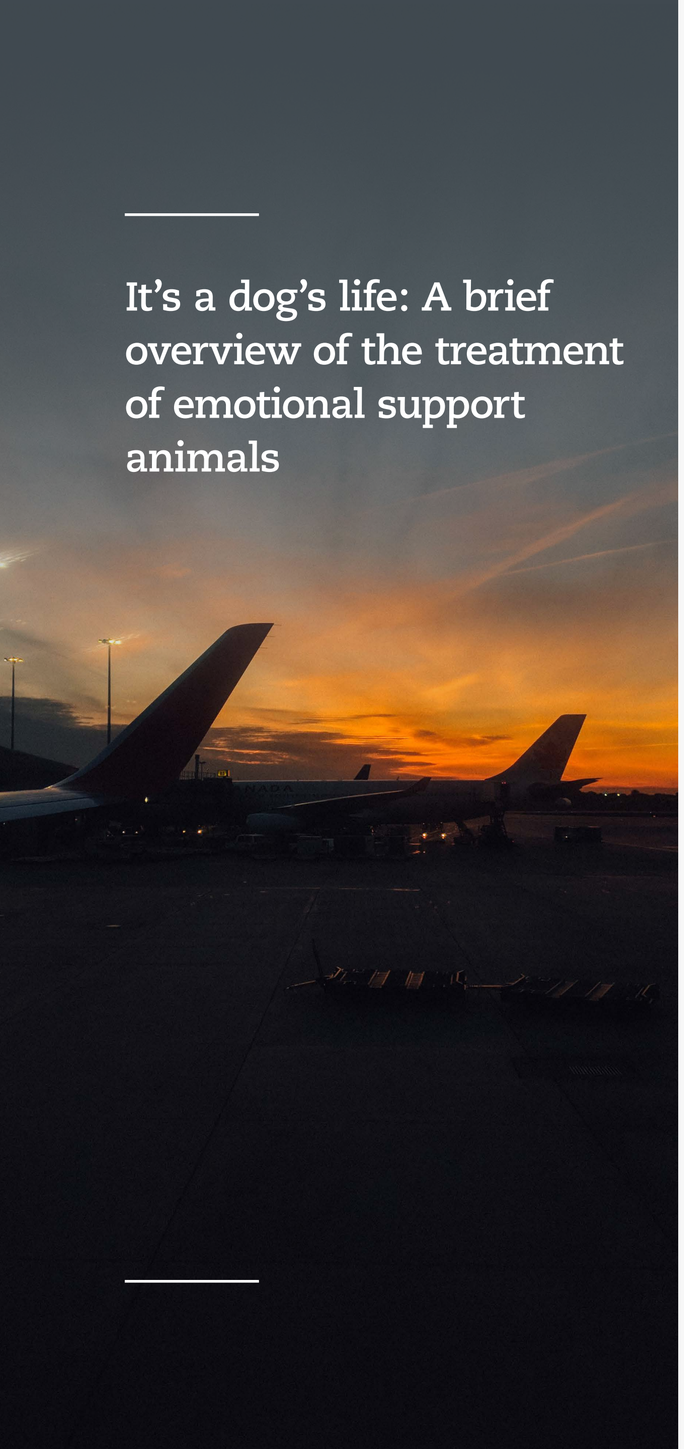
It’s a dog’s life: A brief overview of the treatment of emotional support animals



Recent statistics indicate that between 33 – 40% of passengers suffer from some degree of aviophobia. With this in mind, should this bring the importance of Emotional Support Animals, a topic on the periphery of aviation matters, more under the microscope?

What is an Emotional Support Animal (ESA)?

An ESA can be described as an animal which provides therapeutic and mental health support to a person’s emotional, cognitive or psychological condition.

ESAs should be distinguished from service or assistance animals, the latter being certified guide or assistance dogs. Unfortunately, or fortunately depending on how one views them, ESAs do not possess the same legal recognition as such service or assistance animals.

Position in the UK

In the UK, ESAs are not legally recognised and thus, there is no aviation legislation in respect of them.

It is understood that UK carriers do not allow ESAs to fly in the cabin. However, in order to allow US airlines to comply with their obligations under US legislation, US airlines can agree to allow emotional support dogs, cats and ferrets to travel in the cabin on certain routes between the US and the UK. The procedure for doing so is stipulated in a Required Method of Operation (**RMOP**), which is required by the Department for Environment, Food & Rural Affairs.

This RMOP would need to be agreed with the Animal and Plant Health Agency office responsible for the airport at destination and the pets checker responsible at the relevant airport.

UK carriers are required to accept assistance dogs in the cabin without imposing any additional fees. Usually, assistance dogs would be permitted to sit under the seat in front of the passenger, subject to their owners providing the relevant documentary evidence demonstrating compliance with the applicable regulations and requirements imposed by law or the carrier predominantly relevant to the dog’s healthcare. If the assistance dog is oversized and fails to fit into the space provided, the airline is at liberty to charge the passenger for an additional seat so that there is enough space for the dog to lie down.

According to the UK Civil Aviation Authority (**CAA**), an assistance dog is not intended to cover pet dogs, whether the owner has a disability or not. In the CAA’s view, an assistance dog is defined by its role, which is to assist a person with a recognised disability. On this basis it would not cover emotional support dogs whose owners do not have such a disability.

Notwithstanding the above, ESAs would be permitted to travel in the cargo hold of the aircraft, as manifested cargo, subject to the production of the requisite documentation to customs and other border control officials upon arrival.

Position in the USA

Until recently, it would not have been out of the ordinary to be on a flight in the US and to travel next to an ESA, which could have been a duck, a turkey or even a mini pony. Needless to say, the US appeared to be at the opposite end of the spectrum to the UK in respect of their treatment of ESAs.

However, recent changes to US law suggest that airlines will no longer be required to accommodate ESAs on board US flights. Some say that this is long overdue in light of the fact that passengers used it as a novel way of transporting their beloved pet without having to pay for them, thereby detracting from the original purpose and those that really do need them. United Airlines highlighted a 75% increase in ESAs from 2016 to 2017 alone for example.

Psychological studies consider the therapeutic effectiveness of ESAs as being scant. Delta Airlines has highlighted an 84% increase in animal incidents, including defecation, urination and biting, from 2016 to 2018. This, coupled with the limited therapeutic benefits of ESAs, are likely to be important reasons for this recent change of tack.

As of January 2021, according to the US Department of Transportation, only dogs (irrespective of breed) which have been trained to perform tasks for the benefit of an individual with a disability, including mental, physical, psychiatric, or any other disability are allowed in the cabin of an aircraft. However, the recent US law changes do not prohibit US airlines from transporting ESAs in exchange for a “pet fee”.

Liability for flying animals

Carriage by air is regulated by the international aviation conventions, most usually the Montreal Convention 1999 (**Convention**). In the unfortunate event that an ESA or assistance animal is injured or passes away during the carriage by air, the extent of liability would depend on whether the animal was transported in the cabin, or whether it was placed in the aircraft’s hold.

Although there is no authority yet on point, animals in the cabin are likely to be treated as unchecked baggage for the purpose of the international aviation conventions. This is important because under the Convention the carrier’s liability for unchecked baggage is determined by fault, rather than being strict as it would be if the animal was carried in the hold as checked baggage or cargo.

The carrier would therefore be entitled to limit its liability to the relevant limits of liability prescribed by the Convention. As of 28 December 2019, the limit is Special Drawing Rights 1,288 (approximately US$1,850) for both checked and unchecked baggage and Special Drawing Rights 22 (approximately USD 32) per kilogram in respect of cargo if the Montreal Convention 1999 is applicable and the member State in which the claim is being brought has ratified such an increase into local law.

ESAs v Service/Support Animals

Broadly speaking ESAs assist with mental health, whilst service/support animals predominantly assist from a physical perspective.

The limited nature of a passenger being able to claim psychological damage arising out of an accident during the course of carriage by air, when comparing to compensation for bodily injury, appears to be reflected in the treatment of ESAs when comparing to that of service/support animals.

Given the increased focus on mental health, as opposed to physical health, which had been gaining traction well before the global COVID-19 pandemic left us boxed-up working from home, there may be an argument that speaks to the increasing importance of ESAs, aviophobia aside.

Notwithstanding the hypothetical treatment of ESAs as referred to above, it is also important to highlight that there may be safety considerations with carrying ESAs in the cabin, as such animals are likely to not have received the same training as service/support animals, which could have a negative impact on other passengers. However, we suggest a balance should be struck between the practical and/or safety considerations and the benefits to passengers in need of an ESA.

Conclusion

As we have sought to identify, there is a lack of uniformity in respect of the transportation of ESAs and a lack of clarity regarding the animals that are allowed to accompany their owners in the cabin of an aircraft.

In light of the unification of the rules for international carriage by air seen during the 20th Century, this is an area which has seemingly been overlooked, albeit that it is one that has only grown in momentum relatively recently. There may be some benefit in ICAO member States examining the key issues relating to ESAs and their importance, and adopting a more uniform approach to assist passengers to know where they stand on the subject, and indeed carriers in when and how to accommodate them.

It is anticipated that further changes may need to be made to the applicable legislation in the future, however prior to such changes there needs to be a common consensus as to the emotional and psychological benefits of ESAs in general.

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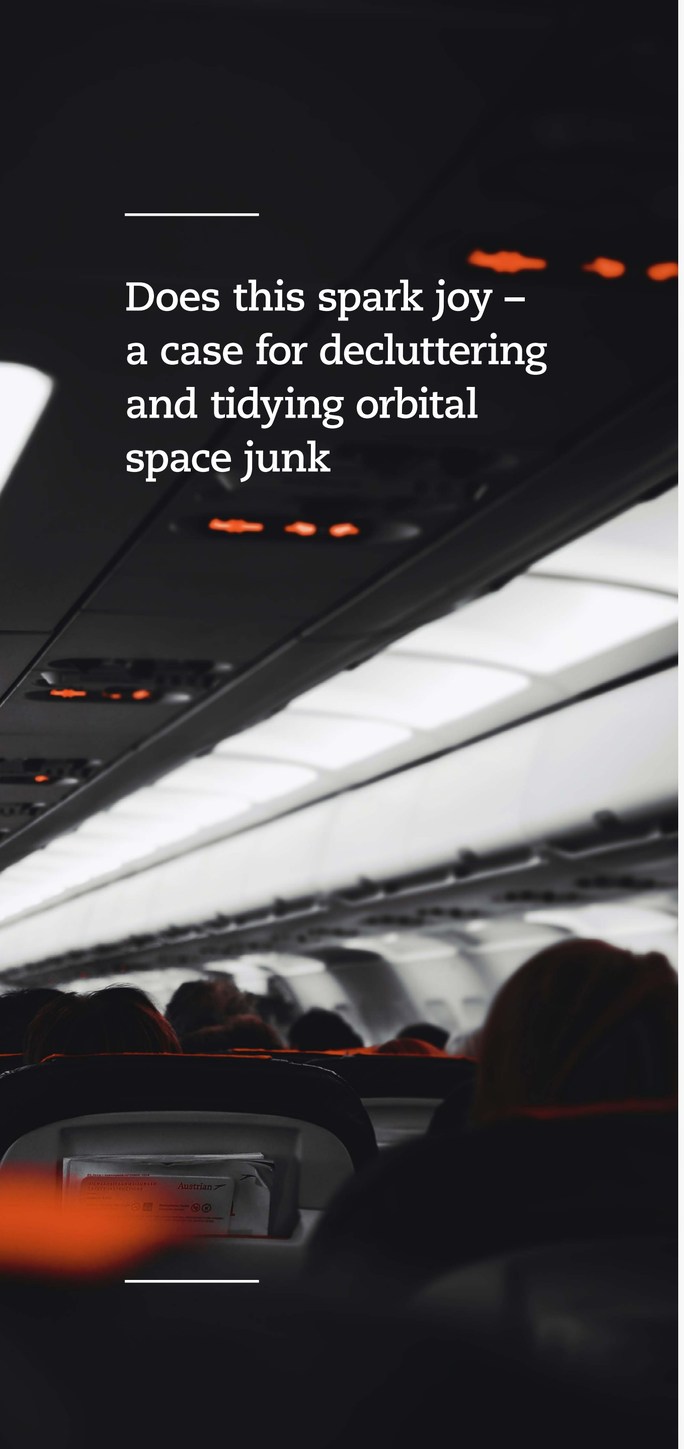

Does this spark joy – a case for decluttering and tidying orbital space junk

Introduction

On 15 October 2020, a non-operational Russian satellite and a discarded Chinese rocket stage segment came within 70 metres of colliding over Antarctica. With a combined mass of over 2,800 kilogrammes, a collision between these 2 pieces of space debris would have been destructive and may have produced a significant shower of debris fragments. Due to the objects' altitude, the resulting debris would have been likely to have remained in orbit for a significant period of time and increased the number and distribution of potentially dangerous space debris.

In the 60 odd years of space exploration following the Soviet Union's launch of its first satellite in 1957, space has become increasingly cluttered with derelict satellites, burnt-out rocket stages, discarded trash and other debris, prompting NASA to refer to the lower earth orbit (**LEO**) as an 'orbital space junk yard'. The European Space Agency recently estimated that there are 34,000 debris objects larger than 10 cm currently in orbit around Earth, along with 900,000 debris objects larger than 1cm.

The European Space Agency's Space Debris Office in its 2020 report on the current state of the debris environment provides that on average over the last 20 years, 12 non-deliberate fragmentation of space debris have occurred in space every year which have created new debris. These fragmentation events are caused by explosions in orbit (from fuel or batteries found in old spacecraft and discarded rocket sections), active space missions (which shed debris), and collisions between space debris and objects in space.

Orbital collisions are not the stuff of science fiction. In LEO, space objects including debris orbit at very high speeds; even a small piece of debris (e.g. a fleck of paint) may cause significant damage at such speeds. As collisions among objects can be highly destructive, there is a concern that without the effective remediation of orbital debris, the collisions will increase and increasingly threaten working satellites and space missions.

The commercial use of space is growing at an increasing rate. The launch of "mega-constellations" (some comprising thousands of satellites) will increase the problems associated with orbital debris. With the increased use of outer space and multiplication of space debris, the European Space Agency predicts that collisions between debris and working satellites will overtake explosions as the dominant source of debris. If LEO becomes too congested with space debris, the threat of collision raises critical questions of the viability of future space exploration prompting development of guidelines around debris remediation.

There is international recognition of the need to deal with orbital debris and to provide an adequate international framework to address the complex legal issues that it raises. Current space treaties do not provide an effective framework to regulate the issue of orbital debris and there is no effective international law regime regarding responsibility to mitigate debris creation, or the remediation of the orbital environment (and who bears the costs). Liability for damage caused by debris raises complex legal issues, with much interpretation left to individual entities (and their lawyers).

Why should we care about the management of orbital debris?

In order to fully appreciate the issues raised by the increased volume of space debris, it is important to understand the origins and management of space objects, as well as the factors contributing to the hazard of these objects colliding.

Space is vast. However, Earthling space activities are limited primarily to three orbital regions: LEO, Medium Earth Orbit (**MEO**) and Geostationary Orbit (**GEO**). An orbit is the curved path that an object in space takes around another object due to gravity. There are different factors which determine the decision as to the orbit in which a satellite is placed. Today, many communications, navigation, experimental and observation satellites are in LEO, including manned missions such as the International Space Station. The proximity of LEO satellites to Earth makes them achieve far lower latency than GEO satellites, making them ideal for high speed communications.

The US Strategic Command Space Surveillance Network (**SSN**) identifies, tracks and catalogues space objects larger than 10cm. Currently the SSN is tracking more than 16,000 man-made space objects. Fewer than 1,000 of these objects are operational. The remaining tens of thousands of objects are orbital debris comprising non-operational payloads, derelict rocket bodies, mission-related debris release and fragmentation debris from the disintegration of payloads or rocket bodies. The intentional destruction of satellites (such as the anti-satellite weapon test by China in 2007) may also significantly increase the debris population. More than half of catalogued space debris is

fragmentation debris. As orbital debris smaller than 10 cm is not trackable with current radar technologies, the risk of collision risk may be underestimated.

Satellites are used for many different purposes, including meteorology, geology, climate research, telecommunications, navigation, remote sensing and human space exploration. Assisted by lower per-launch costs and cheaper satellite development, space opportunities for commercial companies beyond aerospace and defence are opening up. The expected commercialisation of space adds to the challenge of managing orbital debris. Various commercial companies such as SpaceX, OneWeb and Amazon have signalled their ambitions to deploy mega-constellations of thousands of small satellites in the lower earth orbit to provide affordable and reliable internet connectivity.

Space debris can remain in orbit for a very long time depending upon its size, nature and altitude. The higher the altitude, the longer the orbital debris will typically remain in the Earth's orbit. At typical collision speeds of 10km/s in orbit, subject to the size of the debris, a collision with space debris has the potential to damage critically or destroy operational satellites and manned spacecraft, including the International Space Station, threaten the safety of astronauts, deviate satellites from their orbits, threaten the functionality of operating satellites and accelerate the degradation of operational satellites. In 2020, the International Space Station (which resides in LEO) was forced to manoeuvre its path three times to avoid potential collisions with space debris. Not all orbital debris is trackable and therefore, it may not always be possible to manoeuvre from the path of the debris and avoid a collision. Whilst a significant amount of orbital debris is unlikely to survive the severe heating during re-entry to Earth, there is also a risk that large re-entering objects can cause potential safety and environmental threat to objects on Earth.

The significance of orbital space debris is more than an environmental issue. In 2020, the Organisation for Economic Co-operation and Development (**OECD**) published its first report on the economic cost of space debris. The OECD estimates that the economic expense of protecting missions from space debris amounts to an estimated 5 to 10% of the total mission costs for GEO satellites, which could be hundreds of millions of dollars. In LEO, the relative expense per mission could be even higher than 5 to 10%.

If LEO becomes too congested with space debris, the threat of impact raises critical questions of the viability of future space exploration. The OECD report critically states "the main risks and costs lie in the future, if the generation of debris spins out of control and renders certain orbits unusable for human activities." The partial or complete loss of LEO may endanger launches to higher orbits, GEO and MEO, and eventually lead to the Kessler syndrome. The Kessler Syndrome posits that at a certain point, collisions between space debris could cause a cascading effect leading to exponential increase of space debris causing LEO to be unusable.

Given the risks of not addressing orbital debris and the economic costs of space debris, international agencies, national authorities and private commercial enterprises have become increasingly involved in raising awareness and developing means to address the growth of space debris.

Debris mitigation requirements and practices that have been developed and adopted to guide launch and space object operators include limiting or minimising debris release for space systems through improved design. The measures also aim to focus on end-of-use satellite and rocket body disposal, and active detection of on-orbit collisions during mission planning (through the use of shielding to protect the spacecraft), as well as redirecting satellites post-mission towards re-entry to earth or moving satellites to graveyard orbits. Many States also require debris mitigation measures as part of the licensing process for space launchers and operators. In tandem with mitigation measures, active debris removal is necessary to reduce existing orbital debris. The European Space Agency has signed a contract with ClearSpace SA to remove orbital debris with the mission planned to remove its first debris by 2025.

However, it remains the case that as a matter of international law (i.e. as between States) there is no obligation to enforce debris mitigation or prevention measures; the mitigations adopted to date are voluntary on a State by State basis. Without an effective regime that provides necessary authority or power to force compliance, voluntary compliance with international guidelines to reduce space debris may be slow to encourage the necessary changes in the space industry and assist with minimising (or indeed clearing) orbital debris posing threats to the future of space activity.

Current regulatory and legal environment

Orbital debris is not addressed explicitly in current international law. As private commercial space activity increases, new risks and challenges arise in relation to space exploration.

Three treaties with potential relevance to orbital debris issues are the:

- 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (**Outer Space Treaty**);
- 1972 Convention on International Liability for Damage Caused by Space Objects (**Liability Convention**); and
- 1976 Convention on Registration of Objects Launched into Outer Space (**Registration Convention**).

Three articles in the Outer Space Treaty contain language pertinent to orbital debris issues. Article VI requires that signatory nations to the Convention "bear international responsibility for national activities in outer space". Article VII makes signatory nations that launch or procures the launching of an object into outer space "internationally liable for damage caused by objects (and the component parts of those objects). Finally, Article IX requires signatory nations to "conduct all their activities in outer space … with due regard to the corresponding interests" of other signatory nations. Article IX also provides that studies by signatory nations (or their nationals) of outer space and exploration should be conducted "so as to avoid their harmful interference" and where signatory nations have reason to believe that a planned activity or experiment would cause potentially harmful interference with other space activities they should "request consultation" concerning the activity or experiment.

With creative interpretation, the above Articles might be used to support an argument that signatory nations are obliged to avoid the creation of, reduce, and even remove, space debris to allow all States to participate in the exploration and the use of outer space with acceptable risk from debris. However, there are challenges – for example, Article IX does not define what constitutes harmful contamination or what would constitute appropriate measures to mitigate the creation of new debris.

The Liability and Registration Conventions are relevant to the liability of signatory States for damage caused by their space objects.

Article III of the Liability Convention deals with damage that occurs in outer space and makes signatory nations liable to other nations for damage caused by space objects for which they are the "Launching State". Nations are responsible and may be held liable for the commercial activities of their citizen private companies in space, including (arguably) for the consequences and resulting damage of space debris created by those activities. Liability for any and all damage caused by a space object in space attaches upon a finding of fault. This liability arises regardless of when the space object was launched and includes defunct or derelict space objects, with most commentators agreeing that the Liability Convention covers orbital debris.

There are difficulties establishing liability under the Liability Convention. For compensation to be payable, a victim nation must demonstrate proof of fault, causation and damage. The Liability Convention does not define "fault" and it is unclear how this term is applied in practice, nor does it provide assistance on a standard of care for determining fault. It has been argued that the use of "fault" in the Liability Convention was intended to equate to common law negligence, which requires a duty of care and its breach; however, this has not been fully accepted and alternative arguments have been made, for example based on the civil law standard of how "the reasonable man" would have responded under the subject circumstances. Other commentators have advocated for a strict liability system as an alternative to a fault-based system, such as the form of strict liability regime found in the primary international aviation liability agreement, the Montreal Convention 1999.

Proving common law fault generally requires that the wrongdoer fell below a required standard or care. Potentially, for the purposes of the Liability Convention, the requisite standard of care may take into account national and international standards concerning the creation (or mitigation) of space debris or guidelines for conducting space activities, but there is considerable scope for debate concerning the detail of the standards to be applied. Once again, the position is not helped by the lack of mandatory international standards of conduct regarding debris mitigation.

Another obstacle associated with fault-based liability is the difficulty of proving a causal connection between the accident and damage. The most practical problem in establishing liability for damage caused by orbital debris is proving who is responsible for the debris. The Registration Convention seeks to provide information to assist with determining liability by mandating that all "launching States" maintain a register of objects launched into space. Article VI of the Registration Convention directs nations with monitoring or tracking facilities to aid in the identification of space objects that cause damage. However, proving that damage has been caused by space debris may be difficult. It may not be possible to trace the damage to orbital debris or to the owner of the original launched object. Currently, only space debris larger than 10cm is tracked and catalogued. Therefore, the origin of smaller pieces of orbital debris, that cannot be tracked or catalogued by the launching State, is likely to be uncertain.

There is also a question of who has jurisdiction to hear space debris claims and of the law applicable to any such claim in private national law. The Liability Convention only applies to States and each country has authority to make laws regulating various outer space activities by their nationals. Whilst the Liability Convention scheme focuses on diplomatic solutions to address claims caused by a space object, Article XI leaves open the possibility for claims to be brought before the national courts or administrative tribunals or agencies of a Launching State. Article XXIII of the Liability Convention also allows States to enter into their own agreements without interference from the Liability Convention.

The Liability Convention establishes joint and several liability when there is more than one Launching State. The existence of multiple Launching States increases the available jurisdictions for disputes for orbital damage claims to be brought. In the absence of an international convention or other international legal regime providing a clear liability regime for damage caused by orbital debris, national laws will most likely be applied in respect of claims arising from private commercial space activities. For courts unfamiliar with space matters, this can lead to the interpretation of the treaties based on the application of domestic law resulting in a less than uniform treatment of liability. Against this backdrop, the potential for different national laws and legal regimes to apply creates ample opportunity for parties (and their lawyers) to engage in extended argument over which jurisdiction is appropriate and which law should be applied.

In addition to the liability challenges raised, the lack of a clear mechanism for dispute resolution in the Liability Convention and the need to involve signatory nations to bring claims against other nations on behalf of private operators for whom they are responsible has inevitably resulted in the Liability Convention not being commonly used or relied upon. There has yet to be a claim on the basis of damage occurring whilst in orbit. The Liability Convention has not been widely applied, with the only instance arising out of the re-entry of a Russian spacecraft which caused radioactive debris to be scattered on Canadian territory. The claim was settled by diplomatic means.

The possibility of having numerous dispute resolution avenues and applicable laws raises the spectre of uncertainty, and a very significant barrier to enabling wide commercialisation of orbital space. Without an adequate legal international framework addressing the regulation of orbital debris and liability issues, an operator suffering loss in orbit will face very significant issues when seeking to recover compensation for damage caused by orbital debris.

Conclusion

As discussed above, without an adequate legal regime addressing liability and complex issues related to space debris collision, addressing the growing mass of space debris creates ongoing challenges. There is a case for the leading space-faring nations taking the lead in developing international, as well as national, laws and policies on orbital debris. The issue of damage caused by unidentified sources of debris will no doubt remain; that in turn makes it all the more important to establish a legal regime that enforces the protection of this most valuable common heritage of all mankind.

The sustainable future of human activities in outer space demands pro-active action to support long term sustainability of space activities and avoid the real possibility of the Kessler theory coming true. Donald Kessler, retired head of NASA's orbital debris programme has stated:

> "The longer you wait to do this the more expensive it's going to be. Given the economy, we'll probably end up putting it off, but that's really not very wise. This scenario of increasing space debris will play out even if we don't put anything else in orbit".

The law in this growing area of interest remains untested and unclear and therefore, has the potential to be of great importance to current and future users of space. It is a topic that needs to be watched carefully and clarified for the benefit of all concerned.

For further information please contact **Melissa Tang** of Singapore office or **Dylan Jones** of our London office.

The authors acknowledge the assistance of **Patrick Slomski** (Partner, London office) in the preparation of this article.

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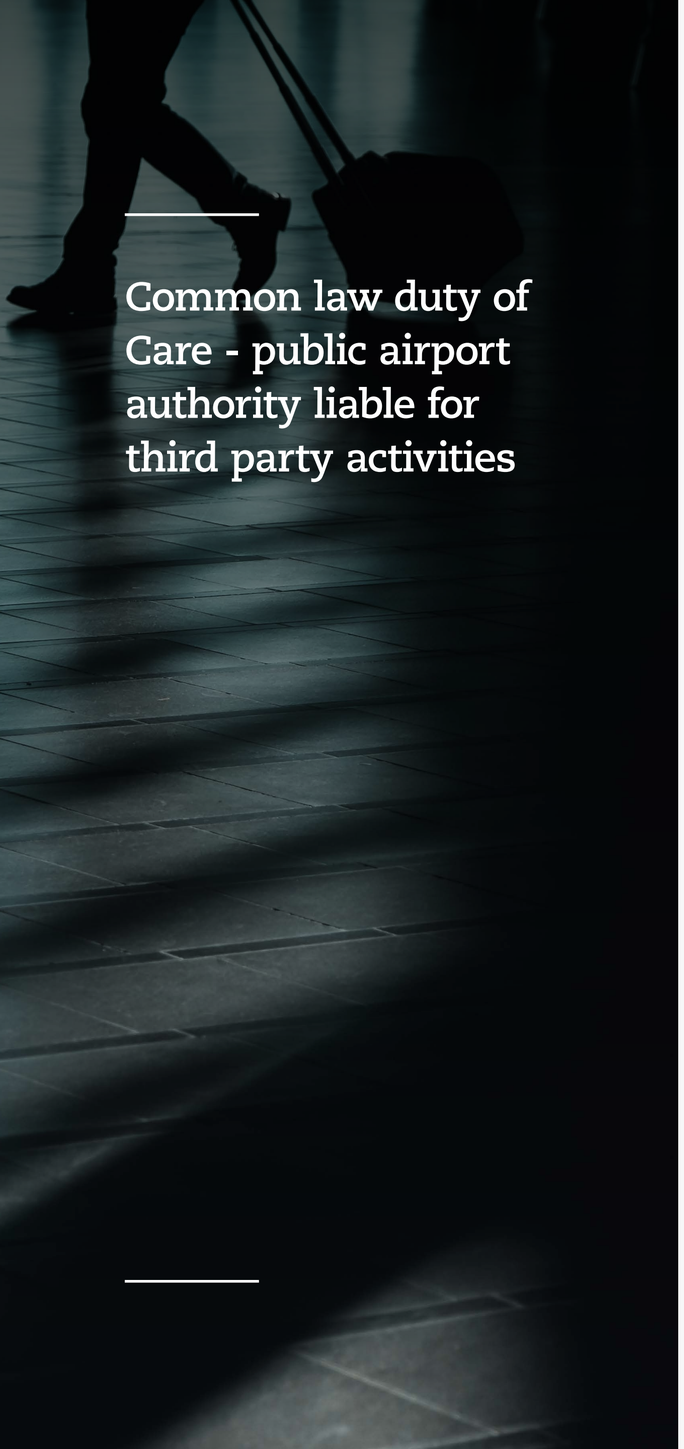

Common law duty of Care - public airport authority liable for third party activities

On 9 November 2020, the Privy Council handed down a decision on the appeal of the Bahamian Airport Authority against Western Air Ltd, [2020] UKPC 29. The case concerned an aircraft from Western Air Ltd that was stolen whilst parked at apron 5 of a restricted zone at Lyden Pindling International Airport in Nassau, The Bahamas, in 2007.

The Airport Authority was responsible for the overall security of the airport; it controlled the restricted areas and prevented access from unauthorised persons. It was determined that on the night of the incident no one attempted to have access to the area where the aircraft was parked, but a security officer heard the propellers of the aircraft start up and saw the aircraft come up from its parking space with no lights on.

Investigation found "defects in the security fencing around the airport" that could have allowed access to the restricted area without passing through the manned security booth. A former pilot employee of Western Air, who had been denied compassionate leave, was deemed to be the likely suspect (on the basis of certain hearsay evidence). However, his involvement could not be proved in the proceedings.

At first instance Western Air claimed that it was not allowed to provide its own security and was therefore owed a duty of care by the Airport Authority that was exclusively responsible for the safeguard of its aircraft. The trial judge found the Authority liable to Western Air for damages on the basis that the three elements of proximity, foreseeability and reasonability were satisfied so as to give rise to a common law duty of care and that the doctrine of *res ipsa loquitur* applied – i.e. negligence was to be presumed because the facts spoke for themselves.

The Airport Authority took the view that it did not owe a duty of care to prevent the theft of aircraft, that the doctrine of *res ipsa loquitur* was misapplied; that both the trial judge and the appellate court were wrong in finding that Western Air was not allowed to provide private security; and that the identity of the person who stole the aircraft was unknown. It therefore filed an appeal before the Privy Council.

The Privy Council held that the challenge to the judge's findings was unconvincing and focused its decision on an analysis of the common law duty of care, economic loss and liability for omissions, and the doctrine of *res ipsa loquitur*.

It recognised that there was strong authority that a common law duty of care cannot be asserted on the basis of a breach of a statutory obligation for which no tort of breach of that statutory duty has been created. However, it found that although the statutory instrument creating the Airport Authority set out the Authority's functions, including the obligation to provide security at the airport, it did not define the nature and scope of this duty; and this did not detracted from the fact that the Authority was responsible for providing security at the airport, including controlling access from unauthorised persons to restricted areas of the airport.

According to the Privy Council that, along with the established finding that Western Air was not allowed to provide its own security, was good enough to justify a finding that the proximity between the Airport Authority and Western Air imposed a common law duty of care upon the Airport Authority: it was responsible for the safeguarding of the aircraft whilst it was parked on its stand. Liability arose because the theft of the aircraft was an unexplained occurrence and would not have happened in the ordinary course of things without negligence on the part of the Airport Authority.

The Authority's assertion that Western Air's claim was a case of "pure economic loss" was also not accepted by the Privy Council. The airline had lost a valuable physical asset. Moreover, it was concluded that this loss arose from the omissions by the Airport Authority and that the common law of negligence applies not only to actions but also to omissions.

Arguably, it would have been beneficial if the Privy Council had explored liability for omissions in more detail. Nevertheless, perhaps more than offering a clear reasoning for the application of the doctrine of *res ipsa loquitor*, the Privy Council's decision is particularly interesting when considering the relationship between an airport authority's liability pursuant to the common law duty of care and its statutory obligations.

The Privy Council found that the Authority's duty was to provide security at the airport (albeit there was no provision for safeguarding of aircraft) and the basis of the airline's claim was not the airport's failure to provide security, but the deficiencies in the security that was provided – that was negligent, including as a result of the defects in the security fencing.

This decision presents an opportunity to argue that a public authority might be liable pursuant to a common law duty of care for the act of a third party and reminds us that it is important to get our evidence right at trial since it is unlikely that the findings of the trial judge will be set aside by the appellate court – in this case the relevant issues being as to who stole the aircraft and/or how they were able to do it notwithstanding the security that the Authority was obliged to and should have provided.

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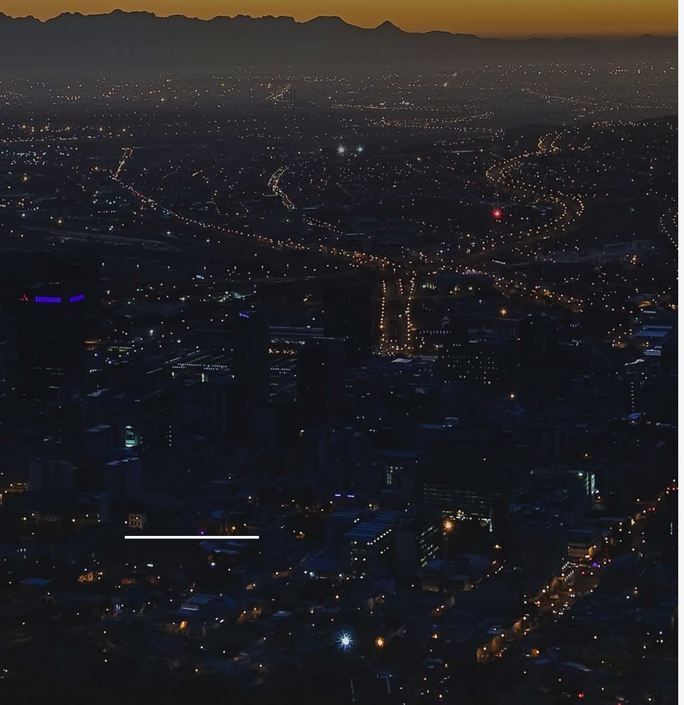
The state of Qatar's accession to the Cape Town convention – summary of declarations



On 8 January 2020, the State of Qatar deposited its instrument of accession to the Cape Town Convention and the Aircraft Protocol with UNIDROIT. By virtue of the Emiri decree Number 52 of 2020 published under the Official Gazette issue No.12 dated 16 July 2020 (**Decree**), the Cape Town Convention and the Aircraft Protocol is in effect in Qatar with effect from 16 June 2020. This means that the provisions of the Cape Town Convention, read along with the Aircraft Protocol, are now effective in Qatar.

As a general comment, it is worth noting that the implementation of the Cape Town Convention in Qatar is in its very early stages and some aspects of its implementation may emerge in the coming days; for example, it is not entirely clear whether the Qatar Civil Aviation Authority (**QCAA**) or the Qatari authorities will insist on any formalities being followed with respect to the execution and recording of irrevocable de-registration and export request authorizations (**IDERAs**), which are meant to permit the person designated therein to de-register and export the aircraft identified therein.

A summary of the key declarations made by Qatar under the Cape Town Convention and the Aircraft Protocol is provided below:

Under the Cape Town Convention

– Pursuant to Article 39(1)(a) of the Cape Town Convention (which permits a contracting State to declare categories of non-consensual right or interest which have priority over a registered international interest), Qatar has declared that the following nonconsensual rights will have priority over a registered international interest:

(a) The right to seize equipment for the benefit of employees of an air carrier following the non-payment of salaries starting from the date of the announcement of a breach of the contract for financing or leasing the subject.

(b) The right to seize equipment, rights or rights of an entity affiliated with the State of Qatar related to taxes or unpaid fees from the date of the announcement of a breach of contract to finance or lease the subject matter of the right. Whilst the Decree makes reference to "taxes or unpaid fees", our view is that the reference in this phrase to "taxes" is to unpaid taxes.

(c) The right to seize equipment for the benefit of someone who repairs something and keeps it in his possession by handing him over, in return for the services, what it has been accomplished and the added value tax (VAT) of that object. It is worth noting that the Arabic text of the Decree is unclear on whether the reference to VAT in this provision is to VAT applicable on the relevant aircraft object or to VAT on the value of the work done; a conclusive view on this can only be taken upon receipt of an official clarification on this provision, which is not available at the moment.

- Pursuant to Article 39(1)(b) of the Cape Town Convention (which permits a contracting State to reserve the right of that State or a State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider), Qatar has reserved its rights and the rights of any "entity affiliated with the State, an intergovernmental organization or any other private body concerned with the provision of public services" to "withhold or detain anything in accordance with its laws in order to pay amounts due to the State of Qatar or for that entity, organization or service provider"
- Pursuant to Article 40 of the Cape Town Convention (which permits a contracting State to list the categories of non-consensual rights or interests registrable under the Cape Town Convention), Qatar has specified the following categories of non-consensual rights as being such registrable non-consensual rights and interests:
  (a) The right of a person holding a court order allowing the seizure of something belonging to an airplane in implementation of a court ruling.
  (b) The right to pensions for the benefit of employees when the pending salaries are not paid before the announcement of the breach of a contract to finance or lease the subject of the right.
  (c) The right to seize equipment or other rights for a State entity related to taxes or unpaid fees prior to the date of the announcement of the breach of a contract for financing or leasing the subject of the right. As mentioned above, whilst the Decree makes reference to "taxes or unpaid fees", our view is that the reference in this phrase to "taxes" is to unpaid taxes.
  (d) All other non-consensual rights and guarantees related to un-satisfaction that, under the law of the State of Qatar, have priority over the rights of those with a guaranteed debt.
- Pursuant to Article 53 of the Cape Town Convention (which permits a contracting State to specify the relevant "court" or "courts" that are to have jurisdiction in respect of claims brought under Cape Town Convention), Qatar has declared that that the Court of First Instance "Supreme Civil Court" is the relevant court for this purpose
- Pursuant to Article 54(2) of the Cape Town Convention (which permits a contracting State to declare whether or not any remedy under the Cape Town Convention may be exercised without court permission), Qatar has declared that any remedies available to a creditor under the Cape Town Convention, unless a provision thereof expressly stipulates that an application must be made to the court, may be made without court permission

Under the Aircraft Protocol

- Pursuant to Article XXX(1) of the Aircraft Protocol (which permits a contracting State to elect whether it applies Article VIII of the Aircraft Protocol), Qatar has declared that it applies Article VIII of the Aircraft Protocol, which means that the parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations
- Pursuant to Article XXX(2) of the Aircraft Protocol (which permits a contracting State to elect whether it applies Article X of the Aircraft Protocol (which in turn links to Article 13 of the Cape Town Convention dealing with reliefs pending final determination), Qatar has declared that it applies the entire Article X of the Aircraft Protocol and that the number of working days for the purposes of Article X(2) of the Aircraft Protocol (and therefore, for the purposes of Article 13(1) of the Cape Town Convention) is as follows:
  (a) For the matters set out in Articles 13(1)(a),(b) and (c) of the Cape Town Convention (preservation of the object and its value; possession, control or custody of the object and immobilisation of the object) a period not exceeding 10 days; and
  (b) For the matters set out in Article 13(1)(d) of the Cape Town Convention (lease or, except where covered by (a) above, management of the object and the income therefrom) a period not exceeding 30 days.
- Pursuant to Article XXX(3) of the Aircraft Protocol (which permits a contracting State to elect Alternative A or Alternative B under Article XI of the Aircraft Protocol), Qatar has declared that it fully applies Alternative A in Article XI of the Aircraft Protocol to all types of insolvency proceedings, and that the waiting period (required to be stipulated under Article XI(3) of the Aircraft Protocol is 60 days. Article XI of the Aircraft Protocol permits contracting States to choose between the application of Alternative A and Alternative B to insolvency proceedings. Under "Alternative A," on the occurrence of an insolvency-related event (among others): (a) a "waiting period" may be chosen by the contracting State and with respect to which Qatar has chosen 60 days as aforementioned; (b) the relevant aircraft object must be returned to the creditor by no later than the earlier of: (i) the end of the above mentioned waiting period; and (ii) the date on which the creditor would be entitled to possession of the relevant aircraft object, provided that the insolvency administrator or the debtor, as applicable, may retain possession of the relevant aircraft object where, by the time specified in this paragraph (b), it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement (provided further that a second waiting period shall not apply in respect of a default in the performance of such future obligations); (c) the remedies in Article IX(1) of the Aircraft Protocol (i.e. to procure the deregistration and export of the relevant aircraft object) shall be

made available by the applicable registry authority (i.e., in this case the QCAA) and the administrative authorities in contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Cape Town Convention; (d) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations; and (e) no exercise of remedies permitted by the Cape Town Convention or the Aircraft Protocol may be prevented or delayed after the date specified in paragraph (b). Further, under Alternative A, the debtor or the insolvency administrator (as applicable) has an obligation to preserve the relevant aircraft object and maintain it and its value in accordance with the relevant agreement and the creditor is permitted to apply for interim relief, in each case, until the creditor is given the opportunity to take possession of the relevant aircraft object under paragraph (b). It is widely accepted that Alternative A provides creditors certainty on the timing of repossession of the relevant aircraft object Aircraft and makes the repossession process more certain and efficient.

- Pursuant to Article XXX(1) of the Aircraft Protocol, Qatar has declared that it applies Article XII and XIII of the Aircraft Protocol. In doing so, Qatar has declared that:

  (a) Article XII – its courts shall, in accordance with its laws, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI of the Aircraft Protocol; and

  (b) Article XIII – (i) the **QCAA** shall record IDERAs if submitted to it; (ii) the "authorised party" under such IDERA or its certified designee shall be solely entitled to exercise the remedies set out in Article IX(1) of the Aircraft Protocol (i.e. to procure the deregistration and export of the relevant aircraft object); (iii) the IDERA may not be revoked by the "issuer" without the written consent of the authorised party; (iv) the QCAA shall revoke an IDERA at the request of the authorised party; and (v) the QCAA and other administrative authorities in Qatar shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX of the Aircraft Protocol.

It is worth noting that Qatar has not made a declaration under Article XIX of the Aircraft Protocol, which means that, at this time, there is no designated entry point for effecting a registration of an international interest under the Cape Town Convention over aircraft objects registered in Qatar. The International Registry has clarified (over the telephone) that registrations of international interests over aircraft objects registered in Qatar can be made without obtaining any other code or authorization. Priority searches conducted with respect to an A350 aircraft recently delivered to a Qatari operator evidence the registration of international interests at the International Registry. Accordingly, at this time, registrations of international interests over aircraft objects registered in Qatar can be made without obtaining a code or other authorization from an authorized entry point.

Accession by Qatar to the Cape Town Convention and the Aircraft Protocol and a robust implementation thereof by the relevant authorities and courts will provide creditors in aircraft financing transactions involving Qatari operators or Qatar registered aircraft with more assurances given the greater level of predictability through standardized remedies and transparent insolvency practices under the Cape Town Convention and the Aircraft Protocol. Undoubtedly, this will benefit Qatari operators as creditors may be willing to reduce the "risk element" in pricing such aircraft financing transactions.

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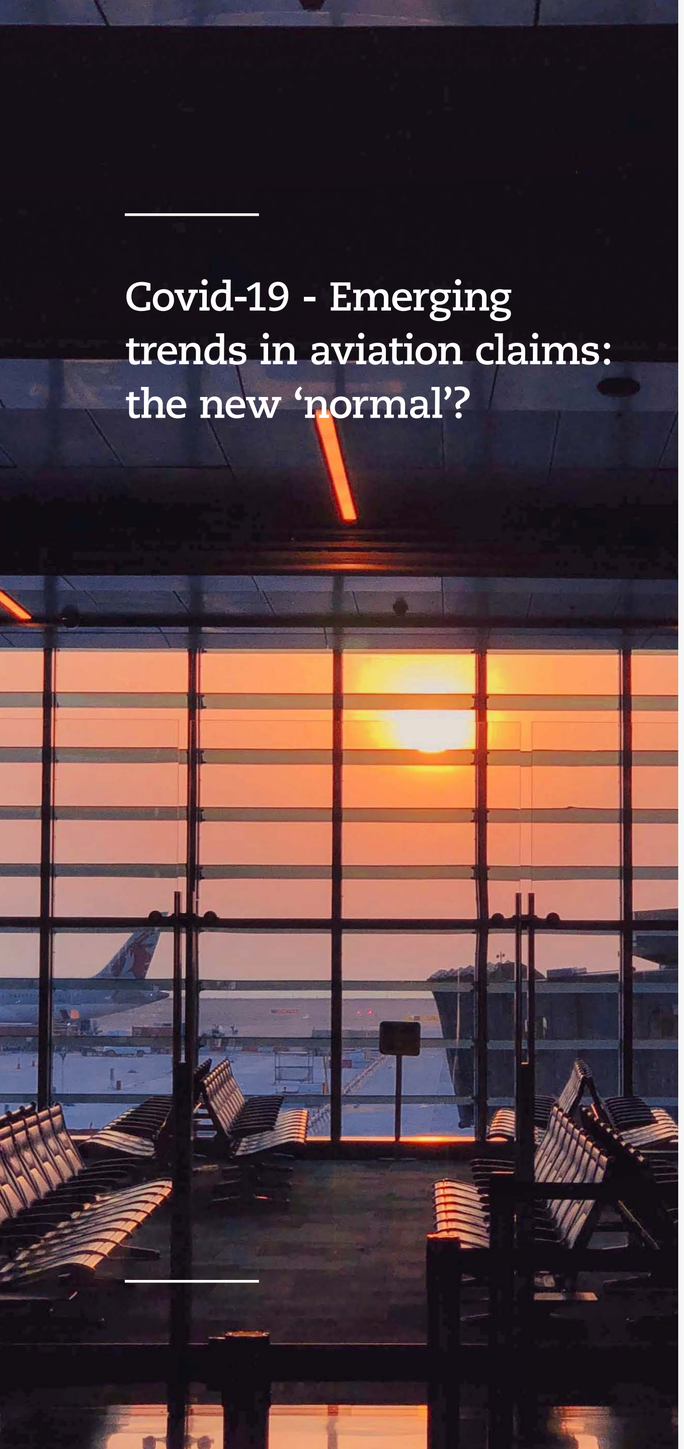

Covid-19 - Emerging trends in aviation claims: the new ‘normal’?

The unprecedented grounding of much of the world’s airline fleet during the ongoing Covid-19 pandemic has led to some developing trends in the types of aviation claims presented and how those claims are being advanced.

Background

The immediate and dramatic impact of the Covid-19 pandemic on the global aviation industry from early 2020 is, by now, a well-trodden story. Widespread national lockdowns, international (and, in some cases like Australia, interstate) border closures, and other containment measures, have taken a heavy toll. In January 2021, ICAO reported there had been an estimated 60% decline in world passenger numbers in 2020 compared to the year prior. Airports have, similarly, suffered an estimated 65% decline in revenue, equating to more than USD 111.8 billion.

The steep drop in passenger numbers has, at least temporarily, altered the risk exposure profile for airlines, aviation insurers and other industry participants. ‘Traditional’ liability claims – for example, in-flight passenger injury claims, slip and fall incidents at airports, and property loss or damage claims – have become far less frequent. This is consistent with the significant reduction in traffic.

To date comparatively few liability claims have been notified that are connected with the pandemic directly. Mostly they concern passenger claims for compensation for flight cancellations or delays. The US has seen some consumer class actions commenced in that context, a topic addressed in our last Aviation Newsletter and discussed further below.

Emerging claim trends

The downturn in traditional aviation claims has in turn been replaced with an increased risk of other emerging claims. It has been noted that loss exposures do not disappear simply because much of the aviation industry has been on hold; rather, those exposures evolve to reflect the new environment in which aviation participants are operating.

The types of claims that have become more frequent since the outset of the pandemic, or are expected to in the near term, include:

(i) Disputes/litigation arising out of commercial contracts between aviation participants. These include aircraft leasing or charter agreements, airline supply contracts such as ground handling agreements or maintenance contracts, and other operational agreements. Such disputes are likely to bring into focus legal avenues potentially available to parties to avoid contractual commitments, such as the interpretation of express force majeure provisions. Commentary on the application of such provisions was provided in our last Aviation Newsletter.

(ii) Claims arising from the increased risks of long term storage of aircraft. It is estimated that more than USD 164 billion of insurable aircraft value is currently parked. Ground risks to aircraft in that context are many and varied, and include damage exposure to severe environmental events (such as hurricanes, tornados, windstorms, and typhoons) and hull claims following ground collision events.

(iii) Organisations already fighting steep financial losses may be subject to class action proceedings or other legal action advanced by shareholders seeking to challenge the strategic and financial decisions made by company boards during the pandemic.

(iv) In order to adapt to the declining number of flights worldwide, businesses have furloughed or laid off employees such as pilots, maintenance engineers, and ground crew, many of whom have since moved on to alternative employment. This has created a skills shortage in the industry. Once operations have resumed, there will be a heightened risk of claims involving human factors. Managing the return of skilled workers (or integration of new workers), including recertification/licensing and training requirements, will be an important focus for stakeholders.

(v) Compliance with obligations concerning deep cleaning and disinfection to prevent the spread of Covid-19 at airports and on aircraft through additional health and safety requirements. Employees working to ensure aircraft are 'Covid-safe' through measures such as frequent deep cleaning may be entitled to bring workers' compensation claims if they are exposed to the virus and become ill and/or are unable to work for a period of time.

(vi) In the US, consumer class actions relating to Covid-19 flight cancellations and disruptions have been filed against both domestic and foreign air carriers. Those actions primarily involve allegations such as failure to refund, breach of contract and violations of State consumer law. Other countries have seen far fewer claims in that context but there remains an ongoing risk exposure for airlines, particularly in consumer-friendly jurisdictions.

The shape of these claim trends into the future remains a little uncertain. Much will depend on the success of global vaccination efforts and the resultant (and expected) loosening of travel restrictions. However, with airline numbers not forecast to return to pre-pandemic levels until 2024, the prevalence of these types of claims is likely to continue for at least the medium term.

As the financial losses suffered by the aviation sector caused by the impact of Covid-19 continue, we expect to see the aviation sector increasing its utilisation of innovative ways of financing their claims. Disputes finance allows companies to access non-recourse finance secured against the outcome of a claim or claims. This non-recourse finance allows the company with the benefit a claim to outsource the legal costs and risk of pursuing that claim to a third party funder on the basis that the funder will only be repaid should the claim be successful. In a time when cashflows are tight and legal budgets limited, this model removes legal costs from a company's balance sheet, which can have a positive effect on operating profit and subsequently on company value.

In addition to the payment of legal costs, there is a recent trend towards more innovative disputes finance models. For example, a party with the benefit of the claim can also monetise their claim and receive an upfront payment on the basis that the funder will receive a portion of the proceeds should there be a successful recovery. This monetisation of claims is in effect a pre-payment of claim proceeds to a claimant, which can have the effect of operating profit at a time that best suits the company.

Disputes funders are also increasingly providing holistic solutions to companies in the form of a facility for the payment of legal costs. 'Portfolio finance' provides a finance solution for a company's entire disputes exposure, providing funding for large and small claims. Such facilities can include finance for the legal costs of the claims where the company is the defendant (such as the class action risk referred to above). Providing finance for a portfolio of claims carries a lower degree of risk to the funder than finance for a single case and for this reason the cost of this type of finance is less expensive than the finance for a single claim.

As the aviation sector comes under significant financial pressure and is facing a variety of claims as a result of the unforeseen pressures resulting from Covid-19, we anticipate that many in the sector will turn to these innovative models in order to finance these claims.

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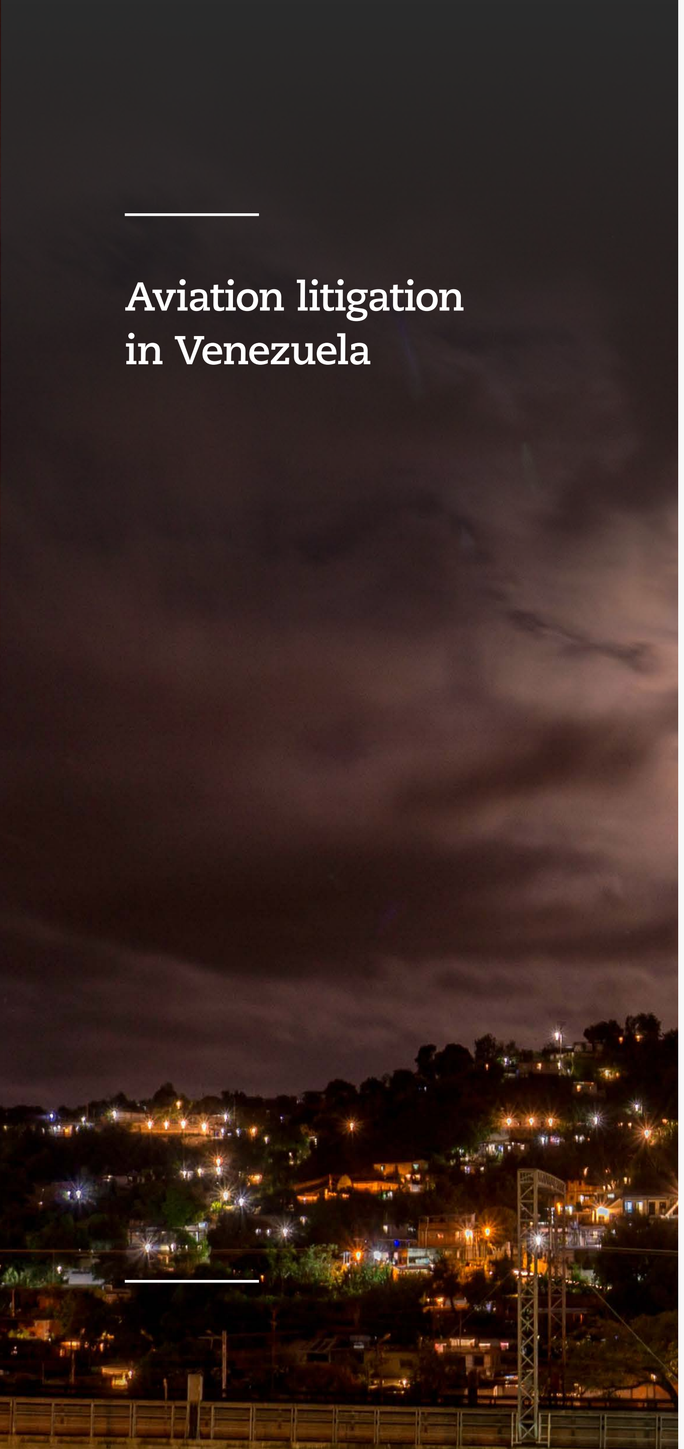
Aviation litigation in Venezuela



Many perceive Venezuela as a difficult jurisdiction. Its political instability, high inflation rates, a questionable independence of its judiciary and the foreign exchange control regime in force since 2003, *inter alia*, have for long justified this belief.

For years, a remarkably-overvalued but legal "official" rate of exchange coexisted with a much more realistic but illegal "parallel" rate. The wide margin between them deterred international and local creditors, including subrogated aviation insurers, aircraft lessors and other aviation stakeholders from pursuing the repayment of their credits in the local courts as debtors could easily -and validly- settle their debt in local currency by converting a small fraction of the original USD amount owed at the parallel rate of exchange. Litigation was therefore an unattractive and ineffective mean of dispute resolution.

The substantial disparity between the two rates also generated distortions in the aviation insurance sector. It was the bone of contention between aviation insurers and their insureds in the coverage of losses occurring in Venezuela. Whilst insureds would typically seek the reimbursement of local expenses in foreign currency at the official rate set forth in the insurance policy, insurers would seek to reimburse these expenses in local currency by doing the conversion themselves in order to prevent their insureds from making a profit out of the policy to the insurers' detriment.

Since 7 September 2018, however, things have changed. On this date, the Venezuelan government issued a new Exchange Agreement (**Exchange Agreement No. 1**) which aimed to establish the free convertibility of the local currency throughout the country and repealed all of the Exchange Agreements upon which the 2003 exchange control regime had been built.

The new regime liberalised the official rate of exchange, which now fluctuates in accordance to rules of supply and demand. Although it still coexists with the parallel rate, they mirror each other; so, the difference between them is insignificant. Furthermore, it allows contractual obligations to be agreed in a foreign currency. Thus, in the event of breach, they can now be effectively enforced in the Venezuelan courts without the risks for the claimant of seeing their credit settled in local currency at a fraction of its value. This has been confirmed by the Supreme Court of Justice though Decision No. 128 handed down by the Civil Cassation Chamber in the case of *Dennis Flores et al v. Promociones* Top 19-20, C.A. on 27 August 2020.

In summary, litigation is once again an effective mean to enforce breached obligations and a deterrent for parties to default on them in Venezuela.

For this reason, we provide an overview of the Venezuelan legal and judicial system and explain how it applies to the resolution of aviation disputes in the local courts. This is particularly relevant now as an avalanche of COVID-19-related claims looms.

The Legal System

The Venezuelan legal system in based on the civil law. As such, its procedural and substantive laws are all codified in written statutes.

The Venezuelan judicial system is hierarchycally structured as follows:

1. The Supreme Court of Justice;

2. Superior or Second Instance Courts;

3. First Instance Court; and

4. Municipal Courts.

The Supreme Court of Justice

The Supreme Court of Justice is the highest court in the country. It is divided in six different Chambers, namely: (i) the Constitutional Chamber; (ii) The Civil Cassation Chamber; (iii) the Criminal Cassation Chamber; (iv) the Social Cassation Chamber; (v) the Electoral Chamber; and (vi) the Political-Administrative Chamber. Each Chamber is made up of five Justices, except for the Constitutional Chamber which is made up of seven. Amongst them a President and a Vicepresident are elected. Decisions are passed by simple majority.

Only matters whose value exceeds 15.000 Fiscal Units can be heard over by the Supreme Court of Justice. Fiscal Units are a special unit of measure similar to the IMF Special Drawing Right, whose value is updated by the Venezuelan fiscal authority (SENIAT) every year.

Its value was last set in the amount of VES1.500,00 through Resolution SNAT/2020/00006 of 21 January 2020, which was publicised in the Official Gazette 41.839 of 13 March 2020.

Superior Courts

The Superior Courts are the second-highest court in the Venezuelan judicial system. They hears over all the appeals and challenges filed against interlocutory and final decisions handed down by First Instance Courts.

First Instance Courts

First Instance Courts, on their part, are the courts at which most civil aviation and other general disputes normally commence. As they can eventually go up to the Supreme Court of Justice, the value of claims must exceed the equivalent of 15.000 Fiscal Units.

Municipal Courts

Finally, Municipal Courts are the lowest courts in the Venezuelan judicial system. These courts normally hear non-contentious or small claims whose value is below the equivalent of 15.000 Fiscal Units.

The Aviation Court

Since 2005, Venezuela has prided itself on having a specialized first instance and superior court with exclusive jurisdiction on aviation matters.

On 3 May 2017, however, things changed. By Resolution No. 2017-0011, the Supreme Court of Justice extended the Aviation Court's jurisdiction to include civil, commercial and banking matters.

At the same time, it vested civil, commercial and banking first instance and superior courts with jurisdiction to hear maritime and aviation matters in seven different States.

This resulted in nine first instance and superior courts with jurisdiction to hear over aviation, maritime, civil, commercial and banking matters scattered throughout the country.

These changes have increased access to justice as aviation claimants, especially passengers residing in cities other than the Capital city, can now file their claim in a local court located in their own estate or at least in a neighboring one. Travel to Caracas for this purposes is no longer needed as it was before.

The changes have also helped to decongest the Civil, Commercial and Banking Courts as new matters in these areas can now also be heard by the former Aviation Court. The same cannot be said in the opposite direction as the number of new aviation matters received by the courts are much less than those of a civil, commercial and banking nature.

However, as new judges with very basic knowledge in a technical and highly-specialized area of law such as aviation law will now have jurisdiction to rule upon aviation disputes, there were also fears that the uniformity of the aviation case-law will somehow be affected and that, for example, the new courts may now start applying local law provisions with preference over the provisions contained in international liability conventions. Luckily, this has not been the case so far.

Jurisdiction of the aviation courts

Article 157 of the Law of Civil Aeronautics sets out the scenarios in which the Venezuelan first-instance aviation court will be competent to hear over the matter. These include, *inter alia*:

- Air passenger claims against air carrier operators for contractual or extra contractual damages;
- Actions filed against an aircraft, its commander, owner, possessor or representative, in which the aircraft has been subject to preventive seizure;
- Cases in which more than one aircraft is involved, where at least one of them is registered or located in Venezuela or its national law is applicable;
- Proceedings for the enforcement of aircraft mortgages or for the claiming of a preferential right to payment;
- Actions arising out of the provision of aeronautical services;
- Aviation insurance disputes;
- Disputes with respect to the ownership or possession of an aircraft, its utilization or the proceeds of its exploitation; and
- Any other aviation-related actions.

Aviation litigation proceedings

Civil procedural rules in Venezuela are codified in the Code of Civil Procedure of 1.990 (**CCP**).

The CCP provides for a general procedure (**Ordinary Procedure**) which, pursuant to Article 338, shall be applied to all disputes unless a special procedure is applicable.

The Ordinary Procedure

The Ordinary Procedure is structured as follows:

- Twenty Days for the defendant to respond to the claim on the merits or alternatively submit preliminary motions to dismiss;
- Fifteen Days for the parties to present evidence in support of their claim and defence;
- Three days for the parties to object, oppose or challenge the evidence presented by the other party;
- Three days for the court to admit or reject the evidence presented by the parties;
- Thirty days for the court to process the evidence presented by each of the parties (i.e. take witness statement, carry out expert examination, etc.);
- Fifteen days for the parties to file their closing arguments;
- Eight days for the parties to file their observations to the closing arguments of the other;
- Sixty days for the court to render its judgement; and
- Five days to appeal against the decision.

The periods above must be counted in hearing days, which are the days in which the court is open to the public. Weekends, bank holidays and the days in which the court is closed cannot be considered.

Preliminary motion to dismiss

Article 346 of the CCP provides for defences that can be invoked by the defendant as a preliminary motion to dismiss. This includes, *inter alia*:

- Lack of jurisdiction or competence on the part of the judge to hear the dispute;
- Illegitimacy issues on the part of the claimant, his legal counsel or the defendant;
- Lack of security to guarantee the outcome of proceedings;
- Formal defect of the particulars of claims;
- The existence of a pending term or condition; and
- *res judicata*;

The submission of a preliminary motion to dismiss based on the any of the defences set forth in Article 346 may lead to the suspension or an early termination of the proceedings if the court finds in favour of the defendant. Therefore, it is common for defendants to present a preliminary motion to dismiss before responding to the claim on the merits.

Aviation claims procedure

Litigation of aviation disputes is conducted in accordance to the Ordinary Procedure. It was so established by the Supreme Court of Justice in ruling No. RC-00114 (File No. 2007-819) issued by the Civil Cassation Chamber in the claim of *Alberto Colucci v. Iberia, Líneas Aéreas de España S.A.* on 12 March 2009.

As such, arguments, counter-arguments and any form of pleadings and communication between the parties and the court are submitted in written form. Any oral activity such as the questioning of witnesses or cross-examination must be typewritten and recorded on the file.

Furthermore, the court system is totally manual. All briefs and pleadings must be printed out and filed in person at the court by the party's legal counsel. With the Covid-19 pandemic, however, some changes have been introduced. E-mail addresses have been activated for each court in order for the parties to e-mail their briefs. However, personal attendance by the parties is still required as the brief must also be submitted and signed in person before the Court's Secretary.

The use of technology in the court, however, is not ruled out. A couple of years ago, in a maritime proceedings, the court admitted a witness cross-examination to be carried out via a video-conferencing system. This set a positive precedent as it comes in handy for the collection of expert witness statements when the experts live abroad and are unable or unwilling to travel to Venezuela. Notwithstanding, this concession was given on an exceptional basis and cannot be taken for granted.

Procedural costs

Since the enactment of the National Constitution of 1999, access to justice in Venezuela has been free, with all court fees repealed. There is therefore no need to pay court fees to bring a claim before a Venezuelan court. However, copies, bailiff or usher transportation fees, official translations and the like must be covered by the litigants as these expenses are not covered by the court.

Interim injunctions

Finally, interim injunctions such as freezing orders, arrest or seizure can always be requested, but will only be granted if is satisfied with the applicant's demonstration of the fumus bonis iuris or the smoke of good law and the periculum in mora or danger that the delay jeopardize such a good law.

Pursuant to Article 27 of the Law of Civil Aeronautics, all aircraft, even those under construction, can be subject to interim injunctions. Their sole recording in the National Aviation Registry gives the holder of a lien the right to be paid with preference to any other creditor except those with privileged credits. However, aircraft engaged in the provision of public air carriage services can only be arrested by an order contained in a final ruling.

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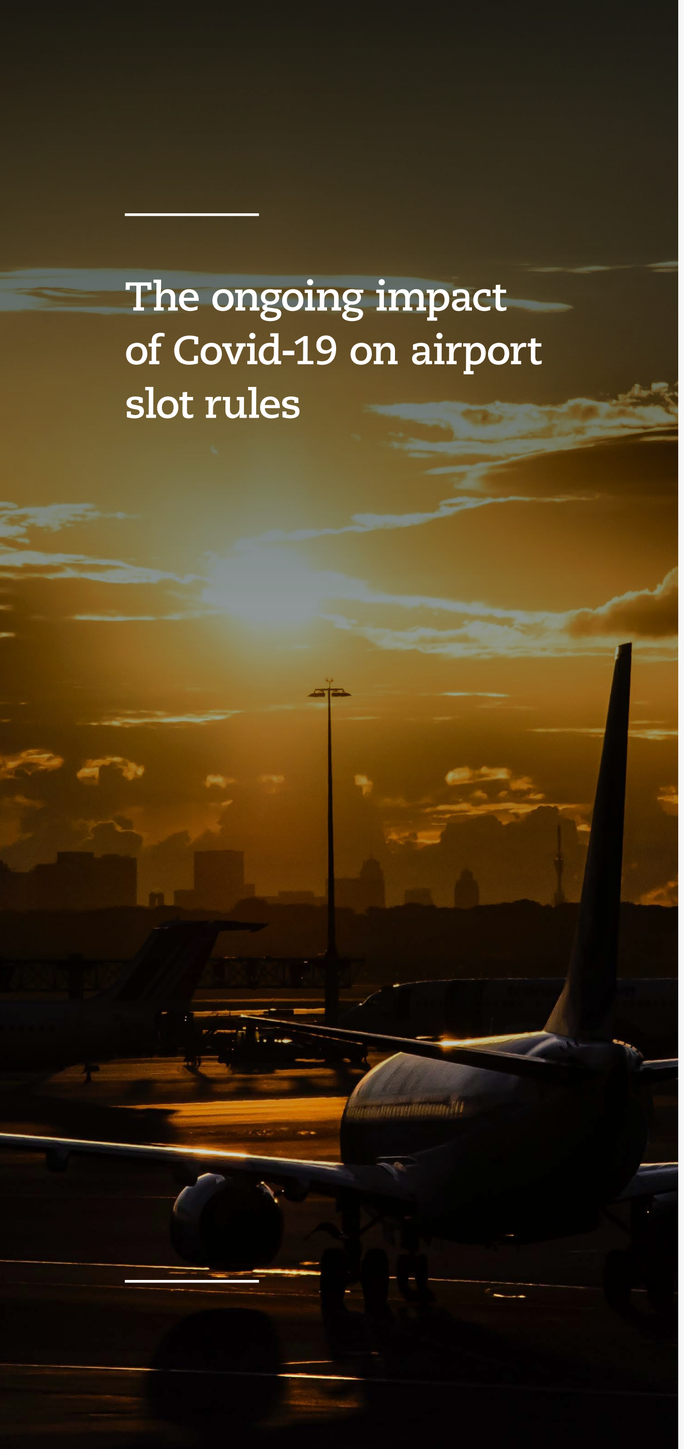

The ongoing impact of Covid-19 on airport slot rules

Our Summer 2020 newsletter contained an article covering the effects of COVID-19 on slots at coordinated airports in the European Union and the UK under Regulation (EEC) 95/93 (**EU Slot Regulation**). By way of summary, that article considered the suspension of the 'use it or lose it' rule from 1 March 2020 until 24 October 2020 (being the end of the 2020 IATA Summer Season).

The 'use it or lose it' rule requires air carriers at coordinated airports to use allocated slots at least 80% of the time during a given IATA season in order to guarantee that the carrier will be re-allocated those slots for the next equivalent IATA season (also known as the '80:20 rule'). Where that target is not met, the EU Slot Regulation provides for those slots to be returned to the pool.

The existing slot rules in the EU Slot Regulation, which are based on the guiding principles set out in IATA's Worldwide Slot Guidelines, were not designed to cope with a prolonged period of industry-wide disruption. The 'use it or lose it' rule left numerous air carriers with a stark choice between cancelling flights at the risk of losing their slots or operating unprofitable 'ghost' flights with few (if any) passengers in order to maintain a slot utilisation of 80%. In an attempt to avoid this dilemma, the European Parliament and Council adopted an amendment to the EU Slot Regulation which suspended the 'use it or lose it rule' until the end of the IATA Northern Summer Season on 24 October 2020. This involved instructing airport coordinators, when determining whether a carrier is entitled to maintain its slots for the upcoming season under the 'use it or lose it' rule, to consider slots as having been operated irrespective of whether they were in fact used.

As air traffic levels remained low throughout 2020, in October the European Commission extended the slot usage waiver to cover the Northern Winter 2020/21 Season, which will run until 27 March 2021.

The winter season slot waiver was subject to certain additional conditions, including that the waiver should not apply to newly allocated slots, with a caveat that slots newly allocated and operated as a series may be considered for historic status if they meet the 80% usage requirement. The set of conditions had been proposed by a joint agreement of industry stakeholders including airports, airlines and slot coordinators around Europe. The Commission set the expectation that those conditions should be observed by the industry during the Northern Winter Season on a voluntary basis pending the adopting of fully enforceable conditions. At a global level, the Worldwide Airport Slot Board (**WASB**), comprising the IATA and other industry bodies, has also proposed extending slot use relief for the Norther Summer 2021 Season subject to certain conditions. Part of the WASB's recommendations include that the normal 'use it or lose it' threshold of 80% be replaced with a lower threshold of 50% and that airlines that return a full series of slots by early February should be permitted to retain the right to operate them in summer 2022. Notwithstanding the WASB's recommendations, local regulators ultimately decide the applicable rules and appropriate waivers thereto according to the need of their local market.

The EU Slot Regulation and the waivers thereto as a result of the pandemic applied to the UK throughout 2020 by virtue of the ongoing Brexit 'transition period', during which time the UK continued to be subject to EU rules, and which officially ended at 11pm on 31 December 2020.

As from 1 January 2021, the EU Slot Regulation was transposed into UK Law pursuant to the Airports Slot Allocation (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/276) (**UK Slot Regulation**). The UK Slot Regulation largely reflect the rules under the EU Slot Regulation save that the scope is changed so that they apply to UK airports and to UK carriers (rather than Community air carriers) or any air carrier eligible to operate services on the route concerned under or by virtue of an agreement between the United Kingdom and another country. These rules will continue to apply until such a time as the UK Government decides to replace them with new national rules. Further amendments were introduced to the UK Slot Regulation in January 2021 to ensure that it aligns with the applicable rules in the EU for the remainder of the Northern Winter 2020 Season and to enable the Secretary of State to consider a further extension to the period of the existing slot waiver beyond 27 March 2021.

On 28 January 2021, the UK Secretary of State for Transport issued a statement of intention to extend the waiver of the 80:20 rule for the Northern Summer 2021 season. The waiver will apply at all UK Level 3 'coordinated' airports (i.e. Heathrow, Gatwick, London City, Stansted, Luton, Manchester, Birmingham and, in the Summer Season, Bristol)) and continues to apply to traded and leased slots, including remedy slots. However, the waiver is conditional upon the following rules:

- Newly-allocated slots will be excluded from the waiver of the 80:20 slot usage rule
- Slots must be handed back at least 3 weeks prior to scheduled operation

In order to prevent the creation of barriers to competition, airlines in the UK are being encouraged by the Secretary of State for Transport to hand back series of slot that they do not intend to operate to the UK slot co-ordinator, Airport Coordination Limited, as soon as possible. The Secretary of State has indicated that a further statement of intention will be issued regarding the application of the waiver in the case of the cessation of air services from an airport.

The Secretary of State for Transport's decision is significant in that it is one of the first examples of the UK setting its own aviation-related policy following the UK's exit from the EU. The Commission has proposed that airlines at EU will need to use their slots to 40% capacity over Summer 2021 in order to retain them. The Commission's proposal also suggests a number of conditions aimed at ensuring airport capacity is used efficiently and without harming competition during the COVID-19 recovery period. The EU estimated in December 2020 that it is reasonable to expect traffic levels for Summer 2021 to return to 50% of 2019 levels, and that a 40% slot usage threshold will guarantee a level of service while still providing a buffer for airlines in the use of slots. The Commission's proposal for Summer 2021 is awaiting approval by the European Parliament and Council. The Commission's proposal is more closely aligned with the WASB's recommendation to reintroduce slot usage requirements for Summer 2021 Season, albeit at a lower level that the standard 80:20 rule.

The reason for the difference in approach to the Summer 2021 Season between the UK and the EU is not entirely clear. The UK Secretary of State for Transport has stated that his decision was based on engagement with industry stakeholders and his assessment that even the more optimistic forecasts for the recovery of passenger travel indicate that demand will remain severely reduced during the Summer 2021 Season. The advantages of the UK's approach include the protection of the financial health of air carriers who hold existing slots at UK coordinated airports. The extension of the waiver will allow these carriers to adjust capacity and operations to meet passenger demand, rather than being forced to operate flights to meet usage thresholds to hold onto lucrative slot assets. It also helps to avoid the negative environmental impact of empty or largely empty flights operated only for the purpose of maintaining underlying airport slots.

On the other hand, extended use of waivers to the 'use it or lose it' rule may produce anti-competitive outcomes. Such waivers limit competition by allowing incumbent airlines to hold onto their slots, even where there are no firm plans for the carrier to resume services using those slots. This prevents new entrants to the market from obtaining slots that may otherwise be returned to the slot coordinator for re-allocation. The EU's reintroduction of a 40% slot usage requirement for Summer 2021 provides important relief to airlines, but also takes initials steps to start relaunching the industry and encouraging competition between airlines.

Given the increase in travel restrictions across Europe and the UK that we have already seen at the beginning of 2021, the slot relief measures adopted in the UK and EU, although somewhat different, are likely to provide welcome relief to airlines as they continue to grapple with the ongoing significant impact of the pandemic.

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Brexit – will the flying public notice any meaningful difference?

On 23 June 2016, the UK public voted by referendum that the UK should leave the EU. On 29 March 2017, the then UK government acted upon that seismic result by giving notice to the European Council that the UK would be leaving the EU.

Since then there has been much debate as to what the UK's relationship with the EU would be when 'Brexit' was finally achieved and, materially, what it would mean for the aviation industry and flying public. The UK formally left the EU on 31 January 2020, but continued to apply EU law as if it was a Member State until the end of a transitional 'implementation period', which expired on 31 December 2020. Negotiations as to what would happen thereafter continued up to the wire, resulting in a Trade and Cooperation Agreement announced on 24 December 2020 (**TCA**). The TCA has been signed by the UK's Prime Minister and the President of the EU Commission, and approved by the UK Parliament. It now awaits formal approval by the EU Parliament and the Member States. Assuming that the TCA does represent the new reality, the question arises as to what it means for us all?

The now completed Brexit undoubtedly involves a significant structural change in the legal landscape having regard to the extent to which aviation law in the UK was derived from EU law pre-Brexit, as well as the benefits enjoyed by both parties – i.e. the UK, and the EU and remaining EU 27 Member States, respectively (the **Parties**) – as part of the EU Single Aviation Market. Carriers will need to adapt to it accordingly. But in terms of optics there is an important question: will the flying public notice any meaningful difference? For the reasons explained below, the answer to that appears at this stage to be: no, not really, subject to the possibility of gradual divergence in the future - and, of course, the unrelated but considerable and very much ongoing impact of the Covid-19 pandemic.

So far as the flying public are concerned, and leaving aside wider immigration and border considerations, what really matters is whether Brexit will have any impact on: the places between which they are able to fly as between the UK and EU 27 Member States and within the EU as compared to pre-Brexit; the carriers they can use for these purposes; the price of such travel; the relevant safety and security standards; and/or a passenger's legal rights of redress against the carriers on which they fly. These points will be addressed below.

The TCA preserves the right of UK air carriers and EU air carriers to fly across the territory of the other Party without landing and to make stops for non-traffic purposes, and, importantly, to perform point-to-point services between the territories of the two Parties. UK and EU airlines, and passengers, can therefore fly between the UK and the EU as before, which includes for the purpose of destination or onwards transit to a third country (i.e. it should not affect the ability to hub traffic as between the UK and EU). It further allows them to carry passengers to two different points in the territory of the other Party as part of the same service (i.e. co-terminalisation). In giving these rights, the TCA confirms that neither Party shall unilaterally limit the volume of traffic, capacity, frequency, regularity, routing, origin or destination of such air transport services, or the aircraft type or types operated for that purpose by the air carriers of the other Party (except as may be required for customs, technical, operational, air traffic management, safety, environmental or health protection reasons, in a non-discriminatory manner).

Whilst the TCA anticipates carriers having to obtain operating authorisations in advance of permitted traffic rights being used, these should be issued with minimal procedural delay, subject to a closed list of criteria being met, and therefore present no artificial hurdle to service performance.

What qualifies as an EU carrier for these purposes remains as it was before the TCA i.e. one having, in essence, ownership and control in the hands of nationals of EU Member States, States of the European Economic Area or Switzerland, and holding an EU operating licence from an EU State in which it has its principal place of business. However, UK stakeholders no longer count for these purposes. EU air carriers may have to adjust their ownership and control accordingly - as several have already done, for example by restricting voting rights of their extant UK shareholders. In contrast, the TCA enshrines a more liberal approach to what qualifies as a UK air carrier. It allows for the mirror of this, but also permits nationals of EU 27 Member States, States of the European Economic Area and Switzerland to count for UK ownership and control purposes in respect of any air carrier holding a valid UK operating licence as at the moment of true Brexit (i.e. 31 December 2020). Accordingly, extant UK carriers will continue to qualify, and to do so without having to make any alteration to their ownership and control.

In contrast, the TCA confirms that UK carriers are not permitted to undertake services using their own aircraft within the territory of an EU Member State, or between two EU Member States, as they could when, as a Member State, the UK was part of the EU Single Aviation Market; and an EU carrier can similarly no longer provide services between two points within the UK. It is in anticipation of this prohibition that several carriers have set up related carriers in the other Party (such as Wizz UK and easyJet Europe), so that their brand can continue to be put on services within the other Party's territory, even if they cannot perform those services themselves. The position of EU air carriers to fly within the EU and of UK air carriers to fly within the UK remains as before.

The TCA further permits code sharing agreements between UK and EU air carriers. These can be used for the purposes of the point-to-point services referred to above. In addition, an air carrier of one Party can use them to carry passengers from a point within its own territory to a point in the territory of the other Party on its own aircraft, with the passengers then continuing their journey under the same contract of carriage to a further point within the territory of the other Party, or beyond, flying on a codeshare service operated by an air carrier of the other Party.

As a result of the above, from the passenger's perspective: the ability to travel by air between the UK and EU 27 Member states should largely be the same as it was pre-Brexit; and on the same carriers as before; and the ability to travel by air within the EU, and within the UK, will be the same as it was pre-Brexit, save that it will not necessarily be possible to do it on the same carriers as before.

The economics for carriers of having to comply with the structural change in the legal landscape post-Brexit is not yet clear and will probably only become apparent over time. However, the TCA does go a reasonable way towards removing unnecessary, and partisan, price distortion in that it:

- Commits the Parties to eliminate, within their respective jurisdictions, all forms of discrimination that would adversely affect the fair and equal opportunity of the air carriers of the other Party to compete in the exercise of the rights provided for by the TCA;
- Requires the Parties to agree to cooperate in removing obstacles to doing business for air carriers of both Parties where such obstacles may hamper commercial operations, create distortions to competition or affect equal opportunities to compete;
- Provides (on the basis of reciprocity) for the exemption from taxes, fees and duties in respect of all equipment and supplies that remain on an aircraft upon arrival in the territory of the other Party;
- Requires that any user charges imposed by one Party on the air carriers of the other Party for the use of air navigation and air traffic control shall be cost-related, non-discriminatory and no less favourable than the most favourable terms available to any other air carrier in like circumstances at the time the charges are applied; and
- Allows air carriers to freely establish their own tariffs on the basis of fair competition.

It is therefore to be hoped that the price of air travel to the flying public will not be disrupted unduly by the fact of Brexit.

Licensing, safety and security standards and assurance are complex topics, and ones the flying public do not usually delve into, but rather take on trust (in what is generally speaking a well-regulated industry worldwide). Upon Brexit the UK ceased to be a member of the EU Aviation Safety Agency, but has retained a considerable volume of EU law in these areas as part of its own domestic law (with all necessary modification). Furthermore, the TCA has reaffirmed the importance of close cooperation of the Parties in the field of aviation safety and provides for mutual recognition of the other Party's certificates of airworthiness, certificates of competency and licences for the purpose of operating air services as referred to above. It also obligates the Parties to:

- Provide upon request all necessary assistance to each other to address any threat to the security of civil aviation;
- Act in conformity with the aviation security standards established by ICAO;
- Ensure that effective measures are taken within its territory to protect civil aviation against acts of unlawful interference; and
- Endeavour to cooperate on aviation security matters "to the highest extent."

This being so, it is to be hoped that safety and security standards will not be prejudiced by Brexit. There is certainly no reasonable basis for believing that either Party will lessen their standards in these regards.

Lastly, the substantive content of a passenger's legal rights of redress against the carriers on which they fly are not materially altered by the TCA or by the happening of Brexit. Liability for death and personal injury to and delay of passengers, and for loss or damage to their baggage, will continue to be governed by the Montreal Convention 1999 in almost all cases (although the legal structure by which it does so may change in relation to some carriage and carriers). In terms of wider consumer protection, by the TCA the Parties have:

- Affirmed a shared objective of "achieving a high level of consumer protection" and to cooperate to that effect;
- Agreed to ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport, including appropriate access to information, assistance including for persons with disabilities and reduced mobility, reimbursement and, if applicable, compensation in case of denied boarding, cancellation or delays, and efficient complaint handling procedures; and
- Agreed to consult each other on any matter related to consumer protection, including their planned measures in that regard.

It is notable in this context that the UK has transposed into its domestic law (and with all necessary modification), amongst other provisions of EU law, EU Regulation 261/2004 (on denied boarding, cancellation and long delay) as well as Regulation (EC) No. 1107/2006 (on rights of disabled persons and persons with reduced mobility when travelling by air). It has further enacted that the related jurisprudence of the European Court of Justice (CJEU) will continue to form part of the UK's law (but CJEU decisions made after Brexit was completed will not). In practical terms and effect, the law in these areas will therefore continue to be the same going forward so far as air travel within and between the UK and EU is concerned, save perhaps in so far as any future CJEU judgment on such topics expands EU law in these areas but the UK chooses not to follow it (notwithstanding the share objective enshrined in the TCA).

In conclusion, whilst the TCA is short of the comprehensive air transport agreement to which many in the industry and commentators, and indeed the Political Declaration setting out the framework for the future relationship between the EU and UK agreed in October 2019, aspired, it is substantially better than would have been the case in the event of a 'no-deal' hard-Brexit. Although the 'new normal' does involve a significant structural change in the legal landscape underpinning aviation as between UK and the EU, there are good grounds for saying that the flying public are unlikely to notice any meaningful difference as a result of Brexit, at least in the short term.

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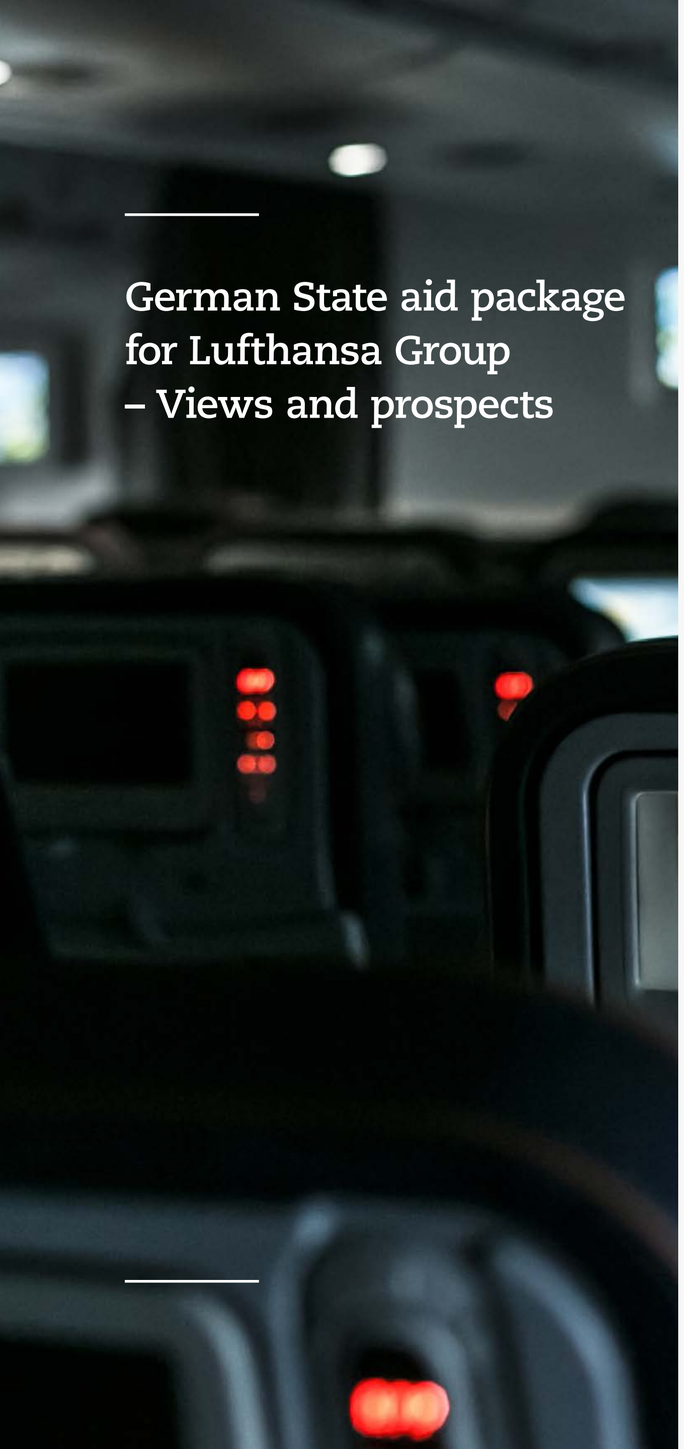

German State aid package for Lufthansa Group – Views and prospects

From the beginning of the COVID-19 pandemic until today, the Lufthansa Group has suffered great losses amounting up to EUR 1.2 billion with thousands of jobs at risk and the company's future on the edge. With the exception of freight transport, the COVID-19 crisis has almost brought Lufthansa's business to a standstill.

The German government stepped in and "rescued" Lufthansa with a state aid package in the amount of EUR 9 billion to prevent the company's insolvency. The State aid was negotiated during several rounds between Lufthansa and the German State as well the European Commission (**EC**) in order to find a well-balanced solution taking into account all sides of the agreement. The discussions have reached a political level and until today, there are different views – and lots of criticism.

National level

The first discussions between Lufthansa and the German government on State aid started at the beginning of May 2020. Already at this moment in time Lufthansa's management and shareholders were of the united opinion that State aid was inevitable in order for Lufthansa to survive the pandemic. However, some feared that it would mean too much political influence on the company. An aid package in the amount of around EUR 9 billion consisting of State-guaranteed loans, equity capital through a silent partnership and a 25 percent share package were discussed and eventually agreed upon. In addition, the German State will participate by way of two supervisory board positions within the company. Needless to say, the agreed stabilisation measures remain controversial, not only on a national, but also on a European level.

European level

The EC demanded strict conditions for the State aid package with respect to dividends, the environment and bonuses next to the EU State aid law requirements. The conditions required the German government to take away take-off and landing slots from the airline at its main airports in Munich and Frankfurt. Effective measures against the competition-distorting effect needed to be imposed according to European Competition Commissioner Margrethe Verstager. She was of the opinion that the Lufthansa Group needed to be prevented from further expanding its position by using State aid. The conditions imposed by the EC were rejected by the German government, as well as by Lufthansa. They argued that in the case of Alitalia and Air France similar State aid had been provided without such strict conditions being imposed on them. Even some of the European Union's own ranks were critical about the EC's tough approach on Lufthansa's State aid package. Eventually, Germany committed that Lufthansa will divest up to 24 slots/day at each of Frankfurt and Munich airport (including both winter and summer slots), and additional assets as required by the Slot Coordinator to allow for a transfer of those slots by way of a partial take-over of an air carrier within the meaning of the Slot Regulation. This is meant to allow one air carrier to establish a base at Frankfurt and one air carrier to establish a base at Munich.

In addition, Germany committed that, upon request of the purchasers, Lufthansa makes available to the purchasers: (i) access to the airport infrastructure or facilities at Frankfurt and Munich on the same terms as those granted to Lufthansa by the airport managers; (ii) overnight parking stands for the aircraft to be based at Frankfurt and/or Munich; (iii) relevant staff (cabin/cockpit) to operate the bases. Lufthansa must offer the rights within a period of one and a half years to competing airlines who have not themselves received equity capital from the State in the course of the COVID-19 pandemic. It is further required that the competing airlines do not already offer flights in and out of Frankfurt and Munich. The applicants must commit to use these rights for three years.

Agreement and consequences

The measures agreed with the EC were accepted by Lufthansa at its Annual Meeting on 25 June 2020. This allowed Lufthansa to accept the state aid package. It has not been an easy decision for Lufthansa. The biggest fear was that the State could prevent restructuring in the future by exerting the voting rights of its two seats on the Supervisory Board. While some politicians commented that the package was well-balanced and would help Lufthansa to overcome the crisis, as well as to save Germany as a business location and its air transport industry, other voices were more critical. They think that, in the long term, Lufthansa's position has been weakened given its huge repayment obligations for the loans.

The consequences of the rescue package are still difficult to assess. Given the lasting impacts of the COVID-19 pandemic, Lufthansa is still under great pressure. It is not clear how the situation will evolve. Critical voices often make use of the example of Commerzbank being rescued by the German State in 2008 after the worldwide financial crisis. Since then, it has been downhill going for Commerzbank. Whether or not this is due to the fact that the German State is still a major shareholder of Commerzbank is another question. However, one can only hope that the German state will give up its business share in Lufthansa as quickly as possible once the aviation world begins to return "back to normal".

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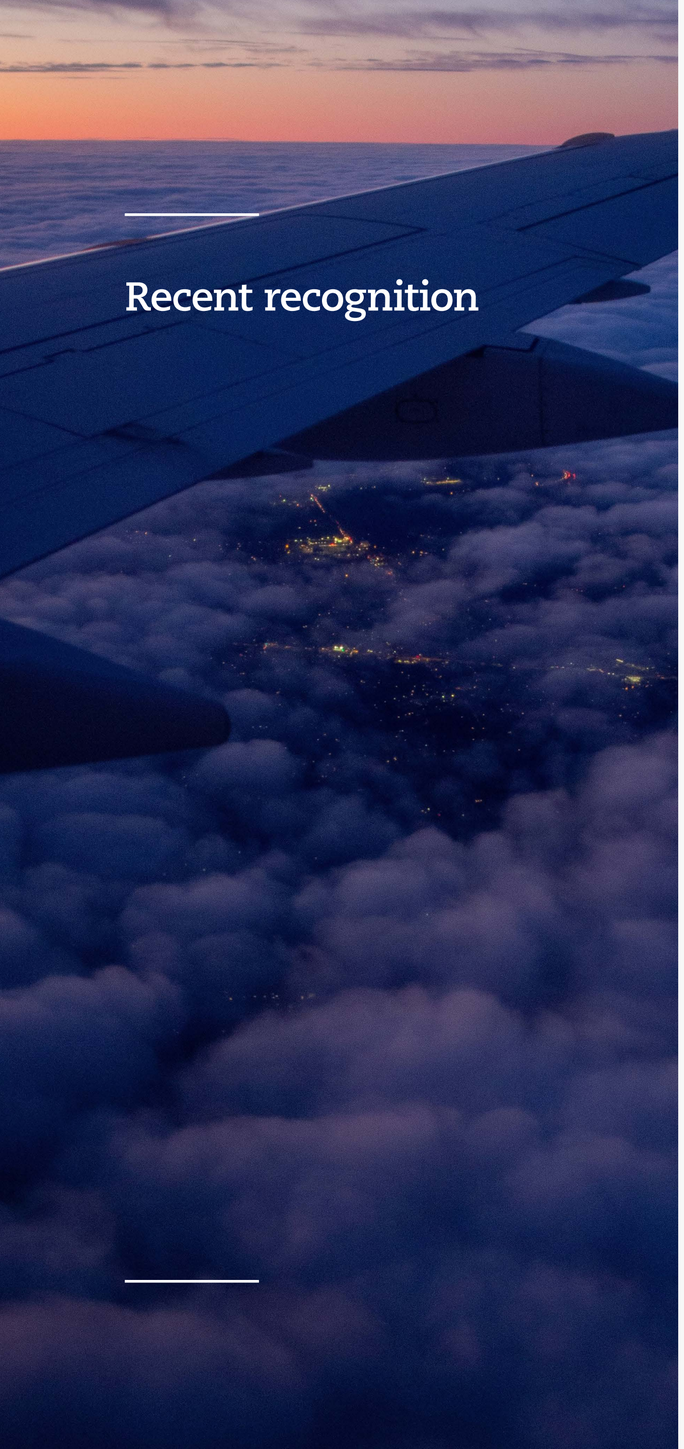

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