

Aviation and aerospace

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Newsletter

February 2016

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Diary dates

The 13th Beaumont International Aviation Conference

22-23 June 2016

Grange St. Paul's Hotel
10 Godliman Street, London

Our 2016 programme highlights will include topics such as:

– The aviation insurance market in 2016
– General aviation
– Geographical round ups
– Drones update
– Employment/social media

For further information or registration details please email:
Elaine Middleton at events.aviation@clydeco.com

We are pleased to be sponsoring the following industry events:

IATA Legal Symposium

17-19 February 2016

Barcelona, Spain

Peter Macara
Speaker, Break-out panel/"Latin America: Growth despite uncertainty"

Mark Bisset
Moderator/"Contemporary trends in Aircraft Finance and Leasing"

Andrew Harakas
Speaker, Plenary Panel/"Navigating an effective criminal justice response to cases of unlawful interference"

Tom van der Wijngaart
Moderator, Break-out panel/"A "post-mortem" for proportionality in consumer protection"

RAAKS – Russian Association of Aviation Insurers International Aviation Conference, "Aviation and space insurance in Russia"

25 February 2016

The President Hotel, Moscow, Russia

David Willcox
Speaker



The European Commission's aviation package 2015

Introduction

Whilst Europe's share in worldwide scheduled passenger traffic is currently estimated at 27%, this may change as rapid economic growth in Asia and the rise of strong competitors in Turkey, the Middle East and China shifts the centre of the air transport industry to the East.

In this context, the European Commission has therefore re-examined the competitiveness of the EU aviation market and carried out a public consultation between March and June 2015 on an "Aviation package for improving the competitiveness of the EU Aviation sector". Based on stakeholder inputs, the Commission has identified the need to focus on the following areas:

1. Access to growth markets
2. Capacity restrictions
3. Safety and security
4. Employment issues
5. Passenger rights
6. Innovation and digital technologies
7. Environmental aspects

As a result, on 7 December 2015, the European Commission adopted a package of measures, consisting of the following:

- The Aviation Strategy for Europe (Communication)
- The European Aviation Safety Programme (EASP)
- A proposal for a Regulation replacing Regulation 216/2008 (EASA Basic Regulation)
- A series of requests to negotiate EU-level comprehensive aviation agreements with third countries

This article will provide a brief summary of the wide-ranging package and the reasons behind the Commission's proposals, and will conclude with the reaction from the main EU airline bodies.

The Commission's package

1. Access to growth markets

Whilst EU carriers enjoy unlimited traffic rights on intra-EU routes and there is no limit on investment by EU nationals in EU carriers, European airlines face market access restrictions when trying to enter third-country markets. EU carriers are also facing substantial competition from the rapidly growing Middle Eastern and Asian carriers. For the EU aviation industry to remain competitive, market access must be based on a regulatory framework that prevents distortion of competition.

To tackle these issues, the Commission has requested mandates from the Council to negotiate comprehensive air transport agreement with the following countries/regions: China, ASEAN, Turkey, Saudi Arabia, Bahrain, UAE, Kuwait, Qatar, Oman, Mexico and Armenia. These are expected to include fair competition provisions and measures to address unfair practices from third countries and third country carriers. The Commission is also considering legislative action in 2016 to address such practices. Additionally, it intends to launch new aviation dialogues with key aviation partners such as India.

The Commission has also recommended that the EU negotiates further bilateral aviation safety agreements with important aeronautical manufacturing nations such as China and Japan to ensure the mutual recognition of safety certification standards and thus reduce the cost of exporting aircraft to these countries.

The Commission is also concerned that current regulatory restrictions on ownership and control of carriers discourage investment in EU carriers by non-EU nationals. The Commission intends to examine the relevance of ownership and control requirements under Regulation 1008/2008 (whereby EU Member States or their nationals must own

more than 50% of the undertaking and effectively control it) and pursue the relaxation of these rules. As a first step, the Commission intends to publish interpretative guidelines on the application of Regulation 1008/2008.

2. Capacity restrictions

It has been noted that capacity and efficiency constraints, both on the ground and in the air, are seriously impacting the growth of the aviation sector. Many European airports are severely congested, whereas others are under-used, indicating a need to enhance use of existing capacity and plan expansion to meet future needs. Inefficient use of airspace is a particular concern, which is why it is necessary to speed up the implementation of the Single European Sky (SES) framework, aimed at optimising the European air traffic management network. Whilst connectivity has not generally been identified as an issue, it is evident that Regulation 1008/2008 rules on Public Service Obligations are plugging the gap where the market is unable to deliver an acceptable level of air transport services.

As a result, the Commission has urged the European Parliament and the Council to swiftly adopt the Single European Sky (SES2+) proposals and focus on the full implementation of SES. To address the capacity restraints on the ground and connectivity issues, the Commission will monitor trends of intra-EU and extra-EU connectivity to identify any corrective action that may need to be taken, publish interpretative guidelines explaining the rules on Public Service Obligations contained in Regulation 1008/2008, and ascertain whether the Airport Charges Directive needs to be reviewed.

3. Safety and security

Specific action

The growth of the European aviation market demands a system better equipped to identify and resolve safety risks. The Commission intends to take both general measures to revise the EASA Basic Regulation (described in further detail below) and specific measures to review existing legislation on the imposition of operating bans (Regulation 2111/2005) and on aviation accident investigation (Regulation 996/2010). Conscious of the high threat of terrorism, the Commission seeks to ensure a risk and performance based approach that would alleviate the burden of security checks on passengers through use of new technology, the establishment of security controls at the point of origin and removal of further controls at transfer points, and the design of systems combatting cyber risks.

Revision of EASA basic regulation

Whilst the Commission has noted that the present European aviation safety system has been effective in ensuring a high level of safety, it also realised the need to adapt the system to the sustained growth of air transport. The current regulatory framework is regarded as burdensome, too costly and outdated. There are also significant differences in capabilities of Member States to effectively implement the aviation safety legislation. All of this causes inefficient use of resources, and gaps and inconsistencies in the regulatory system, affecting all market particpants and the travelling public.

The revision of the EASA Basic Regulation seeks to improve the performance of the European aviation system with regard to safety, security, competitiveness and environmental protection. The initiative aims to ensure regulation proportionate to the risks involved; integration and effective oversight of new market developments; a cooperative safety management process between the EU and Member States to jointly identify and mitigate risks; consistency; and the pooling and sharing of resources between Member States and EASA.

Focussing on these objectives, the revision addresses seven key areas:

- Performance-based and integrated approach to safety
- Modernisation of EASA's safety remit
- Extension of EASA's remit beyond safety
- Optimisation of the use of available resources
- Establishment of adequate and stable funding
- Further integration of aviation aspects
- Regulation beyond EASA's current remit

The European aviation safety programme

The European Aviation Safety Programme (EASP) was first adopted in 2011 and functionally corresponds at EU level to the State Safety Programme as described in Annex 19 to the Chicago Convention. As EU Member States have transferred certain responsibilities under the Chicago Convention to the EU level, the EASP helps clarify where the various responsibilities for safety lie. It has thus been designed not to replace, but complement national equivalents.

The EASP is composed of four parts:

- **Part 1** contains an overview of the European aviation legislative framework and the distribution of competencies between Member States and the EU
- **Part 2** explains the safety management requirements and how the safety risks are collectively assessed and mitigated
- **Part 3** addresses the European dimension of safety assurance and how oversight is performed with the EU and its Member States
- **Part 4** details the European activities in the area of safety promotion including training and international cooperation

The EASP is composed of an integrated set of rules, activities and processes aimed at developing an integrated, evidence-based approach to the prevention of accidents and to the safety of aviation activities in the EU. Regulation 376/2014 on the analysis of occurrences in civil aviation provides the regulatory framework. The EASP is complemented by the European Plan for Aviation Safety that identifies specific risks currently affecting the EU aviation safety system and proposes mitigation measures.

To ensure it remains efficient in the prevention of accidents and the mitigation of risks, the EASP requires regular revision. This second edition includes new rules on Flight Time Limitations, on Third-Country Operators, on Flight Operations, rules in the area of Air Traffic Management, and the regulation of Aerodromes, as well as new rules on the reporting, analysis and follow-up of occurrences.

4. Employment issues

The Commission appreciates the importance of maintaining leadership in aviation through a highly educated and experienced workforce. New skills and competencies such as drone specialists and flight data analysts will have to be developed and this will require partnerships between research, universities and industry. The Commission has also noted the emergence of new business and employment models such as the multiplication of operational bases, the recruitment of air crews through agencies, and pay-to-fly schemes for flight crew.

To address these issues, the Commission aims to support social dialogue through the Sectoral Social Dialogue Committee on Civil Aviation and consider the need for further clarification of applicable law and competent courts vis-à-vis employment contracts of mobile workers in aviation. It also intends to publish a practice guide on applicable labour law and the competent court, and ensure a high level of protection in the labour and social domain when negotiating comprehensive air transport agreements with third countries.

5. Passenger rights

The Commission has already proposed the revision of Regulation 261/2004 on air passenger rights in case of denied boarding, long delays and cancellations, and now urges the Council to swiftly adopt the legislative proposal. In the meantime, the Commission wishes to ensure a strict application by the National Enforcement Bodies of the EU air passenger rights established by Regulation 261/2004 as interpreted by the Court of Justice of the EU. In this context, the Commission will adopt interpretative guidelines in order to provide guidance to citizens and airlines on the current state of the law, relevant until amendments become applicable.

6. Innovation and digital technologies

The Commission realises that innovation is at the core of aviation and appreciates the need to maintain the competitiveness of the aeronautical industry, one of the top five advanced technology sectors in Europe. Aircraft manufacturers undertake huge efforts to improve the environmental footprint of aviation, develop advanced manufacturing processes and use new materials in aircraft construction. For this reason, EASA must be in a position to prepare and conduct certification in a timely and efficient manner.

Drones are a technology that is already bringing about radical changes, by creating opportunities for new services and applications, as well as new challenges. Given the broad variety of types of drones being used under very differing operation conditions, a risk-based framework needs to be put in place rapidly. This framework will ensure their safe use in civil airspace and create legal certainty for the industry.

To address these issues, the Commission proposes to include rules on drone operations in the revision of Regulation 216/2008, and will task EASA with preparing more detailed rules which will allow the drone operations and the development of industry standards.

7. Environmental aspects

The Commission notes that high environmental standards have to be preserved and enhanced over time in order to ensure that aviation develops in a sustainable manner. The EU has, through Directive 2003/87, put in place an emissions trading scheme addressing greenhouse gas emissions. The EU is now determined to develop, within ICAO, a global Market Based Mechanism (MBM) to achieve carbon neutral growth from 2020 and intends to reach out to other regions of the world at the 2016 ICAO Assembly. Support of current research on biofuels and other 'green' technologies should help further reduce the environmental impact of EU aviation. The SES ATM Research project will contribute to fuel savings and thereby the reduction of carbon dioxide emissions; measures to reduce nitrogen oxide emissions will be further pursued.

Noise emissions are also a very topical issue, as aircraft noise directly affects some 4 million citizens in Europe. In view thereof, a Regulation on managing noise-related operating restrictions will be applied throughout Europe from June 2016 and a new international noise standard is expected to be applied to new types of large aircraft from 2017.

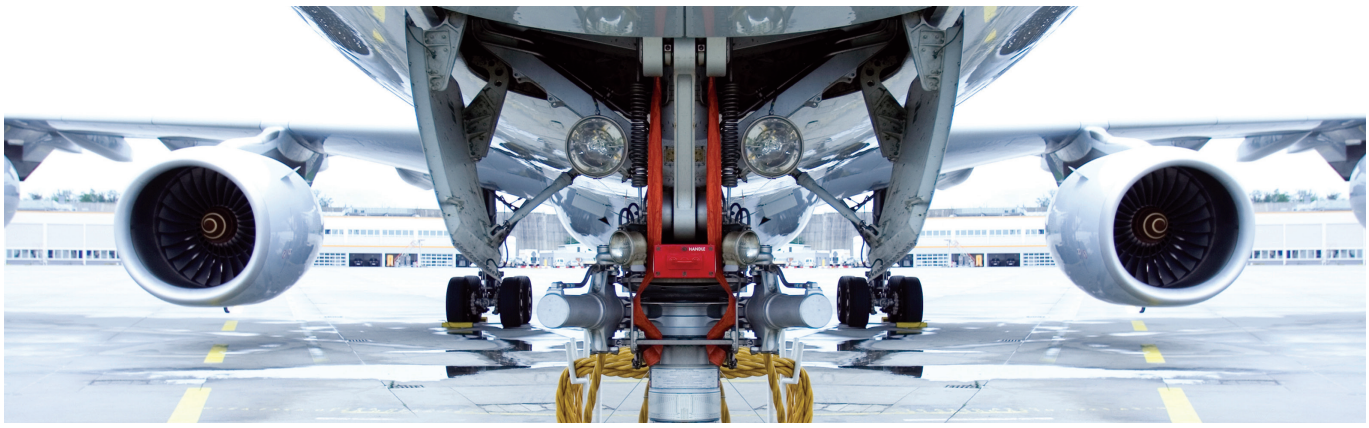
Paris UN climate change conference December 2015

In light of the above, it is worth adding that the final Paris Agreement at UNFCCC COP21 (12 December 2015) does not mention emissions from international transport (aviation and shipping) at all. The deletion of the draft provisions relating to international transport came during the middle of week two of the talks. In respect of aviation, all eyes will therefore turn to the ICAO Assembly in Montreal from 27 September – 7 October 2016 and the proposals with regards to a global MBM agreement. Aviation was addressed in Paris at the Subsidiary Body on Scientific and Technological Advice, where ICAO gave its annual report of work undertaken and parties provided feedback. The G7+CHINA bloc made a strong statement reiterating support for the 1997 Kyoto Protocol position that reduction of greenhouse gas emissions from international aviation should be achieved by "working through the ICAO": "the Group reiterates the importance of supporting multilateral solutions when addressing the issue of emissions from the international maritime and civil aviation sectors working through the International Maritime Organization (IMO) and International Civil Aviation Organization (ICAO), respectively, while taking into account the principles and provisions of the Convention and not on the basis of unilateral measures…"

Industry reception of the commission package

Following the official announcement of the Commission's package on 7 December 2015, the European airspace user associations (AEA, EBAA, EEA, ELFAA, ERA and IACA) issued a joint statement welcoming the Commission's initiative to optimise regulation but at the same time stressing that there is an urgent need for the Commission to now propose more specific and far-reaching remedies. The associations note that whilst the strategy review correctly identifies some of the significant challenges that Europe's aviation sector is currently facing in terms of the cost and provision of infrastructure (both on the ground and in the air), the integrity of the market, inefficiencies in the value chain and a burdensome regulatory framework (e.g. national and local aviation taxes, the intra-EU ETS), it stops short of proposing concrete measures to address these. The associations thus aim to further engage with the Commission and the European decision makers to request immediate actions given the importance of ensuring that aviation becomes a priority sector in Europe.

For further information, please contact **Mark Bisset** or **Lazar Vrbaski**.



Regulation (EC) 261/2004 and 'extraordinary circumstances' - *van der Lans v KLM*

In its judgment delivered on 17 September 2015 in *van der Lans v KLM*, the Court of Justice of the EU held that the 'extraordinary circumstances' defence (which relieves a carrier of its obligation to pay compensation in respect of a cancelled or delayed flight under Regulation (EC) 261/2004) does not apply in the case of an unexpected technical problem which is not attributable to poor maintenance and was not discovered during routine maintenance.

The facts

Ms van der Lans held a ticket for carriage with KLM from Quito (Ecuador) to Amsterdam (Netherlands). During pushback it was discovered that one of the aircraft's engines would not start due to a lack of fuel feed. KLM's investigations revealed that the issue was caused by a problem with two separate engine components. The aircraft did not depart until the following day, with Ms van der Lans suffering a twenty-nine hour delay on arrival as a result.

Ms van der Lans brought a claim against KLM before the District Court in Amsterdam in respect of the flight delay, claiming compensation of EUR 600 under Regulation (EC) 261/2004 (the 'Regulation'). KLM sought to defend that claim on an 'extraordinary circumstances' basis, per Article 5(3) of the Regulation. Its arguments included that the defective components were within their average lifespan and that they had been inspected during the aircraft's last 'A' check. The District Court chose to refer a number of questions to the Court of Justice of the European Union ('CJEU') for consideration, essentially focussing on the status of technical issues as 'extraordinary circumstances'. The CJEU reformulated the Court's specific questions" as follows:

> … whether Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem, such as that at issue in the main proceedings, which occurred unexpectedly, which is not attributable to defective maintenance and which was not detected during regular tests, falls within the definition of 'extraordinary circumstances' within the meaning of that provision, and if so, what the reasonable measures are that the air carrier must take to deal with them.

It appears that KLM in fact settled Ms van der Lans' claim in advance of judgment being handed down, and accordingly requested the CJEU to discontinue its consideration of the questions referred. However, the CJEU decided that, as it had already done most of its work on the case, and in the interest of legal certainty, it would proceed to judgment in any case.

The judgment

Article 5(3) of the Regulation relieves the carrier from its obligation to pay compensation in respect of a cancelled or delayed flight "if it can prove that the cancellation [or delay] is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". In its judgment in *Wallentin-Hermann v. Alitalia* [2008] the CJEU confirmed that technical issues are only 'extraordinary' if they are not inherent in the normal exercise of the activity of the air carrier and are beyond the actual control of that carrier on account of their nature or origin.

As mentioned above, the CJEU held that technical problems of the type suffered by KLM do not constitute extraordinary circumstances, even if they arise unexpectedly and do not result from poor maintenance or are not discovered during maintenance. It reached this conclusion on the basis that such unexpected technical problems are inherent in the normal exercise of the carrier's activity, and that the prevention of such technical problems, or the repairs occasioned by them, are not beyond the actual control of the carrier, since it is required to ensure the maintenance and proper functioning of the aircraft. The CJEU noted that the breakdown suffered by KLM:

remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft will last forever.

The CJEU confirmed that certain technical problems may constitute extraordinary circumstances, but only those arising from hidden manufacturing defects or acts of sabotage or terrorism.

In the usual manner the CJEU confirmed that a carrier's obligations to passengers are without prejudice to its right to seek compensation from any third party responsible for the problem, such as a manufacturer which has supplied a faulty component.

Comment

The CJEU's judgment is unsurprising given the restrictive approach to the availability of the defence in the event of technical problems it took in its Wallentin-Hermann judgment, and the test of inherency in the normal exercise of the carrier's activity that it set forward. However, it goes further by making it clear that the two examples given in that judgment of technical problems which could give rise to the defence were not non-exclusive (the possibility of which was left open) but rather exclusive. Consequently, according to the CJEU, the defence will only be available in the event of technical problems where they have been caused by a hidden manufacturing defect or sabotage or terrorism – clearly not just extraordinary, but very restricted circumstances.

On 28 September 2015 the UK CAA issued practical guidance to carriers in respect of van der Lans, noting that the failure of components whilst under warranty and/or or at an earlier stage in their life than anticipated by programmed maintenance schedules fall outside the scope of the 'extraordinary circumstances' defence. The CAA further referred to the CJEU's explicit recognition that 'safety-critical defects identified by the manufacturer or other competent authority which ground an aircraft fleet would fall within the exemption.' It provided further clarification as follows:

Falling within the definition	Falling outside the definition
When an Airworthiness Directive (relating to a hidden manufacturing defect, design or maintenance deficiency) has been issued that grounds an aircraft fleet in a short space of time and required immediate corrective action before an aircraft can be flown.	Premature failures of equipment early in the 'bathtub' component life curve.
	Failures of components when an aircraft is under warranty.
	An Airworthiness Directive that has a compliance time that could reasonably be expected to be planned and managed by the organisation, as part of its normal Part M activity.

That the CJEU's judgment makes the carrier liable for events which are unforeseeable and hence unavoidable may seem unreasonably hard on carriers, but this is consistent with the overwhelming priority that the CJEU accords to consumer protection, and the logical consequence of the application of the inherency test. The problem arises from the existence of this test, first put forward in Wallentin-Hermann and applied precedentially ever since then, without further discussion or room for any doubt, and the fact that there is almost no limit to what a Court may find to be inherent in the normal exercise of an air carrier's activity. The CJEU's finding that the prevention of unexpected technical problems is not beyond the control of the carrier also seems counter-intuitive, and displays a lack of understanding of how the maintenance of aircraft works.

Arguably, the CJEU's very strict way of interpreting the defence is not consistent with the legislative intent behind the Regulation (an important principle for the interpretation of EU law), which suggests that the legislators intended a defence somewhat closer to the normal 'force majeure' defence, but as the CJEU has ignored this on several occasions now such an argument has no realistic possibility of success.

In the case of *Huzar v. Jet2.com* [2014], which dealt with similar facts/questions, the English Court of Appeal came to much the same conclusion as the CJEU in the present case. However, whilst Huzar is only binding on the English Courts, the van der Lans decision has now set a rather unwelcome precedent on an EU-wide basis. That said, many national courts were already adopting a position that technical issues were not 'extraordinary', and as a result the effect of the judgment could be limited in practice.

As was the case in previous judgments such as Wallentin-Hermann, the CJEU raised the possibility of carriers taking recourse action against those who might ultimately be responsible for the technical issue/the failure of a part. However, no consideration was given to the commercial reality that such action will often be impracticable/not economically viable, particularly having regard to the contractual position vis-à-vis manufacturers/MROs, including contractual exclusions for consequential loss.

Recent UK case on 'extraordinary circumstances'

In a judgment delivered on 14 January 2016 in *Evans v Monarch Airlines*, the Reading County Court held that passengers whose flight was delayed by reason of lightning strikes were entitled to compensation under the Regulation. The court held that lightning strikes did not constitute 'extraordinary circumstances' for the purposes of the Regulation, even though they are included in the CAA's list of examples of extraordinary circumstances, on the grounds that they are inherent in the normal exercise of an air carrier's activity.

This is clearly an unwelcome decision for airlines, although coming from a lower level court it has no formal precedential status, and is unsurprising given the CJEU's inherency test and strict application of it in the ***van der Lans*** case.

Proposed revision of the regulation

It will be recalled that recent attempts to revise the Regulation stalled. However, it appears that the Dutch government is intending to use its Presidency of the EU in the first half of 2016 to try to renew attempts at amendment. This may provide an opportunity for carriers to argue for a more understanding approach to technical problems, although the prospects of any amending legislation reducing passengers' rights must be slight.

For further information, please contact **Thomas van der Wijngaart**.



Air carrier liability for the spread of communicable disease

The issue

A passenger on-board an aircraft travelling from Hong Kong to London begins to exhibit worrying symptoms a short time into the flight: fever, sweating, frequent coughing, head and body aches, diarrhoea and nausea. Within a brief period several other passengers begin to exhibit the same symptoms. Cabin crew are strained and passengers are beginning to get worried.

What are an air carrier's responsibilities during a global health emergency; and to what liability could it be exposed?

The outbreak of the Ebola virus in West Africa in 2014 served to place the fear of pandemic at the top of recent world headlines. Among the foremost concerns surrounding the outbreak was the possible spread of the virus through air travel.

However, Ebola is just one of many global public health issues demanding attention from the aviation industry; the continued monitoring of Middle East respiratory syndrome (MERS) and flu virus strains such as H1N1, vigilance to prevent the spread of diseases such as tuberculosis and hepatitis, and threatened use of biological terror agents, among other concerns, combine to make air travel and public health a pressing concern for the broader air transport industry.

Air carriers, specifically, are placed at the centre of these public health issues as a potential vector for the spread of communicable disease. International and national regulatory rules and protocols have been put in place for air carriers, along with strict internal air carrier policies; however, the possibility exists for air carrier liability in this area.

Current regulations

The World Health Organization leads the international effort in determining the level of risk posed by disease; and providing information and issuing regulations to manage spread of disease. National public health authorities implement those regulations and lead national response efforts. International and national aviation authorities work with health authorities to develop guidelines for the aviation industry. Airports and air carriers coordinate with all of the above to meet their obligations as a first line of defence against the spread of communicable disease posing a threat to global health.

World Health Organization (WHO)

In 2005, the WHO issued the second edition of the International Health Regulations (IHR) to regulate and coordinate the global management and control of the international spread of disease; the IHR went into effect in 2007 and establishes comprehensive rules to meet this goal. Among these rules is recognition of the importance points of entry, such as airports, play in controlling the spread of communicable disease. Part IV, Article 20 requires States to designate and certify airports according to strict guidelines based on prevention, detection, response and control of communicable disease. Further, Annex 5 allows for specific emergency measures to be put in place to control vector-borne diseases on aircraft.

International Civil Aviation Organization (ICAO)

Article 14 of the 1944 Convention on International Civil Aviation (the Chicago Convention) requires States "to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable disease as the Contracting States shall from time to time designate".

ICAO works closely with WHO and other international health and aviation bodies to address the spread of communicable disease in aviation. The IHR provide the framework by which ICAO has developed Standards and Recommended Practices (SARPs) and supporting guidelines to ensure there is coordinated management and response across their specialised disciplines.

The aviation sector's primary role is to reduce the likelihood of individuals who have contracted a communicable disease from travelling outside the area of an outbreak. Generally speaking, this will include traveller screening procedures and medical assessments performed at airports.

wHowever, air carriers also play a large role and there are ICAO SARPs and guidelines specific to areas of air carrier preparedness, including communications, response to in-flight illness, and aircraft cleaning.

International Air Transport Association (IATA)

IATA coordinates with WHO and ICAO to ensure that efforts and guidelines aimed at managing the spread of communicable disease and minimizing the effects on any affected countries and the air transport industry generally are adopted. IATA provides information to air carriers on best practices and their responsibilities, including development of an Emergency Response Plan and Action Checklist in line with WHO's recommendations for use by air carriers in the event of a public health risk.

National legislation

The United States, United Kingdom and most other nations have in place national public health legislation in line with the IHR and the recommendations of national public health authorities, including the Center for Disease Control in the US and Department of Health in the UK. The UK has proposed legislation, the Health Protection (Ships and Aircraft) Regulations, which would specifically address the spread of communicable disease on aircraft.

Air carrier procedures

Under the IHR and ICAO guidelines, there are general areas of preparedness which air carriers are recommended to have in place, and which are required in more detail by national legislation.

Communications

Air carriers should have a central contact for policy and operations, along with a designated position with the responsibility for implementing plans and capable of responding rapidly.

When the aircraft is at the airport: pre- and post-flight

Airports have primary responsibility for screening and managing passengers. However, air carriers should have general procedures for their ground-based passenger agents who may encounter a suspected instance of communicable disease. Further, air carriers should coordinate and cooperate with airports and local public health authorities.

In-flight illness

Perhaps the most vital area, and the one which may most directly lead to potential liability, is the occurrence of in-flight illness. Air carriers should put in place a system by which cabin crew are able to identify suspected cases of communicable disease and procedures for communicating with air traffic control in the event a communicable disease is suspected to be on board the aircraft.

Most importantly in terms of measures to prevent the further spread of communicable disease, air carriers should have a system for managing travellers suspected of having a communicable disease; this includes obtaining advice from and communicating with medical ground support, physical relocation and possible isolation of the traveller on the aircraft, proper medical supplies, clean up of areas occupied by the traveller, proper protective equipment, disposal of contaminated items, and personal hygiene measures.

Aircraft maintenance

Air carriers should have in place procedures for maintenance crew in respect of the aircraft ventilation systems. Adequate precautions should be established for the removal and disposal of air filters, frequent and proper filter replacement, and personal protective equipment and hygiene measures. There should also be procedures in place for the proper venting of waste tanks and removal of bird debris in the event of a bird strike.

Aircraft cleaning

The air carrier crew responsible for cleaning an aircraft following the suspected transport of a traveller with a communicable disease should be subject to robust response and protective procedures. The air carrier should establish these procedures in line with international and national public health authorities, including use of proper personal protective gear, personal hygiene measures, identification of all surfaces to be cleaned, use of proper cleaning products, and disposal of any potentially contaminated items.

Cargo and baggage handling

Air carriers should have policies and procedures in place to ensure cargo and baggage handlers practice proper personal hygiene as well as make available any other measures that may be deemed necessary (i.e. personal protective gear). Air carriers should also cooperate with public health authorities in respect of cargo and baggage inspection.

Miscellaneous

In the event of a communicable disease emergency, air carriers may be forced to operate with significantly reduced staff. If this is the case, air carriers should have protocols in place to prevent disruption to their services.

Potential air carrier liability

There is a very low risk of transmitting a communicable disease on board an aircraft. Cabin air quality is carefully controlled; since 1963, all commercial aircraft have employed the "bleed air" system in which compressed air is drawn through the engines and into the cabin. This recirculated air passes through HEPA (high-efficiency particulate air) filters which trap bacteria and viruses, and which are also employed in hospital operating rooms and intensive care units. Further, modern advances are being adopted, such as in the recently-introduced Boeing 787 Dreamliner in which fresh cabin air is pumped via air scoops on the side of the fuselage which then passes through HEPA filters and an additional gaseous filtration system.

However, there have been incidents of aircraft acting as a vector for the spread of communicable disease. In 1979, an aircraft was delayed on the ground for three hours; within 72 hours, 72 per cent of the passengers had become ill with influenza. The aircraft ventilation system was inoperative during the delay and was identified as the cause of the high contamination rate. In 2002, 20 people on an international flight were infected by a single severe acute respiratory syndrome (SARS) patient, some as far as seven rows from the infected passenger. There have also been several incidents of tuberculosis being spread aboard an aircraft.

Communicable disease may be transmitted between passengers as the result of direct contact or contact with parts of the aircraft which came into contact with an infected passenger. Highly contagious airborne diseases, such as influenza, are more likely to spread where an aircraft's ventilation system is not operating or is malfunctioning.

These instances can give rise to potential and in some cases actual liability exposure for air carriers.

Potential liability

There are a number of risk factors that could result in potential liability for air carriers. These could include, but are not limited to, a carrier's suspecting that a passenger is ill at check-in but taking no steps to medically assess the passenger's ability to fly, a passenger falling ill in-flight but cabin crew failing to isolate or otherwise take responsive measures, an aircraft crew failing to communicate with ground medical staff during an in-flight illness, an air carrier failing to notify and inform other passengers following a flight with a passenger subsequently determined to have flown while infected with a communicable disease, a carrier failing adequately to clean an aircraft, and, perhaps most importantly, passengers falling ill as a result of inoperable or defective aircraft equipment or systems.

However, there are two significant obstacles a passenger must overcome in order to establish liability, in that the passenger must show: (1) that the communicable disease was contracted during the carriage by air; and (2) that the transmission of the communicable disease constituted an "accident" within the meaning of Article 17 of the Montreal Convention.

The first hurdle requires a passenger to establish firmly that he contracted the disease during the period encompassed by the contract of carriage; that is, onboard the aircraft or during embarkation or disembarkation. This is a difficult evidentiary burden as contraction of a disease is not a readily obvious event; an air carrier could argue that the passenger contracted the disease at his hotel, during transport to or from the airport, at the airport or at any one of numerous places the passenger will have been before and after his carriage by air.

The second hurdle requires a more extensive examination.

Montreal Convention

Contracts of carriage by air, and any claims relating to them, are governed exclusively by the Montreal Convention 1999. Article 17 of the Convention provides that an air 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". Therefore, there must be an "accident" before there can be liability, although the word "accident" is not defined by the Convention.

In *Air France v Saks*, the United States Supreme Court defined "accident" for the purposes of the Warsaw Convention as an "unexpected or unusual event or happening that is external to the passenger". Injuries which are the passenger's own "internal reaction to the usual, normal and expected operation of the aircraft" are not caused by an "accident" and therefore do not give rise to liability. The finding in *Air France v Saks* has been adopted or applied in most relevant jurisdictions, and applies equally in the context of the Montreal Convention.

In light of the above, if a communicable disease is spread on board an aircraft as the result of an unexpected or unusual event external to a passenger, an air carrier may find itself liable to passengers for the contraction of that disease. This may occur in several ways. The risk factors listed in the previous section could potentially be found by a court to constitute accidents if they occur in contravention of applicable regulations or air carrier systems.

Failure to operate necessary equipment or malfunctions or defects in aircraft equipment or systems may amount to an accident. This could include not turning on the air ventilation system while the aircraft is grounded during a delay, malfunctions or defects in the aircraft air ventilation or waste disposal systems, insufficient medical supplies or treatment, or inadequate communication with ground medical staff and air traffic control while on board during an in-flight illness.

In the US case of *Dias v Transbrasil Air*, it was asserted that a passenger contracted pneumonia (from which she subsequently died) as a result of the poor quality of the aircraft cabin air during a flight from Brazil to New York City. The court held that the "presence of air of such poor quality that it causes a passenger to develop a fatal respiratory disease" is an accident under the Convention.

Regulatory liability

Failure properly to follow the protocols put in place by the international and national aviation and public health authorities may present issues of potential regulatory liability.

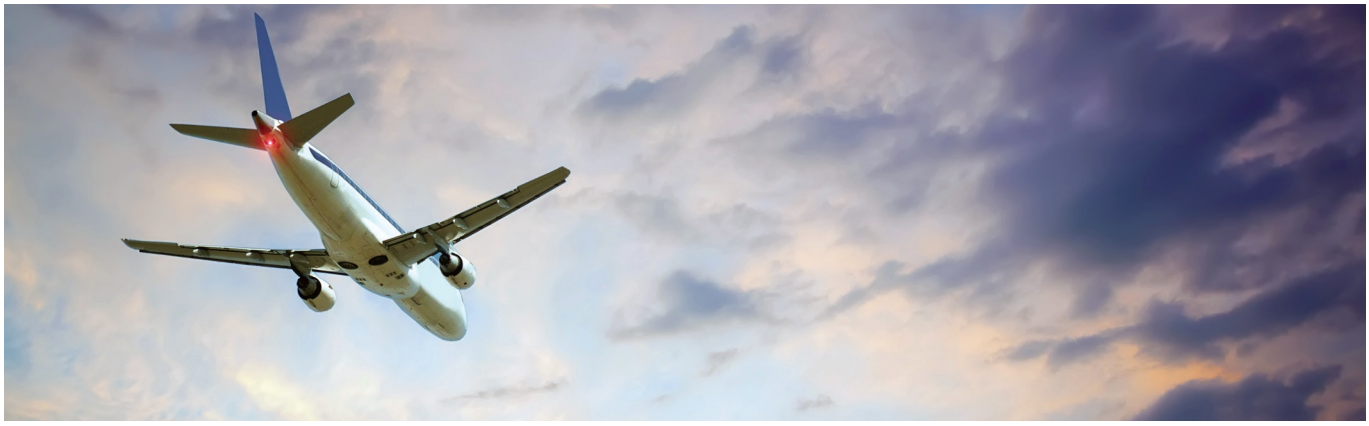
In the United States, there are penalties for certain violations of public health regulations, including failure to notify authorities of any death or seriously ill person on board an aircraft.

The proposed Health Protection (Ships and Aircraft) Regulations, which seek to amend the Public Health (Control of Disease) Act 1984 in the UK, would contain provisions making it a criminal offence to provide false or misleading information or otherwise obstruct public health officials acting under the regulations. There is no clear definition of what specific actions would lead to an offence under these proposed regulations, but clearly an air carrier would have to cooperate fully with public health officials.

Future issues and potential future regulation

It is very likely that current regulations will evolve in response to changing public health threats, and air carriers will have to respond in turn. As worldwide air travel continues to expand, in terms of both total passenger numbers and the geographic locations served, the global threat of the spread of communicable disease by air transport increases. Air carriers must adopt procedures aligned with international and national regulations to respond to this threat, and be aware of the potential liabilities they may face.

For further information, please contact **Dylan Jones**.



EU General Court annuls EC air cargo cartel decision

The EU General Court has annulled the Commission's 2010 decision which found a cartel in the air cargo market and imposed fines of EUR 799 million on 11 airlines.

The annulment is on procedural grounds of failure to state reasons. The Court found inconsistency in the Commission decision (which has not been published yet). On the one hand, in the grounds for its decision the Commission refers to a single continuous infringement committed by all the addressees for which they are all jointly and severally liable - irrespective of whether the airlines operated on the routes concerned. However, the articles of the decision (operative parts)‚ refer to four infringements relating to different periods and different routes and committed by different carriers, with liability attributed only to the carriers which participated in the unlawful conduct referred to in those articles.

The Court found that it was unclear and that the Commission had not examined the extent to which evidence set out in the grounds was liable to establish the existence of the separate infringements set out in the operative parts.

The European Commission has the possibility of appealing against the decision – on points of law only – to the Court of Justice, within two months of the General Court's decision (mid-February) or, perhaps more likely, to adopt a fully reasoned decision if it considers this appropriate. It is too soon to know whether the Commission will follow either of these courses, or take any action.

For further information, please contact **John Milligan**.



Commission approves IAG Aer Lingus merger subject to commitments

The Commission has approved the acquisition by IAG of sole control of Aer Lingus. Previous attempts by Ryanair to increase its shareholding in Aer Lingus had been blocked by the Commission, and the UK competition authorities had ordered it to reduce its shareholding from 29% to 5%. Over 95% of Aer Lingus shareholders, including Ryanair, which has withdrawn legal challenges to the Commission and the UK authorities, and the Irish Government, which held 25%, voted in favour of the sale.

On 14 July 2015, the EC approved, subject to commitments, a merger whereby International Consolidated Airlines Group, S.A. ("IAG") the holding company of British Airways, Iberia, and Vueling Airlines acquired sole control of Aer Lingus, the publicly listed Irish-based airline.

The EU Merger Regulation 139/2004 is the European framework for control of mergers, requiring pre-notification of 'concentrations having a Community dimension'. A 'concentration' will be created where there is a change of control on a lasting basis which results from the acquisition, by one or more persons or undertakings of control of the whole or parts of another undertaking. Mergers which may significantly impede effective competition in the EU or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, must be declared incompatible with the common market.

Dublin and Belfast/London routes

The routes giving rise to concern were those between Irish airports, notably Dublin and Belfast, and London. Within the O&D approach, all substitutable airports are included in the respective O&D if they are perceived as substitutable by travellers. In this regard, IAG and Aer Lingus both operated out of Heathrow, and Aer Lingus also operated out of Gatwick.

The Commission found that as regards Dublin-London, Heathrow was a differentiated airport as regards travellers seeking network connections but generally concluded that the parties' operations at Heathrow were constrained by other airlines' operations at Gatwick and London. The combined share of the parties was, however, significant (upwards of 60-70%) and this, coupled with high barriers to entry or expansion by other airlines, specifically as regards the very limited access to slots and terminals at Heathrow and Gatwick, gave the Commission concerns on this route. Similar analysis and conclusions were reached in relation to Belfast-London.

In order to address these concerns the Commission required the release of slots as follows: 2 daily frequencies between Gatwick and Dublin, 1 daily frequency between Gatwick and Belfast and 2 frequencies between Gatwick and either Belfast or Dublin and both. The agreement to release slots could provide for monetary or other consideration as long as terms were clearly disclosed.

The parties also agreed to enter agreements in relation to city pairs released by slot commitments if requested by another carrier wishing to operate new or increased services on the London-Irish city pair allowing the airline concerned to offer a return trip comprising a non-stop service provided by IAG one way and the other way by the airline at issue.

Further, if a carrier operating such services requested to be hosted on IAG's frequent flyer programme ('FFP') for the relevant city pairs, it must be allowed to participate on equal terms as compared to other members of the oneworld alliance, and the requesting carrier's customers may accrue points, and also benefit from other services such as airport lounge access or priority bookings.

There was consideration of overlaps on routes from Dublin to Barcelona, Madrid, Chicago and New York but there were no serious concerns.

Feed traffic issues

The Commission noted that Aer Lingus was an independent carrier, not a member of any alliance, and offered services to significant numbers of passengers connecting to hub airports such as Heathrow, Gatwick, Amsterdam, Manchester and Shannon to flights operated by another carrier. It considered that IAG, a major long haul carrier, could have an incentive to discontinue such services, terminating Aer Lingus's feed traffic agreements or otherwise imposing more onerous or restrictive terms, in order to benefit its own services on the long haul routes, thereby reducing competition on such routes.

In order to address these concerns the parties agreed to enter into special prorate agreements with carriers operating (or who would be operating) a non-stop service between Heathrow, Gatwick, Amsterdam, Manchester and Shannon and/or Dublin and certain long haul destinations, so as to enable connecting flights from relevant Irish airports to Heathrow, Gatwick, Amsterdam and Manchester.

IAG's position at Heathrow

Finally, while the share of IAG of slots at Heathrow was increased from 53% to 56-57%, the Commission considered that the impact on competitors would be neutral given it was already heavily congested, such that the situation would not be fundamentally changed given also the relatively limited incremental share.

The decision provided for the appointment by the parties of a monitoring trustee subject to Commission approval, to oversee the correct execution of the commitments.

For further information, please contact **John Milligan**.



Update from Brazil

New civil procedural code

On 16 March 2015, after four and a half years of discussions in the National Congress, the final text of the New Brazilian Civil Procedural Code was sanctioned by President Dilma Rousseff. Law no. 13,105/2015, which establishes the New Code, will come into force on 17 March 2016.

The New Code is the government's attempt to provide faster and more effective administration of justice. In Brazil, a suit may often last over five years, or, if it is against the Government or a State-owned entity such as INFRAERO (the operator of many of Brazil's airports), more than a decade, mainly by virtue of the high number of appeals available to the parties.

The largest country in the southern hemisphere with a population of over 200 million, Brazil suffers from an excess of suits that clog the judicial system. According to the latest official data released in 2014, Brazil has 99.7 million active lawsuits, with a growth rate of approx. 3.4% new claims per year. The sheer volume of proceedings prevents decisions from being rendered within a reasonable time.

Following the end of military rule in 1985, rights of broad and unrestricted access to justice for citizens were implemented through the Federal Constitution and the Consumer Defence Code (CDC), which came into force in 1988 and 1990 respectively. However, the current Civil Procedural Code, which has been in force since 1973, has been unable to keep pace with the increase in litigation. Extremely formalistic and complex, the current Code underwent many amendments during the last 20 years. Despite introducing some important advances, these amendments also weakened the Code's structure and compromised its efficiency due to excessive formality and the variety of available appeals which they created.

The New Code attempts to simplify and expedite procedure as well as ensuring greater uniformity. It adopts well-established solutions applied in other countries with both common and civil law traditions. Particularly, the increased recognition of precedents from higher courts as a mechanism to ensure greater uniformity is a key new measure.

Accordingly, first instance judges and appeal courts will be bound by judgments rendered by higher courts. Although this may seem natural in the eyes of a non-Brazilian observer (especially of Anglo-Saxon origin), such provisions represent a true innovation in the system currently in force in Brazil. Currently, the judge has the right to freely decide according to his or her own conviction, as long as the decision is reasoned, that is, takes into account the laws in force and the facts of the case. This wide discretion often results in conflicting decisions on the same subject matter, undermining trust in the judiciary and multiplying appeals. It is hoped that the New Code will result in more consistent decisions and greater legal certainty, thus reducing the number of suits and appeals.

In summary, the major general advancements of the New Code are: (i) fine-tuning to better accord with the Federal Constitution 1988; (ii) establishing the supremacy of case law from higher courts; and (iii) introducing the possibility for a judge to strike-out proceedings at an early stage to avoid repeated and vexatious claims.

Effectiveness of the international aviation treaties

In addition to reducing the number of pending suits, it is hoped that the New Code will also provide the necessary framework for international treaties to which Brazil is a party to be more uniformly applied by Brazilian courts, thus also bringing greater legal certainty to international relations.

Article 178 of the Brazilian Constitution provides that treaties regarding international transportation signed by Brazil must be observed, subject to reciprocity. Thus, in principle, the Constitution already requires Brazilian courts to apply the Warsaw Convention (as amended) and the Montreal Convention 1999. Those familiar with Brazilian passenger claims will know that, in practice, the courts

with very few exceptions apply the CDC, which provides for unlimited liability, in preference to the Conventions. This may be because judges are not familiar with the Conventions, or prefer to take a political position that favours the consumer.

Reinforcing Article 178 of the Brazilian Constitution, the New Code recognises, as regards Brazilian courts' jurisdiction, the provisions of international treaties in force in Brazil. Articles 13 and 24 expressly provide as follows: "Civil jurisdiction shall be governed by Brazilian procedural rules, **subject, however, to the specific provisions in treaties, conventions or international agreements to which Brazil is a party"**; and "A suit brought before a foreign court does not entail lis pendens and does not prevent the Brazilian courts from hearing the same cause and those connected thereto, **subject, however, to any provisions to the contrary in international treaties and bilateral agreements in force in Brazil."**

As a result, the New Code has, in theory, introduced a requirement that a treaty ratified by the Brazilian legal system – such as the Montreal Convention in force in Brazil from 2006) – should prevail, as it occupies the same hierarchical position as local statutory laws. Further, as the Convention contains specific provisions formulated for the aviation industry, it should not conflict with more general local legislation such as the CDC. Although it remains to be seen how the Brazilian courts will approach application of the Convention going forward, the inclusion of specific language in the New Code affirming its applicability is positive.

Convention claims awaiting judgment by the Supreme Courts in 2016

As the guardian of the Federal Constitution, the Supreme Federal Tribunal (STF) in Brasilia began to consider two combined leading aviation cases in May 2014 involving conflict between the CDC and the Warsaw and Montreal Conventions - Sylvia Regina Rosolem vs Société Air France and *Ciontia Cristina Giandulli v Air Canada*. The two cases relate, respectively, to indemnification of pecuniary damages resulting from baggage loss and the applicable limitation period for the purposes of bringing a civil liability suit due to international flight delay.

The first three STF Judges (who are called Ministers) noted that the Montreal Convention establishes special rules for a special type of contract between certain economic entities (airlines) and their clients. They accordingly voted in favour of application of the Convention, finding no incompatibility with the CDC since the lex specialis prevails over the lex generalis. Voting was suspended when Minister Rosa Weber requested the entire court file for review. With a total of eleven Ministers and three votes cast to date, the votes of seven Ministers are still to be rendered. The Presiding Minister only votes in the event of a tie to render a casting vote. The Court file was returned in December 2015 by Minister Rosa Weber, meaning that voting may be resumed at any time following the end of the summer recess on 1 February 2016.

Brazil's Superior Court of Justice (STJ) is also expected to address the applicability of the Warsaw Convention (as amended) to cargo claims later this year when it considers divergent jurisprudence in Unibanco AIG Seguros vs LATAM Airlines Group and Indiana Seguros S.A. vs. Federal Express Corporation. The STJ is responsible for standardising the interpretation of federal law throughout Brazil, and hears appeals where violation of constitutional provisions is not alleged (such claims falling under the STF's limit).

The STJ's Second Section of ten Ministers is divided into two "Terms" of five Ministers each (the 3rd and 4th Terms). The 3rd and 4th Terms "unify" divergent interpretations amongst Brazil's courts in respect of private, commercial and consumer law and – in exceptional cases – unify divergent interpretations within the Second Section itself.

In November 2015, the STJ's 3rd Term ruled 5:0 in Unibanco vs LATAM that a subrogated insurer's claim for cargo damage during international transportation in 2006 should not be limited by the Warsaw Convention (as amended) but should instead follow the "full compensation" principle enshrined in Article 944 of Brazil's Civil Code and Article 5 of the Brazilian Constitution (the date of loss was before the Montreal Convention 1999 came into force on 27 September 2006, so that the Warsaw Convention applied). The Minister leading the judgment concluded that it was not reasonable to concede favourable terms to the carrier and to limit compensation for damage which had not resulted from a risk inherent to the aviation industry (eg, a crash). The 3rd

Term held that the limitation of liability for cargo contained in the Warsaw Convention (as amended) had originally been drafted in 1929 with a view to protecting a nascent aviation industry at a time when its economic outlook was uncertain and the risk of a catastrophic loss high. Given the significant advances in aviation safety, the five Ministers comprising the 3rd Term concluded that the aviation industry no longer warrants the "favourable treatment" afforded by Article 22(2)(b) of the Warsaw Convention (as amended) and reverted to the "full compensation" principle.

The fact that the provisions limiting a carrier's liability regarding cargo contained in Article 22 (2)(b) of the Warsaw Convention (as amended) had been revised by the Hague Protocol and Montreal Protocol 4 and are effectively replicated in Article 22 (3) of the Montreal Convention 1999 was not considered by the 3rd Term. This point rather undermines the argument that the cargo limit should be disregarded today on account of safety developments since 1929.

The 3rd Term's decision did contain one favourable aspect, however. In contrast to earlier instances which had applied the CDC, the 3rd Term concluded (correctly) that there was no consumer relationship between the carrier and the insured (an importer and distributor of electrical components) who was not the end-user of the cargo and sought profit. Accordingly, the 3rd Term held that the CDC did not apply.

LATAM filed a special appeal against the 3rd Term's decision on the basis that the five Ministers of the 4th Term had rendered a divergent decision (by 3:2) in Indiana Seguros vs. Federal Express. On similar facts, the 4th Term had ruled in May 2014 that a subrogated insurer's claim for cargo damaged by the carrier in 2001 was not governed by the CDC but indeed by the Warsaw Convention (as amended). The 4th Term noted that, having elected not to declare the cargo value, there was no question that the importer had agreed to limit the value of an eventual claim in accordance with the Convention.

The fact that the 3rd and 4th Terms of the STJ (Brazil's court of last resort for non-Constitutional matters) could reach such different decisions on two factually similar cases and, indeed, take such different approaches, certainly highlights one of the challenges of the New Civil Procedural Code – to deliver uniform jurisprudence and reduce the high number of appeals. The ten Ministers of both Terms will now vote to "unify" their conflicting decisions. The fact that they have effectively voted 7:3 against application of the Convention to date leaves little room for optimism. It will be interesting to see whether the New Code (specifically Articles 13 and 24 which affirm the applicability of the Conventions) will be taken into account.

For further information, please contact **Peter Macara**, **Adam Jomeen** or **Alexandre Lima**.



United States Supreme Court limits exception to immunity for Government-owned entities

The United States Supreme Court recently issued a decision in OBB Personeverkehr *AG v. Sachs*, 136 S. Ct. 390 (Dec. 1, 2015) which significantly limited the basis upon which a commercial entity owned by a foreign government can be sued in the United States under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 et seq. (the "FSIA"). This decision may significantly impact certain suits brought in the US against state-owned air carriers.

Background on the FSIA

The FSIA applies in both state and federal courts in all litigation against foreign states and governments, including their "agencies and instrumentalities." The basis for the court's jurisdiction to hear cases against those entities is found in the FSIA, which also provides in those cases rules for service and damages available and extinguishes the right to a jury trial.

The purpose of the FSIA is set forth in 28 U.S.C. § 1602, which provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

The term "foreign state" is defined in the FSIA to include (1) a political subdivision of a foreign state or (2) an agency or instrumentality of a foreign state (28 U.S.C. § 1603). Foreign-owned airlines are "instrumentalities of a foreign state" to the extent that "a majority of [the airline's] shares or other ownership interest is owned by a foreign state or political subdivision thereof." (28 U.S.C. § 1603). However, if the airline is not owned directly by the foreign government, but rather is owned by a holding company that is owned by the foreign government, the airline will be deemed to have a "tiered" ownership structure and will not be immune from suit under the FSIA.

"Tiering" occurs when a foreign sovereign owns a majority interest in a holding company or other intermediary entity, which in turn owns a majority interest in the entity claiming sovereign immunity. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Supreme Court resolved a split in the lower courts and held that entities which are indirectly owned by a sovereign government are not agencies or instrumentalities of that government.

As a general matter, pursuant to the FSIA, instrumentalities are immune from suit unless one of the statute's specific exceptions to that immunity applies. If none of the exceptions apply, the instrumentality is immune from suit and the action must be dismissed. If an exception does apply and the instrumentality may be sued in the US, the FSIA governs the handling of the proceedings.

Foreign air carriers are required to waive sovereign immunity in certain contexts in order to receive authority to fly to and from the US. Where the waiver has not been triggered, an exception to FSIA-immunity that frequently applies to foreign-owned airlines relates to the "commercial activity" of the airline, which is defined as "either a regular course of commercial conduct or a particular commercial transaction or act." (28 U.S.C. § 1603(d)).

The "commercial activity" exception in 28 U.S.C. § 1605(a)(2) provides that:

> A foreign state is not immune if the action brought against that state is based upon [emphasis added]:
>
> (2) … a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

The US Supreme Court addressed the "commercial activity" exception in OBB Personeverkehr *AG v. Sachs*.

OBB Personeverkehr *AG v. Sachs*

Petitioner OBB Personenverkehr AG ("OBB") operated a railway that carries nearly 235 million passengers each year within Austria and to and from points throughout Europe. OBB was wholly-owned by the government of Austria. OBB—along with 29 other railways throughout Europe—was a member of the Eurail Group, which was responsible for the marketing and management of the Eurail pass program. Eurail pass holders are entitled to unlimited passage throughout the network. Passengers were able to purchase passes directly from the Eurail Group and indirectly through travel agents around the world.

Respondent Carol Sachs, a resident of Berkeley, California, purchased a Eurail pass over the Internet from The Rail Pass Experts, a Massachusetts-based travel agent. The following month, Sachs arrived at a train station in Innsbruck, Austria, where she intended to use her Eurail pass to ride an OBB train to Prague. As she attempted to board the train, Respondent fell from the platform onto the tracks. Her legs were crushed by OBB's moving train resulting in the amputation of both of her legs.

Respondent sued OBB in federal court asserting five causes of action: (1) negligence; (2) strict liability for design defects in the train and platform; (3) strict liability for failure to warn of those design defects; (4) breach of an implied warranty of merchantability for providing a train and platform unsafe for their intended uses; and (5) breach of an implied warranty of fitness for providing a train and platform unfit for their intended uses. OBB claimed sovereign immunity under the FSIA. The parties agreed OBB was a "foreign state", but disputed the application of the "commercial activity" exception. Specifically, OBB argued that the commercial activity exception to immunity did not apply because the suit was not "based upon" the sale of the rail pass for purposes of the 28 U.S.C. § 1605(a)(2).

In order to determine whether the action is "based upon" the commercial activity of the foreign state/instrumentality, a court must first "identify[ ] the particular conduct on which the [plaintiff's] action is 'based.'" (OBB, at 394, quoting, *Saudi Arabia v. Nelson*, 507 U.S. 349, 356, 113 S.Ct. 1471, 1471, 123 L.Ed.2d 47 (1993)). The Nelson Court instructed that courts should look at those elements, which, if proven, would entitle a plaintiff to relief when determining what a particular claim is "based upon."

The Ninth Circuit adopted a "one-element" test, which would require courts to look at each of the elements of all of the causes of action asserted to determine if the commercial activity made up any one element of the claim. The Ninth Circuit held that if it did, the action was "based upon" that activity.

The Supreme Court rejected this approach, holding that an action is "based upon" the "particular conduct" that constitutes the "gravamen" of the suit. Courts must "zero in on the core" of the suit to determine upon what the suit is based.

Under this analysis, the conduct constituting the gravamen of Respondent's suit plainly occurred outside the US. In fact, "all of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." Respondent argued that her claims were not limited to negligent conduct or unsafe conditions in Austria, but rather involved at least some wrongful action in the United States, specifically, that OBB should have alerted her to the dangerous conditions at the Innsbruck train station when it sold the Eurail pass to her in the United States.

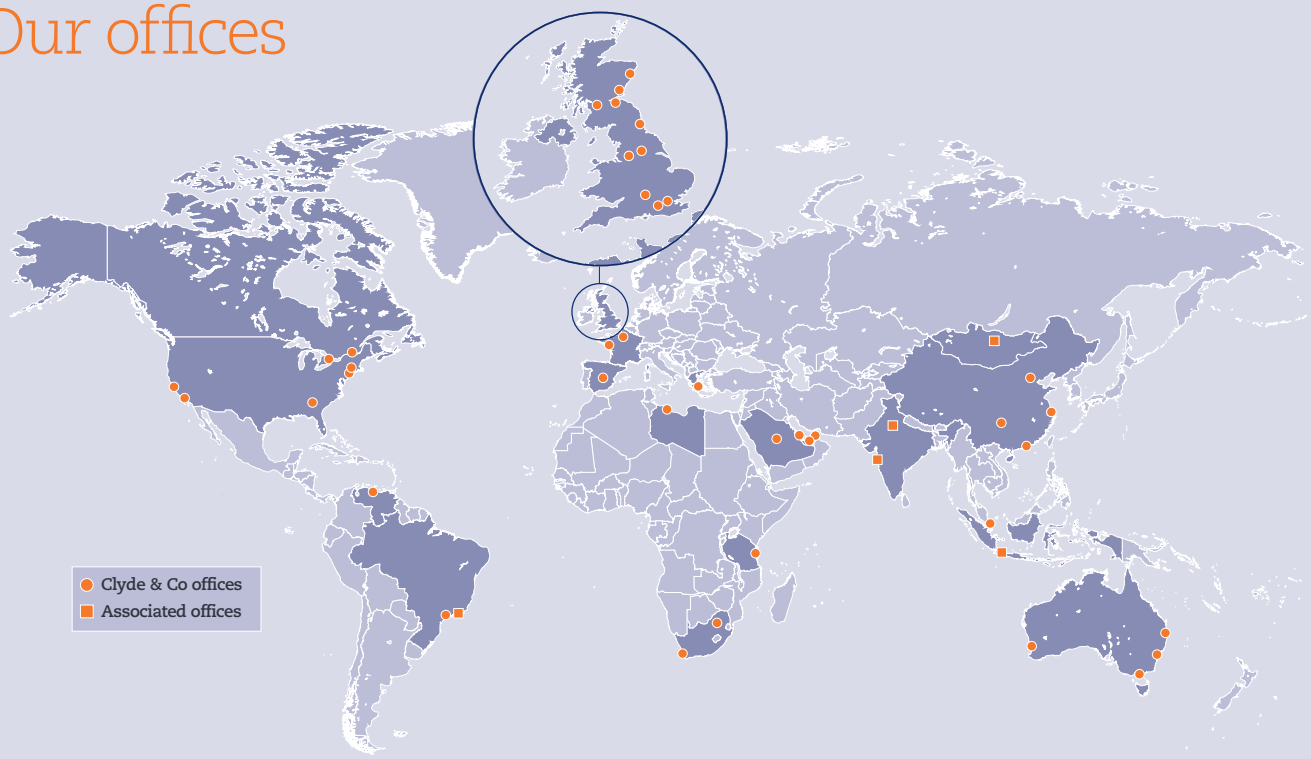
The Court rejected Respondent's attempt to sidestep the FSIA's application through artful pleading. The Court held that "[h]owever Sachs frames her suit, the incident in Innsbruck remains at its foundation." Therefore, the commercial activity exception did not apply and OBB was immune from suit.

Conclusion and implications for airlines

Under the Supreme Court's holding in OBB, foreign government-owned airlines may be immune from suit in the US for their activities occurring outside the US that do not involve flights to or from the US particularly where the conduct central to the plaintiff's claims occurs outside the US.

For further information, please contact **Daniel Correll**.

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