



CLYDE&Co

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As a firm we at Clyde & Co offer a truly global aviation practice, with well over 100 specialist aviation lawyers based across our offices in London, Edinburgh, Paris, Madrid, New York, San Francisco, Los Angeles, Miami, Montreal, Toronto, Caracas, Mexico City, Rio de Janeiro, Dubai, Johannesburg, Singapore, Hong Kong, Shanghai, Melbourne and Sydney.

We have long, and rightly, been regarded as pre-eminent for aviation liability defence work and associated subrogated recovery, in particular related to emergency response and major losses. However, as the variety of articles in this edition of our newsletter indicates, for years we have also provided a much broader range of services to the aviation industry.

Following a number of well-chosen lateral recruitments and internal promotions to partnership in the last few years, we have been able to expand and consolidate this wider product offering. In recognition of this, and to bring our invigorated breadth to the attention of a wider audience, in 2019 we launched a formal initiative that we have labelled 'Aviation Plus'. As the first phase of this project we have produced an e-brochure which showcases our global capabilities and experience acting for airlines in regulatory, non-contentious commercial, finance & leasing, fleet procurement, commercial dispute resolution and debt recovery work. A copy of it is available [here](#). I invite you to take a look and join our ever increasing Aviation Plus community. We look forward to serving you. Many thanks.



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Diary date:

Clyde International Aviation Conference

24/25 June 2020

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A clear view on FNC dismissal: United States Court of Appeals for the District of Columbia rules decisively in MH370 aviation tragedy

The United States Court of Appeals for the District of Columbia Circuit in *In re: Air Crash Over the Southern Indian Ocean* on March 8, 2014, No. 18-7193 handed down its opinion and judgment on 10 January 2020, in which the court affirmed the decision of the United States District Court in *In re: Air Crash Over the Southern Indian Ocean*, on March 8, 2014, No. MC 16-1184 (KBJ) dismissing the litigation from the United States in favour of Malaysia.

In a blow to the MH370 passenger families/appellants who were originally drawn to the United States for potentially more generous awards, the US Court of Appeals (sitting with a panel of three judges) found that there was no clear abuse of discretion in the district court's decision warranting a reversal. Significantly, when affirming the district court's decision on forum non conveniens dismissal, the higher court held that it was "*on substantially the same grounds provided in the district court's well-reasoned opinion*".

This article considers the appeal decision and the implications for foreign litigants seeking to bring their claims in the United States. The earlier district court's decision was reported in the Clyde & Co February 2019 edition of the Aviation Newsletter.

Background

Following the disappearance of Flight MH370 on 8 March 2014, multiple proceedings were commenced in the United States by MH370 passenger families with little or no connection to the United States. Many of the passenger families commenced parallel claims in Malaysia and China. The well documented and widely-publicised factual history of the disappearance of Flight MH370 on 8 March 2014 and the ensuing investigation and search for the missing aircraft need not be repeated here.

The appeal relates to the United States District Court's dismissal of the litigation commenced in the United States in favour of litigation in Malaysia. The US Court of Appeals emphasised that the district court's decision must be afforded substantial deference and overturned only where there was a clear abuse of discretion, the relevant standard for reversal.

In deciding whether there was clear abuse of discretion, the US Court of Appeals had to consider whether the district court's forum non conveniens analysis was reasonable and well supported when reaching the following conclusions:

- Malaysia is an adequate, available forum in respect of the appellants' Montreal Convention, common law wrongful death and products liability claims
- All relevant public and private interest factors favoured dismissal to Malaysia

Arguments on appeal

A number of the appellants challenged the adequacy and availability of Malaysia as a forum arguing that the legislation enacted in Malaysia placing the airline in administration demonstrated clear intent and actual deprivation of any real adequate and available forum in Malaysia. The appellants also attempted to argue that the perceived inadequacy of tort damages under Malaysian law would “obliterate any real likelihood of trial”.

The US Court of Appeals disagreed. The court concluded that the district court had correctly held Malaysia as an available and adequate alternative forum to the United States given available insurance to meet the claims and adequate legal remedies afforded to the appellants in Malaysia. The perceived limited availability of tort damages submission was also rejected by the US Court of Appeals given that it had not been raised before the district court.

On the district court’s analysis of the public and private interests, the US Court of Appeals referred to the “well-reasoned opinion” of the district court when concluding that the district court had “carefully weighed the relevant public and private interest factors” when it found that the claims should be dismissed to Malaysia. The appellants raised two further issues on appeal which were also addressed:

- The degree of deference applied by the district court to various appellants’ choice of forum
- Whether the district court was entitled to consider potential application of sovereign immunity in favour of the airline defendants

On the first point, the US Court of Appeals sharply criticised the appellant’s arguments when it said “applying the correct burden of proof is not a box-checking exercise”. The US Court of Appeals confirmed the appropriateness of the district court’s approach of assigning varying levels of deference to the appellants based on connection to the United States. The US Court of Appeals emphasised that crucial in the analysis of *forum non conveniens* is the thoughtful balancing of the relevant public and private interest factors and “what matters is not the particular words a district court uses but whether the court’s analysis fits the proper standard”. Taking into consideration the proper levels of deference afforded to the various appellants’ forum choice, the private and public interest factors weighed in favour of dismissal to Malaysia.

On the second point, the appellants had argued that the district court had erred when it refused to decide the issue of sovereign immunity challenges raised by the airline defendants and rely on the unresolved immunity issues to dismiss on *forum non conveniens* grounds. The US Court of Appeals found that it was appropriate for the district court to weigh potential immunity issues as part of the *forum non conveniens* analysis and it was not necessary to positively rule on the challenge.

Conclusion

The late Lord Denning once said: “As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune” to illustrate the attraction of the United States as a legal forum.

Although it is tempting as a matter of course to sue in the United States over foreign aviation accidents to maximise compensation, it is by no means certain that the United States courts will assume jurisdiction over claims commenced there. The written opinion from a respected appellate court setting out its reasoning on the ruling will be both highly authoritative and persuasive for other courts seeking to determine a *forum non conveniens* challenge.

The opinion of the US Court of Appeals expressly acknowledged the well-reasoned decision of the trial judge and approved of the legal analysis undertaken in dismissing the claims. Although the *forum non conveniens* determination is largely fact driven, the opinion reconfirms the broad discretionary powers of United States courts to decline jurisdiction and dismiss such claims if:

1. Another available and adequate forum exists
2. The balance of private and public interest factors weigh in favour of dismissal

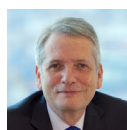
A less generous compensation regime than the United States does not have the effect of making a foreign forum inadequate. The analysis of the US Court of Appeals also confirms that there is no requirement to reach a final determination on other threshold motions to dismiss as a factor in the *forum non conveniens* analysis. Equally, it is clear from this case, as with other previous high profile cases, that where claims are successfully dismissed on forum grounds, this can override a *prima facie* entitlement to Article 33 jurisdiction.

The continuing willingness of United States courts to apply the doctrine of forum non conveniens to dismiss claims makes the discretionary remedy a powerful procedural tool for defendants seeking to dismiss claims from the United States in favour of a more convenient and appropriate forum. Although it remains the prerogative of passenger families to decide where to sue, no prudent plaintiff lawyer would encourage a client to commence suit in the United States without proper consideration of the prospects that the claim may be dismissed based on forum non conveniens.

Challenges to jurisdiction are complex, time consuming and costly, which if successful, will ultimately preclude the claimants from prosecuting their claims in the United States. The unfortunate reality of a jurisdictional tussle is that significant time and effort is focused on determining whether the United States court has jurisdiction to hear the claims rather than resolving liability issues so that fair compensation is made to passenger families as expeditiously as possible.

Clyde & Co Singapore are lead counsel instructed on the loss.

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Navigating the civil standard of proof in the context of the AVS 103 ('50/50') clause

In the age of unprecedented losses in the aviation industry, the question of who bears the costs of claims is a highly significant issue for both airlines and its insurers. The tragic number of recent losses including, Ukrainian International Airlines flight PS752 on 8 January 2020 and Malaysian Airlines flight MH370 on 8 March 2014, illustrate the potential interplay between all-risks insurance (which excludes war risks) and war risk insurance.

This article takes the opportunity to visit the critical issue of civil standard of proof. In civil aviation claims, the only legal standard applied by courts and arbitral tribunals alike is "proof on the balance of probabilities". This is to be contrasted with criminal matters (concerning breaches of criminal law) whereby the requirement is proof "beyond reasonable doubt".

Where the initial cause of loss is not easily determined or potentially falling within a grey-area, knowledge of the requisite standard of proof is vitally important. Absent agreement or apportionment of liability, there has to be a mechanism to initially pay the hull claim and ultimately decide responsibility for bearing the hull related costs of any incident. Fortunately for the insured airline, until a final determination is made as between all-risks and war risks insurers, the application of the standard AVS 103 ('50/50') clause ensures that it is not inconvenienced.

"Balance of probabilities" – what does it mean?

Those who seek the assistance of the law (the claimant) must discharge the legal burden of proof in order to succeed on their claim. How this is achieved is known as the civil standard of proof.

In simple terms, if a civil claim is brought – a court or arbitral tribunal can only find in favour of the party on whom the legal burden of proof rests, if the case is proved, "on the balance of probabilities". The case is proved if a court or arbitral tribunal is satisfied that on the evidence, an occurrence (even for example, an act or a failure to act) more probably happened than not, even if there are doubts. The conclusion that something probably happened means the relevant balance of probabilities standard of proof is met.

Lord Hoffman in *re B (Children) (Care Proceedings: Standard of Proof)* [2009] AC 11, paragraph [15] described this as:

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities".

What needs to be shown to meet the civil standard of proof on the balance of probabilities?

While the requirement needed to meet the balance of probabilities standard of proof sounds simple, the process as to whether or not a fact has been proved is a highly vexed question. This is particularly pertinent in circumstances where there are multiple competing causes or unsatisfactory evidence to assist.

Even the courts have struggled with the process by which it finds that a case has been met on the balance of probabilities. In *Rhesa Shipping Co v Edmunds* (The Popi M), a well-known case dealing with recovery under marine insurance for a ship which sank in calm weather, the House of Lords provided helpful guidance on the correct approach. At trial, the trial judge in deciding whether the loss of Popi M was caused by "perils by the sea" had to choose between two competing theories, either:

- Popi M was sunk by an unidentified, moving, submerged submarine, which was never detected, never seen and which never surfaced (shipowners' argument which the trial judge regarded as extremely improbable)
- Popi M sank due to wear and tear (the underwriters' argument which the trial judge regarded as virtually impossible)

The trial judge found that although shipowners' argument was extremely improbable, on the balance of probabilities, the explanation would be accepted. The House of Lords said this reasoning was flawed. When providing guidance on the process of reasoning to be followed, the House of Lords cautioned against applying a process of elimination such that the remaining hypothesis on the possible cause becomes the probable cause. In stating that it was not sufficient that the cause of loss put forward was merely the most plausible of a number of improbable explanations, the House of Lords specifically disapproved of the trial judge's apparent adoption of Sherlock Holmes reasoning to Dr Watson: *"how often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth"*.

The House of Lords cautioned that the legal test of whether the remaining possible explanation or cause was likely *"on the balance of probabilities"* equates to *"more probable than the suggested alternatives"* keeping in mind that the evidence available may be incomplete, and every possible explanation may not be known. If, on the evidence and weighing the probabilities, a court considers that it cannot make a finding one way or the other, the court can find that the person (with whom the legal burden of proof lies) has failed to discharge that burden and the case not proved on causation.

The courts have also explained that the more serious the allegation or the more unlikely something is, the stronger the evidence required to persuade the court or arbitral tribunal that the allegation is established on the balance of probabilities.

Why is understanding the relevant civil standard of proof important in the aviation context?

In the aviation context, the difficult issue of whether a standard of proof is met arises in many different claims scenarios and challenges even the most seasoned claims handler or insurer:

- Where there are multiple alternatives as to cause of loss
- Where the cause of loss is in dispute
- Where the cause of loss cannot be immediately or readily determined, or where available evidence is incomplete. For example, in the absence of 'black box' recovery or release or where wreckage cannot be found or accessed for examination

- Where every possible cause of loss may not be known
- In the context of coverage disputes, especially in today's climate of increased threat of natural disasters, acts of violence including terrorist attacks and cyber-crime

Aviation hull all-risks policies generally exclude so-called war risks under the common Lloyd's policy exclusion form War, Hijacking and Other Perils Exclusion Clause (AVN48B). Airlines requiring cover for hostile acts of violence, including hijacking and terrorist risks as excluded by AVN48B, commonly purchase separate hull war risk insurance. In the event of loss of an aircraft, whether hull costs fall on the airline's aviation all-risks and war risk insurance markets will depend on whether the airline's aviation all-risks insurers (who bear the burden of proof of establishing that the exclusion will apply) can establish that the cause of loss was due to an excluded peril, *"on the balance of probabilities"*.

To avoid initial uncertainty and inconvenience to the insured airline, typically policies include a standard clause, the AVS 103 wording, otherwise known as the *"50/50 Provisional Claims Settlement Clause"*. Under AVS 103, both sets of insurers agree to equally split aircraft hull costs for any claim where the cause of the loss is unclear. Absent subsequent agreement, the apportionment of liability is then referred to arbitration for a final determination as to which market (all-risks or war risks) is ultimately liable for the hull claim.

In the best of circumstances, conducting an aircraft accident and incident investigation is time consuming and complex, often involving investigators from multiple interested parties. In the case of the loss of Ukrainian International Airlines flight PS752 on 8 January 2020, resolving claims will be fraught with difficulties, given that the aircraft crashed in Iran and the political tensions between Iran, the United States and other nations. However, once Iran ultimately admitted responsibility for the shoot down, determination of which insurance market had to deal with the hull loss became self-evident. In the absence of Iran assuming responsibility (or other clear evidence as to whether or not the excluded perils might apply), this would have most likely led to reliance upon the AVS 103 provisions.

The yet mysterious loss of Malaysia Airlines B777 flight MH370 on 8 March 2014, with the loss of all 239 on board, is the most prominent example in recent times. Even today, aside the finding of some identified pieces of wreckage, an unprecedented multinational search operation, numerous reports and a thorough Annex 13 investigation process, the main body of the aircraft, and none of those who perished, have ever been located.

Arbitration under AVS 103 requires the aviation all-risks insurers to convince the arbitral tribunal that the loss/damage was more probable than not due to an excluded AVN48B peril, otherwise the liability for aircraft hull loss will remain with the hull all-risks insurers.

Given that the value of hull losses is significant and there is need for convincing expert evidence, it is critical that the claimant all-risks insurers understand the standard of proof that must be met. When the cause of loss is open to dispute, all-risks insurers must provide evidence to prove that the cause of the aircraft crash is the probable cause and avoid adopting the Sherlockian line of reasoning disapproved of by the House of Lords in *The Popi M*. In essence, all-risks insurers cannot simply prove their case on causation by showing that any alternative theories that the war risk insurers might advance are less probable than their own, or even impossible. Further, the more unlikely the cause of loss advanced by the all-risks insurers, the more compelling the evidence presented in support of that theory to persuade the arbitral tribunal to accept that despite its unlikelihood, it is nevertheless the probable cause. There is also a lesson in this for war risk insurers. While there is no obligation to advance any competing theories on causation on the civil standard of balance of probabilities, if their experts can provide evidence in support of competing causes of loss/damage to an aircraft (other than the war peril(s) alleged by the claimants), this may challenge or disprove all-risks insurers' case on causation.

In circumstances where a lack of evidence means the cause of a disaster may never be known for certain, taking the dispute to arbitration under AVS 103 is ultimately a costly and time consuming exercise for both sets of insurers. In the case of MH370, the process of resolving causation did not conclude until after a full arbitration hearing in London culminating in an arbitral award in June 2019. Following which, it was reported that the aviation war insurance market would absorb the full USD 110million claim: a payment that was said to have exhausted the aviation hull war insurance market's premium pot.

For further information, please contact **Paul Freeman**, **Melissa Tang** or **Manisha Bains** in our Singapore office.



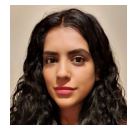
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Are you ready, are you compliant? China's social credit management system 2020

According to the 2018 Annual Report published by the People's Republic of China's (PRC's) National Public Credit Information Centre (NPCIC), approximately 17.46 million people have been barred from purchasing air tickets by the PRC Government. A further 6,908 were restricted from flying by the Civil Aviation Administration of China (CAAC) due to "serious dishonest acts".

This is as a result of the PRC's new Social Credit System ("SCS") which is currently being trialled in just a few provinces around the PRC. It is due to be implemented across the PRC in 2020. Apart from the obvious impact to the aviation industry due to a potentially significant decrease in sales of airline tickets in the PRC, the implementation of the SCS will have a number of significant impacts on all multinational aviation related companies with a footprint in the PRC.

Origins of the SCS

During the 6th Plenum of the 17th Party Congress in 2011, a decision was taken to construct a credit system to foster sincerity in society, not only in commercial affairs, but also in matters of social and political morality.

The current system was laid out in the 2014 "Planning Outline for the Construction of a Social Credit System". This plan put forward a timetable until 2020 for the realisation of five major objectives: (i) creating a legal and regulatory framework, (ii) building credit investigation and oversight, (iii) fostering a flourishing market built on credit services, (iv) completing incentive, and (v) punishment mechanisms. It identified priority fields in four major policy areas:

- In government affairs, the system would increase transparency, enhance lawful administration, build trustworthiness for government actors, and display the government as a model of sincere conduct
- In the market economy, social credit would enhance efficiency, trust and transparency across a range of sectors, ranging from finance to construction, food and ecommerce

- In social services, the system would enhance trust in healthcare providers, strengthen management over particular professions and enhance scrutiny over online conduct
- Lastly, the introduction of credit mechanisms would enable courts to more effectively implement judgments, enhance information sharing about parties in lawsuits and support norms for the legal profession

What is the SCS?

The SCS is a system whereby the PRC Government will track and monitor in detail the activities of individuals and businesses in the PRC, including multinational companies who operate in the PRC. The information obtained will be used to reward and punish businesses and their directors and management teams based on what is deemed to be good and bad behaviour by the PRC Government.

Thus the SCS expands the idea of the "credit check" to a system that standardises the assessment of citizens' and businesses' economic and social reputations. It aims to reinforce the Government's ideology that "keeping trust is glorious and breaking trust is disgraceful."

The collection and use of reputational information is not in itself a new concept. In fact, financial institutions worldwide collect information and "score" both individuals and companies before deciding whether to provide loan services. So what is the difference with the SCS?

The SCS will monitor all aspects of individuals' lives and organisations' dealings, and will rank them:

- For individuals, having a high credit score will give them easier access to such things as internet services, luxury hotels, overseas travel, school admissions and scholarships, favourable loans and eligibility for government jobs. On the other hand, social credit offences will be committed by individuals if they do not pay individual taxes or fines, cheat in exams, spread false information or take drugs. More minor violations include using expired tickets and smoking on a train. The lower each individuals' credit score, the higher the chance he/she will be denied access to aircraft and train travel, overseas trips, schools, social services, the internet and other benefits
- For organisations, having a high credit score could mean easier access to credit, more public procurement opportunities and even lower tax rates. However, lower scores could mean at best the opposite (this is referred to as being "greylisted"), but at worst being blacklisted from conducting business in the PRC, or with Chinese companies and individuals

Aviation

The Civil Aviation Industry Credit Management Measures ("**Credit Measures**"), which were introduced in 2017, are aimed specifically at the aviation industry, and currently cover 177 foreign or regional airlines operating flights in and out of the PRC. They were introduced in order to implement the SCS and to "enhance the building of a credit culture in the industry, maintain the order of civil aviation activities and promote the healthy development of the civil aviation industry". According to the CAAC, "an administrative subject with a poor credit record due to general dishonest acts is subject to strict administration as appropriate, and an administrative subject with a poor credit record due to serious dishonest acts is subject to joint punishment measures in multiple forms by heavier standards, so as to realise the result of ubiquitous restrictions due to one dishonest act".

The Credit Measures identify 15 categories of "serious dishonest acts" and individuals and companies found having engaged in these acts are recorded on a list entitled the Information List of Serious Dishonest Acts of the Civil Aviation Industry ("**CAA List**"). As at August 2019 the CAAC reported 2 companies (one airport, ZQZ, and one general aviation operator) were listed on the CAA List.

Similarly, there is a further list for air passengers.

Passengers who are subject to administrative punishments or prosecuted for criminal liabilities by public security authorities for conducting specific acts at airports or in an aircraft shall be included in the List of Passengers Restricted from Taking Civil Flights ("**Restricted Passengers List**"), and their ticket purchases must be automatically rejected by the ticketing system. In August 2019 the CAAC issued a notice to operators that they must prevent themselves from providing services to people on the Restricted Passengers List on both scheduled and non-scheduled commercial flights, and general aviation flights which are either chartered or scheduled short haul flights ("**Restricted Passenger Requirements**"). This includes business jet services.

Operators who conduct flights into China will be required to submit to the CAAC a form on an annual basis outlining measures they have taken to comply with the CAAC relating to the progress and effectiveness of implementing the Restricted Passenger Requirements.

Despite not coming into full force until 2020, aviation companies worldwide have already been impacted by the SCS, despite full implementation being scheduled for 2020.

In 2018 the CAAC sent letters to many international airlines demanding airlines refrain from designating Hong Kong, Macao and Taiwan as countries, and requested these airlines to describe these places as part of the PRC. In these letters the CAAC stated that if the airlines were not compliant, "our bureau will take further measures according to regulations, including on the basis of Article 8, Section 11 of the **Civil Aviation Industry Credit Management measures (Trial Measures)**, and make a record of your company's serious dishonesty and take disciplinary actions against your company..." Airlines who did not comply would have the non-compliance recorded on their Social Credit records in the PRC (effectively negatively impacting their Social Credit rating). Therefore, non-compliance could have resulted in more frequent inspections by the PRC government, and the airlines' acts of "serious dishonesty" shared on an aviation industry credit platform for others to see (as, amongst other things, a form of public shaming as punishment) which would in turn be shared with other national credit platforms in China. Many viewed this move by the PRC Government as a way to control its political agenda on a worldwide basis, and are suggesting that this will not be the last time this type of requirement will occur.

How will the SCS work for companies?

The full extent of how the SCS will operate nationally has not yet been disclosed by the PRC Government. However, we know that the reporting criteria will be stringent. Any organisations operating in China will have to regularly collect data and submit it to the PRC Government. While the rules have not been fully revealed, some sources have suggested that there will be up to 300 topics that must be reported on, covering issues relating a wide range of issues including taxation, the environment and corporate social responsibility. This information will be analysed along with information sought from various government agencies and even industry associations, and will include information such as court decisions, environmental records and potentially even how many employees are members of the Communist Party. The information will then be used to assess the organisations' Social Credit ratings, in turn providing rewards or punishments based on compliance. So it is a system that will significantly increase compliance costs.

The way companies do business with other companies will also be affected. It will be up to companies to monitor their business partners' and suppliers' Social Credit ratings, and refuse to do business with any whose Social Credit ratings are too low. If a company conducts business with another company or individual who has a poor Social Credit rating, that company will itself be risking having its own Social Credit rating negatively affected. Purchasing parts, for example, from a manufacturer with a low Social Credit rating may well in turn affect the purchaser's rating. The rationale behind this is the lower a company's rating, the more reluctant both organisations and individuals will be to engage with that company. Therefore, companies and individuals will seek to comply with the requirements of the SCS in order to be able to provide or acquire goods and services in the future.

Doing business with a company that has been blacklisted may result in a company being blacklisted itself, regardless of whether it was aware of its business partner's Social Credit rating or not. The company seeking to do business with another company bears the burden of ensuring a high Social Credit rating of its business partner. All this, according to the PRC Government, will tackle issues of corruption, unethical behaviour and lack of compliance with regulation.

Will the companies system be linked to the individual system?

The companies and the individual SCS will be intrinsically linked. Of particular note is that if a company is negatively rated, or finds itself on the blacklist, then individual managers and/or directors of that company may also be treated in the same way. Conversely, if an individual who is employed or is a director of a company has a low Social Credit rating then this could impact negatively on the company's rating. Therefore, it is imperative that companies know and understand not only the Social Credit ratings of its employees, but also those of the senior managers of their business partners, suppliers and other associates. This extends to PRC nationals who are not currently resident in the PRC.

What can businesses do to prepare?

There are many things that we suggest that companies do as a matter of urgency to ensure compliance with the SCS, Credit Measures and Restricted Passenger Requirements, to help avoid the disadvantage of being assessed with a low Social Credit rating at the outset of the SCS's full implementation:

1. Most importantly, conduct an audit on the organisation's current practices to ensure compliance with the SCS, the Credit Measures and the Passenger Requirements. It is significant to remember that once the first reporting requirement becomes due, any non-compliance will be assessed and may have immediate effect on an organisation's rating. Organisations conducting business in the PRC will need to ensure strict compliance to avoid a poor rating, which could result in other organisations and individuals avoiding doing business with them.
2. Consider what information the organisation will be required to supply to both the PRC Government and the CAAC (if not doing so already), and when. Ensure that this information is currently being collected and usable. For example, can the organisation point to a policy that was distributed internally outlining the collection and reporting requirements? How is the organisation going about tracking which individuals are on the CAAC's Restricted Passengers List, and how is it ensuring that these individuals are banned from flying?

3. Conduct a supply chain/business partner audit to ensure all businesses and their managers and directors that the organisation currently works with have a high Social Credit rating, to avoid being affected by others' low ratings, and put a policy in to place to ensure that these ratings are checked regularly to ensure they have not negatively changed.
4. Similarly, conduct an audit on all senior staff to ensure they are not blacklisted, or on the grey list. Businesses will potentially be affected by the Social Credit rating of their senior managers and directors. Once again, put in place a regular audit policy to avoid the company being tainted by the Social Credit rating of an employee or director of the company.
5. Consider drafting clauses into all commercial contracts allowing the organisation to terminate the contract with immediate effect should a business partner or its senior management make the blacklist or the grey list.
6. Check the organisation's data security capabilities. It has been suggested that much of the reporting will be required to be done online, which means that potentially sensitive data relating to employee information (and possibly even trade secrets) may need to be provided to the PRC Government electronically. It is also important to note here that all data must be saved onto PRC servers, and our research suggests that the technology companies maintaining these servers will pass on any information that it is asked for by the PRC Government.
7. Re-evaluate the organisation's approach to issues such as the environmental impact that the organisation has in the PRC, how it conducts its public relations (and how that will be perceived by the PRC Government) and even corporate social responsibility in the areas of the PRC in which it operates. It is likely that all of these issues will have a direct bearing on the organisation's Social Credit rating.

Whilst in theory the full implementation of the SCS should not actually impose any new requirements for businesses in terms of a change in the way business is conducted, it certainly imposes burdensome reporting requirements that were not previously mandatory for multinational companies conducting business in the PRC. The SCS along with the Credit Measures do carry significant risks to conducting business in the PRC. An organisation failing to comply (even inadvertently) may suddenly find itself on a grey list whereby conducting business in the PRC will become difficult or, even worse, blacklisted from doing business in the PRC at all.

Alternatively, businesses may find themselves, at least during the early stages of the full introduction of the SCS, working in a more level playing field with PRC companies suddenly being more highly regulated than previously (for example in relation to pollution emissions). It may, for example, transpire that those manufacturers who are low polluters will be allowed to continue to operate in circumstances whereby other higher polluters will be required to shut down periodically, or even blacklisted.

It is important to remember that it is the companies that bear the burden of demonstrating to the PRC Government that they are complying with the SCS, the Credit Measures and the Restricted Passenger Requirements. Thorough preparation will assist with compliance and avoid companies being greylisted or blacklisted.

For further information, please contact **Julie Marchese**, **Justin Yuen** or **Peter Coles** in our Hong Kong office.



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Airlines liable for hot coffee spills and slips on icy aircraft stairs. The meaning of “accident” under the Montreal Convention in 2019

There have been several notable cases in the English, European and Australian Courts regarding the meaning of “accident” under Art 17(1) of the Montreal Convention in 2019. The Australian case of *Di Falco v Emirates in the Supreme Court of Victoria* is dealt with elsewhere in this newsletter, and this article will focus on the following two decisions:

- *Labbadia v Alitalia* in the English High Court, in which a passenger’s fall on snow-covered steps while descending from the rear of the aircraft was considered to amount to an accident
- *GN v ZU* in the Court of Justice of the European Union (CJEU), in which the CJEU ruled that an airline is liable for an injury caused by a hot coffee spill during a flight even where the cause of the spill is unknown

English High Court: *Labbadia v Alitalia*

The claimant slipped whilst descending stairs at the rear of the aircraft at Milan Airport in freezing and snowy weather conditions, falling head first to the ground and suffering significant injuries to his right shoulder and pelvis. The stairs had not been covered with a canopy to provide protection from the snow and rain. The claimant argued that the airline was liable for his injuries pursuant to Art 17(1) of the Convention, which provides that “(t)he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

The Judge, following the leading modern authority on the interpretation and scope of the word “accident” under the Convention in the US Supreme Court judgment in *Air France v Saks*, and the English decisions affirming the views of *Air France v Saks*, considered that an accident is an event which is external to the claimant and which was unusual, unexpected or untoward.

The airline argued that there had been no accident because the incident was one of “pure omission”, being the failure to clear snow from the aircraft steps, which does not constitute an accident under Art 17. However, Justice Obi held that it was a chain of causes which led to the Claimant’s injuries: (1) a combination of raining and snowfall on the steps, (2) the airline’s decision to use uncovered steps despite the adverse weather conditions, which was against airport policy; (3) the airline’s decision not to clear the snow from the steps prior to the disembarkation of passengers; and (4) the compacting of snow on the steps by other passengers prior to the Claimant’s disembarkation, all of which ultimately led to the passenger slipping and suffering injury. Whilst snow and poor weather conditions were not inherently unusual at Milan Airport at the time of year at which the incident occurred, the use of aircraft steps without a canopy was “a positive decision on the part of the airport personnel” which constituted an “event” sufficient to amount to an accident under Art 17(1).

CJEU: *GN v ZU*

A six-year-old travelling from Mallorca to Vienna seated next to her father suffered second degree burns to her chest when her father was served a cup of coffee by a cabin crew member which, for unknown reasons, tipped on his tray table and spilled its contents onto the claimant. It could not be established whether the cup of coffee tipped over due to a defect in the folding tray table on which it was placed or due to vibration of the aircraft or for some other reason.

The airline argued that there had been no accident within the meaning of Art 17 because:

- *There was no sudden and unexpected incident which led to the tipping of the cup of coffee and the spilling of its contents*
- *The concept of an accident under the Convention only covered situations in which a hazard typically associated with aviation had materialised. This requirement has been applied by the Austrian Courts and in some of the US decisions, although not by the US Supreme Court*

The Austrian Supreme Court referred the question of whether Art 17(1) of the Convention must be interpreted as meaning that the concept of “accident” covers a situation in which an object used when serving passengers has, for unknown reasons, tipped over and caused bodily injury to a passenger, without it being necessary to examine whether that accident stems from a hazard typically associated with aviation.

The Advocate General, in his opinion dated 26 September 2019, considered that the Convention’s meaning of ‘accident’ must be interpreted as a sudden or unusual event on board, external to the passenger concerned, which causes injury “without it being necessary to ascertain whether the event is due to a risk inherent in air transport”. This conclusion was reached after a consideration of certain criteria that have been widely accepted in numerous jurisdictions, including the United States, Germany and France, as being relevant to the concept of “accident”. In particular, the Advocate General noted that “(a)ccording to those courts, in essence, the victim must demonstrate that the event that occurred during the period of carriage by air, whether on board the aircraft or during the operations of embarking or disembarking, and that caused the physical injury relied on, first, is ‘sudden’ or ‘unusual’ and, second, has an origin ‘external’ to the person of the passenger concerned”.

The CJEU noted in its judgment that concepts in the Convention should be interpreted uniformly between signatory states, however, the judgment itself lacks reference to any of the leading authorities on the interpretation of “accident” under Art 17. Most notably, the judgment does not refer to the US Supreme Court decision in *Air France v Saks*, even though this had been considered in the Advocate General’s opinion.

The CJEU instead focussed on certain concepts of consumer protection in the Preamble to the Convention, stating that the purpose of the Convention was to “lay down a system of strict liability for air carriers” while maintaining “an equitable balance of interests”. In doing so, the CJEU ultimately adopted its own interpretation of an “accident” and ruled that “(t)he ordinary meaning given to the concept of “accident” is that of an unforeseen, harmful and involuntary event”. The CJEU omitted any reference to the requirement of “externality” of the event to the passenger in its definition.

The CJEU considered that the “equitable balance” sought to be struck by the Convention is met on its interpretation of “accident” because the carrier is able to exclude or limit its liability if the carrier proves that the damage was caused or contributed to by the negligence of the passenger. It is difficult to see how this could be possible in circumstances where the cause of the incident was unknown by both parties, as was the present situation.

On the key issue of whether an event must stem from “a hazard typically associated with aviation” in order to amount to an “accident” under Art 17(1), the CJEU ruled that “the concept of ‘accident’ within the meaning of that provision covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.” The CJEU therefore concluded that an “accident” under Art 17(1) had occurred.

The impact of the CJEU’s broad interpretation of “accident”

The CJEU’s ruling that an event does not need to stem from a hazard typically associated with aviation in order to amount to an “accident” does not seem controversial. Such an approach has been accepted in numerous jurisdictions, and the obiter observations of the English Court of Appeal case of *KLM Royal Dutch Airlines v Morris* support a similar conclusion.

However, the CJEU's definition of "accident" does not refer to the requirement of proof of the "externality" of the unusual or unexpected event causing injury to the passenger, which has been a clear requirement in leading case law from multiple jurisdictions to date. In the present case, it was not known whether there was any sudden, unexpected and external incident which led to the tipping of the coffee cup and the spilling of its contents onto the Claimant, and yet it has been ruled that an accident has occurred in any event. This potentially broadens a carrier's liability to pay compensation in circumstances where there is a spill which is unexplained by any factor external to a passenger or which is caused solely by the act or omission of that passenger, unless the airline can prove the contributory negligence of the passenger.

It will be interesting to see how the courts in European Member States that have already applied the widely accepted definition of "accident" as set out in *Air France v Saks*, such as the UK, Germany and France, reconcile the CJEU's newly formulated definition of accident with the position that an accident is an "unexpected or unusual event or happening that is external to the passenger".

Further, it is not clear that the CJEU's decision will be binding on UK Courts post-Brexit. Whilst UK Courts remain bound by CJEU rulings on matters of EU law prior to Exit Day, it is arguable that this decision is not binding as it concerns an interpretation of an international treaty, rather than EU law.

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Thirsty for a verdict: Australian court confirms that dehydration is not an accident under Montreal Convention 1999

The Supreme Court of Victoria has recently dismissed a claim by a passenger who fainted and fractured her ankle during an Emirates flight, which she alleged was caused by the airline's failure to serve her with water upon request.

In *Di Falco v Emirates* (No 2) [2019] VSC 654, the plaintiff alleged that in March 2015 she was injured from a fall that occurred while she was a passenger aboard an Emirates flight from Melbourne, Australia to Dubai, United Arab Emirates. The plaintiff gave evidence that she had requested water from the cabin crew four times during the course of the flight because she had felt dehydrated, but had been denied this request on all four occasions. She subsequently fainted on her way to the bathroom, sustaining serious injury.

The plaintiff alleged that Emirates was liable for her injuries pursuant to Article 17(1) of the Montreal Convention. Article 17(1) provides:

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

The Montreal Convention is given force in Australia by the Civil Aviation (Carriers Liability) Act 1959 (Cth) (**Carriers' Act**). Section 9E of the Carriers' Act substitutes a liability under the Montreal Convention for any other basis of civil liability.

During the course of the trial, the plaintiff submitted that despite her expectations, Emirates' cabin crew had failed to supply or provide her with access to adequate hydration on board the flight, and that this failure constituted an unusual or unexpected event.

The key question examined by Justice Forbes was whether the airline's alleged failure to provide the plaintiff with adequate hydration following multiple requests constituted an 'accident' within the meaning of Article 17(1) of the Montreal Convention.

Judgment

The evidence at trial as to the sequence of events on the flight was largely uncontentious. It was accepted that:

- (i) The plaintiff made two requests for water to the same Emirates cabin crew member prior to take off. The response given to each of those requests was that water would be provided with the meal service;
- (ii) The plaintiff received a full meal service, accompanied by a small cup of water, roughly 1 to 2 hours into the flight;
- (iii) After consuming her meal, but while meal service was still in progress, the plaintiff made two further requests for water. She was told that another cabin crew member with a beverage cart would be providing drinks to passengers;
- (iv) After making those further requests the plaintiff had felt queasy and went to the bathroom, during which time she had fainted;
- (v) The plaintiff had not made any of her requests for water by utilising the cabin crew call button located at her seat. There was also no evidence that the plaintiff had informed the crew she had been feeling unwell at the time of her requests for water; and
- (vi) There was a drinking water fountain on the aircraft but the plaintiff was not informed of its presence.

In determining whether these events constituted an 'accident' under the Montreal Convention, Justice Forbes had regard to the leading international authorities of *Air France v Saks* and *Olympic Airways v Husain*, together with the High Court of Australia's decision in *Povey v Qantas Airways Limited*. Her Honour helpfully provided the following summary of the principles to be applied in determining whether an 'accident' has occurred (see paragraph [18] of the judgment):

- (a) A passenger's own internal reaction to the usual, normal and expected operation of the aircraft is not an accident;
- (b) An accident that is a cause of an injury is different to the occurrence of the injury itself;
- (c) It is necessary to identify an event or happening that is external to the passenger;
- (d) Identifying an event requires flexible application. An event may arise from acts, omissions or from a combination of acts or omissions;
- (e) The event must be unusual or unexpected;
- (f) There may be a chain of events that lead to injury;
- (g) It is sufficient that some link in the chain of causal events was an unexpected or unusual event external to the passenger;
- (h) If the event is described as inaction or as a failure to do something, the absence of the action will not amount to an event unless it can be shown to be an omission by reference to some legal standard requiring action;
- (i) Common law notions of actions or failure to act arising from a duty of care owed to passengers are irrelevant; and
- (j) Whether an accident has occurred is a question of fact.

Having regard to the above principles, Justice Forbes accepted that an omission, such as the airline's failure to provide adequate hydration despite numerous requests, could constitute an event that was external to the plaintiff. Her Honour held, however, that determining whether such an event constitutes an 'accident' under the Montreal Convention must be measured 'by reference to objective standards of normal aircraft operations, not by reference to the subjective expectation of the passenger'. Although it was usual practice for cabin crew to provide water to passengers on request, this is qualified by competing demands on the crew's time. The crew here had given evidence of occasions where requests would need to be deferred due to competing demands, particularly when performing pre-departure checks (which was when the plaintiff's first two requests were made) and during meal service (when the other two requests were made).

It followed that the plaintiff's requests were dealt with in accordance with the cabin crew's usual practice and were not in disregard of or contrary to airline policy. Nothing unusual or unexpected occurred on the flight which gave rise to the plaintiff's injuries and the claim was accordingly dismissed.

Comment

The outcome in *Di Falco* was not altogether unexpected. The judgment is significant however, as it is the only decision made by court of superior jurisdiction in Australia, and one of the few recent cases globally, that have considered the issue of what actions constitute an ‘accident’ under the Montreal Convention within the context of airline crew standards of service.

Justice Forbes’ clear restatement of the principles to be applied in determining the question of ‘accident’ under the Montreal Convention, particularly in the context of events as omissions or inaction, is instructive. This is all the more so in a jurisdiction such as Australia where the number of judicial determinations on Montreal Convention issues is comparatively few.

Airlines and their insurers will be comforted by the Supreme Court of Victoria’s findings that the refusal or deferral of an action by cabin crew is unlikely to constitute an ‘accident’ under the Montreal Convention, in circumstances where crew were otherwise acting in accordance with their airline’s usual established practice and policies. The decision suggests that Courts will have regard to the competing demands on an airline staff member at the time of a passenger request being refused or deferred, when determining whether such refusal or deferral constitutes an ‘accident’ under the Montreal Convention.

Clyde & Co, together with trial counsel John Ribbands of the Victorian Bar, represented Emirates in these proceedings.

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Travelers Insurance Company Ltd v XYZ: The UK Supreme Court rules on the making of non-party costs orders against insurers

This case centred on the circumstances where a court should make a Non-Party Costs Order (**NPCO**) against insurers.

Claimants in a group litigation action maintained that they had been provided with defective breast implants. They brought claims against a number of defendants, including Transform Medical Group (CS) Ltd (“**Transform**”). Transform supplied and fitted implants in England.

Travelers Insurance Co Ltd (“**Travelers**”) provided product liability insurance to Transform. The insurance covered liability for bodily injury occurring between 31 March 2007 and 30 March 2011.

Out of a total 1000 claims, 623 were brought against Transform. 197 of the claims brought against Transform were insured. 426 claims were uninsured. The insured and uninsured claims raised common issues and so, as a matter of law, Travelers was obliged to fund Transform’s whole defence as the case went to trial.

Early in the proceeding, the claimants sought details on the extent of Transform’s insurance. It was only in June 2014, at a relatively late stage in the litigation, that Travelers and Transform disclosed the information.

The insured claims settled in August 2015. Travelers’ obligation to fund the defence costs of the uninsured claims ceased. The uninsured claimants continued to pursue Transform which, by this point, was in administration. The uninsured claimants obtained default judgment against Transform in March 2016.

They sought a NPCO against Travelers pursuant to section 51 of the Senior Courts Act 1981.

Decisions in the lower courts

The uninsured claimants were granted a NPCO against Travelers by Thirlwall LJ in the High Court ([2017] EWHC 287 (QB)). The judge was guided by the following principles: (1) whether the case was exceptional; and (2) whether the making of an order accorded with fairness and justice.

The High Court found that Travelers had no business involving itself in the uninsured claims. Thirlwall LJ held that if Travelers had disclosed the relevant insurance information at an earlier stage in the proceeding then the uninsured claimants would not have continued their claims. Furthermore, the High Court considered that without a NPCO, there would be an unjustified asymmetry in costs risk as between the uninsured claimants and Travelers.

The Court of Appeal dismissed Travelers’ appeal ([2018] Lloyd’s Rep IR 636). It agreed that the making of a NPCO was dependent on the issues of “exceptionality” and “fairness and justice”. The Court of Appeal placed particular emphasis on the asymmetry of costs risk factor. For instance, if the uninsured claims had been successfully defended (at Travelers’ expense), then Travelers would have a full costs recovery against the claimants for their several share of that liability. By contrast, if the uninsured claimants were successful, they would have no recourse at all against Travelers, and because of Transform’s insolvency, no effective recourse against Transform.

Supreme Court reverses lower court rulings

In a judgment delivered on 30 October 2019, the Supreme Court allowed Travelers' appeal. Lord Briggs (with whom Lady Black and Lord Kitchin agreed) delivered the leading judgment. Lord Reed and Lord Sumption delivered concurring judgments.

The Supreme Court was concerned that a more principled approach be taken by courts when it issued a NPCO against insurers. The court considered that there was a lack of precision associated with the concepts of "exceptionality" and "fairness and justice". These terms were vague and left the outcome too dependent on the "uncontrolled perception of a particular judge".

The court held that, for insurance cases, liability insurers would be subject to a NPCO where the insurer had either: (1) become the "real defendant" in a proceeding; or (2) conducted itself in a way which amounted to "unjustified intermeddling" in a proceeding.

In several previous cases where a NPCO had been made against an insurer, the insurer was found to have become the "real defendant". This was because the insurers had defended a claim motivated purely by their own interests, as opposed to the interests of the insured.

Lord Briggs explained that where a claim fell within the scope of an insurance policy, whether or not the claim was subject to the limits of cover, then the "real defendant" test would usually be most appropriate when considering whether a NPCO should be made.

However, these cases did not assist where a NPCO was sought against an insurer by an uninsured claimant. In this context, the intermeddling principle was more applicable. The key question for such a case was whether an insurer's involvement in the defence of an uninsured claim amounted to unjustified intermeddling such that the insurer should be liable for the claimant's legal fees.

Lord Briggs held that the close connection between the uninsured claims and insured claims justified Travelers' involvement in decision-making with respect to the uninsured claims. Travelers' was obliged to defend all of the claims where they raised common issues. Travelers' participation in the defence of the uninsured claims was therefore an "involuntary engagement which arose from their status as insurers under the policies". Furthermore, it was unrealistic to expect the claims to be treated separately. For instance, the offer of a drop hands settlement to uninsured claimants (which Transform sought and which Travelers had no interest in) might have weakened the insured claims (which Travelers had a direct interest in). In these circumstances, the court held that Travelers' should not be liable to pay the uninsured claimants' costs.

The Supreme Court dismissed concerns over the asymmetry of costs risk that had particularly motivated the Court of Appeal. The asymmetry in this case was not a result of Travelers' unjustified intervention or conduct of Transform's defence. The asymmetry arose from the particular facts of the case. Essentially, all of the claimants had decided to pursue Transform without knowing whether their respective claims were insured or not.

As it turned out, Transform only had insurance for some of the claims and became insolvent. The claimants had assumed several-only costs liability. This meant that the costs position of each claimant needed to be looked at individually. Looked at separately, Lord Briggs held that this was simply a case where "each claimant had either an insured or uninsured claim against a common insolvent defendant, with all of the consequences of reciprocity that followed".

The court considered whether Travelers' had contributed to the asymmetric costs outcome given that solicitors jointly instructed by Travelers and Transform had played an advisory role in Transform's decision not to disclose the limits of its insurance cover earlier. To the extent that the advice could be attributed to Travelers', the court found that the non-disclosure "fairly reflected Travelers' rights as insurer" and "was not conduct which amounted to unjustified intermeddling in the uninsured claims".

Lord Briggs held that in these “intermeddling” cases, it was crucial that the “unjustified intermeddling” be causative of the costs sought by the claimant. The High Court found that the non-disclosure of insurance information until a relatively late stage was causative of the costs being incurred by the uninsured claimants. However, the Supreme Court considered that the non-disclosure was not unjustified intermeddling in the first place and, in terms of the test being applied, could not have caused the incurring of costs by the uninsured claimants.

Comments

In this decision, the Supreme Court sought to establish a more principled approach to the making of a NPCO against an insurer. It was concerned that concepts which had guided the lower courts, such as “fairness and justice” and the “exceptionality” of a case, were vague and granted an individual judge too much discretion when issuing a NPCO. In this sense, the Supreme Court has provided more certainty in this area of law.

The decision sets out the two occasions on which insurers will be subject to a NPCO. The first occasion is where an insurer becomes the “real defendant” in a proceeding. The second is where an insurer “unjustifiably intermeddles” in a proceeding. It is the latter test which will normally be applicable where costs are sought from an insurer following a successful action against the insured defendant of a claim which is outside the scope of the insurer’s cover: ie an uninsured claim.

The Supreme Court’s decision still leaves some uncertainty. Lord Briggs noted that there was no “fixed benchmark” as to what amounts to “intermeddling”. Indeed, in each case, “the nature and extent of the non-party’s involvement will have to be measured against the alleged justification or excuse for it”.

However, where insurers are confronted with uninsured and insured claims relating to the same subject matter, and an insurer does not go beyond its “contractual obligations and attendant rights” when making decisions which concern the uninsured claims, then, according to Lord Briggs, “liability as an intermeddler may be very hard to establish”.

The close connection between the uninsured and insured claims made against Transform was a critical factor in the Supreme Court’s decision. The court was prepared to grant Travelers a somewhat large degree of discretion when it involved itself in decisions which affected the uninsured claims.

Overall insurers may take some comfort from this decision. It provides more certainty around the tests to be applied where insurers face a NPCO claim. Furthermore, insurers can perhaps feel more confident that when they are directing litigation involving both insured and uninsured claims, they are unlikely to be exposed to a NPCO with respect to the uninsured claims so long as they follow the guidelines outlined by the Supreme Court.

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Dawn of a new era for the Montreal Convention and liability limits for airlines

The Montreal Convention 1999 (“**the Montreal Convention**”) is an international treaty governing the liability of airlines for death of or injury to passengers as well as for damage, loss or delay of cargo and baggage. Its overarching purpose was to modernise the 1929 Warsaw Convention and consolidate it and related instruments, maintaining the Warsaw Convention’s achievements of certainty, harmonisation and uniformity, while improving passenger protection.

Pursuant to its powers under Article 24 of the Montreal Convention, and upon completion of its quinquennial review, the International Civil Aviation Organisation has revised the Special Drawing Rights (“**SDR**”) limits set out under Articles 21 and 22 which relate to: the level up to which the carrier cannot exclude or limit its liability for death or personal injury (i.e. is strictly liable); liability for passenger delay; liability for baggage per passenger; and liability for cargo per kilogramme. The previous SDR limits, in place since 30 December 2009, have been revised by a factor of 13.9%, based on an accumulated rate of inflation since the last adjustment nearly a decade ago, and the revised limits will take effect as of 28 December 2019.

An important factor to take note of is that the fact that the revised SDR limits come into effect on 28 December 2019 does not necessarily mean that they will be applicable to all contracts of carriage to which the Montreal Convention applies, because this depends on the manner in which each Contracting State ratified the Montreal Convention in terms of its local legislation. If a Contracting State ratified the Montreal Convention by reference to the adoption of the Convention as if it formed part of its local law, then the revised SDR limits will automatically apply in that Contracting State as of 28 December 2019.

Revised limits

Montreal Convention	Original limit (SDR)	Revised limit as of 30 December 2009 (SDR)	Revised limit as of 28 December 2019 (SDR)
Strict liability for death or injury to passengers under Article 21	100,000	113,100	128,821
Damage caused by delay in the carriage of passengers under Article 22(1)	4,150	4,694	5,346
Loss, damage or delay of baggage per passenger under Article 22(2)	1,000	1,131	1,288
Loss, damage or delay of cargo per kilogramme under Article 22(3) Associate	17	19	22

However, if the Contracting State ratified the Convention by inclusion of the wording of the Convention as a stand-alone statute, as is the case with some Contracting States, then the revision of the SDR limits on 28 December 2019 will not take effect in those States automatically, and they will need to amend their own local legislation in order to bring it up to speed with the revisions made to the Convention. This process may take some time as the legislative wheels in many Contracting States turn slowly. Practically speaking, this means that one of the Montreal Convention's fundamental purposes i.e. to create certainty and uniformity regarding liability limits will not be fully achieved (at least until such time as all Contracting States have ensured that their local laws are likewise amended). In the UK, legislation will be required, but, if the experience with the 2009 increase is an indication, this is likely to be in place soon. Interestingly, insofar as the implementation of legislation at the EU level to accommodate the increases to the liability limits, Regulation 889/2002 (which was originally implemented to bring the Montreal Convention into effect in the EU) has not yet been amended to account for the 2009 liability increases, albeit that the proposed revision has been pending since 2013.

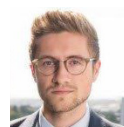
That being said, this lack of uniformity can be contractually circumvented by airlines ensuring that their conditions of carriage (for passengers and cargo) are amended to reflect the revisions as necessary.

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French Supreme Court confirms that criminal courts lack jurisdiction over claims arising from air accidents

As most of our readers will know, claims for compensation for bodily injuries or death arising from contracts of carriage are subject to specific rules, mostly set out by either the Warsaw Convention 1929 or the Montreal Convention 1999. These Conventions cover different aspects of the carrier's liability, such as conditions for liability, limitation period and jurisdiction.

Pursuant to its powers under Article 24 of the Montreal Convention, the French Supreme Court has recently given a new illustration of the specificities of this regime, as well as the superiority of the Convention over national law. In a decision dated 10 September 2019, the French Supreme Court (Cour de Cassation) has confirmed its previous jurisprudence, deciding that the criminal courts lack jurisdiction to rule on claims for compensation for bodily injuries or death arising from air transport accidents.

This matter involved the crash of a small aircraft during a domestic flight. Under French law, all domestic flights are governed by the provisions of the Warsaw Convention, even if the flight is not international but domestic.

Article 28 of the Warsaw Convention sets out rules for jurisdiction for claims for bodily injuries or death: domicile of the carrier or its main place of business, place of destination or place of the establishment of the carrier through which the contract of carriage was made. These rules are for territorial jurisdiction only, i.e. they determine the place of the court which can be seized. The Warsaw Convention does not set out which type of court (i.e. civil, administrative, commercial, criminal, etc.) can be seized for such claims. However, when pilots of aircraft which crashed and killed passengers were first prosecuted for manslaughter, and claims for compensation were made by the victim's families before the criminal court, the defendants (the pilots and their liability insurers) argued that the criminal courts cannot rule on the civil claims for compensation as the Warsaw Convention sets out a specific regime of compensation, which excludes the national rules such as the French rule allowing a criminal court to award compensation while making a decision on the criminal

offence. The French Supreme Court followed their argument for the first time on 3 December 1969, and confirmed its jurisprudence in 1975 and 1977.

These decisions were made at a time when the criminal courts could award compensation to the victims only if the liable party was found guilty of the offence, and on the basis of fault for the offence. Given that the Warsaw Convention sets out a regime of strict liability which is not based on fault, it was considered that it was not for the criminal courts to make a decision on compensation.

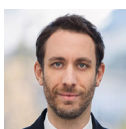
Since a reform in 1983, criminal courts can award compensation not only based on fault, but also under various liability regimes in French law. The Cour de Cassation had not been seized of the issue since the reform, so the question was whether the former jurisprudence would continue to apply in spite of the reform, or whether the air accident liability regime would now be one of the many other civil liability regimes that the criminal courts can apply. The response to this question is no: as before, the criminal courts cannot make a ruling on compensation of the victims, who have to seize a civil court.

The importance of this decision is broader than the mere jurisdiction issue. Indeed, the lack of jurisdiction of the criminal courts has consequences on time bar. The French Supreme Court has decided that the criminal complaint filed by the victims does not interrupt the limitation period of their claim for compensation, whereas it is the case for other liability regimes. Usually the criminal complaint is considered as a claim for compensation for the damage caused by the manslaughter, so that the limitation period applying to the civil claim is interrupted by the complaint.

The reason is that the victims can claim for compensation before criminal courts, so that their criminal complaint is supposed to contain – even implicitly - a claim for compensation. In aviation law, the situation was – and remains - different; as the criminal court does not have jurisdiction to rule on a claim for compensation, the claimant is not able to make a claim for compensation when he files a criminal complaint. As a consequence, the criminal complaint will not be considered as a claim for compensation interrupting time bar, unless the claimant makes it very clear in its criminal complaint that he also intends to claim for compensation.

The 10 September 2019 decision is good news for air carriers and their insurers, not only because they can still rely on the jurisdiction exception before criminal courts, but also because criminal complaints will most likely continue to have no effect on limitation periods for claims for compensation.

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Blockchain in aviation

The aviation industry is increasingly turning its attention to blockchain-based solutions to leverage commercial advantages, make cost savings and improve data exchanges in a variety of scenarios.

Outside of financial services, little is generally known about how blockchain will enhance and/or disrupt other industries. Some believe it represents a step change in technology whilst others are sceptical. Many people do not actually know what blockchain is or how it works. It usually conjures up images of virtual currency, super-fast computers and flashing lights.

Beyond bitcoin

That is understandable, but blockchain could be more than infrastructure for financial transactions using bitcoin and other cryptocurrencies. It could provide solutions to various non-financial challenges. IATA acknowledged this in its October 2018 White Paper (Blockchain in Aviation: Exploring the fundamentals, use cases and industry initiatives) in which it reviewed the latest projects that are exploring opportunities in aviation with this technology.

As a result, we are increasingly being asked by clients to assist them with determining whether blockchain might solve a particular issue and if so what the possible legal and regulatory consequences of deploying this technology would be. Blockchain specialists are nevertheless keen to point out that business should avoid finding problems for blockchain to solve in order to cash in on the buzz. It is not a panacea or magic bullet.

The technology

In fact, blockchain is merely one form of Distributed Ledger Technology (“DLT”). The terminology can be confusing and merits a brief (layman’s) explanation:

- DLT is essentially a giant, decentralised peer-to-peer database and is used as a platform to validate or authenticate records of transactions and other data exchanges between people and then to store those records

- The distributed records are identical and can be created via different access points called nodes rather than having to route through one central point
- Those distributed record may either be public, private or a mix of both. Access to a private ledger would be permissioned through the use of digital keys. Where the distributed ledger is permissionless, it will generally be available to anyone to view without the need for a digital key. However, ability to add new information might be restricted and certain confidential or commercially sensitive information may be encrypted and available only to a select few. The ‘block’ contains the data and the ‘chain’ connecting the ‘blocks’ is encrypted code called a hash
- Data records will only appear on the ledger once the majority of the parties, who have access to that distributed ledger, have reached agreement on the veracity of that data. This is often known as “the truth” – i.e., a single agreed version following a defined consensus protocol
- “The truth” is then timestamped and given a unique cryptographic identifier so that it cannot be altered or doctored. It becomes a secure permanent record

With the above concepts in mind, aviation industry stakeholders are exploring uses for blockchains and DLT more widely. They include proper digital records for aircraft components, parts and spares, asset registration and aircraft ownership and tokenizing e-tickets for direct distribution.

Aircraft maintenance

Once thrown into circulation, aircraft components can be difficult to track in real time. There is no global database containing information on physical location, ownership, storage and use (in terms of flight hours) and maintenance history. That is stored in piecemeal fashion on disparate systems, usually owned or operated by an airline, MRO or OEM. Therefore having a single version of “the truth” on component data would be invaluable. Efforts are afoot to develop a coherent, consolidated and immutable digital record on a distributed ledger covering the lifecycle of those aircraft components, leading to greater efficiencies and cost savings in scheduled and unplanned maintenance.

Of course, commercial reality means that a single distributed ledger for all components servicing the world’s fleet is unlikely. Applications will be monetized and are already jealously guarded as new sources of revenue.

Mobile asset registry

Blockchain might also be used for the International Registry of Mobile Assets, created by the Cape Town Convention 2001 (the “**Convention**”). Records could be tokenized i.e. given a unique digital ID that is immutable. Whilst certain information would be publically searchable, as required by Article 16 of the Convention, commercially sensitive data would be encrypted. Only Approved Administrators and/or the Supervisory Authority would have permission to write and add new blocks of data on the International Registry.

Each new block once validated (consensus achieved across the distributed ledger) would leave a secure and indelible digital imprint. It would reduce the risk of mistakes in updating the registry e.g. after a sale or taking of security or charge over the asset and of fraudulent transactions. There might be less scope for disputes arising about competing priorities as a result of unknown mortgages, securities, liens and other encumbrances subsequently surfacing.

E-tickets

As an alternative to Global Distribution System (“**GDS**”) channels, airlines are starting to implement blockchain-based distribution models to sell flights. Similarly, e-tickets can be tokenized i.e. the physical rights in the ticket are digitalized. The e-ticket becomes a private key in which the value is locked in for use when the flight is redeemed. Smart contracts (pieces of code) will self-execute when certain conditions precedent embedded within that private key are met, making the process smoother.

Instead of feeding inventory into a centralised ticket management system belonging to a GDS, e-tickets could be offered for sale across decentralised platforms, either directly to consumers or to other sellers. There would be no need to rely on complex technical links to various GDS databases as the main route to market.

Conclusion

These use cases are merely a snapshot of a much wider pool of initiatives and studies being undertaken by the industry into blockchain and DLT. Efficiencies and new revenue streams will be welcome, but the technology will no doubt spawn new battles over data use, ownership, liability for errors, information security, cyber risk and anti-competitive behaviour.

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Regulation of drones in Venezuela

On 29 August 2016, three regulations were issued by the Ministry of Internal Affairs (**MoIA**) jointly with the Ministry of Defense (**MoD**), the Ministry of Transport (**MoT**) and the Civil Aviation Authority (**CAA**), restricting, prohibiting and regulating, respectively, the operation of drones in Venezuela. It was the very first time that the term ‘drone’ appeared in a local legal instrument, so it marked the ‘Big Bang’ of the existence of these flying devices in the national legislation.

It was not until 23 December 2016, however, that drones were effectively incorporated into the national aviation legal framework. On that day, thirteen Venezuelan Aviation Regulations (“**RAV’s**”) were amended and reissued to regulate their use, registration, classification and operation. The result was a robust and comprehensive body of law not yet seen in other jurisdictions in Latin America, the main points of which are described below.

Classification

RAV 45 classifies drones or remotely piloted aircraft (hereafter referred to as RPAs) into four different classes, namely:

Class 1 – Lighter than 3 Kg.

Class 2 – Between 3 and 25 Kgs.

Class 3 – Between 25 and 150 Kgs.

Class 4 – Heavier than 150 Kgs.

Although the regulation applies equally to all classes of RPAs, more flexibility is sometimes granted to the operation of drones under Class 1 and Class 2. Operation of RPAs under Class 3 and Class 4 is more heavily and carefully regulated.

Use

In Venezuela, the use of drones is divided into two main categories: recreational and commercial. Each one is regulated differently.

Recreational

No authorisation is needed to operate Class 1 or Class 2 RPAs for recreational purposes. However, this is not the case for recreational operation of Class 3 and Class 4 drones, which need a special authorisation from the CAA.

Pilots operating drones for recreational purposes need to be at least 13 years old and must hold a Certificate of Successful Completion of a Course on RPAs from a certified training organisation. They also need to hold a civil liability policy to cover damage caused to third parties as a result of their operation. For the operation of Class 3 or Class 4 RPAs, this insurance policy also needs to be validated before the CAA.

Finally, no licence is required for the recreational operation of Class 1 RPAs. For all other classes, a valid licence is required.

Commercial

Any operator wishing to operate drones commercially in Venezuela needs to go first through a certification process before the CAA in order to be granted with a drone operator certificate or “**ROC**” (Remote Aircraft Operator Certificate - the equivalent of the **AOC** (Aircraft Operator Certificate) used in traditional commercial aviation).

The regulation does not distinguish between foreign or national RPA operators. Therefore, the certification procedure is equally open to both unless the CAA provides otherwise.

Although the regulation provides for a certification period of 30 days for operation of Class 1 and Class 2 RPA, and of 90 days for operation of Class 3 and Class 4 RPAs, experience suggests that these timeframes are quite ambitious as they normally take much longer.

Registration

RAV 47, which governs registration of civil aircraft in Venezuela, provides for all RPAs to be registered before the National Aviation Registry (“**RAN**”) before flying in national airspace. However, only those classified as Class 3 or 4 will be granted proper registration marks. All other classes will only receive a Proof of Registration before the RAN.

The Venezuelan registration marks for RPAs are distinguished by an alphanumeric code starting with the Venezuelan nationality mark ‘YV’, followed by the letter ‘R’, and ending with a group of three numbers starting from 100. For example, YVR123.

Airworthiness

RPAs classified under Class 4 need to obtain from the CAA a Certificate of Airworthiness to fly in national airspace. RPAs under Class 2 and Class 3, however, do not. Instead, they need to obtain a document of Conformity with Airworthy Condition which certifies that the RPA in question can fly safely. Class 1 RPAs, for their part, do not need to obtain any proof of airworthiness but the operator needs to submit to the CAA a Declaration of Safe Operation and Conformity with Original Design in the event the RPA is going to be engaged in commercial operations.

Operations

With respect to operational restrictions, all operations must be carried out during daylight hours and under VFR conditions. They must avoid overflying populated areas as well as over private property for the purposes of taking pictures or recording videos without the authorisation of the owner of the property concerned.

RPAs under Class 1 and Class 2 can fly no higher than 400 feet (122Mts) from the point of take-off and must remain within 500Mts and 700Mts, respectively, of visual line of sight (VLOS). These restrictions do not apply to RPAs, under Class 3 or Class 4, which will instead be based on performance as per their manufacturer’s manual.

Furthermore, no drone can be operated within 5 nautical miles or 9 kilometers from any airport, nor within a perimeter of 1.8 kilometers from: (1) the President of the State; (2) any military or police station; (3) any prison; or (4) any of the oil and mineral-processing companies belonging to the so-called ‘strategic industries’.

Notwithstanding the above, it is important to remark that RAV91 enables the CAA to authorise operators to deviate on an exceptional basis from any restriction set forth in the regulation if it is so required by the operation concerned. Therefore, any restrictions can always be lifted by the CAA if there are good grounds for them to do so.

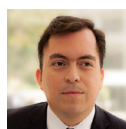
Final remarks

Although the CAA has done a very good job in regulating the use of drones in Venezuela, the operation of these flying machines has been prohibited since the unfortunate event of 4 August 2018 when two drones, loaded with explosives, were exploded by unknown individuals with the purpose of causing damage to Venezuela’s President Nicolas Maduro during an official event held in Caracas.

Stakeholders of the drone industry, however, have organised themselves and created the Venezuelan Association of RPAs (“**AVERPAS**”) -which we are proud to legally advise- in order to work together with the CAA for the lifting of the restriction on a permanent basis. This initiative has produced good results as the CAA has recently authorised certain commercial operations, including a traffic monitoring service carried out by a certified drone operator for the reporting of the traffic in Caracas through one of the biggest radio stations in the country.

Although this service has been provided by the same radio station for over a decade, it involved the use of a helicopter, its risks and the payment of all the costs associated with it. Now, with the incorporation of the new regulations, this traffic reporting service is made from the ground with RPAs at a significantly reduced cost.

For further information, please contact: **Rodolfo Ruiz A.** or **Aurelio Fernandez-Concheso** in our Caracas office.



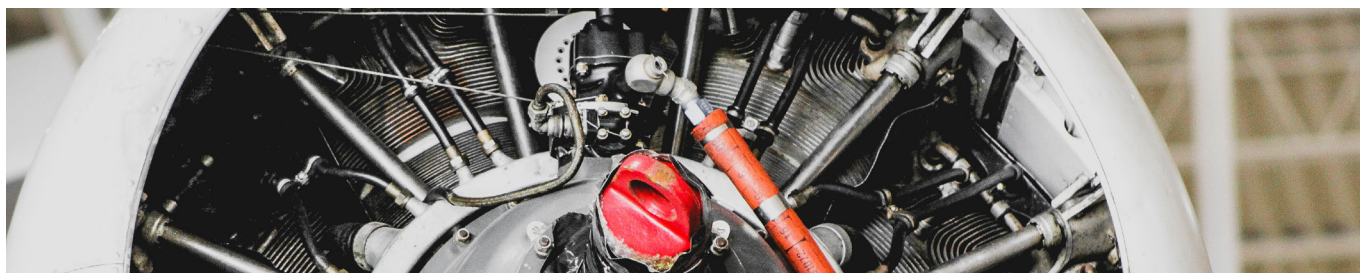
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A brief guide to the statutory framework for MROs in China

Maintenance, repair and overhaul (**MRO**) of an aircraft and its engines is a process involving regularly servicing, repairing, or testing carried by a group of technical, administrative, managerial and supervision actions. The main categories of MRO service providers include in-house airline MRO, third-party airline MRO, and OEM-affiliated and certified maintenance shops.

The China MRO market consists of a large number of maintenance companies variously owned by air carriers, joint venture maintenance companies, private maintenance companies and OEM-owned maintenance companies. It is a thriving and expanding industry sector.

An industry summit - "MRO China" has been held in China annually since 2006. The major players dominating the China MRO market include **"AMECO"** (Aircraft Maintenance & Engineering Corporation 北京飞机维修工程有限公司); **"GAMECO"** (Guangzhou Aircraft Maintenance Engineering Co., Ltd. 广州飞机维修工程有限公司); and **"STARCO"** (Shanghai Technologies Aerospace Company Limited 上海科技宇航有限公司), all of which are joint ventures set up by major mainland Chinese airlines with the big names in the global MRO market.

The main regulatory body is the Civil Aviation Administration of China (**CAAC**). There is also the Civil Aviation Maintenance Association of China (**CAMAC**) formed by MRO players in China. CAMAC acts as the coordinator between the governmental authorities and MRO companies.

There are a number of relevant laws, regulations and industry standards and policies:

Civil Aviation Law of the PRC ("《中华人民共和国民用航空法》")

This is the main piece of regulation on civil aviation in the People's Republic of China (**PRC**). The Civil Aviation Law includes provisions on the management of Chinese civil aircraft registration, aircraft rights, airworthiness management, aviation personnel, civil airports, air traffic control, public air transport companies and general aviation issues.

Regulations of the PRC for the Administration of the Airworthiness of Civil Aircraft ("《中华人民共和国民用航空器适航管理条例》")

These Regulations set out provisions on the qualifications and requirements to be met in aircraft design, manufacture, use, maintenance, import and export, and by companies or individuals involved. Any domestic or overseas maintenance company or individuals undertaking maintenance relating to civil aircraft registered in China must apply to the CAAC for a maintenance permit. Once the CAAC inspects the maintenance facilities, technicians, and quality management system and issues a maintenance permit, MRO companies may then carry out MRO business activities within the scope of their permit.

Certification Requirements for Civil Aircraft Maintenance Units

(“民用航空器维修单位合格审定规定”)

These are the relevant provisions in respect of the certification of MRO companies applying for the repair of civil aircraft and their components, the issuance of licences, and follow-up supervision and inspection. In particular, there are strict requirements and regulations on the maintenance facilities, tools and equipment used, personnel qualifications, airworthiness standards, and quality systems implemented.

General Rules for Repair and Modification

(“维修和改装一般规则”)

These are provisions relating to the repair and modification of civil aircraft and their components. The applicable rules seek to ensure that the current maintenance manuals or approved repair methods, technical requirements and guidelines of aircraft manufacturers are adopted and followed. Moreover, it is mandated that the equipment (including test equipment) used is that necessary to ensure that repairs and modifications are performed in accordance with acceptable industry guidelines.

Certification Requirements for Civil Aviation Products and accessories and parts

(“民用航空产品和零部件合格审定规定”)

These are the relevant regulations relating to the certification of civil aviation products, parts and accessories, production licence certification and airworthiness certification, as well as the application, issuance and management of relevant certificates. This includes the granting of the design and production of the materials, components, and airborne equipment for civil aviation products and the management of relevant licence holders.

Civil Aircraft Maintenance Personnel Licence Management Rules

(“民用航空器维修人员执照管理规则”)

These are the regulations relevant to the issuance and management of licences and qualification certificates of civil aircraft maintenance personnel. The main licences include civil aircraft maintenance personnel licences, civil aircraft component repair personnel licences, and civil aircraft maintenance management personnel qualification certificates.

Although the China MRO market is said to be fast growing with an increasing number of MRO companies entering each year, the growth is hindered by various challenges. One of the main challenges is the rapid growth in air traffic and fleets. Existing facilities of the China MRO infrastructure have so far not been able to meet the growth in maintenance needs. Moreover, due to Original Equipment Manufacturer (“OEM”) protection of technology and intellectual property, as well as the control of component supply, the maintenance capacity of the domestic/local maintenance shops is relatively low. Most of the high value work still needs to be sent to joint venture companies, OEM-owned companies or overseas MRO companies overseas. It remains to be seen whether ongoing trade and tariff disputes will affect this market.

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Brexit update

The decisive Conservative victory in the general election on 12 December, followed by the adoption of the EU (Withdrawal Agreement) Act in January, approving the Withdrawal Agreement agreed with the EU, and the European Parliament's approval of the Agreement towards the end of January, means that the UK finally left the EU on 31 January 2020, with a Withdrawal Agreement in place, under both UK and EU law.

There will now follow talks on a trade relationship between the two sides, the specified period for which is due to expire at the end of 2020. The intervening period will be a transition period, during which EU law will continue fully to apply to the UK.

Although under EU law it is open to the UK to request an extension of the period for these talks, the Withdrawal Agreement Act enshrines in UK law that no such extension shall be sought. While it is in theory possible for the UK Parliament to amend this law so as to permit an extension, at present it seems unlikely that the government would wish to propose this.

Annexed to the Withdrawal Agreement is a Political Declaration setting out the broad aims of the parties for the future trade negotiations. As regards air transport, this provides that the parties shall ensure passenger and cargo air connectivity through a Comprehensive Air Transport Agreement, covering market access and investment, aviation safety and security, air traffic management and provisions to ensure open and fair competition, including appropriate and relevant consumer protection requirements and social standards.

The period till the end of 2020

As a result of the transition period provided by the Withdrawal Agreement, EU law will continue to apply in and to the UK without change until the end of 2020. Thus, as regards air transport, including issues of market access, ownership and control, safety, security and air traffic management, and all other related issues, existing EU regulations will continue to apply as before, and there will be no change.

As a result of the UK's membership of the EU, its aviation relations with 17 states have depended on agreements between the EU and those states (as a result of either the EEA Agreement, the ECAA Agreement or individual comprehensive vertical aviation agreements). As these will no longer apply following the UK's exit from the EU, the UK has concluded replacement agreements with each of these states (with the sole exception of Liechtenstein), intended to ensure continuation of substantially the same regime as has applied under the EU agreements. However, as EU law, including these EU agreements, will continue to apply fully to the UK during the transition period, until the end of 2020, these replacement agreements will not come into force until 1 January 2021.

After the end of 2020

The Political Declaration envisages the negotiation of a Comprehensive Air Transport Agreement. It is far from clear what the likely outcome will be, given the very general language of the Political Declaration and the fact that it is not legally binding, and the very real possibility that progress in any one area may be dependent upon the EU's being satisfied as to what is achieved in other areas (such as, to name just one, fishing). Even if a comprehensive agreement is reached, it may be unlikely that it will precisely continue the present status quo - for example, with regard to seventh freedom and cabotage services, as these are not normally included in comprehensive agreements between the EU and third countries, and the Commission has repeatedly made clear its position that the UK should not be able to enjoy the full benefits of the EU single market despite not being a full member of it.

If no air transport agreement is reached before the end of the year, then the position will be as was being contemplated when the UK's exit even without a Withdrawal Agreement was being seen as a possibility. In order to deal with this contingency, the EU adopted Regulation 2019/502 providing for basic air connectivity between the UK and the EU for a temporary period, and also Regulation 2019/494 providing for continued validity of certain aviation safety certificates. As these will not now come into practical effect before their expiry, it seems likely that, in such an event, the EU would adopt similar regulations, at any rate to apply during the first part of 2021. This would only provide a partial and temporary solution. Some additional fall-back legal basis for continued services between the UK and the individual EU member states could also be provided by the pre-existing bilaterals between them (albeit probably to a limited extent) and/or by the doctrine of "comity and reciprocity" - essentially an informal arrangement between two countries to permit existing services to continue (as existed, for example, between the US and France from 1992 to 1996). However, a more comprehensive and long term solution would probably have to be found by the conclusion of new bilateral agreements with the individual member states, if a satisfactory agreement could not be reached with the Commission on behalf of the EU as a whole.

Speeches of 3 February 2020

The general position of the two sides became clearer on 3 February, when UK Prime Minister Boris Johnson and the European Commission's Michel Barnier gave speeches, in Greenwich and Brussels respectively.

Boris Johnson said that, while the UK would like a thriving trade and economic relationship with the EU, it is not willing to follow the EU's rules (and would not expect the EU to follow the UK's rules) - an apparent departure from the principles set out in the Political Declaration (although it is non-binding). Hence, while the objective will be a comprehensive fair trade agreement similar to Canada's agreement with the EU, if this is not possible the UK will be prepared to live with just the Withdrawal Agreement and an arrangement like Australia's (which essentially means trading on WTO terms). He added that he hopes that an agreement on aviation can be reached.

Michel Barnier, on the other hand, while holding out an ambitious trade deal, made it clear that this was subject to an agreement being reached on fishing, and the familiar mantras of level playing field, integrity of the single market and customs union, indivisibility of the four freedoms and the EU Court of Justice as the final arbiter.

Michel Barnier's speech was occasioned by the delivery of the Commission's recommendation to the Council to open negotiations with the UK, accompanied by proposals for negotiating directives. As regards aviation, these state the objective of ensuring "a reciprocal, sustainable and balanced opening of markets while preserving the internal market for air transport services", and "encompassing on a reciprocal basis certain traffic rights to ensure continued connectivity. However, the United Kingdom, as a non-member of the Union, cannot have the same rights and enjoy the same benefits as a member. Elements included in the Fifth Freedom of the Air may be considered if, taking into account the geographical proximity of the United Kingdom, they are balanced with corresponding obligations and in the interest of the Union".

Prospects

The stage therefore seems to be set for a negotiation in which the two sides have fundamentally different approaches and outlooks, with the Commission maintaining its rigid dogmatic position, and the UK unwilling to be subjected to rules and constraints which do not apply to other independent third country trade partners of the EU.

As far as aviation is concerned, the Commission's position does not look very constructive at the moment, but it is still early days, and pressure from the Member States may result in a more co-operative approach. If it does not, then it may be necessary for solutions to be found bilaterally in 2021.

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Overview of the Latin America Aviation Seminar, Madrid – 20 November 2019

Clyde & Co LLP held its second Latin America Aviation Seminar at the Lazaro Galdiano Museum in Madrid on 20 November 2019, comprising panelists from our Brazil, Mexico, Venezuela, Miami, London and Madrid offices and aimed towards Spanish aviation insurance clients. The afternoon session afforded an opportunity to showcase Clyde & Co LLP's broad expertise in the region and to update clients on topical issues affecting the Brazilian, Colombian, Mexican and Venezuelan aviation markets. Additionally, a practical example of a major aviation accident in the region addressed the peculiarities of each jurisdiction and how these may interplay and amplify the desire to commence litigation in the US.

Brazil

Peter Macara from the Clyde & Co Rio office brought light to the ever complex economic and legal landscape in Brazil. Since 2014 fewer Brazilians have travelled abroad, deterred by the weak currency. This has led to airlines cutting capacity, insolvencies and from an insurance perspective fewer claims and lower judgments/settlements/reserves in USD/EUR terms. There are however moderate signs of recovery, with new routes in the domestic and international markets and the removal of ownership/control restrictions brought about by Law 13.842 of 17/06/19 likely to lead to new commercial arrangements.

Brazil continues to be most litigious in the region and legal outcomes as unpredictable as ever, with slow and bureaucratic procedures particularly in the North and Northeast of the country. A nationwide network of small claims courts (even including representative offices within Brazil's major airports) allows aggrieved consumers/passengers to file suit in their place of residence, regardless of whether the defendant is based there. Like other industries, airlines operating in and to Brazil have been avalanched with relatively low value claims in relation to almost every aspect of an airline's work. Other complexities involve the application of monetary correction and accrued combined interest of 18% per annum plus lawyer success fees (*sucumbência*) of 10-20% on the final amount which can often lead to reluctance to settle and the inflation of the value of judgments.

The Supreme Federal Court ("**STF**") test case decision of November 2017 was discussed, which has led to the Brazilian courts applying the 2 year limitation period and the Art 22 limit of liability in baggage claims more regularly. Nevertheless, moral damages are still usually awarded in addition to the limit of 1,131SDR, at the judge's discretion depending on the perceived severity of the event. As regards cargo, the decisions have generally been favorable and the Article 22(3) limit of liability has been more regularly applied.

Venezuela

Rodolfo Ruiz from Clyde & Co's Caracas office discussed Venezuela's economic crisis which has in turn generated a humanitarian crisis and a forced migration of over 4 million Venezuelans, according to UN data.

The official currency, the Bolivar, depreciated more than 90% last year, while hyperinflation in the first nine months of 2019 clocked in at 4,680%, according to the central bank. This has led to the factual "dollarisation" of the economy in an effort to ease the effects of hyperinflation.

For more than a decade, the United States has employed sanctions as a response to Venezuela's political and economic crisis, with the Trump administration widening sanctions against Venezuela's state oil company, *Petróleos de Venezuela, S.A.*, government and central bank.

On 15 May 2019 the Department of Transport prohibited transport between the U.S. and any Venezuelan Airport. On August 5, 2019, President Trump issued Executive Order (“**E.O.**”) 13884, blocking (freezing) the property and interests of the government in the U.S. and within the control of U.S. persons. The order also prohibits U.S. persons from engaging in transactions with the Venezuelan government unless authorised by the Office of Foreign Assets Control (“**OFAC**”). E.O. 13884 also authorised financial sanctions and visa restrictions on non-U.S. persons that assist or support the government.

Sanctions have caused difficulties in the placement of aviation risks in the international insurance market and complexities in payment of premiums and claims. Sanctions have also caused a decline in Venezuela’s oil production and thus a shortage of fuel for general aviation operations. This in turn is leading to the degradation of piloting expertise and a new black market in fuel consumption.

Colombia

Sonia Lopez from our London office provided an update of issues affecting the Colombian aviation and insurance market. Colombia is in an upward economic trend with GDP having grown 2.8% in the first trimester of 2019. However, Colombia’s President, Iván Duque, faces a number of social-political issues caused by low approval ratings, worsening security in rural areas due to violence by armed groups and the Venezuelan migratory crisis, which has led to over 1.4 million Venezuelans entering Colombia. The second largest aviation market in Latin America has grown from 19.9 million to 33.5 million passengers in the last 10 years, driven by a new middle class and the reduction of prices caused by new entrants into the aviation market such as Viva Air, Easyfly, Jetblue, Spirit, Wingo, JetSMART and Sarpa. There is still a need to increase capacity at Bogotá’s main airport, El Dorado and to loosen the ties of regulatory bureaucracy which hinders airline operations and growth. A summary of the legal process in Colombia was provided and the system of quantification of damages for passenger death and injury. While the value of claims in Colombia can be comparatively moderate considering damages levels in other countries in the region, corruption, congestion and judicial strikes in the court system still disadvantage the effective handling of claims.

Mexico

Arturo Arista from our Mexico office discussed the national debate surrounding the future of Mexico City International Airport (“**AICM**”) which is owned by Grupo Aeroportuario de la Ciudad de México, a government-owned corporation. The airport has been marred by a lack of capacity due to restrictions on expansion, since it is located in a densely populated area. The lack of capacity caused by its two runways has led to restrictions to private aircraft which must use alternate airports in Toluca, Cuernavaca or Puebla. On 2 September 2014, the then Mexican president, Enrique Peña Nieto, announced the construction of a new Mexico City international airport (“**NAIM**”) in Texcoco to be hailed as a national symbol and to replace AICM. It was to have a single terminal of 6,000,000 square feet (560,000 m²) and six runways.

Following presidential elections on 1 July 2018, newly elected President Andres Manuel Lopez Obrador, who had firmly opposed the project during the presidential campaign, decided to hold a non-binding referendum on the issue. Voters were asked to choose whether the incoming government should finish the new USD 14.5bn New Mexico International Airport (“**NAIM**”) project or upgrade a military airbase to be used in addition to the current airport. Sixty-nine percent of those who voted rejected the NAIM option. However, turnout was extremely low. At that point, the construction of Texcoco was already well underway, with construction having started in 2015 under Nieto. Some USD 5 billion had been poured into the New International Airport in Texcoco. The estimate to finish it was another USD 8.3 billion or so — and scrapping it will end up costing more than USD 9 billion.

The session ended with Diego Olmedo from Clyde & Co LLP’s Madrid office presenting a regional major loss scenario with participation from our respective regional offices, highlighting the inter-connectivity of the Spanish and Latin American desks. Clayton Thornton from Clyde & Co LLP’s Miami office also discussed the various ways in which regionally based claims may ultimately be brought in the US, with emphasis on issues relating to US class actions, personal jurisdiction and forum non conveniens.

For any further information regarding Clyde & Co LLP's capability in the Spanish and Latin American region or the topics described above, please contact **Peter Macara** or **Sonia Lopez** in our London office or **Enrique Navarro** in our Madrid office.



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Partner Nick Elwell-Sutton from the Clyde & Co employment, pensions and immigration department authored the UK chapter of the EU Commission research report into the application of the EU Posted Workers Directive as it applies to aircrew.

The report was commissioned by the European social partners of the aviation sector being the European Cockpit Association ("**ECA**"), European Regions Airline Association ("**ERA**") and European Transport Workers' Federation ("**ETF**"). The report covers the local requirements when an EU based aircrew member is temporarily posted to work in another EU member state. For cross-border carriers with posted aircrew within the EU the report is an insightful guide to current practice and the aviation sector specific requirements.

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