CLYDE&CO

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Forum shopping: United States District Court for the District of Columbia declines jurisdiction in MH370 aviation tragedy

In aviation disasters, it is not uncommon for claims to be commenced by foreign parties in US courts. This strategic decision is influenced by the view that the US is more plaintiff-friendly due to favourable procedural and substantive laws, including the possibility of jury trials and more generous damages.

The litigation that ensued following the disappearance of Malaysia Airlines Flight MH370 was no different and forty proceedings were initially filed by the representatives or beneficiaries of passengers against the airline, Malaysian Airlines System Berhad (Administrator Appointed) (MAS), its reinsurer Allianz Global Corporate & Specialty SE (AGCS SE), Malaysia Airlines Berhad (MAB) and the Boeing Company (Boeing) in the US. Overwhelmingly, proceedings that were filed in the US were by citizens of China. Subsequently, the defendants jointly sought to dismiss the claims on various grounds including *forum non conveniens*.

The recent decision, handed down on 21 November 2018, after an oral hearing in December 2017, by the United States District Court in *In re: Air Crash Over the Southern Indian Ocean*, on March 8, 2014, No. MC 16-1184 (KBJ) (**In re: Air Crash Over the Southern Indian Ocean**) confirms the continuing willingness of US courts to dismiss claims relating to foreign aviation accidents. In this particular instance, the Court declined to exercise jurisdiction over the US proceedings, finding that Malaysia was an available and adequate alternative forum and that the balance of private and public interest factors weighed in favour of dismissal even for the claims brought in relation to US citizens and residents.

The judgment emphasises that, whilst foreign plaintiffs can continue to try their luck and maximise recovery by filing claims in the US, this may ultimately prove to be futile. Where prima facie an available and adequate alternative forum is available to try the claim, the forum non conveniens doctrine is a powerful tool on which defendants will continue to rely to seek the dismissal of claims commenced in the US.

Following the dismissal, the plaintiffs have appealed the decision to the US Court of Appeals. We shall report further when the ruling on the appeal is available.

The decision of the United States District Court for the District of Columbia

The circumstances of the disappearance of Flight MH370 on 8 March 2014 remain a mystery with all 12 crew members and 227 passengers of 15 different nationalities presumed deceased. *In re: Air Crash Over the Southern Indian Ocean*, the Court found in favour of the defendants that claims regarding the disappearance of Malaysia Airlines Flight MH370 (initially filed against the defendants in the District of Columbia, California, New York and Illinois and later consolidated by the Judicial Panel on Multidistrict Litigation) are to be dismissed in the US in favour of Malaysia on *forum non conveniens* grounds. The proceedings filed encompassed two different types of claims: Montreal Convention claims against MAS, MAB and their insurers, AGCS SE and Henning Haagen, an officer at AGCS SE and common law wrongful death and products liability claims against Boeing.

The defendants jointly sought dismissal of the claims on various grounds including *forum non conveniens*, arguing that Malaysia is an available and adequate forum and the private and public interests weigh heavily in favour of dismissal to Malaysia. In deciding in favour of the defendants, the Court referred to the test laid out by the US Supreme Court in *Piper Aircraft Co v Reyno* 454 U.S. 235 (1981). The test requires the Court to consider first whether an available and adequate alternative forum exists for the action and, if *prima facie* if there is such a forum, the next step requires the Court to analyse the balance of the private and public interest factors to determine whether proceedings should be dismissed in favour of the alternative forum.

An argument was made on behalf of some of the plaintiffs that Malaysia was an inadequate forum because legislation passed in Malaysia to place MAS in administration effectively

resulted in MAS and MAB being judgment-proof and left the plaintiffs without a legal remedy. The Court was unpersuaded by this argument and acknowledged that there was no evidence to suggest that the plaintiffs would be "deprived of all remedy or treated unfairly" if these cases were litigated in Malaysia. It was also persuasive to the Court that a number of the plaintiffs had conceded Malaysia as an available and adequate alternative forum. It is worth noting that in reaching this finding, the Court emphasised that the necessary focus is concerned with the availability and adequacy of an alternate forum rather than the concept of juridical advantage.

As noted above, the second step in the *forum non conveniens* analysis requires a court to analyse private and public interest factors to determine whether it is appropriate for a US court to exercise jurisdiction over the claims. With the Montreal Convention claims, the Court found that the cases should be dismissed, having evaluated the relevant public and private interest considerations as follows:

1. The facts demonstrate that Malaysia has an overwhelmingly greater interest in resolving the claims arising from the tragedy than the US.
2. Although a greater deference was afforded to the forum choice of those plaintiffs/decedents with a connection to the US, this factor was insufficient to weigh in favour of the claims being in heard in the US.
3. The claims are likely to present complex conflicts-of-law questions and the necessity of addressing difficult, novel legal issues including the validity and ramifications of the Malaysian legislation referred to above.
4. Defending against claims for unlimited damages under the Montreal Convention will expand the scope of the claims so that litigation in the US could become unduly burdensome.
5. Parties will be required to conduct extensive discovery of the issues.
6. Burdensome, costly and time-consuming procedure of enforcing discovery requests on unwilling Malaysian parties through letters rogatory.
7. Key liability related evidence located in Malaysia or China.

In relation to the common law wrongful death and products liability claims against Boeing, the Court similarly found that Malaysia was an available and adequate alternative forum based on Boeing agreeing to submit to Malaysia's jurisdiction and to toll the statute of limitations available with respect to the claims. For similar reasons to the Montreal Convention claims, the Court found that the public and private interest factors weighed in favour of dismissal. While the Court found "the balancing of the private interests is a closer call in the products liability context", in the end the Court was concerned by the extent to which Boeing could, or would, seek to implead all potential defendants especially sovereign defendants controlled by the Malaysian government as a matter which favoured dismissal. In view of the finding on the *forum non conveniens* motion, the Court determined that it was unnecessary to rule upon the other, alternative defence motions that were also before it.

Conclusion

This decision serves as a useful reminder to foreign plaintiffs (with little or no connection to the US) that a choice of US forum does not necessarily guarantee that the merits of their dispute will ultimately be heard in the US. For some time now, arguably the trend in the US courts has been to curb the practice of forum shopping through their willingness to dismiss cases on *forum non conveniens* grounds. While there may be legitimate and strategic reasons why a foreign plaintiff may choose to commence proceedings in the US, foreign plaintiffs will inevitably find that they face an uphill battle to pursue litigation in the US. In approaching a *forum non conveniens* dismissal application, US courts are often reluctant, for reasons of international comity, to find that an available and alternative forum is inadequate. The significance of juridical or legitimate advantage is not a relevant factor as part of the consideration whether there is an available and adequate alternative forum.
As a foreign plaintiff's choice of US forum is given lesser judicial deference in comparison to a domestic plaintiff, unless the private and public interest factors point strongly enough against dismissal foreign plaintiffs will be denied access to a US court. Given the interests at stake in transnational litigation, the jurisdiction tussle remains a litigation reality and the doctrine of *forum non conveniens* remains highly relevant to cases brought in the US, particularly those involving foreign parties.

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What do Uber and Pimlico Plumbers have in common with the aviation industry?

In the national press, Uber has become notorious, not so much for its taxi services, but for the high court litigation around its drivers' worker status claims. Similar litigation against Pimlico Plumbers, which ended up in the UK's Supreme Court, was widely reported by the BBC last summer. Pimlico lost its appeal against a claim by one of its "self-employed" plumbers for worker status. This left the door open to claims against it for holiday pay, unlawful deductions from wages and discrimination.

These cases should be a wake-up call for the aviation industry, where a range of individuals, including even airline pilots, are treated as self-employed contractors. In light of these decisions, airlines should now be re-examining those contractual arrangements, weighing up their exposure to worker status claims and considering whether alternative contractual arrangements should be put in place with their staff.

But why is worker status such an issue?

By way of background, employment law in the UK divides individuals into three categories: employees, workers and the self-employed. Individuals who are self-employed are not entitled to worker rights such as redundancy and holiday pay. But this will change if those individuals are able to show they are in fact workers. UK tax law on the other hand is different, dividing individuals into just two categories: employees and self-employed. Sometimes an individual who is a worker for employment purposes may be taxed as an employee, but this is not always the case.

Determining employment status is not always clear cut, as demonstrated by a growing line of cases, particularly in relation to the gig economy, and the risk to employers of getting it wrong can be costly. Uber, for example, faces large claims for backdated unpaid holiday pay if it is unsuccessful in defending the claims for worker status by its drivers. Having recently lost its case in the Court of Appeal, this will now be for the Supreme Court to decide.

It is usually straightforward to identify an employee/employer relationship by looking at the contract of employment and the mutuality of obligation between the parties — right to work, right to pay etc. However, it is often more difficult to identify the differences between worker and independent contractor status. The key indications of "worker" status are:

- The employer is not a customer of the business operated by the individual but instead has some control over the individual and the way they perform their services;
- The individual is obliged to perform the work "personally", ie themselves, and in practice is not free to provide a substitute;
- The individual provides their services to a principal employer rather than to many "employers"/customers.

The wide publicity around both the Uber and Pimlico Plumbers cases, and other similar cases (such as Deliveroo), has had a substantial impact on businesses and their workforces in the gig economy, where a lack of clarity in the law has led to confusion and uncertainty. The employers in Uber and Pimlico Plumbers have, so far, both lost their cases — the courts concluding that the individuals were workers and not self-employed contractors. Only Deliveroo has been successful in arguing that their staff are not workers. That case, which was before the Central Arbitration Committee (CAC), decided that the delivery riders had a genuine right to arrange for others to deliver food on their behalf and therefore this meant they could use a substitute and did not provide "personal service" — one of the requirements of "worker" status.

Each case will turn on its own particular facts. To illustrate this, we summarise below the Pimlico Plumbers decision in a little more detail.

Pimlico Plumbers litigation

Gary Smith had worked solely for Pimlico Plumbers for six years under a contract which described him as an 'independent contractor' in business on his own account. His contract was ended after he suffered a heart attack. He brought a number of claims against Pimlico Plumbers in the Employment Tribunal, including unfair dismissal, unlawful deduction from wages, holiday pay and disability discrimination. Before his claims could be heard, the court had to decide what claims he was allowed to bring, which depended on whether he was an employee, a worker or self-employed.

The courts look beyond the label that the written contract puts on their status, and consider the reality of how their relationship works in practice. So even if the contract states that someone is self-employed, a court may decide that they are in fact a worker or employee, with the greater employment protections that follow.

In Mr Smith's case, the Employment Tribunal decided that he was a worker. This finding was appealed all the way to the Supreme Court by Pimlico Plumbers, after the Employment Appeal Tribunal and Court of Appeal agreed with this conclusion [https://www.clydeco.com/blog/the-hive/article/self-employed-status-not-so-water-tight].

Key factors in the court's decision that Mr Smith was a worker were their conclusions that:

- The dominant feature of Mr Smith's contract was that he was required to perform the work himself. Although he could provide a substitute to do the work for him, the substitute had to be another Pimlico Plumber on similar terms.
- Whilst Mr Smith was able to reject work and took on some financial risk, this did not outweigh the factors pointing against Pimlico Plumbers being a client of a business run by Mr Smith. Pimlico Plumbers determined the minimum number of hours to be worked and placed numerous restrictions and controls on how Mr Smith carried out his work, for example requiring him to wear a uniform and be clean and smart at all times. The company also dictated when and how much (if any) pay he received for his work. The subordinate position of Mr Smith in the relationship between himself and Pimlico Plumbers was a key indicator that he was really their worker.

What these cases mean for the aviation industry

The gig economy cases mentioned above are reminders that in every employment status case, courts will have to grapple with the particular facts, considering whether personal service is required, or if there is a genuine right to provide a substitute, and looking at questions of control, risk and subordination. This analysis will go beyond the terms of the written documentation.

What has emerged from the recent line of cases is that where a business seeks to exercise a significant amount of control over how, and by whom, the work is done, integrates the individual into its own business and dictates terms which put them in a subordinate position, they are likely to be found to be a worker (if not an employee). Employers in the aviation industry should therefore examine their arrangements with independent contractors against these criteria, taking legal advice where they think there may be a risk of worker (or employee) status.

Unfortunately, a cloud of uncertainty still remains over employment status in many cases. The Government has recently announced that it will introduce new legislation to clarify the test for employment status that reflects modern working practices. It will also seek to align how the law deals with status for tax purposes with the status for employment rights purposes. There will be an online tool which can determine employment status in the majority of cases. This new legislation has not been given any particular timetable and will be difficult to draft. Consequently it seems likely that there will always be an element of interpretation and the outcome will turn on the specific facts of the working relationship. This means that this area is likely to continue to cause confusion and uncertainty for some time to come.

Pimlico Plumbers Ltd and another v Smith
https://www.supremecourt.uk/cases/docs/uksc-2017-0053-judgment.pdf

UBER B.V. ("UBV") (1) Appellants UBER LONDON LIMITED ("ULL") (2) UBER BRITANNIA LIMITED (3) and Yaseen ASLAM (1) Respondents James FARRAR (2) Robert DAWSON & others (3)
https://www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf

Independent Workers' Union of Great Britain (IWGB) and RooFoods Limited T/A Deliveroo (CAC)
https://iwgbunion.files.wordpress.com/2017/11/17-11-14-final-version-deliveroo-acceptance-decision.pdf

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Australian Federal Court confirms strict application of Montreal Convention's 2 year limitation period

The Federal Court of Australia has recently underscored the strength of the two year limitation period that exists under the *Montreal Convention 1999* by dismissing a passenger claim commenced within time but against the wrong legal entity.

Background

The claimant, Dr Sajan Singh Bhatia, commenced proceedings against Malaysian Airline System Berhad (MAS) for injuries he allegedly suffered during a Malaysian Airlines flight from London to Kuala Lumpur on 5 June 2016.

Article 35(1) of the *Montreal Convention 1999* (the Convention) provides that a passenger's right to damages against a carrier is extinguished if an action is not brought within two years from the date of arrival or projected arrival of the flight.

In Dr Bhatia's case, the proceedings were filed on 4 June 2018, within the two year limitation period. It eventuated during the course of the proceedings, however, that the flight was actually operated by a different legal entity, being Malaysia Airlines Berhad (MAB). MAB, and not MAS, was therefore the correct "carrier" for the purpose of any claim under the Convention.

Dr Bhatia subsequently applied to amend his claim to replace MAS with MAB as the named respondent. The application was brought pursuant to rule 8.21 of the *Federal Court Rules 2011* (Cth) (FCR). That rule confers a discretionary power on the court to allow a party to amend a claim for certain purposes so as to correct the identity of a party or a mistake in the name of a party.

The key question was therefore whether Dr Bhatia had properly commenced "an action" within the meaning of Article 35(1) of the Convention, so that his right to damages had not been extinguished and he was able to request the court to use its discretionary power to correct the name of the respondent.

Judgment

In hearing the application, Justice Charlesworth of the Federal Court of Australia accepted that Dr Bhatia had commenced the proceedings within two years from the date on which the relevant carriage took place, and that sufficient facts were alleged against the person named as the respondent (i.e. MAS). The pleading was described as a "model of compliance" in that regard.

Nevertheless, to avoid the right to damages being extinguished under Article 35(1) of the Convention, it must first be established in a proceeding that a valid "action" has been brought within the time permitted. Here, on the matters pleaded, Dr Bhatia could not prove the critical facts necessary to sustain a right to damages against the named respondent, MAS, because MAS was not the carrier. In other words, Dr Bhatia had brought a *'perfectly constituted proceeding against a person against whom he has no right to damages'*. The court held that this was not a valid "action" as contemplated by Article 35(1) and therefore the right to damages was extinguished.

Significantly, Justice Charlesworth also held that Australian domestic laws affecting limitation periods, such as rule 8.21 of the FCR, cannot operate in a manner inconsistent with the extinguishment of rights brought about by Article 35(1) of the Convention so as to give life to a claim that has otherwise ceased to exist. The use of a procedural rule to backdate an amendment to circumvent the two year limitation period would *'impermissibly contradict the legal relationship (or extinguishment thereof) for which article 35 provides'*. That is in line with the approach adopted in other jurisdictions such as the United Kingdom and Canada.

In any event, Justice Charlesworth determined that the amendment sought by Dr Bhatia was best characterised as the "substitution" of a party rather than the correction of a mistake in the name or identity of a party. The effect of the applicable procedural rules governing such a "substitution" is that the proceeding would be taken to have started against that newly named respondent on the day of the amendment, not from the date the original proceedings were commenced. Accordingly, Dr Bhatia would still have fallen foul of the two year limitation.

Comment

The interplay between the extinguishment of rights under Article 35(1) of the Montreal Convention and Australia's domestic rules affecting limitation periods has received little judicial exposure.

The decision in *Bhatia* makes clear that unless an "action" has been brought within two years, a passenger's right to damages is extinguished and cannot be resurrected by way of a back-dated amendment made pursuant to domestic procedural rules. An "action" within that context will only be properly brought where the critical facts necessary to sustain the claim have been alleged in the original claim. That could not be said to have occurred in the case of Dr Bhatia.

In reinforcing the protection and certainty the Article 35(1) limitation period affords to airlines and their insurers within Australian courts, *Bhatia* also serves as a stark reminder to ensure the correct entity has been named in a proceeding.

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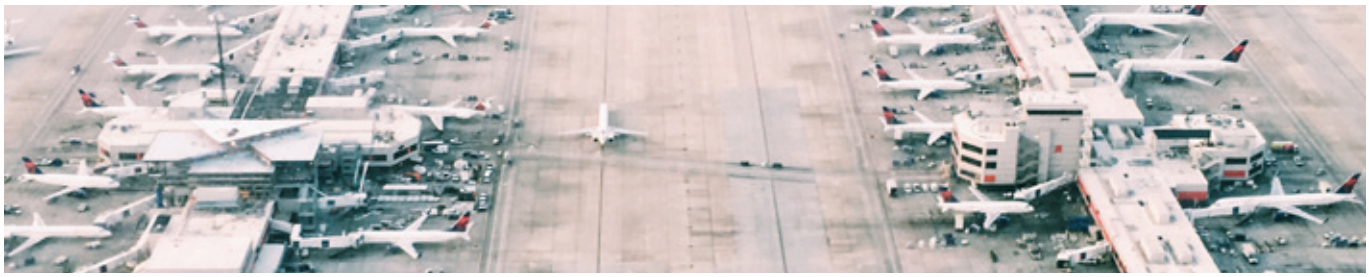

Aircraft Purchase Fleet Limited v Compagnia Aerea Italiana S.p.A.

On 30 November 2018 judgment was handed down by Stephen Phillips J in the Commercial Court case *Aircraft Purchase Fleet Limited v Compagnia Aerea Italiana S.p.A.* (CL-2016-000039). Following a 2 week trial in November 2017 Phillips J dismissed in its entirety the US$260million claim made against Compagnia Aerea Italiana S.p.A.(CAI).

The parties

The Claimant in these proceedings was Aircraft Purchase Fleet Limited (APFL). APFL is an Irish company which purchases and leases aircraft. APFL is beneficially owned by Toto Holding, an Italian construction company, which previously owned an Italian airline, Air One.

The Defendant CAI is the holding company of Alitalia - Società Aerea Italiana S.p.A. (SAI), which operates as the airline "Alitalia". CAI was previously the airline itself. In August 2008 a group of investors formed CAI to purchase "old Alitalia" (Alitalia – Linee Aeree Italiane) — which was bankrupt — and merge it with Air One, which was also bankrupt. From 2008 until 2015 CAI was therefore the company that operated as the airline. On 1 January 2015, CAI formally passed airline operations to SAI, a new entity owned 49% by Etihad Airways and 51% by the former Italian stakeholders of CAI (mainly a syndicate of Italian banks). Unconnected to the case, SAI entered into "extraordinary administration" in Italy on 3 March 2017 under the Marzano Law (Amministrazione Straordinaria), a procedure for large companies similar to US Chapter 11.

The claim

The Claimant (APFL) claimed US$260 million in damages from the Defendant (CAI), due to CAI's alleged renunciation of an Airbus A320 Family Framework Agreement from December 2008 (the "Framework Agreement") under which CAI was obliged to lease new Airbus A320 Family aircraft from APFL. The A320 Family includes A319, A320 and A321 aircraft. The Framework Agreement enabled CAI to choose between aircraft within the A320 Family. For example, CAI could specify that it wanted A319 instead of A320 aircraft. This right was subject to various restrictions and requirements.

APFL would source these aircraft under an A320 Family Purchase Agreement between Airbus as the seller and APFL as the buyer (the "APA"). This purchase agreement had originally been entered into between Airbus as seller and Air One as buyer, and was novated from Air One to APFL when Air One merged with Alitalia in 2008, simultaneously with APFL and Air One entering into the Framework Agreement. APFL would therefore buy the aircraft from Airbus under the APA and lease them to CAI under the Framework Agreement.

This was a dispute over the non-delivery of thirteen Airbus aircraft which (on APFL's case) CAI was bound to but refused to take on lease from APFL between the years 2012 and 2015.

In 2009-2010, APFL failed to perform the Framework Agreement as it was required to. It could not deliver all of the aircraft which it was required to deliver to CAI, and instead agreed with CAI and Airbus that Airbus would deliver certain aircraft to CAI directly. Moreover, some of the aircraft which it did deliver were late. It is understood that APFL's failures to perform the Framework Agreement were due to its inability or difficulty to obtain the financing it required to buy the relevant aircraft from Airbus.

On 10 November 2010, CAI and APFL concluded Amendment Agreement No 1 to the Framework Agreement ("AA1"). AA1 reduced the number of aircraft due to be delivered to CAI. It also gave CAI the right to a larger number of A319 aircraft, since by that time CAI had decided that it wished to favour the (smaller) A319 aircraft over the (larger) A320 model. The parties therefore agreed that APFL would deliver the following aircraft:

- Three A320 Aircraft in 2010
- Five A319 Aircraft in 2011
- Five A319 Aircraft in 2012
- Five A320 Family Aircraft in 2013
- Five A320 Family Aircraft in 2014
- Three A320 Family Aircraft in 2015

APFL duly performed the Framework Agreement (as amended by AA1) by delivering (albeit late) the A320 and A319 aircraft due to CAI in 2010-2012. However, APFL did not deliver any of the thirteen aircraft due in 2013, 2014 or 2015, and it is in relation to those years that this dispute emerged.

APFL's case was that, beginning in February 2012, CAI committed a series of anticipatory repudiatory breaches of the Framework Agreement, by insisting on having only A319 aircraft in 2013-2015. APFL's case was that CAI was only entitled to demand that "every second" aircraft was converted to an A319, and that this right was subject to requirements which were not satisfied. APFL pleaded that it accepted CAI's anticipatory repudiation of the Framework Agreement in April 2013, and it claimed damages from CAI. This claim for damages was based upon the presumption that the Framework Agreement had been performed – i.e. that APFL would have purchased from Airbus and then delivered to CAI thirteen A320 aircraft between 2013 and 2015. APFL alleged that it would thereby have received rental payments for the aircraft which, together with other sums, would have generated profits of US$260million.

CAI pleaded a number of defences to the claim. Amongst the defences, CAI relied upon the fact that on 5 April 2012 Airbus unilaterally terminated the Airbus Purchase Agreement in respect of the 14 aircraft due to be delivered in 2013 and 2014 (10 for CAI and 4 for a Chinese leasing company CALC), as a result of a dispute between APFL and Airbus. Further, by an Amendment No 11 dated 19 September 2012 Airbus and APFL agreed to also cancel 17 aircraft scheduled for delivery in 2015 and 2016 (3 of which were allocated to CAI). In the circumstances, CAI pleaded that it became impossible for APFL to perform the Framework Agreement in 2013 and 2014 (from April 2012) and 2015 and 2016 (from September 2012), alternatively that APFL disabled itself from performance of that contract. CAI's case was that this provides a complete defence to the claim.

The judgment

In his judgment Phillips J focussed on the termination by Airbus of the Airbus Purchase Agreement (the APA).

It was common ground that, if CAI had renounced the Framework Agreement as alleged, it would nevertheless have a defence to APFL's claim for damages if APFL had, independently, rendered itself incapable of performing its obligations under the contract. The onus on CAI to establish impossibility was met: Airbus' termination of the 2013 and 2014 aircraft deliveries in April 2012, its refusal to reinstate those deliveries, and the entry into of Amendment No 11 did indeed result in APFL being unable to perform the Framework Agreement at any time after 19 September 2012.

However, APFL submitted that such impossibility or inability was attributable to CAI's (alleged) renunciation, and so did not provide CAI with a defence. APFL recognised that the burden was on APFL to establish that causative link. Phillips J concluded that "there is no direct evidence to the effect that Airbus' action was in any way influenced by CAI's alleged renunciation in relation to A319s". The judge determined that Airbus' decision to terminate the Airbus Purchase Agreement was due to failure by APFL on spurious technical grounds to take delivery of aircraft MSN5018 in January 2012, which in fact APFL could not finance, this being "a further blatant default" by APFL in the context of a history of a long history of difficulties in its performance of the contract, this being "made all the more inevitable" by "aggressive and dishonest denials and allegations" put forward to Airbus by APFL. The sole reason for the Airbus termination was the failure of APFL to accept, pay for and take delivery of MSN 5018; there was no mention of CAI being responsible at the time. APFL's contention was based solely on an unfounded inference that Airbus was motivated by other commercial considerations in effecting the termination. The proper inference to be drawn was that Airbus had terminated due to APFL's failure to perform its obligations under the APA.

APFL further argued that Airbus would have reinstated the cancelled 2013 and 2014 aircraft deliveries but for CAI's position in relation to A319s, Phillips J decided that this argument is also without merit for a number of reasons. APFL did not suggest to CAI at the time that its conduct was preventing Airbus from reinstating deliveries. At no point did APFL even tell CAI that Airbus had terminated the Aircraft Purchase Agreement deliveries: "strongly suggesting that APFL did not consider that CAI was responsible for such termination or its non-reversal". Having taken the decision to terminate, it was extremely unlikely that Airbus would have been willing to re-instate the agreement without some serious improvement in APFL's ability to perform its obligations, and CAI's stance would not have been such an improvement. Thus, APFL was entirely responsible for rendering itself unable to perform its obligations under the Framework Agreement.

Phillips J concluded that APFL had "not come close" to discharging the burden of establishing that Airbus' actions were in any way influenced by CAI's stance. It follows that CAI "has a complete defence to APFL's claim as APFL would not have been able to perform its obligations under the Framework Agreement" in any event, independently of CAI's alleged renunciation.

As APFL's claim failed on the facts, Mr Justice Phillips did not need to explore the numerous issues around renunciation, affirmation of the Framework Agreement or the "complex exercise" of assessing the damages claimed by APFL.

Legal analysis

CAI argued that the doctrine of frustration applied, as it had become impossible for either party to perform the Framework Agreement once Airbus had terminated the 2013 and 2014 deliveries. The judge held that the doctrine of frustration was not applicable, since frustration could only arise where responsibility for the matters giving rise to the impossibility of performance was not allocated in the contract, either expressly or implicitly, *National Carriers Ltd v Panalpina (Northern) Ltd [1981] A.C. 675*. In this case, APFL's obligations under the Framework Agreement were wholly dependent on the APA remaining in force. The judge therefore decided that it was plainly necessary, in order to give business efficacy to the Framework Agreement, to imply a term that APFL would not act so as to permit Airbus to terminate the APA.

However, it was a potential defence to a renunciation claim that the innocent party was not itself ready or willing to perform the contract, *Acre 1127 Ltd (In Liquidation) (formerly Castle Galleries Ltd) v De Montfort Fine Art Ltd [2011] EWCA Civ 87*. Since APFL would not have been able to perform its obligations under the Framework Agreement independently of CAI's alleged renunciation, CAI had a complete defence to APFL's claim. The judge concluded that it was inevitable that Airbus would terminate the APA in the circumstances of APFL's further blatant default, regardless of any stance CAI was adopting in relation to A319s. Phillips J held that even if CAI had renounced the Framework Agreement, APFL had rendered itself incapable of performing its obligations under that contract, which provided CAI with a complete defence to the claim for damages.

Counterclaim

CAI had a counterclaim arising under separate provisions of the Framework Agreement. This related to amounts payable by Toto S.p.A. to CAI relating to misrepresentation and/or breach of warranty under the purchase arrangements in respect of the sale to CAI by Toto of Air One, which amounts were (CAI argued) guaranteed by APFL to CAI under the terms of the Framework Agreement. This counterclaim amounted to EUR40.2 million. In March 2015 CAI commenced arbitration proceedings in Italy against Toto in relation to these claims; by an arbitral award issued in February 2017 the arbitrators upheld CAI's claims and awarded CAI the full amount claimed of EUR 40.2 million. There was a dispute in relation to APFL's liability under the Framework Agreement as a matter of Italian law and Phillips J found largely in favour of APFL and upheld only EUR 276,118 of CAI's counterclaim. The judge himself recognised however that this is of "little commercial significance" as Toto is liable as primary debtor under a settlement arrangement relating to the arbitration award.

Clyde & Co involvement

The successful defence of CAI was conducted by a team from Clyde & Co's aviation team in London including partners Rob Lawson QC, Patrick Slomski, Rob Ireland and Mark Bisset, and associates Louise High and Nicholas Harding. Counsel was a team from 7 King's Bench Walk comprising Head of Chambers Gavin Kealey QC, Andrew Wales QC, Anna Gotts and Harry Wright.

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Personal injury update – progress towards new discount rate

The Civil Liability Act was given Royal Assent on 20 December 2018. The Act's implications for personal injury claims are significant, with a change to the existing discount rate likely by 6 August 2019.

We previously wrote about the anticipated changes to the discount rate in the February 2018 issue of the Bulletin. Whilst the prospect of a new discount rate being in force by early 2019 is now unlikely, the signing of the Civil Liability Bill into law at the end of 2018 is a positive step. The Civil Liability Act sets out a formal timetable for review of the existing discount rate, but with the chaos of Brexit tying up precious Government resources over the next few months this process is only one amongst many priorities facing the Ministry of Justice.

Discount rate recap

The discount rate is a standard adjustment rate which is used to calculate the value of future losses for personal injury claims. The aim is to modify the lump sum damages that a claimant receives at trial or settlement to reflect the interest that the claimant will gain by investing their money, thereby preventing the claimant from receiving more than the value of their loss. The discount rate is set by the Lord Chancellor and was historically 2.5%, which resulted in a reduction to the lump sum. In March 2017, concerned that the 2.5% rate caused claimants to be under-compensated, the then Lord Chancellor (now Chief Secretary to the Treasury) Elizabeth Truss changed the rate to -0.75%.

The change to a minus rate resulted in a significant increase in the value of lump sum damages and was widely criticised by the insurance industry. In February 2017, when the change was announced, Huw Evans of the Association for British Insurers described the move as "reckless in the extreme" and estimated that it would result in an additional £1 billion in compensation paid by the NHS alone.

In September 2017 plans were announced by the Ministry of Justice for an overhaul of the mechanism for setting the discount rate, which resulted in the Civil Liability Bill (now Civil Liability Act 2018).

The Civil Liability Act 2018

The Civil Liability Act 2018 ("the Act") alters existing legislation in the Damages Act 1996 to require the Lord Chancellor to begin a review of the discount rate within 90 days of the date of enactment (so by 19 March 2019). The review period may last up to 140 days after which the Lord Chancellor, in consultation with the Government Actuary and the Treasury, must determine whether the rate will be either affirmed or changed. Any changes will be made through an Order, which must be published by 6 August 2019. After the initial review the rate must be reviewed periodically, with each subsequent review period commencing no later than five years after the expiry of the previous review period.

The Act also sets out specific assumptions that the Lord Chancellor must make when determining whether the rate should be changed (a process described in the Act as the "rate determination"). This includes the assumption that the claimant is receiving their damages as a lump sum, rather than periodic payments and that they have had the benefit of proper investment advice.

The Act does not mean that a change to the discount rate is guaranteed, but the sustained criticism of the current rate, and negative discount rates in general, suggest that revision is highly likely. More specifically, the current -0.75% rate was based on the assumption that claimants are "risk averse" or "risk free" investors. Following consultations, the position adopted in the Act has shifted and the Lord Chancellor must assume that the claimant is prepared to take "more risk than a very low level of risk, but less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims".

What to watch for

In early December 2018, ahead of the Act receiving Royal Assent, the Ministry of Justice announced a call for evidence on what the new rate should be, with the stated aim of collating information in preparation for the 140 day review period. The call for evidence posed a series of technical questions about the types of investments available to a hypothetical "low-risk" investor as well as the advice typically given to claimants after payment of their damages claim and whether they choose to follow it. The nature of the questions means that respondents will likely have been drawn from the claimant side, including claimant solicitors and financial advisors. The call for evidence closed on 30 January 2019 and the results are awaited.

It has been a long road since the first changes were announced at the end of February 2017, but the seemingly proactive approach to the Lord Chancellor's review period is encouraging. With the new timetable set in place by the Act, we should see changes between the second and third quarters of this year which will bring much-needed relief to compensators and insurers.

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The erosion of exclusivity under the Montreal Convention 1999: a case study on the issue of overbooking and denied boarding from New Delhi

In *Air France v O.P. Srivastava & Others* (Appeal No. 310 of 2008), the National Consumer Disputes Redressal Commission of New Delhi ("NCDRC") held that the denial of boarding to passengers holding confirmed tickets amounted to deficiency in service on the part of the Appellant airline.

Case summary

On 5 May 2002, the Complainants booked confirmed tickets to travel from Delhi to Paris with the Appellant, via the ticketing agent Travel Wings based in Kanpur.
The Complainants were intending to travel to attend various business meetings. On 8 November 2002, the Complainants requested that the date of their return journey be changed to accommodate a rescheduling of business meetings. The Complainants paid the differential amount owed and were issued three confirmed tickets for the return flight.

On 10 November 2002 the Complainants were denied boarding at Charles de Gaulle Airport due to overbooking. The Appellant offered the Complainants 300 euros by way of compensation, in addition to free hotel accommodation with meals and telephone vouchers. Despite having accepted this, the Complainants sought redress on the basis that such overbooking practice amounted to deficiency in service, contrary to consumer protection legislation.

A Complaint was filed before the Uttar Pradesh State Commission, alleging that the Complainants had been subjected to embarrassment and humiliation by the staff of the Appellant. It was also alleged that the 24-hour delay resulted in significant financial business losses as a result of the Complainants' inability to attend important business meetings.

A State Commission decision

The State Commission (the "Commission") allowed the Complaint, directing that the sum of Rs 630,000 (approx. US$8,949) be paid to each of the Complainants with interest on the basis that the denial of boarding amounted to deficiency of service. In summary, the Commission concluded that it had the requisite jurisdiction to decide the Complaint, on the basis that the tickets were purchased through an agent residing in Uttar Pradesh. The fact that the Complainants had filed complaints in their individual capacity which resulted in 'personal discomfort, inconvenience and mental agony' meant that they retained their status as 'consumers' and were thereby entitled to legislative protection under the applicable statutory provisions, notwithstanding their claim for damages as a result of losses incurred by the company. Furthermore, the Complainants were not found to have concealed the fact that compensation had been received from the Appellant and the Commission rejected the argument that receipt of such compensation meant that the Complainants were 'estopped' from pursuing any additional remedies.

Appeal before the NCDRC

On appeal, the NCDRC concurred with the reasoning of the Commission in principle but reduced the compensation payable to Rs 400,000 (approx. US$5,682) per passenger on the basis that the Complainants had failed to adduce cogent evidence as to the extent of the alleged financial loss incurred by the company as a result of the delay. The specific arguments raised by both parties and considered by the NCDRC provide an interesting basis for further discussion.

The Montreal Convention and applicable law

In reliance on the Supreme Court decision in *Trans Mediterranean Airways v Universal Exports & Anr* (2011), the NCDRC considered that the protection provided under the Consumer Protection Act 1986 'does not extinguish the remedies under another statute but provides an additional or alternative remedy'. On this basis, the NCDRC rejected the Appellant's argument that the question of civil liability

in this case had to be decided pursuant to the Montreal Convention 1999 ("the Convention") - in other words, ruling that the Convention is not an exclusive regime.

The NCDRC's ruling and rationale adds a further layer of complication to an already fraught and contentious issue of the relationship between the Convention, as an exclusive civil liability regime, and the rights and remedies which exist within domestic legal systems and as created by supranational structures such as the European Union. EU Regulation 261/2004 in respect of compensation and assistance owed to passengers in the event of flight delays, cancellations and denied boarding has given rise to much debate, and unfortunately the Court of Justice of the EU set an undesirable and incorrect precedent in the IATA and ELFAA case by holding that the Regulation and Convention had different scopes and hence did not conflict. This ruling of the NCDRC similarly illustrates the tension which exists between the Convention as a unifying set of rules in respect of civil liability in carriage by air, and the application of domestic law by individual signatory states, often giving rise to disparities due to the differing aims/social policy and objectives of the respective provisions.

Whilst there will inevitably be differences in the way in which the Convention is interpreted and applied depending on the applicable domestic laws of each jurisdiction, the fundamental principle of exclusivity under the Convention ought to remain intact to avoid a situation of double recovery and ambiguity in passenger rights.

Deficiency of service

With respect to the question of whether the denied boarding of passengers amounted to deficiency of service, the NCDRC referred to EU Regulation 261/2004 and specifically article 4(1), which requires that an operating carrier must first call for volunteers to surrender their reservations, prior to denying boarding to any passengers, even though the EU Regulation does not of course apply in India. The NCDRC considered that the Appellant airline had failed to follow this procedure and also failed to prove that it had 'take[n] all necessary measures to avoid unnecessary delay' to the Complainants as per Article 19 of the Montreal Convention.

The NCDRC opined that 'the practice of overbooking may be a commercially viable international practice being adopted by all the airlines, probably, to ensure that seats in the flights do not go vacant in the event of no-shows by booked passenger(s) but the same cannot be at the altar of the passengers' (sic). This would seem to echo the sentiment expressed by the Commission in the first instance decision that 'the practice of overbooking does not authorize an airline to go to any extent of overbooking and resultant 'denied boarding' of a large number of persons without rhyme or reason'. Put simply, a plausible explanation for overbooking must be offered by the airline as justification.

The NCDRC's disapproval of overbooking practices is perhaps not surprising but is, arguably, unwarranted given its acceptance and use internationally as a tool by which to create more choice, enable airlines to offer competitively priced fares to passengers and thereby actually benefit consumers. The International Air Transport Association ("IATA") published guidance in its overbooking position paper in 2017, recommending that the long-established overbooking practice be allowed to continue. The paper recognised that the overbooking process is based upon extensive statistical analysis and historical data to predict "no shows" with a high degree of certainty. It should be recognised that offering maximum flexibility to accommodate passengers via last-minute amendments or cancellations (as in the present case) brings with it the justifiable (yet arguably unavoidable) risk that the flight may indeed be overbooked.

Conclusion

In keeping with the emerging trend established in earlier cases concerning deficiency of service and the applicability of the CPA 1986, this decision gives rise to potential risks for carriers operating in India where boarding may need to be denied due to overbooking. The contention that the domestic legislation operates as an alternative and/or additional remedy to the Convention is a concerning one, with the potential to give rise to a host of further related claims at the behest of disgruntled passengers.

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The 2010 Beijing Convention and Protocol: new tools to address new threats to civil aviation security

Since the first international instrument, the Tokyo Convention of 1963, and the various international conventions that followed, including the Hague Convention of 1970, the Montreal Convention of 1971 and the Montreal Protocol of 1988, the international community has worked to allow for criminal acts affecting civil aviation security to be criminally punished everywhere in the world and to allow for those responsible to be prosecuted.

One additional step has been accomplished towards the unification and strengthening of civil aviation security with the entry into force on 1 July 2018 of the Convention on the Suppression of Unlawful Acts relating to Civil Aviation ("The Beijing Convention") and of the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft ("The 2010 Beijing Protocol"), which supersede the Hague Convention of 1970, the Montreal Convention of 1971 and the Montreal Protocol of 1988. Both treaties' scopes are limited to civil aviation and expressly exclude military aviation.

The origin of these two new international conventions lies in the terrorist attacks of 11 September 2011, when the international community realized that the existing legal framework of international instruments relating to terrorism and in particular to the potential use of aircraft as weapons needed to be improved and updated in order to take into consideration the new threat to aviation security and to allow a more effective means of prevention.

The two treaties update the ever-evolving list of criminal offences defined internationally relating to aviation terrorism, and also modernize the procedural rules.

Modernization of the list of criminal offences

The Beijing Convention expands the list of criminal offences already contained in the previous international treaties and expands their scope. It provides that the following shall be criminal offences, punishable by severe penalties:

- The unlawful and intentional performance of an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft or destroys or damages an aircraft in service so as to render it incapable of flight or to be likely to endanger its safety in flight.
- (In response to the 11 September 2001 attacks and the growing concerns relating to the environment), the use of an aircraft in service for the purpose of causing death, serious bodily injury or serious damage to property or the environment.
- The use of an aircraft to transport, release or discharge a nuclear, chemical or biological weapon (the exact definition of which is extremely technical).
- An attack against air navigation facilities if such act is likely to endanger safety of aircraft in flight. Some commentators consider that this offence can include cyber-attacks, which are becoming an increasing concern.
- An attack against airport facilities if such act endangers or is likely to endanger safety at that airport.
- The communication of information which the author knows to be false, thereby endangering the safety of an aircraft in flight.

Modernizing the legal regime, the Convention also criminalizes the attempt to commit an offence, allows for accomplice liability and conspiracy, and is not limited to persons on board of the aircraft, but includes as authors persons on the ground who participated in the commission of the offence as well as legal entities.

The Beijing Protocol follows the same modernization trend as the Beijing Convention and expands the scope of the hijacking offence, which is no longer limited to hijackings that occur in flight but, now includes pre- or post-flight. It also adds the same ancillary offences, such as attempt to commit, accomplice liability etc.

Modernization of the procedural rules

Both treaties contain similar provisions adding circumstances to the list of those already contained in the Montreal Convention in which a State Party may establish its jurisdiction over an offence: when the offence is committed by a national of that State, and when it is committed by a stateless person whose habitual residence is in the territory of that State.

Both treaties still contain the same principle as in previous treaties: prosecute or extradite.

With regard to the latter, they add that none of the offences they define can be considered as a political offence which would *per se* allow a State Party to refuse to extradite an offender. However, extradition can be refused if a State Party has substantial grounds for believing that the request for extradition for an offence under the Convention or for mutual legal assistance with respect to such offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

The modernization of the criminal regime also extends to the modernization of the human rights guarantees during extradition, investigation and prosecution. As explained above, in the context of extradition, discrimination on the ground of race, religion, nationality, ethnic origin, political opinion or gender is prohibited. Lastly, both treaties guarantee fair treatment and enjoyment of all rights and guarantees available in the territory of the prosecuting State, and expressly refer to the applicable provisions of international law, including international human rights law.

Conclusion

As of today, the Beijing Convention has been ratified by only sixteen States and the Beijing Protocol by only fifteen States. The number of contracting parties is still far from the almost universality of the Hague Convention and the Montreal Protocol the Beijing treaties aim to replace. One of the possible reasons may be the inclusion in the Beijing legal regime of an undefined *"international human rights law"* which may frighten some States who have not ratified some of the international conventions on human rights..

If it fails to attract more contracting States, the Beijing legal regime will remain theoretical compared to the old Hague Convention and Montreal Protocol. While France has ratified both Beijing treaties, the US, the UK, the Russian Federation and many others have not. If one may think that the legislation of those States against terrorism is sufficiently up to date and developed, this is most certainly not the case for many of the non-contracting States.

The modernity of the Beijing legal regime may bring more States to contemplate ratifying both treaties. The implicit but real inclusion of cyber-terrorism in the scope of the Beijing Convention and the reference to damage to the environment will help to make it an attractive tool against the ever increasing challenges that civil aviation faces.

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The Federal Aviation Administration's Reauthorization Act and its preemption of claims against aircraft owners, lessors, and secured parties

In October 2018, the United States Congress enacted the FAA Reauthorization Act (2018). The Act reauthorized and funded the Federal Aviation Administration until the end of fiscal year 2023, and contains a number of new measures intended to improve airline safety in an array of areas including airport infrastructure, unmanned aerial systems, aircraft noise, and airplane passenger protections.

One amendment of particular concern was to 49 U.S.C. § 44112(b), which governs the limitation of liability of an aircraft owner for personal injury, death, or property loss. Under the FAA Reauthorization Bill, Congress amended 49 U.S.C. § 44112(b) by striking "on land or water" and inserting "operational" before the expression "control".
As a consequence, the statute now in effect reads:

> *Liability: The lessor, owner or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, engine or propeller is in the actual possession or operational control of the lessor, owner or secured party, and the personal injury, death or property loss or damage occurs because of: (1) the aircraft, engine or propeller; or (2) the flight of or an object falling from, the aircraft, engine or propeller.*

This has the effect of deleting the expression "on land or water" which was the premise for the Florida Supreme Court decision in Vreeland v. Ferrer, 71 So. 3d 70 (Fla. 2011) with regard to the scope of the prior statute. Vreeland involved a wrongful death claim as a consequence of an aircraft crash. The owner of the plane, Danny Ferrer, had entered into an agreement to lease the airplane from a company known as Aerolease of America, Inc. for a period of one year. During the term of the lease, the aircraft crashed, resulting in the death of both the pilot and passenger, Jose Martinez. John Vreeland, the Plaintiff in the action, was the Personal Representative of the Martinez Estate and filed a wrongful death action against Aerolease, as the owner of the aircraft. The Complaint was premised upon Florida's Dangerous Instrumentality Doctrine which extends liability to the owner of a dangerous instrumentality for the negligent acts of its permissive user.

In response, Aerolease moved for summary judgment contending that 49 U.S.C. § 44112 (1994) preempted Florida law. The 1994 iteration of the statute provides as follows:

> *Liability: A lessor, owner or secured party is liable for personal injury, death or property loss or damage on land or water only when a civil aircraft, aircraft engine or propeller is in the actual possession or control of the lessor, owner or secured party and the personal injury, death or property loss or damage occurs because of: (1) the aircraft, engine or propeller; or (2) the flight of or an object falling from the aircraft engine, or propeller.*

The Florida Supreme Court reviewed the case after the Florida Second District Court of Appeal determined that the federal statute cited above preempted Florida law and precluded any action against Aerolease as the owner of the aircraft. The Florida Supreme Court posed the question as "whether the federal law currently codified at 49 U.S.C. § 44112 preempts Florida state law with regard to the liability of aircraft owners under the Dangerous Instrumentality Doctrine and if it does, how broadly the scope of that preemption covers". Noting that the statute does not contain an express statement of preemption, the court initially determined that to the extent there was any preemption, it would have to exist by virtue of implied preemption. After evaluating the history and scope of the statute, the court determined that the statute did provide limited implied

preemption. It then undertook an analysis of the preemptive scope. Of great significance to its decision was the portion of the statute which limited the scope to personal injury, death, or property damage for loss or damage on land or water. Specifically, the court held:

> *Every version of the owner/lessor liability federal statute since its enactment in 1948 has referenced injury, death, or property damage that has occurred…on land or water, or on the surface of the earth… At no time has Congress removed this geographic requirement for the federal statute. (emphasis added)*

The court went on to note that in statutory interpretation, the court is obligated to give effect, if possible, to every clause and word in the statute. It then observed that the words "on land or water" or "on the surface of the earth" should be read to specify that the limitation on liability only applies to death, injury or damage that is caused to people or property that are physically on the ground or in the water. Finally, in its conclusion, the majority decision stated:

> *We conclude that by adopting a federal law that specifically references damages or injuries that occur… on the surface of the earth…the 1948 Congress did not intend to preempt state law with regard to injuries to passengers or aircraft crew.*

The Florida Supreme Court's decision was almost entirely reliant upon the provisions in the original statute, reauthorized in 1994, without any statutory revision, that limited the waiver of liability to such losses that occur on land or water interpreted to be "on the surface of the earth" and not occupants of the aircraft itself. Although the majority of courts which have reviewed the extent of the statute, or have addressed it in dicta, have determined that the statute provided immunity to owners, lessors or secured parties not in actual possession or control of the aircraft, a certain minority of jurisdictions, including Florida, have limited the preemptive effect. See, e.g., *Storie v. Southfield Leasing, Inc.*, 282 N.W.2d 417, 418 (Mich. Ct. App. 1979); *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345 (Ill. App. Ct. 1999); *Coleman v. Windham Aviation, Inc.*, 2005 WL 1793907 (R.I. Super. July 18, 2005).

49 U.S.C. § 44112 as amended has removed the language on which the Florida Supreme Court relied. Thus, a court reviewing the statute would no longer be able to, as the court in *Vreeland* did, adopt an interpretation that the injured person must be "underneath" the aircraft and "on the surface of the earth". As a result of the foregoing, it would appear that the *Vreeland* decision and those of other courts applying the same reasoning are of dubious precedential value.

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Brexit update

With the end of March date set for the UK's departure from the EU approaching, and following the House of Commons' decisive rejection of the proposed Withdrawal Agreement on 15 January, the terms applying to the UK's future relationship with the EU, both generally and specifically with regard to aviation, are still unclear. At present a so-called "no deal" scenario seems a serious possibility, although in reality even if there were no comprehensive withdrawal agreement, it is highly likely that there would be a series of "mini-deals", one or more of them dealing with aspects of aviation.

On 24 September the UK government issued three notices, concerned with flights, security and safety in the event of a no deal scenario, broadly announcing a permissive, liberal approach, and confidence that the CAA will be well prepared to take back safety regulation functions from EASA. On 13 November the Commission issued a general notice on no deal contingency planning, and then on 19 December proposals for two regulations. While they will not become law unless and until approved by the EU Parliament and Council, and the timescale is tight, and they may be amended during the process, they represent the best current indication of the Commission's policy and the EU legislative framework that is likely to apply.

The Commission's proposal on basic air connectivity

This proposal starts from the premise that EU air carriers' rights to provide air services within the EU arise exclusively from EU Regulation 1008/2008, and consequently that, when this ceases to apply to the UK on withdrawal, there will be no legal basis for the provision of air services between the UK and the EU, and further that UK carriers, and also carriers majority owned or effectively controlled by UK nationals, will cease to qualify as EU carriers.

The proposal would permit UK carriers, for the period until 30 March 2020, to:

- Fly across EU territory without landing, and make stops in it for non-traffic purposes; and
- Perform scheduled and non-scheduled passenger and/or cargo services between any point in the UK and any point in the EU, but with total seasonal capacity limited to the total number of frequencies operated on routes between the UK and each member state during the equivalent traffic season in 2018, subject to equivalent treatment by the UK of EU carriers.

The draft regulation also provides that member states shall neither negotiate nor enter into bilateral agreements or arrangements with the UK on matters falling within the scope of the Regulation, and shall not otherwise grant the UK any air transport rights other than those granted by the Regulation.

The Commission's proposal on aviation safety

This proposal would confer continued validity on certain technical certificates and approvals, as follows:

- For type certificates, repair approvals and design organisation approvals issued by EASA to UK persons and companies, continued validity for a limited period of 9 months;
- For certificates relating to products, parts and appliances, airworthiness and maintenance work issued by persons certified by the UK CAA, continued validity without time limit.

Comment on the Commission's proposals

The Commission likes to create the impression that the EU is the fount of all rights, and that its permission is needed for virtually any business to be done cross-border in the EU, but, despite the undoubted contribution of the EU to aviation, this is something of an exaggeration. A very good example is provided by the draft Regulation on air connectivity.

In the first place, the apparent generosity of permitting UK airlines to overfly and make non-traffic stops in EU airspace is unnecessary, as these rights (commonly known as the first two freedoms of the air) have since the Two Freedoms Agreement signed at Chicago in 1944 been exchanged between

all states that are now EU member states (except Romania and Lithuania, which are not parties, but which have exchanged these rights with the UK bilaterally). Moreover, significantly, it was not thought necessary to include these rights in Regulation 1008/2008, or any of its predecessors.

Furthermore, no mention is made of the bilateral air services agreements between the UK and the various member states which were concluded prior to the EU single aviation market, and which have (at any rate in most cases) never been terminated, and have remained in existence, although largely dormant. This is confirmed not only by the fact that they deal with matters falling outside the scope of EU law (such as excise duties) but also because their continued existence is specifically recognised in Article 15.5 of Regulation 1008/2008 ("Notwithstanding the provisions of bilateral agreements between Member States."). While most of these are quite old and restrictive, and would not provide a sufficient legal basis for many of today's flights, nevertheless they would provide a basis to some extent, and the bilateral with the Netherlands, for example, is in fairly liberal terms.

It is unsurprising that the Commission sternly proposes that member states should not be allowed to enter into any separate agreements with the UK, or grant any other rights to UK carriers, as the Commission is always keen to extend the range of EU competence, and then jealously protect it. However, this cannot affect rights already granted (eg, under pre-existing bilaterals), and under Regulation 847/2004 the member states retain the legal competence to negotiate air services agreements with third countries (such as the UK will become) unless and until they have conferred a mandate on the EU to do so on their behalf. Consequently, if member states in the Council are minded to agree with this proposal, they would be well advised to consider carefully the consequences for the transfer of competence, and whether it is possible to restrict or qualify it in any way.

As regards the technical proposal, the essential aim is to ensure the continued validity of parts and appliances in aircraft registered in EU member states which have been certificated by a UK person or organisation. Although the continued validity of certain certificates issued by EASA to UK holders is only envisaged to last for 9 months, it seems likely that the UK CAA will have satisfactory alternative arrangements in place by the end of the 9 month period. Certificates and licences issued by the UK CAA relating to UK-registered aircraft should in any case continue to be valid and acceptable in all other countries party to the Chicago Convention under the Convention's system of mutual recognition.

EU Regulations

One thing that can be stated with certainty is that all existing EU Regulations (such as Regulation 261 and other passenger protection measures and the slot Regulation) will continue to apply. This is provided by the EU (Withdrawal) Act 2018, which also states that they are to be interpreted in accordance with existing CJEU case law (subject to the possibility of the Supreme Court departing from it, applying the same test as it does for departing from its own case law), but that future CJEU judgments will not be binding. It may be that some of this is amended (improved?) or even repealed in years to come, but for the time being it will continue to apply. Much painstaking drafting work has been, and is continuing to be, done on statutory instruments making the EU Regulations applicable and appropriate for the UK as a non-member state, and a number have already been adopted, without much publicity.

Non-UK airlines in the UK

The statutory instrument that will replace the current EU rules on airline licensing and ownership and control makes it clear that the UK will no longer apply any nationality requirement to carriers licensed in the UK, and will simply require that their principal place of business is in the UK (although UK carriers operating to non-EU states could be affected by nationality provisions in the applicable bilateral).

It has been reported that Ryanair and Wizz Air, which both have significant operations in the UK, have each acquired a UK AOC. This, given the UK's liberal, permissive policy, will allow them to continue with their current operations that will become subject to UK law, such as domestic services in the UK and services between the UK and non-EU states (eg, Ryanair's flights to Norway, Ukraine and Morocco).

UK - non-EU services

The UK's aviation relations with 17 countries (including the US, Canada, Switzerland and Morocco) currently depend on agreements between those countries and the EU, which will no longer apply to the UK following departure. The government has confirmed that it has been negotiating replacement agreements with all these countries, that agreements with the US, Canada and Switzerland have already been signed, and that all the others should be in place by exit day.

It is understood that the main issue in the UK/US negotiations was the issue of ownership and control, with the UK wishing a more open regime, that would continue to recognise EU ownership and control of carriers exercising rights under the Agreement, and the US having reservations about this. The agreed compromise is that UK carriers currently operating will continue to enjoy their right to operate, even if majority owned and controlled by EU rather than UK nationals, but that this will not automatically apply to any new carriers.

The UK's aviation relations with all other non-EU countries will continue unaffected.

UK - EU services

If the Commission's proposal is adopted in time substantially as drafted, then it will provide legal certainty for continued services between the UK and the EU (commonly known as 3rd and 4th freedom services), but only until the end of March 2020, and subject to a cap of 2018 frequencies (calculated per member state). The requirement for equal treatment by the UK should be no problem, as the UK has indicated that it intends to take a liberal, permissive approach. This artificial frequency cap would of course prevent new services or increased frequencies, unless possibly they could be justified under the existing bilateral (which might be possible, for example, in the case of the Netherlands). There is some uncertainty about how the cap would be calculated and applied, particularly in the case of charter and ad hoc services, and what effective enforcement action could be taken against infringements. IATA has already called on member states to seek to remove this limitation in the legislative process, and this would appear to make good sense.

The position relating to the many services operated by Ryanair between the UK and points in the EU is interesting, as such flights have traditionally been operated by the Irish carrier Ryanair and hence, from a legal point of view, constitute 7th freedom services, and would not be covered by the Commission's proposal. However, now that Ryanair has been granted a UK AOC, if its UK-EU services are performed by this operating company then it should qualify as a UK carrier for the purposes of the proposal and hence these services fall within its scope.

If the proposed regulation is not adopted, or adopted but not extended beyond 2020, then the position would be much less clear, although some fall-back legal basis for continued services should be provided, either by the pre-existing bilaterals (albeit to a limited extent) and/or by the little known doctrine of "comity and reciprocity". This is essentially an informal agreement between the two countries concerned that the existing state of affairs should continue, and it was on this basis, for example, that air services continued to be provided between France and the US from 1992 to1996 following termination of the bilateral between them.

7th and 9th freedom services

The Commission's claim that the legal basis stems exclusively from EU law is justified to the extent that 7th and 9th freedom services are concerned. In the present context, these are services by UK carriers between two different EU member states (eg, Amsterdam - Milan) and within a member state (eg, Rome - Milan), respectively. The proposed regulation says nothing about these and would provide no solution for them, although there is a significant volume of such services.

The most pragmatic solution would be an amendment of the regulation to continue to allow such services as are already operated, on a "grandfather rights" type of basis, although the Commission is likely to resist this strongly. Failing that, in principle it might be possible for the member states in question (eg, the Netherlands and Italy in the example given) to agree on continuation between themselves (and possibly also the UK), although the Commission would be likely to contest their right to do so, on grounds of lack of legal competence. Otherwise, the only legal solution would seem to be for the carriers in question to establish a related company as an EU carrier, which would continue to have the right to operate such services. This is presumably the intention behind easyJet's establishment of an operating company in Austria.

Ownership and control

Another important issue which is not dealt with by the proposals is the rule in Regulation 1008/2008 that EU carriers (in order to have access to the EU single aviation market) must be majority owned and effectively controlled by EU nationals, and indeed the Commission has reminded airlines and member states of the importance of ensuring continued compliance with this rule.

It is difficult, if not impossible, to ascertain and keep track of the precise shareholding makeup at any moment of a widely held public company. However, there have been suggestions that certain non-UK airlines (such as Ryanair and airlines in the IAG group, including Iberia, Vueling and Aer Lingus) may cease to satisfy this requirement once UK nationals no longer count as EU nationals, because of the significant number of UK nationals among their shareholders. Ryanair has said that if necessary it will remove voting rights from non-EU shareholders, as permitted under its articles of association, in order to ensure compliance with the rule. It appears that IAG has been established with a complex structure intended to ensure that Iberia and Vueling remain Spanish majority owned and effectively controlled.

However, if these measures are considered insufficient, and if the rule is to be strictly applied, then the only solution for such airlines would be significant restructuring of their shareholding so as to ensure EU majority ownership and effective control, which may be easier said than done. If this is not, or cannot be, done, then a strict application of the rule would require the airlines concerned to have their operating licences revoked, and thus be grounded. The responsibility for this lies with the national licensing authorities, not the Commission, and as it may be unlikely, for example, that the Spanish authority would ground Iberia and Vueling, the stage would be set for an interesting conflict of positions.

In fact, that this issue arises provides a clear demonstration that these antiquated ownership and control rules are no longer fit for purpose, in a world where many airlines are publicly quoted companies, and listed on international exchanges such as the London exchange, where the concept of nationality of ownership of shares is often meaningless.

Furthermore, that objection should be made on doctrinaire grounds to UK ownership may be said to be particularly hypocritical and inappropriate given the fact that the UK has always been extremely open to ownership by EU nationals. Large parts of UK infrastructure and utility companies are owned by French, German, Dutch and Spanish companies, and only recently it was announced that the French company Vinci is to acquire 50.1% of Gatwick Airport. The UK does not appear to be intending any change to this open policy, despite Brexit, or indeed even to be trying to use it to strengthen its negotiating position, but perhaps it is now appropriate for it to begin to do so.

The simplest, and least disruptive, solution would be the acceptance of the present status quo and "grandfathering" of existing carriers, despite their continued high proportion of UK ownership. EU rules are not as inflexible as the Commission sometimes likes to maintain, and there is a precedent for flexibility with this rule, as demonstrated by the "third package" Regulation 2407/92, which created an exemption in favour of SAS, Monarch and Britannia, none of which at the time would have satisfied the rule.

Conclusions

While it is understandable that the Commission should have been keen to demonstrate that leaving the EU is not easy and not without adverse consequences, arguably now that has been very clearly shown, and a more constructive, pragmatic approach is called for. It is to be hoped that, if this is not forthcoming from the Commission, then it will be from the Parliament and/or Council.

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