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Ratification of the Cape Town Convention by the United Kingdom

On 27 July 2015 the United Kingdom's instruments of ratification to the Convention on International Interests in Mobile Equipment 2001 and the Protocol thereto on Matters Specific to Aircraft Equipment 2001 (together for the purposes of this article the "Cape Town Convention") were deposited with UNIDROIT. The Convention and the Aircraft Protocol will enter into force in the United Kingdom on 1 November 2015. The ratification by the United Kingdom of the Cape Town Convention serves as an interesting example of how a contracting state faces the legal and policy issues arising from the implementation of the Convention.

Introduction

The Cape Town Convention is the result of a remarkable effort by states to establish a commercially-oriented international legal framework that governs the creation, registration, priority, search and enforcement of security and leasing interests in aircraft. It has been ratified to date by 58 states (now 59 following UK ratification; in addition the EU has ratified in respect of its areas of competence) including major aviation jurisdictions such as the United States, China, India, Ireland, Russia and the UAE. There are important economic benefits from becoming a contracting state to the Cape Town Convention; aircraft operators increase their ability to obtain additional – and less costly – sources of financing in the market due to a reduction of legal risks, and not surprisingly, many have encouraged their states to become parties to it.

One fundamental aspect of the Cape Town Convention is that it is a tailor-made instrument that allows contracting states to make declarations on several key provisions (i.e. non-consensual liens, relationship with the 1933 Rome Convention, internal transactions, territorial units, remedies, pre-existing interests or rights and certain other provisions). The declarations that a contracting state makes can greatly enhance or diminish the Cape Town Convention's economic impact. For example, an aircraft operator (and, if different, the borrower/

buyer or lessor) may qualify for a reduction of export credit costs provided that the corresponding contracting state has made the recommended "qualifying declarations" set out by the Organisation for Economic Co-operation and Development's Aircraft Sector Understanding (ASU).

As part of the UK's ratification and implementation effort the Government invited stakeholders in the UK to be part of a consultation process and its results were published in March 2015 together with an impact assessment and a draft of regulations to implement the Cape Town Convention. Parties that submitted responses included manufacturers, lessors, airlines, legal practitioners and non-governmental organisations.

The Government analysed each of the responses and then explained the legal and policy considerations that it took into account in adopting a particular implementation option. One key consideration was to comply with the ASU export credit discount criteria by making the appropriate declarations in the Cape Town Convention so that eligible operators in the UK may be able to benefit from the discount.

Although the Cape Town Convention reflects basic concepts of English law, partly because of the central role that the UK played in its negotiations and at the diplomatic conference in which the instrument was concluded, its ratification and implementation by the UK involves addressing a number of issues. The UK signed the Cape Town Convention in 2001 so the ratification process has taken over a decade, partly because certain elements of the Convention which touch on the EU's jurisdiction were required to be addressed by the EU first (such as insolvency provisions). By EU Council Decision 2009/370/EC the EU ratified the Convention in April 2009 in so far as it has competency over the relevant subject of the Convention / Aircraft Protocol. The United Kingdom made declarations under Articles 39(1)(a)-(b), 39(4), 52, 53 and 54(2) of the Convention, and under Articles XXIX, XXX(1), XXX(2) and XXX(3) of the Aircraft Protocol.

As a result of ratification by the UK the Convention will become effective in certain offshore jurisdictions which are of significance in aviation: for example, the Convention is now due to come into force in the Cayman Islands on 1 November 2015 at the same time as the Convention takes effect in the UK.

Retention of non-consensual liens

Under English law, aircraft may be detained (and sold) to cover unpaid airport charges and air navigation charges incurred by an operator. These debts take priority over any security that a creditor may have over the aircraft and, most worryingly for parties holding an interest over them, the rules allow an aircraft to be detained to cover unpaid charges of an entire fleet (the "fleet lien" under Section 88 of the Civil Aviation Act 1982).

One of the main purposes of the Cape Town Convention is to establish a first-to-file priority based registration system for interests over an aircraft that is readily viewable by interested parties. Therefore, the fact that a set of third parties can detain an aircraft without registering their interests, and regardless as to whether there are other parties with prior interests registered with the international registry set up by the Convention, diminishes the very legal certainty that the Cape Town Convention hopes to provide. However, Article 39 of the Convention allows contracting states to make a declaration whereby non-consensual liens have priority over a registered international interest created under the terms of the Cape Town Convention. Therefore, by making the appropriate declaration, a contracting state that already has such provision in its laws is able to retain it under the Cape Town Convention.

The "fleet lien" has been strongly criticised by legal practitioners and academics, and many saw the ratification of the Cape Town Convention as an opportunity to repeal it. Indeed, respondents to the consultation raised their concerns by stating that the "fleet lien" is a draconian compliance mechanism that unjustly affects aircraft lessors and financiers. However, while noting the concerns regarding the potential impact of the fleet lien on third parties, the Government decided to grant all existing and future non-consensual rights that have priority under English law over a mortgage or lease the same priority over an international interest, including the fleet lien, and will, therefore, make the appropriate declaration. This is reflected in the implementing Regulations (the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015).

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Insolvency remedies

The Cape Town Convention contains alternative provisions in respect of insolvency remedies available to creditors. Article XI enables the contracting state which is the "primary insolvency jurisdiction" to specify a "waiting period" at the end of which the insolvency administrator or the debtor must give up possession of the relevant aircraft or engine to the creditor, unless the insolvency administrator or the debtor has cured all defaults and agreed to perform all future obligations under the relevant agreement. The main advantage of adopting Alternative A is that by stipulating a waiting period, together with the availability of remedies to de-register and export aircraft from the state where it is situated, creditors may be assured that in an event of default scenario the aircraft or engine can be recovered within a fixed period.

Alternative A essentially permits creditors to exercise self-help remedies and is much more flexible than Alternative B which is a more restrictive, court-based approach. This alternative allows for greater involvement of courts in line with civil law tradition. Finally, in the absence of a declaration of a contracting state as to which alternative it chooses, the remedies on insolvency are governed by applicable law.

Alternative A is, not surprisingly, favoured by lessors and financiers and is also required by the ASU discount criteria. The majority of stakeholders in their responses called for the Government to adopt Alternative A in the implementation of the Cape Town Convention. However, insolvency practitioners stated that English law insolvency rules are robust and well understood by parties and therefore there was no need to implement Alternative A; national insolvency rules should then be retained.

In the end, and in a departure from its initial position, the Government decided to adopt Alternative A based on the fact that (i) there are potential economic benefits for aircraft finance associated with the adoption of such alternative (i.e. it complies with the ASU discount criteria) and (ii) aircraft are a sufficiently unique type of asset that warrants a separate administration regime. Therefore, Alternative A is reflected in the Regulations and a 60-day "waiting period" was adopted as well, all in line with the ASU discount criteria.

Lex situs and the international interest

Under English law, the *lex situs* principle, as clarified by the (in)famous 2010 Blue Sky case, is used to determine whether a security interest has been validly constituted over an aircraft. This means in practice that in order for an English law security interest to be validly constituted over an aircraft, the aircraft needs to be physically located in England (or airspace over England) at the time of taking the mortgage. This has substantial practical implications when choosing English law as applicable law and can potentially increase the parties' transaction costs.

The Cape Town Convention seeks to exclude the application of conflict of laws when creating interests over aircraft. Therefore, the fact that the lex situs is applied under English law conflicts with this very goal because under the Cape Town Convention an international interest is constituted over an aircraft once the Convention's (straightforward) validity conditions are satisfied without taking into account national laws. Therefore, the UK had to address this crucial matter in the implementation of the Cape Town Convention.

The Government, in line with the provisions of the Cape Town Convention, declared that an international interest is a proprietary right that takes effect in law once the conditions for the creation and registration of an international interest are satisfied, effectively distinguishing an interest created under the Cape Town Convention from other interests created outside it. As a result, the validity of a security interest under English law which is not an international interest would still be determined by the application of lex situs. This interpretation is included in the Regulations, regulation 6 of which provides: "an international interest has effect where the conditions of the [Cape Town] Convention are satisfied (with no requirement to determine whether a proprietary right has been validly created or transferred pursuant to the common law lex situs rule)".

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Irrevocable de-registration and export request authorisation

The Cape Town Convention sets out provisions in relation to an irrevocable de-registration and export request authorisation (IDERA) which allows the person in whose favour the authorisation has been issued to exercise the remedies available to it. Contracting States are able to make a declaration as to whether this provision applies and such a declaration is mandatory in order to obtain the benefit of the ASU discount qualifying criteria.

The Government acknowledged that under English law a power of attorney can be issued by the debtor and that therefore making a declaration to apply the IDERA provision was not altogether necessary. Nevertheless, the Government decided to apply the IDERA provisions. Under the Regulations, the UK's Civil Aviation Authority must honour a request for de-registration filed with it but subject to any applicable safety laws and regulations. The CAA will provide further guidance on this matter.

Conclusion

The UK is ratifying and implementing the Cape Town Convention in such a way that it achieves its maximum effect i.e. reducing legal risk by having an international framework under which aircraft financiers can better predict outcomes, and thus allowing operators in the UK to obtain financing on more favourable terms. In depositing the instruments of ratification at UNIDROIT Mr Jonathan Marshall, the Justice and Home Affairs Counsellor at the British Embassy in Rome, stated: "The United Kingdom's approach to the ratification of treaties on private law matters is known for being highly prudent and pragmatic". The Secretary-General said at the occasion: "We see in the United Kingdom ratification of the Cape Town Convention and the Aircraft protocol another demonstration of both the high quality of this Convention as well as the tangible economic benefits it generates."

Moreover, by the UK's having made all the ASU "qualifying declarations", operators in the UK should be able to benefit from the export credit discount. This is, however, provided that the "home country" rule is not applicable. This rule, which dates back to 1992, is an unwritten, informal understanding among the four principal ECAs supporting the manufacturers of large commercial jet aircraft: Export-Import Bank of the United States (Ex-Im Bank); Export Credits Guarantee Department (UK); Compagnie Française d'Assurance pour le Commerce Extérieur, also known as COFACE (France); and Euler Hermes (Germany). These agencies agreed not to provide financing for competing aircraft that will be principally located in their own or in each other's countries (including, for this purpose, Spain).

Although the Government stated that it evaluated the impact of each of the implementation options separately and on their own merit, it seems that the rationale behind the Government's choices was to effectively comply with the ASU criteria, as other contracting states to the Cape Town Convention have done. Unfortunately, however, because of the "home country" rule, it is unlikely that most UK airlines will be able to benefit from the export credit discount that follows from compliance with the ASU criteria.

This article was written with the assistance of Gustavo Boccardo, who was recently awarded his LLM in air and space law *cum laude* by Leiden University, while on an internship with the firm.

For further information, please contact **Mark Bisset**.

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Who is a passenger?

The question of who is a passenger on an aircraft may at first sight seem relatively straightforward. When we think of a passenger, we envisage a person who has purchased an airline ticket for a round trip or a single flight.

However, there are some different scenarios that call into question who a passenger on board an aircraft actually is. For example, where a person on board is a member of the operating crew (including e.g. student pilots), cabin crew or supernumerary crew, or indeed who is otherwise employed on the aircraft (e.g. a helicopter winchman), there is general agreement that they are not a passenger for the purposes of the international conventions relating to carriage by air (namely the Warsaw Convention 1929, the Hague Protocol 1955 and the Montreal Convention 1999). In respect of the latter category, being otherwise employed on an aircraft has been held to include the situation where the person's primary duties may not be intended to occur on the aircraft. For example, a maintenance representative employed to deal with procedures to be followed while the aircraft is on the ground at each stop, but who is also available during each flight should anything occur, would not therefore be classed as a passenger.

Herd v Clyde Helicopters

The question of who is a passenger arose in the 1996/97 Scottish case of *Herd v Clyde Helicopters Ltd*, which went all the way to the House of Lords. In that case, a police sergeant employed by the Strathclyde Police Authority was on a surveillance helicopter flight when it crashed and he was killed. It was the Police Authority that had contracted with the air carrier for the contract of carriage, not the sergeant, and the sergeant was clearly not an employee of the air carrier. The question before the court was whether he was a passenger under the Carriage by Air Acts (Application of Provisions) Order 1967 (this being a domestic flight) and therefore fell within the Warsaw Convention 1929 as amended by the Hague Protocol 1955, which was applied to qualifying domestic flights by the 1967 Order.

The House of Lords held (as had the First Instance and Appeal courts) that for the application of the 1967 Order it was not necessary for a person to be carried under a contract to which he was a party or under a contract of any particular type (the ticketing requirements of the Warsaw Convention 1929 not having been carried over into the 1967 Order). The sergeant was on board the helicopter for the purpose of carrying out his police duties and had no responsibility for the operation of the helicopter. He was therefore properly regarded as a passenger. There was no relationship between the carrier and the sergeant, other than that of carrier and carried.

If the sergeant had been employed directly by the air carrier to carry out employment duties on behalf of the air carrier (or had been part of the operating crew), then he would not have been a passenger. However, there was a contract of carriage between the Police Authority and the air carrier, and the sergeant was being carried pursuant to that contract. This was enough to put him within the realms of being a passenger.

Wucher and Euro-Aviation v Santer – Austrian proceedings

The issue of who is a passenger was the subject of a recent (26 February 2015) preliminary ruling by the Court of Justice of the EU. The Supreme Court in Austria had referred the case of *Wucher Helicopter GmbH* and *Euro-Aviation Versicherung AG v Fridolin Santer* (C-6/14) to the CJEU in order to clarify a number of questions relating to who is a passenger on board an aircraft.

In this case, Mr Santer was employed by his employer, Ötztaler Gletscherbahn-GmbH & Co. KG, as a member of the avalanche commission responsible for safety in the glacier area of Sölden in Austria and his employer's ski pistes. Mr Santer had to decide which pistes must be closed and where avalanches needed to be blasted. Blasting was to be carried out from a helicopter, and for this purpose Ötztaler had entered into a contract of carriage with the air carrier (Wucher); a contractual situation similar to that in *Herd*, albeit in this case related to Austrian rather than UK domestic carriage.

Mr Santer's duties as a "guide familiar with the terrain" on board the helicopter included directing the pilot (who was employed by the air carrier) to the places where the explosive charges were to be thrown out. Mr Santer was also required to open the helicopter door during the flight

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at the pilot's direction and to hold it open for a particular period of time so that the person sitting behind him could throw out the charge. During this procedure on the incident flight a sudden gust of wind caught the slightly open door, causing it to fly open. Mr Santer was unable to let go of the door and as a consequence seriously injured his elbow. Mr Santer's claim was against the air carrier (Wucher) and the air carrier's insurer (Euro-Aviation).

The First Instance Austrian court held that Mr Santer was a passenger on the flight. However, the Appellate court held that Mr Santer was not a passenger within the Montreal Convention, since the purpose of the flight was the blasting of avalanches rather than to carry him from one place to another. However, Austrian law was not precluded from applying to Mr Santer's claim for compensation.

On appeal by Wucher and Euro-Aviation the Supreme Court considered that whether or not Mr Santer was a passenger was a crucial question as to whether the Montreal Convention applied to Mr Santer's claim for compensation. The Supreme Court chose to clarify certain questions with the CJEU, with the intention of obtaining a common understanding of the concept of "passenger" in EU law and in the Montreal Convention.

Wucher and Euro-Aviation v Santer – CJEU ruling

The essential question referred was whether Mr Santer, on the facts discussed above, was a passenger or ranked among "on-duty members of both the flight crew and the cabin crew". This raised issues related to the definition of "passenger" within the meaning of EU Regulation 785/2004, which imposes insurance obligations on air carriers and aircraft operators (such as Wucher), and Article 3(g) of that Regulation, which defines a "passenger" as: "…any person who is on a flight with the consent of the air carrier or the aircraft operator, excluding on-duty members of both the flight crew and the cabin crew". If Mr Santer fell within this definition and was a passenger, or indeed even if he fell outside this definition and was not a passenger, the Austrian court then wanted to know whether he was a passenger for the purposes of Article 17(1) of the Montreal Convention.

The CJEU first turned to the definition of "passenger" within the Regulation and held that Article 3(g) of the Regulation, classifying a person as a member of the flight crew and the cabin crew, is an exception to the rule that the person on board is a passenger. Such exceptions are to be interpreted strictly, so that general rules are not negated. Mr Santer did not perform tasks of the flight crew. His task of opening the helicopter door also did not confer on Mr Santer the status of being a member of the cabin crew. Indeed, the CJEU stated that the pilot, as commander on board, is always authorised to give instructions to any of those on board the aircraft, including passengers, so this fact did not mean that Mr Santer was part of the cabin crew.

Therefore, the CJEU found that Mr Santer was a passenger for the purposes of Article 3(g) of the Regulation. It went on to say that Article 3(g) must be interpreted as meaning that the occupant of a helicopter operated by a Community air carrier, who is carried on the basis of a contract (of carriage) between that air carrier and the occupant's employer in order to perform a specific task such as that at issue in the main proceedings, is a "passenger" within the meaning of that provision.

To answer the question relating to the Montreal Convention, the CJEU recognised that the Montreal Convention is an integral part of the EU legal order, and that it (the CJEU) has jurisdiction to give a preliminary ruling concerning the interpretation of the Convention. The CJEU considered that it must be ascertained whether the purpose of the flight at issue was the "carriage of passengers" within the meaning of the Convention, and expressed the view that the absence of documents of carriage did not affect the existence or validity of the contract of carriage.

Therefore, where a contract of carriage exists and all the other conditions for the application of the Convention (i.e. pursuant to Article 1 and the scope of application) are fulfilled, it applies, irrespective of the form that contract of carriage might take. The flight in question was one for the carriage of employees of Ötztaler (of whom Mr Santer was one) to the places where they had to perform their usual tasks. It was precisely on a contractual basis (that being the contract of carriage between the air carrier and Ötztaler) that the air carrier flew Mr Santer from the take-off location to the places where the avalanche blasting was to take place and then brought him back to the take-off location.

The CJEU therefore held that Article 17(1) of the Montreal Convention must be interpreted as meaning that a person who comes within the definition of "passenger" under Article 3(g) of EU Regulation 785/2004 also comes within the definition of "passenger" under Article 17(1) of the Convention, once that person has been carried on the basis of a "contract of carriage" (within the meaning of Article 3 of the Convention).

This finding of the CJEU is consistent with the conclusion of the House of Lords in *Herd* and is a welcome clarification at an EU-wide level of who is a passenger for the purposes of the Montreal Convention.

For further information, please contact **Tina Collier.**

French Supreme Court overturns Court of Appeal's decision to apply Warsaw Convention to claim by manufacturer against airline

In March this year the French Supreme Court overturned the decision by the Toulouse Court of Appeal to apply the Warsaw Convention to a claim by a manufacturer against an airline. Disappointingly, the Supreme Court has not provided any reasoning for its decision to overturn the judgment of the Toulouse Court of Appeal, which held that the Warsaw Convention 1929 applies not only to passenger claims brought directly against an airline, but also to an attempt by a manufacturer to join an airline as a third party to an action brought by passenger interests against the manufacturer of the aircraft involved in an accident.

Background

On 2 May 2006, flight RNV967 from Yerevan in Armenia to Sochi in Russia crashed into the Black Sea during an attempt to land in difficult weather conditions, tragically causing the death of all those aboard. After settling their claims with the airline and its insurers against a full release and discharge, the relatives of some of the victims began legal proceedings against the aircraft manufacturer in Toulouse, France, claiming further compensation on the basis that the aircraft had been a defective product with technical faults. The manufacturer subsequently attempted to join the airline to the action as a third party, claiming crew error had caused the accident and not any product defect. The purpose of such third party proceedings was effectively for the manufacturer to claim indemnity or contribution from the airline in respect of any liability the manufacturer might have towards the passengers.

In its defence, the airline pleaded that claims against an airline can only be brought subject to the conditions and limits set out in the Warsaw Convention 1929. Moreover, Article 28 of the Convention states that an action for damages can only be brought in either the country where the carrier is ordinarily resident or has its principal place of business or has an establishment by which the contract was made (in this case, Armenia), or the country of destination (in this instance, Russia). Accordingly, the French court did not have jurisdiction to hear the claim against the airline.

In May 2011, the Toulouse District Court declared that the manufacturer's claim was indeed governed by the Convention and, accordingly, the Court did not have territorial jurisdiction to hear the claim. The manufacturer appealed the decision, but it was upheld by the Toulouse Court of Appeal in March 2013.

Arguments on behalf of the manufacturer

The manufacturer then appealed to the French Supreme Court. The manufacturer argued that the Convention has a limited scope of application that governs only actions for damages relating to loss occurring during carriage by air brought by the victims of the loss (or by their relatives). This, it was said, excluded third party claims by the manufacturer, as a manufacturer has not sustained loss during carriage by air, but rather chooses to join an airline to the proceedings as a warranty for any order to pay compensation to the victims' relatives.

The manufacturer relied on a number of arguments to support its interpretation. First, it stated that the discussions undertaken during the drafting of the Convention focused on actions brought by passengers and did not consider actions as between a manufacturer and an airline. Secondly, the wording of Article 30 of the Convention – which states that in the case of carriage performed by successive carriers, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident occurred – read in conjunction with the wording of Article 22(1) of

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the Convention – which expressly refers to the amount of compensation for which the carrier is liable – show that the Convention governs a particular relationship between the passengers and the airline only. It was argued that this was further evidenced by the lack of any connection between the competent courts provided for in Article 28 of the Convention and the place of residence of the aircraft manufacturer.

The manufacturer argued that the Convention should be read as a whole, providing a balance between the strict liability of the carrier in the event of a fatal accident and the compensation limit for the victims and their relatives. This means that the rules on jurisdiction cannot be read in isolation in order to restrict the manufacturer in its third party action against the airline, when the same manufacturer cannot rely upon the other rules regarding strict liability or limits of compensation. In particular, the manufacturer submitted that it was unrealistic to impose the two year limitation period provided for by the Convention on a manufacturer wishing to bring an action against the carrier, as the time to bring suit could lapse before any claim had even been commenced against the manufacturer. The manufacturer went so far as to argue that imposing such a limitation period would contravene the right to a fair and public hearing, guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms.

Three associations also intervened in support of the manufacturer. They put forward further objections to the Court of Appeal's decision: the significant imbalance in the protection of manufacturers' interests as opposed to those of airlines; the possibility of conflicting decisions from different courts if the manufacturer was obliged to bring separate proceedings against the airline; and the undermining of jurisdiction clauses in aircraft sales agreements.

Arguments on behalf of the airline

The airline, on the other hand, argued that the international Convention took precedence over any domestic French law which allowed the extension of jurisdiction to the French courts. It contended that issues regarding jurisdiction must be resolved before considering any other aspect governed by the Convention. The airline held that Article 24 of the Convention – which states that any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention – must be applied whether an action is brought by a victim's family or by a third party and whether in main proceedings or through a third party action. Moreover, nothing prevents the two year limitation period from being interrupted or suspended if the law of the court to which the matter is referred allows this and, in France, it is arguable that the time limit would not start to run until the main proceedings were brought (as limitation cannot commence against a party who is unable to take action due to an impediment resulting from the law). Accordingly, the manufacturer's right to a fair trial would not be prejudiced.

Another association also intervened in support of the airline, stating that a separate manufacturer's action against the carrier for damage caused to the passengers would conflict with the balance struck by the Convention between passengers' interests and those of the airline, as such a third party action would potentially go beyond the provisions of the Convention, including the limit of compensation. It also pointed out that Article 28 of the Convention regarding jurisdiction did not in any way undermine aircraft sales agreements, since the Convention does not apply to these.

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Comment

In its decision, the Supreme Court overturned the Court of Appeal judgment, but chose not to give any reasoning for its decision. Accordingly, one is left to presume that it agreed with some or all of the arguments put forward by the manufacturer.

It is arguable that this is a flawed decision, as Article 24 of the Convention– which states that any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention – should provide consistency regardless of either the identity of the claimant (be it a passenger, his or her relative or a manufacturer) or the nature of the claim (contractual or otherwise). Being an international Convention, this consistency should take precedence over any national law to the contrary.

This is the case not least because, although the action is not being brought by the passengers or their relatives directly against the airline, it is essentially for reasons of compensation that the relatives in this instance are bringing proceedings against the manufacturer and so, by extension, the third party action should be governed by the same rules and laws that would usually govern claims brought directly by passengers against the airline.

The predictability of the interpretation of the Convention is essential for carriers if the Convention is to have the effect intended when it was first enacted almost ninety years ago. Moreover, it is of concern that this reasoning could also be applied to similar situations arising under the Montreal Convention 1999.

The next step would now be for the matter to return to the Toulouse Court of Appeal, where the arguments would be heard again by a different panel of judges; hopefully, the Court of Appeal would provide more of an insight into its reasoning than the Supreme Court.

This case was handled on behalf of the airline by Clyde & Co LLP London and Paris.

For further information, please contact **Philip Bass** or **Elizabeth Lambert-James** of our London office, or **Maylis Casati-Ollier** or **Benjamin Potier** of our Paris office.

Anti-suit injunctions – an unclear position

The recent CJEU decision in *Gazprom* (C536/13) has provided only limited clarity in relation to the role of anti-suit injunctions and their permissibility under Brussels I Regulation and the recast of that Regulation.

The judgment did not address whether anti-suit injunctions are a permitted remedy under the recast Brussels I Regulation ("the Recast Regulation"), with the Court instead preferring to limit its decision by focusing solely on the old regime of the unmodified Brussels I Regulation ("the Regulation") and noting that the facts of *Gazprom* were distinguishable from previous case law.

The failure to address any wider issues under the new recitals in the Recast Regulation means the position remains vague and the wait continues for a clarification with regard to the arbitration exception within the Recast Regulation.

Background

The anti-suit injunction (an order requiring a party not to commence or cease to pursue court proceedings in a different jurisdiction) is a key weapon in safeguarding an exclusive jurisdiction clause in an arbitration agreement against the tactical use of parallel proceedings in a different jurisdiction.

However, the effectiveness of such injunctions was blunted in a European context with the decision in *Western Tankers* (C185/07) where the CJEU determined that an arbitral anti-suit injunction preventing the court of a Member State seised of a dispute from ruling on its own jurisdiction was incompatible with the principles of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This decision was notwithstanding the provision in Article 1 (2)(d) of the Regulation stating as follows: "The Regulation shall not apply to:… (d) arbitration".

The CJEU's decision in this instance was based on the premise that although the Regulation did not apply to arbitration itself, proceedings commenced in a foreign jurisdiction, and in particular proceedings to determine the validity of an arbitration agreement did fall under the Regulation's scope. The Court determined that an anti-suit injunction would strip a court of a Member State to rule on its own jurisdiction which ran counter to the mutual trust which Member States accorded to each other's legal systems.

The Recast Regulation

There appeared to be an attempt with the reworking of the Regulation to re-establish the arbitration exception with the introduction of a new recital as follows:

> This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
>
> A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
>
> On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.
>
> This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

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The Recast Regulation is to apply to all legal proceedings instituted on or after 10 January 2015 and clearly establishes that a court seised of an action may make a ruling on whether an arbitration agreement is null and void, inoperative or incapable or being performed. With such a ruling falling outside the scope of the Recast Regulation the tantalising possibility has been raised that anti-suit injunctions may no longer be dead in the water following *West Tankers*.

Gazprom – a missed opportunity?

With the Recast Regulation yet to be tested, it was felt that *Gazprom* might offer the CJEU the perfect opportunity to distinguish *West Tankers* and enshrine the arbitration exception.

The case related to a dispute between *Gazprom* OAO and the Government of Lithuania regarding the running of Lithuania's main natural gas provider (Lietuvos dujos AB), in which both parties were shareholders. Following a dispute, the Lithuanian Ministry of Energy commenced proceedings in the Lithuanian Courts, while *Gazprom* commenced arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). *Gazprom* argued that the Ministry were in breach of the terms of the arbitration agreement and the SCC issued an anti-suit injunction requiring the Ministry to withdraw certain court claims.

Unsure of whether to enforce the arbitral tribunal's award, the Lithuanian court referred three questions to the CJEU as to whether a Member State court can refuse to:

1. recognise an arbitral award that limits the jurisdiction of a national court to rule on its own competence
2. enforce an arbitral award that contains an anti-suit injunction if it orders a party to limit their claims in another Member State court
3. recognise an arbitral award that limits the right of a national court to rule on its own jurisdiction for the purpose of ensuring the supremacy of the EU law and full effectiveness of the Regulation

While the issues in *Gazprom* were in fact covered by the Regulation, it was hoped that the CJEU might provide in its judgment guidance on the Recast Regulation. These hopes were further buoyed when the Advocate General Wathelet issued his wide-ranging, and controversial, opinion on the case.

AG Wathelet argued that the Recast Regulation should apply to *Gazprom* because it was a "retroactive interpretative law" as it explains how the arbitration exception should be interpreted. In his opinion, the Recast Regulation excludes any proceedings in which the validity of an arbitration agreement is contested (making anti-suit injunctions permissible). This opinion was on the basis that the fourth paragraph of the new recital refers to ancillary proceedings which, in his interpretation, covers anti-suit injunctions.

In the alternative, AG Wathelet argued that should the CJEU determine that the Regulation applied (rather than the Recast Regulation), then *Gazprom* could be distinguished from *West Tankers*, as *West Tankers* only applied to anti-suit injunctions issued by the court of a Member State, while arbitral tribunals are not bound by the Regulation nor the principles of mutual trust.

Not unsurprisingly, the CJEU declined the opportunity to offer judgment on AG Wathelet's wider opinion that anti-suit injunctions were permissible under the Recast Regulation, instead deciding that *Gazprom* was covered by the Regulation and by restricting itself to a finding that *Gazprom* did indeed occupy separate ground from *West Tankers* and that arbitral anti-suit injunctions did fall outside the scope of the Regulation.

The current position

While the judgment provided clarity that Member State courts may give rulings on anti-suit injunctions issued by arbitral tribunals without reference to the Regulation, the position under the Recast Regulation (which will only increase in importance) remains unsatisfyingly open.

As a result, arbitration practitioners are left unsure whether anti-suit injunctions ordered by the courts that are in relation to an arbitration are permissible under the Recast Regulation, and it is left for another case and another day to determine this important point of law.

For further information, please contact **Adam Tozzi** or **Alex Stovold.**

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Update on recent US preemption cases

This article addresses recent US cases considering the preemptive effect of the **Air Carrier Access Act**, the **Airline Deregulation Act** and the **Montreal Convention**. These cases demonstrate that preemption cannot be defined in broad strokes, but rather must be considered on a case-by-case basis.

Preemption under the Airline Deregulation Act

In *Gleason v United Airlines, Inc.*, 2015 WL 2448682 (E. D. Cal. May 20, 2015), the plaintiff Alisa Gleason brought a personal injury action against United Airlines arising from a "severe peanut allergy attack" she allegedly suffered while on a United flight bound for Chicago. The action alleged seven common law causes of action under Illinois state law.

Prior to boarding the Chicago-bound United flight in Orlando, the plaintiff notified several United employees that she had a "severe, grave allergy to [ ] peanut[s] and peanut-related products…" The plaintiff alleged that at least one United employee informed her that the flight attendants would make an announcement asking passengers to refrain from consuming peanuts and peanut-related products during the flight. However, when the plaintiff notified the crew members on board of her alleged allergy, they informed her that they would not make the announcement.

About an hour into the flight, the plaintiff "began to experience initial physical symptoms of a severe peanut allergy attack." She subsequently observed a passenger seated four rows behind her eating peanuts. After self-medicating did not relieve her symptoms, it became clear that she was in serious distress. In fact, the flight attendants and medical personnel who assisted her informed the pilot that the plaintiff would not survive if the aircraft did not divert. Following an unscheduled emergency landing in St. Louis, Missouri, the plaintiff was transported by ambulance to a local hospital where she received emergency medical care and was placed in an intensive care unit for two days.

The plaintiff alleged that she suffered permanent physical and emotional injury, and asserted the following causes of action in her First Amended Complaint: negligence, negligent infliction of emotional distress, promissory estoppel, fraudulent misrepresentation, breach of contract, tortious breach of contract, and breach of the implied convent of good faith and fair dealing.

United moved for summary judgment, arguing that federal law, specifically the Airline Deregulation Act, 49 U.S.C. § 41713(b) ("ADA"), expressly preempted the plaintiff's state law claims. The ADA includes an express preemption provision prohibiting states from "enact[ing] or enforc[ing] a law … related to a price, route, or service of an air carrier …." The Court concluded that each of the plaintiff's claims related to the service of an air carrier.

First, there was no dispute that United was an air carrier for purposes of the ADA. Second, each of the plaintiff's claims were based on United's alleged refusal to make an announcement asking that passengers refrain from consuming peanuts and peanut-based products during the flight. Therefore, the Court found that the claims related to a service provided (or more appropriately, not provided) by United. As the plaintiff's claims related to the service of an air carrier, they were pre-empted by the ADA.

Preemption under the Air Carrier Access Act

The case of *Baugh v Delta Air Lines, Inc.*, 2015 WL 761932 (N.D. Ga. Feb. 23, 2015) addressed the possible preemption of the plaintiff's state-law claims by the Air Carrier Access Act of 1986 ("ACAA"). The ACAA is a federal law that prohibits air carriers from discriminating against individuals with disabilities. The action, originally filed in Georgia state court, was removed by defendant Delta Air Lines, Inc. to federal court. The plaintiff sought remand to state court and Delta moved to dismiss the complaint for failure to state a claim.

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The plaintiff alleged that after her flight was called for boarding, she told a Delta gate employee that she was blind and needed assistance boarding the aircraft, but was told to proceed with boarding without assistance. After the plaintiff boarded the aircraft without assistance as per the instructions of the Delta ground staff, she claimed that she tripped and fell while attempting to walk down the sloping ramp, suffered serious injuries and incurred medical expenses as a result.

The Court analyzed whether the plaintiff's claims were preempted in whole, or in part, by the ACAA. As a matter of background, the ACAA amended the Federal Aviation Act. See 49 U.S.C. § 40101 et seq. In 2003, the ACAA implementing regulations, entitled the "Nondiscrimination on the Basis of Disability in Air Travel," were enacted. The ACAA Regulations "prohibit[ ] both U.S. and foreign carriers from discriminating against passengers on the basis of disability; require[ ] carriers to make aircraft, other facilities, and services accessible; and require[ ] carriers to take steps to accommodate passengers with a disability." 14 C.F.R. § 82.1.

Delta argued that, because the plaintiff was physically disabled and her claim arose while attempting to board an aircraft, her rights and remedies exclusively were those allowed by the ACAA. Delta further argued that, because the ACAA preempts the plaintiff's state-law claim and does not provide a private cause of action, the plaintiff's claim should be dismissed. The plaintiff countered in her motion for remand that she was not asserting a discrimination claim pursuant to the ACAA, but rather only a state-law tort claim for damages based upon Delta's negligence. Specifically, the plaintiff alleged that Delta was negligent in failing to:

1. keep its premises and approaches safe for invitees, in violation of Massachusetts law
2. ensure that the premises and boarding procedures were in a safe and proper condition for blind passengers
3. properly and adequately assist Plaintiff in boarding Defendant's aircraft, after Defendant knew, or should have known, of her condition
4. follow its own policies and procedures in assisting disabled, or blind invitees into Defendant's aircraft
5. properly assist Plaintiff when Defendant knew this created a hazardous condition, in violation of Massachusetts law
6. exercise extraordinary care required to protect Plaintiff, a known blind passenger, while she was attempting to negotiate the boarding ramp and board Defendant's aircraft, in violation of Massachusetts law

The ACAA Regulations provide that an air carrier:

> Must promptly provide or ensure the provision of assistance requested by or on behalf of passengers with a disability, or offered by carrier or airport operator personnel and accepted by passengers with a disability, in enplaning and deplaning.

See 14 C.F.R. § 382.95.

Thus, the Court noted that four of the plaintiff's claims appeared to be related to Delta's alleged failure to assist the plaintiff in boarding the defendant's aircraft.

The Court then considered whether the ACAA completely preempted the plaintiff's state-law negligence claims, an issue of first impression for the Northern District as well as the Eleventh Circuit.

Under the Supremacy Clause of the United States Constitution, when a state law conflicts, or is incompatible with federal law, federal law preempts the state law. See, e.g., *Teper v Miller,* 82 F.3d 989, 993 (11th Cir.1996); see also U.S. Const. art. VI, § 2. Preemption generally arises under three circumstances: (1) express preemption – where Congress has expressly preempted state law by statute; (2) field or complete preemption –where, through Congressional legislation, federal law occupies an entire field of regulation and leaves no room for state law; or (3) conflict preemption – where federal law so conflicts with state law that it is impossible to comply with both.

In this case, because the ACAA does not expressly preempt state law and there is no conflict between state law and the ACAA, the only possible area of preemption was field preemption.

Factors considered by a court in determining whether federal law has completely preempted state law in an area include: (1) whether the state claim is displaced by federal law under an ordinary preemption analysis; (2) whether the federal statute provides a cause of action; (3) what kind of jurisdictional language exists in the federal statute; and (4) what kind of language is present in the legislative history to evince Congress's intentions. Id. at *5, citing, *Smith v GTE Corp.,* 236 F.3d 1292, 1312 (11th Cir. 2001) (internal citations omitted).

The Court found that the main cases cited by Delta (*Love v Delta Air Lines*, 310 F.3d 1347, 1350 (11th Cir. 2002); *Gill v JetBlue Airways Corp.*, 836 F. Supp. 2d 33, 45-46 (D. Mass.2011)), do not stand for the proposition that the ACAA preempts state-law negligence claims. Instead, the Court held that, at best, the cases hold that the ACAA does not provide a private cause of action and does not preempt state-law claims but may preempt the standard of care applied in state-law based claims.

The US Supreme Court and the Eleventh Circuit have found complete preemption in the context of only three statutes: (1) the Labor Management Relations Act; (2) the Employee Retirement Income Security Act of 1974; and (3) the National Bank Act. See *Dunlap v G & L Holding Grp., Inc.,* 381 F.3d 1285, 1290 (11th Cir.2004) (citing *Beneficial Nat'l Bank v Anderson,* 539 U.S. 1, 7–11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). Significantly, each of these statutes set forth the causes of action and remedies available.

In *Bough*, the court found significant to its complete preemption analysis the fact that the ACAA does not provide a private cause of action. The Court further noted that the FAA does not specifically exclude tort claims, but rather contemplates them, as evidenced by the liability insurance requirements provided therein. Based upon the foregoing, the Court held that the ACAA does not preempt a state-law negligence claim, and agreed with the Ninth Circuit, which has held that the ACAA does preempt state-law standards of care. See *Gilstrap v United Air Lines, Inc.,* 709 F.3d 995, 998 (9th Cir. 2013).

Thus, the Court concluded that the ACAA and its implementing regulations did not completely preempt the plaintiff's state-law negligence claim, but did preempt the state-law standard of care with regard to the plaintiff's failure to assist in boarding claims. The Court then determined that the preemption of the state standard of care did not confer federal question jurisdiction upon the Court. The Court concluded that federal jurisdiction did not exist merely because state law provides that the violation of a federal statute establishes negligence and remanded the case to state court.

Preemption under the Montreal Convention

The case of *Naqvi v Turkish Airlines, Inc.*, 2015 WL 757198 (D.D.C. Feb. 23, 2015) addressed the issue of express preemption pursuant to the Montreal Convention.

The action was brought by *pro se* plaintiff Syed M. Arif Naqvi and arose from the plaintiff's transportation with his wife from Dulles International Airport to Istanbul, Turkey on a Turkish Airlines flight. According to the Complaint, the plaintiff requested exit row seating during check-in, but was told that all of the exit row seats, which were reserved for "Elite Class" passengers, had already been assigned. The plaintiff also alleged that he was told that only passengers taller than six feet were assigned to exit rows, and that plaintiff, at six feet tall, was ineligible for such seating. The plaintiff demanded a return of his baggage, but relented and agreed to fly after being told that he would be given a seat with "leg space". When the plaintiff boarded the plane, he noticed that all of the exit row seats were occupied by passengers who appeared to be of Turkish descent, six of whom were women under six feet. Once seated, the plaintiff realized that his seat was not, as he allegedly was promised by Turkish Airlines staff, a "leg space seat," causing the plaintiff great distress. According to the plaintiff, this distress was intensified when the crew allegedly violated airline "safety requirements," by failing to both "provide any information regarding safety" and to "illuminate the seat belt signs before landing."

The plaintiff claimed that Turkish Airlines' denial of an exit row and "leg space" seat, coupled with the flight staff's purported failure to follow safety protocols, caused him "extreme emotional" distress that manifested in physical malaise and a loss of appetite during the flight. The plaintiff commenced an action in District of Columbia Superior Court alleging breach of contract and discrimination under what the Court called "a kaleidoscope of federal statutes", including 42 U.S.C. § 1981 and sections 41310(a) and 40127(a) of the ADA. Turkish Airlines removed the action to federal court and later moved to dismiss the plaintiff's complaint.

The Court first addressed whether the Montreal Convention applied to the plaintiff's claims. Holding that the plaintiff's journey was "marked by the prototypical features of 'international carriage'", the plaintiff's claims fell within the ambit of the Montreal Convention.

It is well-settled in the US that, where applicable, the Montreal Convention preempts state law remedies for claims within its "substantive scope." See *El Al Israel Airlines, Ltd. v Tsui Yuan Tseng,* 525 U.S. 155, 161, 119 S.Ct. 662 (U.S. Sup. Ct. 1999)("[R]ecovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' ... if not allowed under the Convention, is not available at all.")

The Court then addressed whether the plaintiff's discrimination and breach of contract claims were preempted—whether they fell within the substantive scope of the Montreal Convention. In doing so, the Court looked at whether the plaintiff's particular claims fell within the Montreal Convention's liability provision in Article 17.

With respect to the federal discrimination claims, the Court followed the lead of "numerous courts" that have found similar discrimination claims preempted. Interestingly, the Court noted that, even if the Montreal Convention did not preempt the plaintiff's discrimination claims, the claims would fail because the ADA does not confer a private right of action.

Addressing the breach of contract claim, the Court noted that while some courts have held that the Montreal Convention does not preempt claims of contractual non-performance, other courts have been wary of attempts to circumvent the Convention through artful pleading. Ultimately, the Court found the plaintiff's contract claim to be "a tort masquerading as a contractual dispute. Stripped of this guise, the plaintiff's contract claim is indistinct from his discrimination claims, and must be brought 'under the terms of the Convention or not at all.'"

With the Montreal Convention deemed to be the plaintiff's only avenue for relief, the Court examined whether the plaintiff stated a claim for relief under Article 17. In that regard, the plaintiff was required to show that: (1) an accident (2) caused him bodily injury (3) either "on board the aircraft or in the course of any of the operations of embarking or disembarking." As the plaintiff did not allege a cognizable Article 17 "accident" or an actionable "bodily injury", the Court granted Turkish Airlines' motion and dismissed the plaintiff's complaint in its entirety.

Conclusion

As these cases demonstrate, federal preemption of state law claims is highly dependent upon the statute/regulation involved and the types of claims being asserted.

For further information, please contact **Daniel Correll** of our New York office.

Employment law – revised rules around strikes

On 15 July 2015 the Government published the Trade Union Bill 2015 to make good on its manifesto pledge to significantly tighten up the legislation governing trade unions and in particular the rules around strike action.

The main elements of the Bill are as follows:

- A higher "turn-out threshold" of 50% for strike ballots meaning that at least half of those entitled to vote do so whilst retaining the current requirement for there to be a simple majority of votes in favour of the strike action balloted
- In addition to the 50% "turn-out threshold", for strike action in essential public services (health, education, fire and transport), 40% of those entitled to vote must actually vote in favour of industrial action. What amounts to "essential public services" is subject to Government consultation
- Tackling the intimidation of non-striking workers during a strike through the introduction of a picketing supervisor
- Tightening the rules around "facility time" for union representatives
- Any future industrial action to take place within four months of a ballot, together with a new requirement for the ballot paper to contain a clear description of the trade dispute and the planned industrial action - this will make it difficult for unions holding a single ballot to authorise a series of strikes
- Increasing from 7 to 14 days the notice unions must give to employers to take industrial action allowing employers greater time to prepare and make contingency arrangements
- Explicit opt-in approval from union members to pay into political funds
- A possible repeal of the current ban on employers from hiring agency workers to cover striking employees

The Bill has predictably provoked criticism from the unions. Unite, which has significant membership within airlines (the British Airlines Stewards and Stewardesses Association (BASSA) is a branch of Unite), has changed its constitutional rule book to remove the requirement that it will only support lawful strike action. Immunity from legal action against unions only applies to lawful strike action so it is probably a case of this being symbolic rather than opening a new wave of industrial unrest and wildcat strikes. A loss of legal immunity through union support of unlawful strike action would have catastrophic financial consequences with employers able to sue unions for losses. Likewise if there is a breach of the "picketing supervisor's" obligations this too will lead to a loss of immunity from suit.

The Bill is expected to become law by around the end of the year. To read more about this please visit: **http://www.clydeco.com/insight/updates/view/trade-union-reform-latest-update**

27 jurisdictions guide

Clyde & Co is pleased to introduce its "at a glance" guide to employment law in 27 jurisdictions covering all the main European countries and key aviation hubs.

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Those crazy little things called remotely piloted aircraft – the South African legal framework

Introduction

The unmanned aircraft vehicle (UAV), or as it is often called remotely piloted aircraft (RPA), industry is set for take-off in South Africa. Whilst in the past RPA operators were flying under the radar given the lack of regulatory oversight, RPAs are now the next "small" thing in the aerospace industry.

It is rightly so given that the global forecast for the worldwide RPA industry (military and civilian) is approximately USD 90 billion over the next ten years. Whilst the military segment of RPAs dominate the market at present, the commercial and civil markets are emerging as the game changers. This is directly as a result of regulatory framework being created by the relevant authorities to provide a platform for the commercial and civil segments to grow. The most common commercial uses of RPAs are at present aerial surveys, film making, search and rescue operations, crowd monitoring etc. However, as technology develops the use of RPAs will also develop and with that the role of RPA regulators will become more important in order to maintain the fine balance between ensuring safety to the general public on the one hand and providing scope for growth of the industry on the other hand.

To this end, the purpose of this article is to analyse the South African remotely piloted aircraft systems regulations (which became effective as of 1 July 2015) in order to establish whether the South Africa Civil Aviation Authority has created such a balance.

Overview of Regulations

In general, the Regulations are based on a safety first approach by allowing RPA operators to fly their systems within visual line-of-sight (VLOS) at specific altitudes. However, they have also created scope for future development by creating a Class for RPA operations beyond visual line-of-sight with no altitude limit. On the current wording of the Regulations it is unclear whether RPA operators will be allowed to operate this class of RPA, but more on this aspect below.

Application

- The Regulations apply to all commercial, corporate, non-profit and private RPA operations. They do not apply to autonomous unmanned aircraft or any other aircraft which cannot be managed on a real-time basis during flight
- Five different classes of RPAs have been created ranging from RPAs weighing less than 1.5 kilograms to RPAs weighing more than 150 kg, each class having a respective limitation on line-of-sight, energy and height. In regard to the line-of-sight limitations, there are five ways in which an RPA may be operated namely: (i) radio line-of-sight; (ii) visual line-of-sight (meaning an operation below 400ft above ground level in which the remote pilot maintains direct and unaided visual contact with the RPA at a distance not exceeding 500 meters); (iii) restricted VLOS (meaning an operation within 500m of the remote pilot and below the height of the highest obstacle within 300m of the RPA, in which the remote pilot maintains direct unaided visual contact with the RPA to manage its flight and meet separation and collision avoidance responsibilities); (iv) extended VLOS (meaning an operation below 400ft above ground level in which an observer maintains direct and unaided visual contact with the remotely piloted aircraft at a distance not exceeding 1000m from the pilot; and (v) beyond VLOS (meaning an operation in which the remote pilot cannot maintain direct unaided visual contact with the remotely piloted aircraft to manage its flight and to meet separation and collision avoidance responsibilities visually). RPA operations of extended VLOS must make use of an "observer" to assist the RPA pilot)
- Except for RPAs which are operated in restricted VLOS, all other RPAs are to be equipped with an altimeter that is capable of displaying to the operator the altitude and height of the RPA above ground level
- At present the Regulations apply to Class 1 and Class 2 RPAs. Given the ambiguous wording of the applicability section, it appears as if there may be scope to argue that the Regulations also apply to Class 3, 4 and 5 RPAs (if consideration is given to the Regulations and the technical standards as a whole, it seems that Class 3, 4 and 5 operations have been catered for)

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Private operators

- Private RPA operators are restricted to operate only Class 1A or 1B RPAs in restricted VLOS
- For the most part private operators are exempted from compliance with the Regulations except for Part 5 which pertains to the operations of the RPA itself
- Private operators are not allowed to inter alia operate above 400ft of the surface, within a radius of 10km from an aerodrome, or adjacent to or above a nuclear power plant, a prison, police station, crime scene, court of law, national key point or strategic installations
- Whilst an RPA pilot for a private operation is not required to have a remote pilot licence he/she has a duty to operate the RPA safely and in such a way that the safe separation from other aircraft is maintained and that adequate obstacle clearance is ensured
- It appears that a private operator wishing to operate any RPA from Class 2 and above will have to apply to the Director of the South African Civil Aviation Authority for approval, will have to obtain an RPA licence and will not be exempted from the rest of the Regulations

Commercial, corporate and non-profit operators

- Commercial, corporate and non-profit operators of Class 1 and Class 2 RPAs (also Class 3, 4 and 5), must comply with all the Regulations in order to operate legally
- It is useful at this stage to point out that operating an RPA outside of the regulatory framework (ie illegally) may lead to the imposition of administrative monetary fines ranging from 5,000 to 160,000 Rand and may also include, depending on the violation, criminal charges and could lead to the suspension and/or cancellation and licence and/or certificate issued by the CAA
- The first step in order to operate legally is to obtain a RPA letter of approval from the Director. In order to do so, an operator must submit documentation regarding the standard to which the RPA was designed, alternatively documentation demonstrating a level of safety acceptable to the Director or documentation demonstrating the safety system as prescribed for in the technical standards
- The second step is to apply for a certificate of registration for each respective RPA. If successful the Director will issue the operator with a certificate as well as a registration mark. The format and specification of the nationality mark of the RPA must comply with the technical standards
- The third step is to apply for an RPA Operating Certificate. This entails an application to the Director which includes:
  - a copy of the certificate of registration of each RPA to be operated
  - a copy of the RPA letter of approval for each RPA to be operated
  - an original operations manual
- In regard to the operations manual, it seems that the prospective operator must create a manual containing all the information required to demonstrate how the operator would ensure compliance with all the regulations and how safety standards will be applied and achieved. In addition a RPA operator must establish a system of record-keeping that allows adequate storage and reliable traceability of all activities. The technical standards are useful in order to determine the content of the operations manual
- In addition to the above mentioned a prospective operator will have to:
  - develop and establish for approval to the Director a command and control link (C2) requirements safety case. The functions to be considered for the safety case shall include the downlink, telemetry and uplink of the C2 as well as the target values for each which will be an assessment of the continuity, integrity, availability and latency of the data link
  - develop and establish a safety management system, to include a process of identifying actual and potential safety hazards which will have to develop and implement remedial action necessary to maintain an acceptable level of safety, making provision for continuous and regular assessment of the appropriateness and effectiveness of safety management activities
- As for security, the holder of an RPA Operating Certificate must conduct background checks and criminal record checks on all personnel recruited to handle, deploy and store RPAs. Moreover, the operator must designate a security coordinator responsible for the implementation, application and supervision of security control and must ensure that all personnel employed to handle, deploy or store an RPA have received security awareness training as prescribed in Civil Aviation Regulations Part 109

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– Lastly, the prospective operator must submit for approval a maintenance programme for the RPA. The maintenance of an RPA or component thereof must be carried out by the holder of a valid RPA Maintenance Technician licence for Class 3 RPAs and above. In respect of RPAs classified as class 2 and lower, the holder of the RPA Operating Certificate may perform the maintenance provided that the Director is satisfied of his/her or its ability to perform the required maintenance
– An RPA Operating Certificate is valid for 12 months unless surrendered by the applicant or suspended by an authorised officer of the CAA. The holder of an RPA Operating Certificate must apply annually for a renewal of such certificate at least 60 days before it expires

Commercial operators

– Not only are commercial operators required to have an RPA Operating Certificate (by implication this means completing the steps mentioned above) but they are also required to apply for an air service licence in terms of the Air Services Licensing Act No 115 of 1990 ("the ASL Act"). This in itself may present another hurdle before a commercial operator can operate legally
– In terms of the ASL Act, no person may provide an air service unless it is provided under and in accordance with the terms and conditions of an air service licence issued to that person under the Act. An air service means any service operated by means of an aircraft for reward. An application for an air service licence must be made to the Air Service Licensing Council, which will issue a licence for the prescribed class of air service
– In terms of the Domestic Air Services Regulations 1990 there are three classes of air services: I – scheduled air services; II – non-scheduled air services; and III – general air services. In addition there are various types of air services in respect of each class (for instance in respect of a class III licence there is, amongst other types, a type G3 – for aerial patrol, observation and surveys) as well as categories of aircraft (for instance category A4 – any aircraft, excluding a helicopter, with a maximum certified mass of 2,700 kilograms or less. Thus, for example, a commercial RPA operator providing advertising services will have to apply for a Class III, Type G2, Category A4 or H1 / H2 licence from the Air Service Licensing Council
– In assessing an application for a licence, the Air Services Licensing Council must be satisfied that (i) the air service will be operated in a safe and reliable manner, (ii) if the applicant is a natural person he is a resident of the Republic of South Africa but if the applicant is a juristic person 75% of the voting rights in the applicant is held by residents of the Republic; (iii) the applicant will be in active and effective control of the air service; and (iv) the aircraft providing the air service is a South African aircraft as defined in the Civil Aviation Act
– The holder of an air service licence is also obligated to have insurance cover depending on the class of air service. Commercial operators of RPAs will be obligated to have third party liability cover for RPAs in the sum of 500,000 Rand per RPA weighing 450kg or less (micro-light aeroplanes). The total third party liability may be insured as a combined single limit per any one occurrence
– If at any time an air service licence holder fails to comply with any provision of the ASL Act, the Air Service Licensing Council may suspend or cancel the licence of a licence holder
– Again, operating an air service in contravention of the Act or without the requisite approval of the Air Service Licensing Council may lead to a fine or imprisonment

Operations

– All RPAs are to be operated by a duly qualified licensed pilot. There are three licence categories (aeroplane, helicopter, multi-rotor) with a relevant rating (VLOS, extended-VLOS and beyond-VLOS). A licence may be applied for by any person 18 years or older having the relevant medical certificate and having completed a theoretical examination, flight training and a skill test
– As for the operation of the RPA itself, most operations (which include operations in controlled air space, releasing of objects in the vicinity of people etc) are restricted unless the operator has an RPA Operating Certificate and approval from the Director in its operations manual for the specific operation
– In addition, no RPA shall be operated (except for Restrictive-VLOS) unless the pilot has an air-band radio in his possession tuned into the frequency applicable to the ATSU providing services or controlling airspace in the area of the intended operation. For VLOS, extended-VLOS and beyond-VLOS operations a pilot is obligated to make the required radio calls, by using the registration of the RPA as a call sign, to indicate the altitude, location and intended operation of the RPA in that area at such intervals as are required to ensure adequate separation from other aircraft. For operations in controlled airspace, the pilot must maintain radio contact with the relevant ATSU and acknowledge and execute such instructions as the ATSU may give

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– An RPA pilot is required to conduct pre-flight and flight preparations before commencing any RPA operation. The operator of an RPA also has to ensure that an appropriate flight folio is kept for each RPA in respect of each operation

Discussion

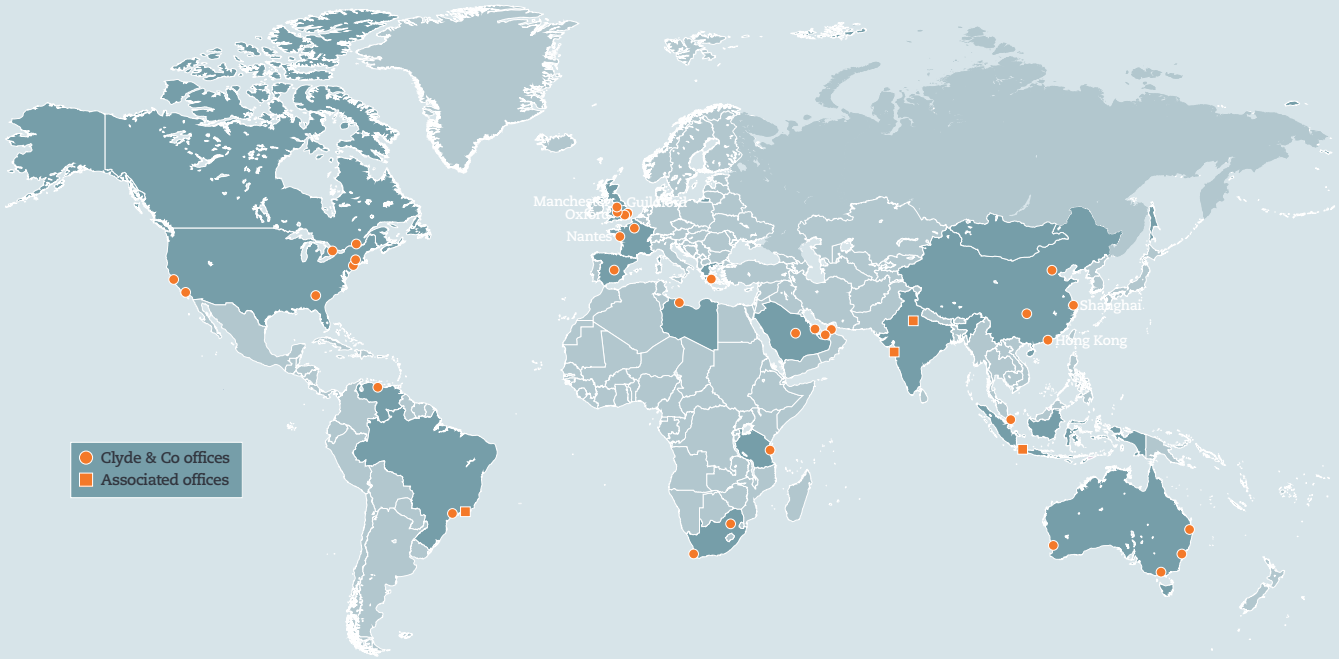
The Regulations appear to be comprehensive in nature, with the main focus being safety. On face value it seems as if the Regulations create unnecessary hurdles for RPA operators to comply with. However, given the complexities of RPA operations, the safety risks, as well as the "unknown factor", the hurdles do not appear to be unreasonable.

The first real issue to be dealt with by regulators is the systematic introduction of RPAs into the general aviation airspace, which in the South Africa market plays a significant role. The major concerns from a general aviation perspective are the available safety technology for avoidance collision (especially mid-air collisions) when operating RPAs, more particularly operating RPAs beyond-VLOS, what safety requirements will be enforced upon RPA operators and whether the existing safety technology can be relied upon. These are all important questions to be considered and answered by regulators and the RPA industry in general but in the interim regulators are more likely to apply a "belts and braces" approach to the regulation of RPA operators for the near future.

Overall the CAA's attempt to create a regulatory framework within which RPA operators can operate safely and legally may be commended even if it errs on the side of safety, as this is arguably justified in the aviation industry. That being said, it only seems logical that as the RPA industry develops, the Regulations should be able to adapt accordingly. The question is whether the adaptability of the Regulations can keep up with the speed at which the industry develops. That is probably the biggest challenge facing the RPAs industry, and one which is essentially not within its control.

For more information please contact **Thomas Lawrenson** of our Johannesburg office

Our offices



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Further advice should be taken before relying on the contents of this Newsletter.

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