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UK government launches the Airline Insolvency Review

Following last year's insolvency of Monarch Airlines, the issues of passenger repatriation and refund protection are to be considered by the UK Government, starting with an independent review (the "Airline Insolvency Review") into the "levels of protection" that are available for passengers who find themselves impacted by the failure of an airline.

On 30 March 2018 the Department for Transport published the terms of reference of the review. The review is being chaired by Peter Bucks and an interim report will be provided to the Secretary of State for Transport by summer 2018. It will outline the potential options that could be put in place to repatriate passengers of a collapsed airline. It will also be looking at ways of allowing airlines to wind down while at the same time carrying out the repatriation of passengers with minimal or no government intervention. The review will consider alternative models for the provision of refund protection, including through the travel insurance market. A final report will be produced by the end of 2018.

Monarch Airlines

Monarch Airlines was the UK's fifth biggest airline, with a fleet of 33 aircraft when it entered administration on 2 October 2017. Following the collapse of Monarch, 110,000 passengers were left without transport home, leading the UK CAA to carry out successfully the biggest ever peacetime repatriation programme, at a cost of £60 million. The review will consider if there are alternative models that can provide repatriation for passengers, whilst avoiding the repetition of such a spend by the UK taxpayer.

The CAA repatriation operation saw more than 60 aircraft from 27 airlines chartered to bring back almost 84,000 Monarch customers. The rescue operation covered flights to six UK airports from more than 30 destinations in 14 countries across the Mediterranean and beyond, including Spain, Portugal, Greece, Italy, Sweden and Israel. In total, the operation flew more than 1.5 million miles.

In addition, the CAA arranged for ATOL protected passengers to return home when their package holidays ended.

The Airline Insolvency Review chair, Peter Bucks has said: "Given the scale of changes in the air travel market over the past decade it is high time to take a fresh look at how well consumers are protected in the event of an airline insolvency. Recently we have seen first-hand the very real consequences of an airline failure and the distress that this can cause for passengers. This review will engage with stakeholders to establish what could be done in the event that travellers need to be repatriated and how best this is achieved."

It is important, however, to put the Monarch insolvency in context. As BAR UK has pointed out, cases of airline failure are very rare as a percentage of UK passengers carried over an extended time period. Moreover, the occasions of airline failure where the carrier concerned is a UK registered carrier – and so carrying a large percentage of UK passengers - is even more so. According to a European Commission report, between 2011 and 2020 only 0.07% of airline flight-only passengers are projected to be affected by airline insolvency, with only around 12% (0.0084%) of that figure stranded abroad and in need of repatriation.

It is also important to differentiate between major crises like Monarch serving many primarily leisure destinations; and the impact of some non-UK airline failures which have in practice been relatively minor with no government intervention as a result of small numbers of passengers, and operating destinations served by other carriers. For example, when Cyprus Airways failed in January 2015 the rescue fares offered by other airlines were sufficient for repatriation and rebooking of future travel.

ATOL protection

UK passengers in the package travel market are currently covered under the ATOL scheme. As was evident from the Monarch insolvency, the main concern being addressed by the review is the protection to be provided for flight-only passengers. At the time of the collapse, the CAA estimated that around 50 per cent of customers affected would have "some form of ATOL protection", with up to 20 per cent having booked a package directly through Monarch and the remainder having booked through other tour operators that also offered cover.

The ATOL scheme was first introduced under the Civil Aviation Act 1971 to provide a degree of financial protection for consumers booking flight-inclusive holidays against the insolvency of their tour organiser. Under the current ATOL scheme, protection is achieved through the payment of an ATOL Protection Contribution to the Air Travel Trust Fund (ATTF) for each ATOL protected holiday sold (currently at a rate of £2.50). In the event of the ATOL holder's insolvency, the monies held by the ATTF are used to fund repatriation where a holiday has already commenced or a refund where it has not.

Since the introduction of the ATOL scheme some four decades ago, changing trade practices in the marketing and sale of holiday products have necessitated further amendments to the ATOL scheme so as to provide necessary levels of consumer protection and to bring it in line with parallel consumer protection legislation such as The Package Travel, Package Holidays and Package Tours Regulations 1992. The most recent changes were introduced on 30 April 2012 when the majority of The Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012 came into force. The 2012 Regulations significantly expanded the scope of selling practices which are caught by the ATOL scheme, provided more stringent controls on the contractual relationship between ATOL holders and their agents and clarified the ways in which ATOL protection is evidenced to consumers at the point of sale. These changes, and specifically the introduction of the 'Flight-Plus' rules under the 2012 Regulations, can be attributed to a number of factors including the steady decline in the number of ATOL–protected holidays due to the increasing use of 'dynamic packaging' and the associated defeat of the CAA in the 2009 CAA v Travel Republic case. Reasons for the changes included a perceived lack of clarity on the part of consumers as to when holidays benefit from ATOL protection and the UK Government's desire to increase contributions to the ATTF thereby decreasing the fund deficit which is currently underpinned by a Government guarantee.

Many airlines are concerned that the Insolvency Review could recommend a simple extension of the ATOL scheme to flight-only passengers, effectively charging a new levy against all UK passenger travel. Many airlines have consistently taken the view that ATOL is not the right mechanism for allocating risks to airline flight-only passengers, or for insuring against airline insolvency. Extending an ATOL levy on flight only passengers would likely unbalance the entire ATOL mechanism, due to the significant number of new passengers brought into scope. Furthermore, any such levy would result in excessive revenues that could not be justified. There is also significant concern over the administrative costs of operating such funding schemes. Many airline argue that a levy on all tickets penalises financially viable airlines, and that a better alternative would be to examine the financial fitness tests under Regulation 1008/2008 and have financial alarm bells responded to at an earlier stage by the UK CAA.

Other current protections

Current alternative methods of protections for passengers in addition to ATOL, which are to be looked at by the Review and may be enhanced, are:

Insurance

Insurance to protect against the failure of airlines is a product that is currently available to both passengers and businesses. Passengers have the opportunity to include supplier failure insurance in their travel insurance policy, although this tends to be for higher end travel insurance policies. Travel agents and other businesses that rely on airlines to deliver products they sell to passengers can also purchase Scheduled Airline Failure Insurance (SAFI) as part of their risk management processes. The extension of this and more guidance to passengers on the advisability of taking out this form of cover could be considered as a potential solution. It is unlikely, however, that UK airlines would consider regulation that would oblige airlines to undertake mandatory insurance cover for insolvency as being a workable solution. It is also not clear how an insurance based solution could assist in any repatriation effort.

Card payments

Under Section 75 of the Consumer Credit Act 1974, credit card issuers are jointly and severally liable with the retailer or trader for breaches of contract, which in this context would include the failure of an airline to honour a contract of carriage, and allows a card-holder to claim a refund of all personal losses and any applicable consequential losses. There are limitations, however: cover is limited to purchases with a value of £100 or more; it only covers personal loss to the card holder, thereby potentially excluding the losses to others within a booking; and protection may depend on the nature of the contract and whether it is with the airline or a third party such as a travel agent. For these reasons protection may not extend to all payments. Section 75 of the Consumer Credit Act 1974 is a useful supplementary protection but in isolation does not provide the level of protection to meet the objectives of the review.

There is an additional non-statutory scheme called Charge-Back, which forms part of a card issuer's agreement with Visa and Mastercard. Consumers who pay an airline direct with a participating debit or credit card may request their card issuer to reverse a disputed transaction, although claims will be subject to time limits: in some cases claims must be made within 120 days of the original date of the transaction. This would include the failure of an airline to honour a contract of carriage due to insolvency, provided the consumer claims within the timescales. Other card schemes like PayPal and American Express provide similar arrangements.

Rescue fares

Airline groupings, including IATA, have entered into voluntary arrangements on behalf of their members (UK and non-UK) to offer lower (repatriation) fares to UK consumers who would otherwise be stranded. While this initiative is welcome, it is a voluntary scheme, and passengers are often unclear about how to access rescue fares. In addition, because the rescue fares are subject to availability the amount of protection is subject to variation and therefore uncertain.

The IATA rescue fare initiative is supported by the industry as a positive innovation and a working example of voluntary action in place of regulation. It is likely that most UK airlines will support a recommendation from the Review that would look to enhance the rescue fares initiative.

The Airline insolvency review

The Insolvency Review committee's call for evidence outlines four principles:

1. **The beneficiary pays for protection.** This will require a careful balancing of the level of risk covered and the affordability of protection. The corollary of this principle is that the taxpayer's exposure should be minimised or removed.

2. **Efficient allocation of risk.** The risks for passengers should be allocated to those best placed to manage and control them, whilst avoiding duplication where possible.

3. **Minimisation of market distortions.** Constraints on the competitiveness and size of the UK aviation market should be minimised and UK registered airlines should not be put at a competitive disadvantage vis-à-vis international competitors.

4. **Simplicity for passengers.** Passengers should understand the protection available and be able to identify which risks are covered, and to what level. In addition, passengers should be compensated in a timely and efficient manner: being brought home and compensated quickly.

Initial commentary on these principles from some UK airline trade bodies has not been entirely welcoming.

BAR UK has commented on the first principle: "whilst we support evaluation of how the beneficiary can best fund a level of protection, BAR UK airlines wish to avoid implementing further regulation, or the creation of a new fund or levy on airline passengers. We have identified a primary concern that potential proposals could instead create unintended consequences by layering additional costs on passengers and wrongly allocating risks. Avoiding duplication and adding further costs and complexity must remain primary consideration".

In the context of the objective to minimise market distortion, BAR UK points out that non-UK airlines, that tend to carry fewer UK passengers, are covered by a completely different set of bankruptcy processes and procedures – as was witnessed with Air Berlin, which filed for insolvency

in August 2017. In the context of 'proportionality', non-UK passengers booked on foreign airlines would not be subject to UK repatriation efforts, nor would they benefit from any UK fund or levy. BAR UK therefore believes that it would be "wholly disproportionate, and a serious misallocation of risk", to charge a foreign national booked with a foreign airline any form of UK levy.

APD

It is worth recalling that all airline passengers over the age of 16 departing the UK are charged Air Passenger Duty (APD), the highest tax of its type in the world, which generates over £3.2bn per year revenue to the UK Government. Therefore, with any move towards a new fund or levy there is a substantial risk of duplicate, layered, and excessive, cost burden to passengers - many of which would already have contributed to the ATOL fund where their flight is part of a package transaction. This reinforces the importance of no layering of additional charges since it would not be acceptable for passengers to pay twice, or to pay for wrongly allocated or non-existent risks.

Conclusion

The cost of the Monarch repatriation programme was a highly politically sensitive issue in the UK, especially because of uncertainty as to whether the sale of Monarch assets (such as its take-off and landing slots, the sale of which was subject to judicial review) would enable the airline's owners, Greybull Capital, to fulfil a "moral commitment" to "defray the cost". Partly because of this background of controversy, the launch of the Insolvency Review has engendered much reportage and discussion in the UK media generally, as well as in the aviation press.

Arguably the successful Monarch repatriation has undermined the existing protection regime by setting an expectation that the same will happen again if an airline fails. It also highlighted the urgent need to revisit the issue of passenger protection, so this review is a welcome and necessary step in order to create a consumer protection regime fit for the 21st century, provided, however, that it is fair to airlines that are already subject to a high degree of regulation and increasing surcharges.

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Slot acquisitions may require notification under merger control rules - the Commission's easyJet/Air Berlin decision

The European Commission's decisions on mergers and acquisitions in the airline sector have included the acquisition of slots held by the airline being acquired, in whole or in part, along with control over the airline, but in *easyJet/Certain Air Berlin Assets (Case M.8672 12 December 2017)*, the target consisted primarily of slots (and ancillary rights) at Berlin Tegel airport, held by Air Berlin prior to its insolvency.

The legal basis of the Commission's finding that the acquisition of slots can of itself constitute a 'concentration', triggering the need for a filing if certain turnover thresholds are met, is discussed below.

The EU Merger Regulation 139/2004 (EUMR) requires the notification of 'concentrations with a Community dimension', a 'concentration' being an operation where a change of control in the undertakings concerned occurs on a lasting basis, and which brings about a lasting change in the structure of the market. Article 3(1) EUMR provides that a 'concentration' arises in the case of, amongst other things, *'the acquisition of direct or indirect control, by contract conferring rights over management, or any other means such as purchase of assets or shares, of all or part of an undertaking'*.

According to European Commission guidelines on mergers (the Consolidated Jurisdictional Notice 2007), control over assets will be considered a concentration if those assets constitute a business with a market presence, to which a market turnover could be attributed. The Guidelines also provide that the assets transferred should include core elements that would allow the acquirer to build up a market presence within a relatively short time period, and they suggest a time-frame similar to the start-up period for joint ventures (3 years).

Applying this principle in the easyJet case, the Commission stated that slots are a particularly important right, since they give access to congested airports. The acquisition of slots by easyJet would enable it to develop its operations at Berlin Tegel airport and at some destination airports, resulting in the transfer of Air Berlin's market position at the relevant airports. The slots, therefore, constituted a business with a market presence to which a turnover could be attributed and constituted part of an 'undertaking'.

The Commission assessed the impact of the transaction in terms of easyJet's resulting slot holding in relation to the markets for passenger air transport services from or to the relevant airports and concluded that this was not such as to enable it to prevent competitors from gaining access or remove their incentive or ability to increase their presence at the airport, or unduly strengthen its position to unduly influence an airport manager (an issue which arose with KLM and Amsterdam Schiphol airport - undertakings given to the Dutch competition authority in October 2017).

There are similar rules under national merger control regimes which should equally be borne in mind for mergers lacking an EU dimension. In the UK, for example, the acquisition of an enterprise or parts of an enterprise will constitute a 'relevant merger situation' within the meaning of the Enterprise Act 2002. 'Enterprise' is defined as activities of a business, and assets alone will suffice where facilities transferred enable a particular business activity to be carried on. The UK is one of the few jurisdictions worldwide where notification of qualifying mergers is not mandatory, but they may be subject to enforcement action if certain market share and/or turnover thresholds are met. In UK cases, therefore, an assessment of risk of completing a merger without notifying should be carried out.

Given the serious penalties for completing a merger or acquisition without making the necessary pre-merger filings (up to 10% of worldwide turnover – even in cases where it has turned out there have not been competition concerns) compliance departments and legal advisors should ensure that in the case of slot transactions it should be considered whether filing obligations may arise.

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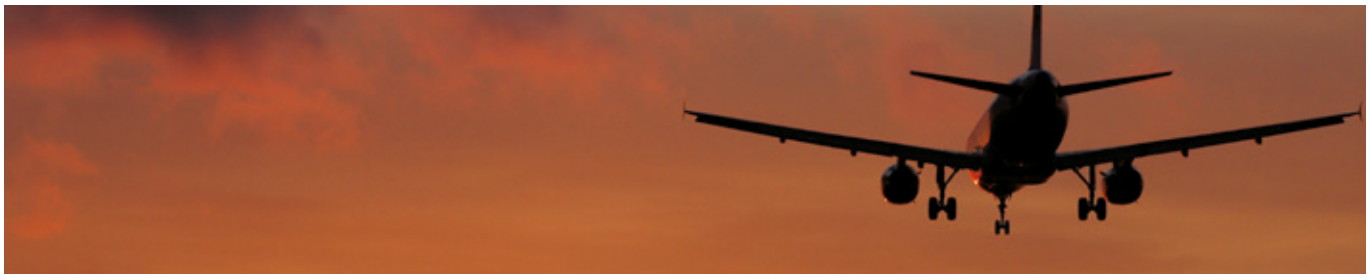

Service of proceedings and enforcement of a foreign judgment against a state

The case of Certain Underwriters at *Lloyds London v Syrian Arab Republic & Ors* [2018] EWCH 385 (Comms), heard in the High Court of Justice on 5 February 2018, examined issues relating to service on a state, and whether the state had submitted to the jurisdiction of a foreign court for the purposes of the recognition and enforcement of a foreign judgment.

The facts

On 23 November 1985, EgyptAir flight 648 was hijacked whilst bound from Athens to Cairo, resulting in the complete destruction of the aircraft. The claimants, who were the insurers of the aircraft, brought proceedings in the US against, amongst others, the Syrian Arab Republic ('Syria'), the Syrian Air Force Intelligence, and its then-Chief General Muhammed Al Khuli, for damages resulting from the destruction of the aircraft due to acts of state-sponsored terrorism. On 14 May 2012, the claimants obtained a final judgment against the defendants in the sum of USD 51,574,997.89.

The claimants brought proceedings in England to enforce that judgment. Two key issues arose:

1. Had the defendants been validly served with the English proceedings, or should service be dispensed with?
2. Had the defendants submitted to the jurisdiction of the US courts?

Was there valid service?

Section 12 of the State Immunity Act 1978 ('SIA') provides that:

"12(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or other document is received at the Ministry."

Pursuant to the SIA, the definition of a 'State' included not only Syria, but also the Syrian Air Force Intelligence, and General Muhammed Al Khuli.

Due to the absence of diplomatic relations between Syria and the UK, it was impossible to serve the English proceedings on the defendants through the usual diplomatic channels. The claimants therefore filed a request for service to be arranged by the Foreign and Commonwealth Office ("FCO"), pursuant to the English Civil Procedure Rules r6.44. The FCO arranged for service of the proceedings by couriering the documents to the Syrian Ministry of Foreign Affairs in Damascus ('Syrian MFA') via DHL Courier. When DHL attended the Syrian MFA's premises to deliver the documents, the Syrian MFA's representative (allegedly aware that the documents originated from the FCO) refused to accept the documents and insisted upon their immediate removal. DHL further advised the FCO that for staff welfare reasons, they could not leave the documents on the street outside the Syrian MFA.

The claimants subsequently took a number of other steps to bring the proceedings to the defendants' attention. Such steps included emailing the documents to the Syrian MFA's email address as listed on its website, notifying the defendants' former US attorneys and by courier.

In the present case, the Court was asked to consider whether the documents had been "transmitted" through the FCO to the Syrian MFA, and "received" at the Syrian MFA, pursuant to s12 of the SIA. The Court found that it was, stating:

"It seems likely that the word "received" is intended, at least, to indicate that it is not sufficient merely for documents to be transmitted in the sense of being dispatched: they must actually reach the relevant Ministry. Conversely, section 12 does not in my view require the documents to be accepted upon delivery: otherwise the recipient could evade service simply by declining to accept delivery".

Thus, even though the Syrian MFO rejected delivery of the documents, this did not prevent valid service from having taken place.

The Court considered in the alternative, if valid service had not been effected, whether service could be dispensed with. English Civil Procedure Rules r6.16(1) and r6.28(1) permit service of a claim form and other documents to be dispensed with by the Court where the circumstances are exceptional. Given the lack of diplomatic relations between the UK and Syria, the Syrian MFA's refusal to accept the documents, the additional steps the claimants had taken to bring the proceedings to the defendants' attention, and there being no further steps which the claimants could reasonably be expected to take to effect service, the Court considered that the circumstances were truly exceptional. Accordingly, an order was made in the alternative that service be dispensed with.

Had the defendants submitted to the jurisdiction of the US court?

In the absence of any convention or other instrument for mutual recognition between the US and the UK, the US judgment can only be recognised if it was delivered by a court which had jurisdiction according to English private international law. That means that the defendants must have either (a) been present in the US when proceedings were commenced; (b) claimed or counter claimed in those proceedings; (c) previously agreed to submit to the jurisdiction; or (d) voluntarily submitted themselves to the US court's jurisdiction. In the present case (a) to (c) did not apply, hence the claimants had to establish that the defendants submitted to the US court's jurisdiction.

Specific to judgments by overseas courts against states, such as Syria, sections 31(1)(a) and 31(1)(b) of the Civil Jurisdiction and Judgments Act 1982 ('CJJA') also required the claimants to show that they had submitted themselves to the US court's jurisdiction. Relying on the decision of NML Capital v Argentina [2011] 2 AC 495, the Court said that section 31 of the CJJA provided a separate gateway for enforcement against a state, over and above those in the SIA. Section 31(1) of the CJJA states:

"A judgment given by a court of an overseas country against a State other than the United Kingdom or the State to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if

(a) It would be so recognised and enforced if it had not been given against a State; and

(b) That court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978".

In examining whether the defendants in the instant case had submitted themselves to the US court's jurisdiction, the Court firstly looked at the key steps in the US proceedings. In those proceedings, the defendants took no part in the US first instance proceedings up to and including the delivery of the judgment. However, thereafter a number of steps were taken in relation to an appeal of that judgment, including the filing of a Notice of Appeal. The Notice of Appeal and subsequent submissions challenged the merits of the first instance judgment, and made no mention of or objection to the jurisdiction of the US court to assume jurisdiction over the defendants.

The Court then conducted a thorough analysis of the various relevant English and EU cases, before concluding that the defendants had submitted to the jurisdiction of the US court. The Court held that by filing a Notice of Appeal only against the merits of the US court's decision, without expressing any challenge or reservation as to jurisdiction, and absent any other sovereign immunity arguments, the defendants' conduct constituted a submission to the jurisdiction.

The defendants did ultimately challenge jurisdiction, months after filing their Notice to Appeal, and a subsequent consent motion for voluntary dismissal of the appeal. The Court found however that by this time the defendants had already submitted to the jurisdiction of the US court. The Court also found that in separate US proceedings involving the defendants, the defendants had made it clear from the outset that they were only appearing in order to challenge jurisdiction. They could have easily made the same challenges in the subject US proceedings, but seemingly chose not to do so.

After finding that the defendants therefore had submitted themselves to the US court's jurisdiction, the Court finally examined whether the US judgment satisfied the usual common law requirements necessary for enforcing foreign judgments. The Court found that it did, in that it was final and conclusive on the merits, was for a definite sum of money (and not payable in respect of tax or similar charges), and not impeachable on the basis of fraud, contrary to public policy or obtained in proceedings which were contrary to natural justice.

Comments

Attempting service on a foreign entity can often be a difficult and costly exercise. These difficulties are compounded when service is to be effected on a hostile foreign state, particularly in these times of increasing political instability. Whilst each case will turn on its own facts, this case is a useful demonstration that where it can be shown that all legislative steps have been complied with, and all reasonable attempts have been made to bring the proceedings to the foreign entity's attention, the Court may be willing to adopt a practical approach towards service and enforcement of a foreign judgment.

However, these are just two of the many issues to consider when litigating against foreign states. It was noted in the Court's decision that separate issues may arise about indemnity from enforcement pursuant to section 13 of the SIA, which was not an issue to be decided upon in the current proceedings. We therefore recommend that the full effects of the SIA and CJJA be fully understood before commencing proceedings against a state entity.

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Litigation update: High Court of Malaya rules on the exclusivity of the Montreal Convention and the relevant legislation applicable to the calculation of damages

The world was shocked in 2014 when a Malaysian Boeing 777 disappeared with the loss of all 239 persons on board. Some four years later, with the aircraft still not found and the loss remaining unexplained, it is perhaps not surprising that litigation on fundamental points of law relating to liability and assessment of damages is continuing to rage.

On 21 May 2018, the High Court of Malaya confirmed that the **Montreal Convention** and its predecessor, the **Warsaw Convention** contain the exclusive source of liability for air carriers where the Conventions apply. The Court also found that the Malaysian Civil Law Act 1956 should apply in respect of the assessment of claims under the Conventions, following the line of authority developed from the United States Supreme Court decision in *Zicherman v Korean Airlines 516 U.S. 217* (1996). The contrary position would, by reference to the Carriage by Air Act 1974 (the "**CAA**"), have opened the way to broader common law damages beyond the codified formula applied to claims under the Civil Law Act.

The decision of the High Court of Malaya on these two issues is welcome and sends a clear message that Malaysia is committed to honour the international air carriage liability regime, as set out in the Conventions, in line with comparable international practice.

The decision of the High Court of Malaya

In relation to proceedings commenced against Malaysian Airline System Berhad arising out of the disappearance of flight MH370 on 8 March 2014, the High Court of Malaya directed the determination of two preliminary questions of law:

1. Whether the Montreal Convention and Warsaw Convention provide exclusive causes of action against a carrier and, as a consequence, oust all common law causes of action; and,

2. Whether the Malaysian Civil Law Act 1956 applies to the assessment of damages in respect of claims made under the Montreal Convention.

Exclusivity of the Conventions

In relation to the first issue, the Court determined that if a contract for carriage by air falls within the scope of either the Montreal or Warsaw Conventions, then the wording of Article 29 of the Montreal Convention or Article 24(2) of the Warsaw Convention (as the case may be) operates to provide the exclusive remedy for carriage claims against a carrier. The interpretation that the causes of action under the Conventions are exclusive has the effect that all other causes of action, whether common law or otherwise, are ousted. The issue was in focus because a number of the claimants have sought to plead a range of claims including conspiracy, fraud, negligence and breach of contract either in addition to or instead of a cause of action under the Conventions.

In addressing this question, the Court reviewed well known decisions dealing with the exclusivity principle. In particular, the Court referred to the seminal cases of *Sidhu v British Airways PLC* [1997] AC 431 and *El Al Israel Airlines v Tseng* 525 U.S. 155 (1999), where the House of Lords and the United States Supreme Court found that the exclusivity of the Warsaw Convention prevails and provides the sole remedy in which a carrier will be liable in damages to the passenger for claims arising out of international carriage by air.

The Court also referred to the decision of the Supreme Court of Canada in *Thibodeau v Air Canada* [2015] 4 LRC 324, a case dealing with the exclusivity principle under the Montreal Convention. In that decision, the Supreme Court of Canada analysed the purpose of the Montreal Convention and the jurisprudence from other jurisdictions in concluding that the Montreal Convention contains an exhaustive source of remedies and claims not contemplated by the Convention

are excluded. In reaching its decision, the High Court of Malaya expressed similar sentiments to those stated in *Tseng* and *Thibodeau* regarding the importance of having regard to the decisions of other countries implementing the Conventions in the interests of certainty and uniformity.

A number of the plaintiffs argued that the preconditions for liability under Article 17(1) had to be shown to exist before a claimant could have a right of action under the Montreal Convention. It was further argued that whether or not liability could be demonstrated under Article 17(1) of the Montreal Convention was a matter for trial and therefore, determination of the preliminary question on the exclusivity of the Montreal Convention was not appropriate. The Court dealt with this argument by simply finding that the issue for determination relates to whether the Conventions apply, rather than whether liability is engaged under Article 17.

Application of section 7 of the Civil Law Act to the Convention claims

Section 7 of the Malaysian Civil Law Act governs compensation to dependants of the deceased in the case of fatal accidents. The issue before the Court was to determine whether the Civil Law Act applies to claims brought under the Conventions. The plaintiffs had sought to argue that section 5 of the CAA excludes the Malaysian courts from considering section 7(3) of the Civil Law Act. Section 7 governs compensation to dependents of the deceased where death is caused by 'wrongful act, neglect or default'.

The practical effect of applying the Civil Law Act is that it provides a more restricted and formulaic approach to the assessment of damages in respect of wrongful death claims. For example, family members of the deceased are not entitled to claim for loss of support where the deceased is over 55 years of age at the time of death.

The CAA is the enabling Malaysian legislation that gives force of law in Malaysia to the Warsaw and Montreal Conventions.

Section 5 of the CAA provides that:

'any liability imposed by Article 17 of the Convention, … or paragraph 1 of Article 17 of the Montreal Convention' shall be 'in substitution for any liability of the carrier for such death either under any written law or any rule of law in force in Malaysia relating to fatal accidents due to a wrongful act, neglect or default and the provisions set out in the Third Schedule shall have effect with respect of the person by and for whose benefit the liability so imposed is enforceable, and with respect to the manner in which it may be enforced …'

The Court found that section 5 of the CAA does not displace the whole of section 7 of the Civil Law Act. Rather, section 5 of the CAA merely operates to substitute the fault based liability for fatal accidents with the applicable causes of action under the Conventions. In other words, the reference to 'wrongful act, neglect and default' is extended, or intended to be broad enough to include the liability of a carrier under the Conventions. On this construction, the Court also found that the family members of the deceased entitled to claim for loss of support are the persons recognised under the Third Schedule to the CAA, with the effect that the categories of potential claimants are extended beyond those recognised under the Civil Law Act.

Conclusion

Although the response to both questions broadly reflects the long held (and previously unchallenged) view of the law of Malaysia, it is not surprising, in the context of the high profile MH370 loss, that the decision is now the subject of appeal by various plaintiffs. It could be some time before we can report the ultimate outcome.

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The thorny question of whether non-passengers are entitled to claim compensation for psychological injuries following the death of a passenger – Is Australia closer to resolving the question?

The question of whether the Montreal Convention 1999 and its predecessor, the Warsaw Convention system (Warsaw Convention 1929, as amended and supplemented over time by various Protocols and Conventions) applies to claims for psychiatric injuries to non-passengers arising from the death of a passenger still arises in various jurisdictions, although the point in the context of the scope of passenger "bodily injury" is well settled.

By favouring a more liberal interpretation of the recovery of common law damages for psychological injury for bystanders and non-passengers in the context of its domestic air carriage regime, the Australian courts have arguably taken a different approach to other jurisdictions with regards to the exclusivity of the Conventions.

The majority of the NSW Court of Appeal in *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312 (**South West Helicopters**) confirmed that tortious claims for psychiatric injury by non-passengers following the death of a passenger are not compensable. The decision confirms that the claims of non-passengers following the death of a passenger are to be treated as being dependent upon the death of the passenger and derived from his/her own rights.

Although decided in the context of domestic Australian air carriage, we suggest that the *South West Helicopters* decision should be viewed as applying to international carriage and as a step in the right direction in bringing Australian law in line with the exclusivity principle of the Conventions. It also brings Australia closer into line with international jurisprudence on exclusivity and (ir)recoverability of damages for psychological injury absent bodily injury.

Nevertheless, the NSW Court of Appeal in its construction and interpretation of the Commonwealth Civil Aviation (Carriers' Liability)18

(**CACL**) missed an important opportunity to put the issue beyond doubt in the context of international carriage. The High Court of Australia has recently granted special leave to appeal and hopefully, the highest Australian appellate court will provide some certainty on the point when the case is heard, probably in the first half of 2019.

Background to the case

In 2006, Parkes Shire Council engaged South West Helicopters Pty Ltd (**South West**) to provide a helicopter and pilot to conduct an aerial noxious weed survey. The helicopter pilot was employed by South West while the helicopter was owned by Country Connection Airlines Pty Ltd. During the survey, the helicopter struck a power line owned by Essential Energy and crashed, killing the pilot and two council employees on board.

The tragic accident led to a number of claims and cross-claims, including the claims for psychological injury brought by the family members of one of the council employees, Mr Stephenson, who was killed in the crash. This update deals only with the family members' negligence claims against South West and Parkes Shire Council for psychological injuries suffered, as a number of other unrelated claims were also part of the litigation that ensued.

South West defended the claim on the basis that any liability was to be determined under the New South Wales Civil Aviation Carriage Liability Act 1967 (**NSW CACL**). In Australia, the CACL is the applicable legislation which gives force of law to the Warsaw Convention system and the Montreal Convention. At its simplest, the state carriage legislation is linked to the Commonwealth legislation to apply a carrier liability regime broadly modelled on the Warsaw Convention system for a flight operating within a single state.

The NSW Court of Appeal decision in South West Helicopters

To resolve the question, it was necessary for the Court to consider whether Mr Stephenson was a "passenger" for the purposes of the CACL and secondly, whether the claims arose "by reason of" or "in respect of" the death of Mr Stephenson.

The phrase "passenger" is not defined under the Convention regime or any of the local carriage legislation. In finding that Mr Stephenson was a "passenger" for the purposes of the NSW CACL, the Court was influenced by the fact that it was necessary to identify the relationship between the operation of the aircraft and the purpose for which the traveller was on the aircraft. On this construction, it was determined that "passengers" are persons other than those involved in the operation of the flight.

On the question of whether the family's psychological injury claims arose "in respect of" the death of Mr Stephenson within the meaning of the NSW CACL, the Court held that it was necessary to first identify the relevant relationship between the liability [the cause of action in negligence] and the event giving rise to the liability [the death of Mr Stephenson]. In addressing this issue, the Court made it clear that the operative provisions of the domestic carriage legislation are to be interpreted in the context of the purpose and the text of the Warsaw Convention system.

The Court considered the liability imposed under the CACL, which is slightly different to the wording of the Warsaw Convention system. The legislation provides for "damage sustained by reason of the death of the passenger" while the wording of Article 17 of the Convention provides for "damage sustained in the event of the death".

The majority was of the view that, having regard to the "exclusivity" principles set out under the Warsaw Convention system, the claimants were only entitled to succeed on their claims for damages for psychiatric injury if they were able to show that these rights did not arise under the Convention. The Court held that, given that Mr Stephenson died as a passenger in an aircraft accident occurring in the course of carriage by air, it was not possible to identify the claims of the family otherwise than as being "in respect of" his death and their claims were therefore excluded by the CACL and, on the facts, extinguished as they were brought beyond the prescribed two year limitation period.

In reaching this decision, the Court held that a Full Court decision of the Federal Court in *South Pacific Air Motive Pty Ltd v Magnus* (1998) 87 FCR 301; [1998] FCA 1107 (**South Pacific**) was not directly applicable to the correct construction of section 35 of the CACL as it did not concern the death of a passenger. Instead, the case involved the claims for psychological injuries by parents whose children were on a flight from Sydney to Norfolk Island which ditched in Botany Bay shortly after take-off. In *South Pacific*, the Court held that such non-passenger claims were not excluded by the CACL and could therefore be pursued under general law.

Conclusion

From a somewhat messy and complex decision, there is however clear authority for the proposition that there is no available claim for psychological injury or 'nervous shock' by a family member at common law or otherwise beyond the CACL or the Convention. Furthermore, and as demonstrated in other well established case law, the effect of Article 24(2) of the Warsaw Convention System or Article 29 of the Montreal Convention (as the case may be) is to substitute any other liability thereunder and to extend the scope of such claims thereby 'caught' by the regime. What is less clear is whether the non-passenger claims - the subject of South West Helicopters - trigger Article17(1) liability and we must now wait for the views of the High Court which will make for important and interesting reading.

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Will the recent Brazilian Supreme Court decision upholding application of the Convention result in a reduction in exposure for airlines?

Almost six months after the oral judgment on 25 May 2017 in two leading cases concerning international carriage by air appealed to the Brazilian Supreme Federal Court (STF) by Air France (AF) and Air Canada (AC), the long awaited decision was finally published by the STF on 13 November 2017. We now have a clearer understanding of the STF's reasoning and have already seen the decision being applied by lower courts.

By way of recap, the appeal by AF related to loss of baggage and whether the Warsaw Convention, particularly the limit of liability prescribed by Article 22, or the Consumer Defence Code (CDC), which applies strict and unlimited liability, should apply. The appeal by AC related to a passenger claim for delay and whether the 2-year limitation period prescribed by the Montreal Convention or the 5-year period prescribed by the CDC should apply. In both cases the 2nd Instance Courts had applied the CDC rather than the Convention regime. Both carriers argued in their appeals that in applying the CDC rather than the Convention regime the lower courts had violated Article 178 of the Brazilian Constitution, which provides that international treaties signed by Brazil must be observed subject to reciprocity.

Background

As airlines and their insurers are well aware, although Brazil is a party to both the Warsaw and Montreal Conventions, Brazilian courts have in the past regularly avoided application of the Convention regime where it conflicts with provisions of local law. In particular, courts have frequently applied the CDC in passenger and even, on occasion, cargo claims, including cargo claims brought by subrogated insurers of cargo interests. The CDC reverses the burden of proof and requires airlines to prove they took all reasonable steps to avoid the damage complained of or they face strict and unlimited liability.

From the beginning of the 1990s, access to justice for the majority of the population was facilitated by the introduction of the CDC and in tandem, the establishment of the small claims court system (currently for claims with values up to BRL 38,160/approx. USD 10,900) which charges low court costs. This encouraged an explosion of litigation that by 2017 resulted in over 100 million legal claims being considered by the courts. This unfortunate backdrop, combined with the generally slow pace of litigation and with judicial interest and monetary correction running at a combined rate of approximately 18% per annum, led to airlines and their insurers suffering very high levels of exposure in Brazil over the years.

The leading cases

The leading cases attracted the attention of the International Air Transport Association (IATA), the International Union of Aerospace Insurers (IUAI) and American Airlines (AA) who each filed amicus briefs in support of Air France's arguments before the STF that the limits of liability in the Warsaw and Montreal Conventions should be applied in precedence to the CDC. In its amicus brief, AA requested the STF to confirm that the unbreakable limit of 19 SDRs per kilo contained in Article 22(3) of the Montreal Convention should also be applied over local legislation in cargo claims.

The STF and the Brazilian Superior Court (STJ) had previously recognised that the decision in the leading cases should have relevance to over 400 other cases before the STF and STJ relating to carriage by air by denoting the cases as having "repercussão geral" (general repercussion). The delay in publication of the STF decision of 25 May 2017, which took far longer than the usual matter of weeks, appears to have been due to the length of the debate and written votes of the 11 ministers of the STF as indicated by the 137 pages of the judgment.

As we have known since the oral judgment last May, the STF ruled in favour of the application of the Montreal and Warsaw Conventions in precedence over local legislation in the 2 cases by a majority of 9 votes to 2. The written judgment published 6 months later gives clearer guidance to operators and their insurers on the effect and reach of the decision. The STF clearly held that in cases involving international air carriage, the Conventions should prevail where there is conflict with local law, particularly the CDC. This means that, in theory, claims in Brazil arising out of international carriage must now be brought within 2 years of the event, rather than 5 years as prescribed by the CDC, and also that the limits of liability prescribed by the Convention should apply.

A clarification appeal was filed by a consumer representative challenging the decision but no other clarification appeals were filed. It is likely that a decision of the clarification appeal will take several more months given the high number of cases before the STF, including many of a high-profile political nature. However, it is extremely rare for clarification appeals to have any substantive effect on a decision and therefore it is very unlikely that the decision will be altered in any way.

Moral damages

However, the decision was not a complete victory for the Convention as the STF clearly distinguished the right to moral damages from the provisions of the Convention which limit a carrier's liability.

In Brazil moral damages, which are awarded at the discretion of the court, are intended to compensate for emotional suffering and the right to them is enshrined in the Federal Constitution of 1988 and the CDC of 1990, both drawn up shortly after the country had emerged from a period of military rule. The intention of the legislature in creating a right to moral damages in the Constitution was to protect the dignity of the ordinary citizen, against so-called powerful corporations and other institutions. However, over the years it became common for moral damages to be awarded by courts for simple breaches of contract, rather than more serious cases of emotional distress. In claims against airlines, the situation was often exacerbated by the view (often held by the Brazilian judiciary) that air travel is a special experience for most people, often connected with an important business or family event, or a well-earned holiday. This resulted in moral damages habitually being awarded for all types of claims by passengers, including even minor delays.

Reading judgments of the judges, the rationale of the STF in maintaining the status quo regarding moral damages appears to have largely been that the Convention does not provide any right to moral damages. Therefore, they took the view that moral damages should not be subject to any limit as said damages have their basis in the Federal Constitution and are understood by most of the Brazilian judiciary to be a particular advancement by Brazilian society which should be protected. Therefore, it is likely that courts will continue to award moral damages of the same level against airlines, or possibly even increase them to compensate for the limit to material damages specified by the STF.

Cargo

Although the leading cases both related to passenger claims, many cases concerning cargo before the STF and STJ were suspended by the courts on the basis that they related to the same issues. Almost all of those are subrogated suits brought by the insurers of the cargo seeking to recover amounts paid out to cargo interests. Now that the STF decision has been given, those cases are starting to move forward again towards final decisions.

Moral damages are only awarded to companies in rare cases where it can be established that the company suffered damage to its reputation. In view of the fact that cargo claims are rarely brought by individuals, it would appear there should be good chances of the STF precedent being applied favourably in cargo claims notwithstanding that the judgment only made passing reference to cargo. However, there are other issues in cargo claims which might make Brazilian courts less likely to apply the Convention regime,

particularly the fact the Article 22 (3) limit of liability is unbreakable, unlike in cases of baggage. Brazilian judges might consider that the Convention unreasonably restricts their ability to compensate a claimant fairly for damage caused which could lead them to seek to distinguish the STF decision in cargo claims.

In the written judgment of the STF, most of the judges who voted in favour of the Convention regime refer only to passenger claims and state that the Convention should take precedence over the CDC. The published summary of the decision, which is what most judges will see, stated the following – "In terms of Art 178 of the Federal Constitution, the norms and the international treaties which limit the liability of air carriers of passengers, particularly the Montreal and Warsaw Conventions, take precedence over the CDC". It is noteworthy that the summary refers only to liability to passengers and the court made no specific comment regarding the amicus brief filed by AA, which requested the court to confirm the application of the decision in cargo claims.

Further, in most cargo claims Brazilian courts tend to apply the Civil Code (CC) rather than the CDC; this is because the claimant is usually not a consumer and therefore, while claimants in cargo actions (even subrogated insurers) seek to rely on the CDC on the basis that they or their insureds were customers of the airline, courts have previously applied the CC in most cases. Therefore, it might at first appear that the STF decision could be said to be of limited relevance to cargo claims in view of its focus on the CDC and passengers. This is an argument that lawyers acting for cargo insurers have already tried to make in an attempt to distinguish cargo claims from the leading cases.

However, the reporting Judge Gilmar Mendes mentioned in his discussion prior to his decision that the decision should apply to the international transport of passengers, baggage and cargo. He also stated that "the same judicial reasoning for cases of baggage loss should be applied in other hypotheses where there are similar conflicts between the Convention and other local legislation". This understanding is supported by the fact that the STF and STJ suspended many claims relating to cargo pending the STF decision in the leading cases as a result of the repercussão geral denoted to said cases.

Subsequent decisions

Soon after the publication of the STF decision, on 5 December 2017, the 3rd chamber of the STJ upheld application of the Montreal Convention limit of liability in a subrogated baggage claim by a Brazilian travel insurer also brought against AF regarding loss of baggage. The STJ held that the subrogated insurer had no right to recover from AF any amount above the Article 22(2) limit of liability for material damages as the passenger had not made any special declaration of value. Encouragingly, the STJ commented that in view of the STF precedent, the reorientation of previous jurisprudence of the STJ is necessary.

In another decision soon after, on 14 December 2017, the Rio de Janeiro 2nd Instance Court, notoriously pro-consumer, reached a favourable decision in proceedings brought by a passenger for alleged personal injury due to a spillage of hot water against KLM. The court held that the claim was time barred as a preliminary issue, as the incident occurred on 19 April 2014 yet the action was not commenced until 29 April 2016. In its decision, the court stated that Montreal Convention and other international treaties signed by Brazil relating to air transport should prevail over the CDC, in cases of international transport of passengers, baggage and cargo in respect of all types of damages, except moral damages.

However, the news is not all positive. In a claim against another carrier relating to loss of baggage, the 2nd Instance Court of São Paulo avoided applying the STF precedent to limit material damages, by finding that loss of baggage results from behaviour which allows the court to exceed the limit of liability under Article 22(5) of the Convention. The court reached this decision notwithstanding that there was no evidence of any kind of misconduct and the wording of the Convention in English requires intent or recklessness with knowledge on the part of the carrier to be proven.

Most of the decisions that have been reached by the STJ since the STF decision have related to cargo and encouragingly these have all upheld application of the Convention.

In a decision dated 9 November 2017, the 3rd chamber of the STJ unanimously applied the Convention regime in a subrogated cargo claim by Itaú Seguros S/A against Aerolineas Brasileiras SA relating to partial loss of cargo

of lithium batteries during carriage between Miami and Manaus. The court held that the liability of the operator should be limited to 17 SDRs per kilogram in line with the STF decision, overturning the 2nd Instance decision which held that such limit did not apply to loss of cargo and that such claims should be governed by the Civil Code.

Although the Montreal Convention contains provisions which provide for the automatic updating of the SDR limits every 5 years if necessary due to inflation and this has occurred on one occasion in 2010, Brazilian courts generally continue to apply the originally specified figures because no legislation was passed regarding the increase. Therefore, it is likely that other courts will continue to apply a cargo limit of 17 rather than 19 SDR per kilo. The same applies in baggage claims where courts tend to award the original Montreal Convention limit of 1,000 SDRs for material damages rather than the updated figure of 1,131 SDRs.

Probably the clearest precedent so far regarding cargo is in another subrogated cargo claim brought by Royal SunAlliance Seguros against Fedex, which was published on 23 March 2018. This case concerned a subrogated claim in respect of loss of cargo during carriage from Atlanta to São Paulo Guarulhos. The 2nd Instance Court applied the CDC and awarded full compensation to the subrogated insurer claimant. However, in considering Fed-Ex's appeal, the STJ referred to the STF decision and stated that it clearly applied to this cargo claim. Therefore, the award in favour of the subrogated insurer by the 2nd Instance Court should be reduced to 17 SDRs per kilo, in accordance with Article 22 of the Warsaw Convention, because there had been no special declaration of value by the owner of cargo.

In another decision in April 2018, the 4th chamber of the STJ also confirmed the application of the Montreal Convention Article 22(3) limit of liability in another subrogated claim by Itaú XL Seguros Corporativos against United Airlines relating to loss of a cargo of electrical components between Los Angeles and São Paulo. The STJ held that the CDC should not be applied as the owner of the goods was not the final consumer of the product. The court upheld the 2nd Instance decision, which also applied the Convention, holding that because the claimant had not declared the value of the goods, it had assumed the risk of not being fully reimbursed in the case of loss. However, the STJ found that the Convention should be applied as the guiding precedent having a higher status than local legislation such as the CDC or the CC. In the STJ decision Judge Salomão referred to the STF precedent, judged by the STF to have general repercussion, which established that in view of Article 178 of the Federal Constitution, the Convention should be applied to claims involving international carriage by air, whether relating to passenger or cargo, as provided for in the text of the Convention.

Most recently on 18 May 2018, in view of the STF precedent, the 3rd chamber of the STJ reformed one of its own decisions which had applied the CDC and unlimited liability in a subrogated cargo suit by a Brazilian insurer against AA. In the reformed decision the STJ re-established the 1st Instance decision which applied the limit of liability prescribed by Article 22 of the Warsaw Convention. The court limited the award to R$8,992.32 (currently approx. USD 2,450) as against the full compensation of R$139,979.12 (currently approx. USD 38,200) awarded by the 2nd Instance Court.

Encouragingly, we have also seen the STF decision being applied by lower courts in cargo claims. A favourable decision was also issued by the 2nd Instance Court of São Paulo in December 2017 in another subrogated claim by Itau Seguros S/A against DHL Global Forwarding in relation to partial damage to a consignment of pharmaceuticals owned by Pfizer during carriage from Miami to Viracopos, São Paulo. The 2nd Instance Court upheld the lower court decision applying the Montreal Convention. The leading judge commented that in similar cases involving international transport by air she would have previously applied the CDC, notwithstanding, we note, that neither party was a consumer. However, in view of the STF decision, she held that the Convention regime should be applied in preference to the CDC. The judge went on to state that as no special declaration of value was made by the consignee, which was experienced in the cargo market, DHL's liability was indeed limited to 17 SDRs per kilo and the lower decision should be upheld.

Conclusion

It will certainly be interesting to see further decisions being made, particularly by the STJ as it decides other cases relating to international carriage which were suspended pending the decision of the leading cases by the STF. All such cases should now be decided according to the STF precedent which suggests that the Convention will now be applied.

The indications thus far have been favourable, even in cargo claims where the position appeared less clear, and we are yet to see a decision from the STJ where the Convention has not been applied. Thus the potential exposure to carriers before Brazilian courts may be coming more into line with other jurisdictions.

Given their past record, it is ironic that, in applying the limits of the Convention without the inflationary increases applied in 2010, Brazilian courts could be said to be establishing a more favourable position for carriers than other countries which apply the Convention with the correct updated limits. However, it should be noted that Brazilian courts may order the updating of awards of Convention limits with judicial interest and monetary correction at a combined rate of approximately 18%, often since the loss event, which would significantly increase the amount payable. It is usual for Brazilian awards of damages to be updated in this way and it is possible that some courts may regard this as appropriate notwithstanding that the SDR is already updated.

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The single African air transport market: open skies over Africa (finally)?

On 28 January 2018, during the African Union summit held in Addis Ababa, the liberalisation of air transport in Africa took a major step forward when the governments of 23 African countries agreed to the Single African Air Transport Market (SAATM) initiative. The initiative seeks to open up intra-African air transport, reduce fares for consumers and increase available air traffic routes in accordance with the liberalisation principles first drawn up in the Yamoussoukro Declaration of 1988 and subsequent Yamoussoukro Decision of 1999.

Background

Africa represents about 15% of the world's population yet accounts for only 3% of the world's aviation traffic. Unfortunately, African aviation has traditionally been plagued by a lack of efficient connectivity between destinations, lack of meaningful competition amongst airlines, insufficient investment in aviation infrastructure and serious safety concerns. Perhaps foremost, for many decades, air transport in Africa has been severely limited by restrictive regulatory systems designed to support often inefficient national air carriers at the expense of competition, development and growth. In 2017, the UN Conference on Trade and Development reported that between 1995 and 2014 the total number of international tourist arrivals to Africa more than doubled while Africans themselves accounted for only four in every ten visitors.

Connectivity

As a result of long-standing regulatory restrictions and lack of aviation investment across the continent, for many years intra-African air travel often involved inefficient circuitous routes to reach destinations, with many routes between African cities involving travel on a non-African airline with stops in Europe or the Middle East.

Infrastructure

As passenger numbers in Africa continue to grow year on year at numbers higher than in Europe and North America, the infrastructure in place to welcome these passengers remains woefully inadequate. Efforts toward liberalisation have also made the improvement of airports and air traffic control systems a major priority to foster increased routes and capacity, as well as improve on safety. Currently, there is a severe drop off in the quality of air transport infrastructure between major airports such as Johannesburg and Nairobi and smaller airports with lower traffic volume. Air traffic control services are perhaps the most significant infrastructure issue that needs to be addressed.

Safety

As many people both in and outside the air transport industries are aware, while there are prominent exceptions, taken as a whole, African carriers have long had the worst safety record in the world. While many would argue this is because of ageing fleets and substandard aircraft types used by some African carriers, the primary cause is recognised as the overall lax regulatory oversight of aircraft, maintenance and personnel. As a result of insufficient oversight in their home countries, many African carriers are included on the EU's list of banned carriers, including all carriers certified in Congo, the DRC, Libya and Sierra Leone, as well as notable national carriers such as Sudan Airways and Air Zimbabwe.

Competition

African carriers struggle to compete with much larger international airlines which carry the great majority of passengers to and from the continent. Traditionally, these international airlines were based in Europe and took advantage of historic colonial links. However, more recently, Middle Eastern carriers have played a larger role with many routes to and from Africa going through hubs such as Dubai; this is most significant in terms of routes between Africa and China as Chinese investment in African infrastructure and natural resource projects continues to grow in terms of funding and personnel. In response to this, major African carriers, such as Ethiopian Airlines and Kenya Airways, are adopting positive competitive strategies and opening new routes to destinations in Europe, North America and Asia.

It is believed and hoped that the liberalisation of African air transport can finally resolve many of the traditional issues thwarting the success and growth of African air transport - and allow nations and airlines to take full advantage of the economic boon greater access to air transport promises. A joint 2015 report by the African Civil Aviation Commission ("ACAC") and IATA estimated that full liberalisation of the air transport market among the 12 largest African economies would contribute USD1.3 billion to the economic output of those nations, generate hundreds of thousands of new jobs and bring fare prices down by up to 35 percent.

Yamoussoukro

The first major effort to address the bemired and restrictive African air transport regulatory system was in 1988 when the Civil Aviation Ministers of all the African nations met at Yamoussoukro, Cote d'Ivoire, to discuss a new pan-continental air transport policy. The desired goal of this new policy would be greater cooperation amongst African carriers so as to better compete with the non-African carriers dominating international routes.

However, it was not until over 10 years later, in 1999, that the Yamoussoukro Decision ("Yamoussoukro") on the liberalisation of African air services was issued. Yamoussoukro has as its main objectives the liberalisation of intra-African air services, the abolishment of limits on both capacity and frequency of international air services within Africa, the universal grant of traffic rights up to the fifth freedom and the liberalisation of fares.

Yamoussoukro was signed by 44 of the 55 African nations who together agreed to ensure fair competition amongst carriers on a non-discriminatory basis. Implementation of the Decision was placed with separate regional economic bodies. While there have been notable operational successes, implementation of Yamoussoukro policies across all regions and the individual signatory nations has been very slow-going.

SAATM

The SAATM approach is modelled on similar single market aviation agreements, such as that in place in the EU, which have increased competition amongst airlines, reduced costs to consumers and opened up routes to destinations previously underserved by the transport of both passengers and cargo. The SAATM initiative is conceived as a major piece of a larger effort toward a pan-African free trade area, including plans for EU-style free movement of people and goods across the continent.

Under the initiative, eligible airlines from the 23 current signatory nations will be able to conduct business across the wider mutual market and operate with full traffic rights. The 23 participating countries are: Benin, Botswana, Burkina Faso, Cabo Verde, Congo, Cote d'Ivoire, Egypt, Ethiopia, Gabon, Ghana, Guinea, Kenya, Liberia, Mali, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, Swaziland, Togo and Zimbabwe. These countries represent more than half of Africa's population, two-thirds of the continent's gross domestic product and are responsible for more than 80 percent of the current intra-continental air transport.

While the initiative is a major development and one that has been eagerly awaited for many years, there remains much work to be done toward implementation and overcoming the traditional hurdles to liberalisation which have proven difficult to overcome. In addition, the remaining 32 African nations which have not signed onto the initiative must do so to make it truly effective continent-wide. Further, the governments of those countries who have currently signed on to the initiative must meaningfully follow through on that commitment.

However, it is because of the engrained implementation problems encountered following Yamoussoukro that the SAATM initiative is recognised as such a significant step. Now, 23 countries representing the majority of African air transport, including major aviation nations such as Egypt, Ethiopia, Kenya, Nigeria and South Africa, and major growing tourism nations such as Botswana, Ghana and Rwanda, have committed themselves to overcoming the problem previously encountered in implementation of the liberalisation provided for in Yamoussoukro.

If the initiative can be efficiently and effectively implemented as is hoped, it is estimated that aviation officials and passengers may start to see practical benefits in as little as six months.

Conclusion

Increased liberalisation of the African skies has been a goal long dreamed of but which has proven difficult to achieve. The announcement of the SAATM initiative is seen as the first major undertaking toward meeting the goals of Yamoussoukro. If the traditional obstacles to implementation can be overcome, SAATM may accomplish the elimination of the stagnant air transport regulatory environment on the continent and truly open the African skies. The progress of SAATM will be eagerly observed over the coming months and years.

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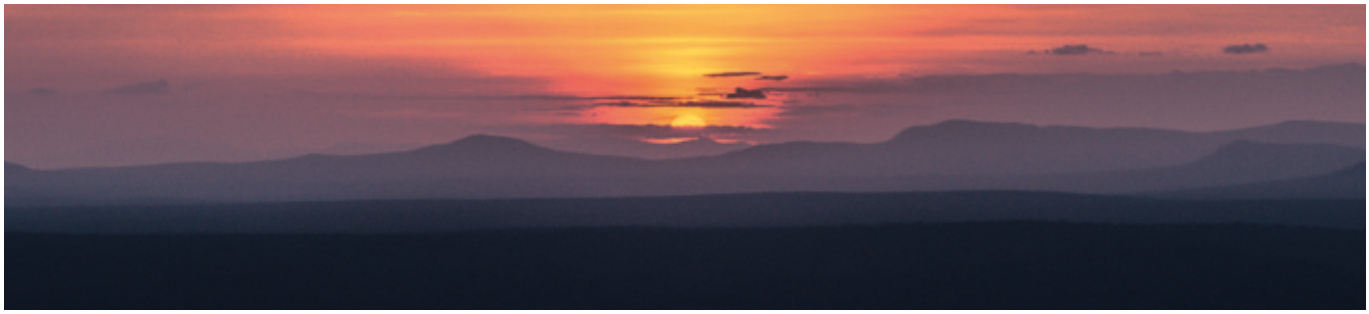

European Court interprets Montreal Convention requirements on notification of damage to baggage

On 12 April 2018 the Court of Justice of the EU issued a preliminary ruling on the interpretation of Article 31 of the Montreal Convention 1999 (which deals with notice of complaints about lost and damaged baggage and cargo) on a reference from the Supreme Court of Finland, in the case of *Finnair v Fennia*.

Article 31 of the Montreal Convention provides, with regard to checked baggage and cargo:

2..In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and 14 days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within 21 days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part."

The Finnish proceedings

These provisions came up for consideration in the context of a claim brought in the Finnish courts by an insurance company, Fennia, which had compensated a passenger on a Finnair flight from Malaga to Helsinki in respect of loss of several items from her checked baggage, and brought a subrogated action against Finnair for recovery of what it had paid. The passenger had notified a Finnair customer service representative of the loss by telephone on the day of arrival of the flight, identifying the lost items and giving an indication of their value, and the representative entered this information into Finnair's computer system. Two days later, the passenger again telephoned Finnair customer service, to request a certificate to provide to her insurers, and Finnair issued a certificate of the lodging of a declaration of loss.

Finnair contested Fennia's claim, on the ground that the passenger had not filed a written complaint within seven days, as required by Article 31(2) of the Montreal Convention. The Helsinki District Court accepted Finnair's defence and dismissed the action. The Court of Appeal allowed Fennia's appeal, but Finnair appealed further to the Supreme Court, which decided to refer four questions about the interpretation of Article 31 to the Court of Justice of the EU.

The CJEU's judgment

The Court responded to the four questions referred as follows:

1. In order for a claim to be preserved, complaint must be made in writing within the periods specified in Article 31(2)

2. A complaint recorded in the carrier's computer system fulfils the requirement for complaint to be made in writing

3. The requirement of a complaint in writing can be satisfied where, with the knowledge of the passenger, a representative of the carrier records in writing the declaration of loss, either on paper or electronically in the carrier's computer system, provided the passenger can check the accuracy of what the representative has recorded and can, if appropriate, amend, supplement or replace it before the expiry of the specified period.

4. A complaint is not subject to any further substantive requirements in addition to that of giving notice to the carrier of the damage sustained.

Comment

The two essential points in issue in this case were: whether "in writing" includes recording in electronic form; and whether complaint in writing has to be made by the passenger, or whether the requirement is satisfied when the passenger gives the necessary information to a representative of the carrier, who records it on the carrier's computer.

As to the first point, the Court held that "in writing" must be interpreted as referring to any set of meaningful graphic signs, irrespective of whether they are handwritten, printed on paper, or recorded in electronic form. As to the second point, the Court decided that the requirement could be satisfied by a representative of the carrier recording the passenger's complaint.

The Court's recognition that the requirement for complaint to be in writing is satisfied by electronic entry into a computer system makes obvious sense given contemporary practice. While it might be argued that its view on the second issue is not consistent with a literal reading of Article 31(2) and (3) read together, which require respectively complaint by the person entitled to delivery and every complaint to be made in writing, it is submitted that this is a pragmatic and common sense approach, given practical realities. The Court stated that any other interpretation would run counter to the objective of protecting the interests of the consumer, stated in the third paragraph of the preamble to the Convention. This is a fair observation, and such objective should certainly be taken into account in interpretation of the Convention. However, the Court did not mention the "equitable balance of interests" referred to at the end of the preamble, which ought also to be taken into account in interpretation, although it is unlikely that this would have led to a different conclusion in the present case.

The Court has now delivered several preliminary rulings interpreting various provisions of the Convention (as it happens, a number of them concerning baggage issues). Its jurisdiction to do so arises from the fact that the EU, in addition to its Member States, is party to the Convention, and the Convention has been implemented into EU law (by Parliament and Council Regulation 889/2002, amending Council Regulation 2027/97).

While it is welcome to see that, as in previous rulings, the Court has referred to the Vienna Convention principle that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, and has approached interpretation with these principles in mind, it remains a matter of concern that, as in previous rulings, the Court has made absolutely no reference to any existing case law from courts of other parties to the Convention, although it is possible that this is because the parties did not refer to any in their arguments. As the Court itself said, in Walz v Clickair, "in the light of the aim of [the Montreal Convention], which is to unify the rules for international carriage by air, [terms in the Convention] must be given a uniform and autonomous interpretation", and courts in other parties to the Convention have frequently stressed the desirability of comity in the interests of attaining uniformity and to such end have had regard to judgments from other parties' higher courts. If the CJEU is to continue to play a significant role in the interpretation of the Convention, it is to be hoped that it will in future cases have regard to relevant jurisprudence of other parties.

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Brexit update

Since our last report some six months ago, there had been no apparent progress on the aviation aspects of Brexit, until the end of May, when it was reported that reputable sources in London and Washington had confirmed that, consensus having been reached on the major issues, an "open skies" agreement between the UK and the US is close, and should be capable of being in place by the end of March 2019 Brexit date, when the EU-US open skies agreement will cease to apply to the UK. This is welcome news, and shows that, although there has been little or no public sign of progress, effective work has been taking place behind the scenes.

Otherwise, the only specific development of any note was the publication by the European Commission on 13 April of a "Notice to stakeholders" stating that following Brexit EU safety rules and EASA certifications will no longer apply. As this simply stated the default position, which was well appreciated by those concerned, it was an unhelpful and unnecessarily aggressive and unconstructive contribution, though by no means surprising given the Commission's general attitude to the negotiations. The CAA responded, with admirable restraint in the circumstances, that: the CAA had always made it clear that its preference was for the UK to remain a member of EASA; the Commission's paper described what the position would be if this were not achieved and no other arrangements were in place (including an implementation period); and, while this was a matter for governments, the CAA considered this to be a highly unlikely scenario, although continued to make the necessary contingency plans.

On 7 June GAMA and ADS (organisations representing respectively international and UK aerospace manufacturers) sent a letter to Michel Barnier presenting a well-argued case for prompt and constructive action on the continued recognition of UK aerospace products and certification in the interests of the European Aviation industry as a whole. It has been reported that the Commission's reaction to this has been to forbid EASA from discussing a no deal contingency plan with the UK CAA. This may misrepresent the position to some extent, as EASA does not have the legal competence to negotiate and conclude such a deal with a non-member aviation authority. However, discussions between the two bodies would seem to be of some use, and it is undeniable that a constructive approach is in the interests of the European aerospace and aviation industries, and their users, generally, so that it is not helpful for the Commission to take such an obstructive and antagonistic position. If it persists in doing so, it is to be hoped that the Council (comprising the elected representatives of the peoples of the Member States) will intervene in order to ensure that common sense prevails over political posturing.

Somewhat more helpful for aviation, although of general rather than aviation-specific application, was the reaching of an agreement between the UK and EU on a transition period until the end of 2020 during which existing EU law will continue to apply to the UK, although subject to agreement being reached on a trade deal, the Irish question and a dispute resolution mechanism by the end of March 2019. Hence, as it is conditional and not yet clear what it will be a transition to, it may be more accurate to characterise the agreement rather as an extension of the current period of uncertainty than a real transition period. If the transition period comes into effect, it will at least postpone the "cliff edge" looming at the end of March 2019, which is understandably causing concern to the aviation industry, and many other industries, but the helpful effect of this is reduced by the fact that whether this will happen is unlikely to be clear for some further time yet. Consequently, it remains highly important and urgent that substantial progress be made on the position of aviation following Brexit.

As we were going to press, on 13 June the Government published its Framework for the UK -EU partnership - transport. After an initial reminder that the Council, in its March 2018 negotiating guidelines, had said that the aim should be to ensure continued connectivity, the UK set out the following outline proposals:

- A future partnership deal that maintains connectivity and allows services to evolve, providing choice at affordable prices;
- The maintenance of arrangements for UK and EU licensed operators to operate services within the UK and the EU on an equal basis (including 7th and 9th freedom);
- Cooperation on air traffic management and on security;
- Continued participation in EASA, in a manner still to be determined, but possibly involving a financial contribution from the UK and the acceptance of CJEU jurisdiction (to this extent) by the UK, and noting that precedents exist for third country participation in EASA.

These proposals make perfect sense, in the interests of industry and users not only in the UK but in the EU as a whole. Whether they will meet with a constructive response from the Commission remains to be seen, and its behaviour to date makes this seem unlikely, but perhaps the Council's involvement will help achieve a sensible outcome.

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