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The air cargo cartel case - lessons for the airline industry

On 9 November 2010 the European Commission finally issued its long awaited decision and fined 11 airlines a total of €799 million for price fixing on fuel surcharges and security surcharges and refusing to pay commission on surcharges. This included over €300 million for Air France-KLM and €104 million for British Airways. SAS had its fine increased by 50% to €70 million in view of its previous involvement in market fixing with Maersk Air in 2001. Appeals by some or all of the airlines are likely. The decision contains important guidance for the aviation sector on the application of EU competition rules.

Over twenty airlines and a consultancy company were involved in a lengthy cartel investigation by the Commission. The investigation started in February 2006 following Lufthansa's revelations to the Commission in late 2005. The Commission's allegations were almost entirely based on "leniency" applications made by the 11 airlines – ie, statements made by them to the Commission confessing to illegal behaviour and implicating other airlines in it, in the hope of receiving reduced or no fines. Lufthansa as the "whistleblower" was rewarded with 100% immunity from fines. Martinair was rewarded with a 50% reduction down to Euros 29.5 million. All the airlines except one received some reduction.

"The first lesson of the case is that price fixing will be punished harshly"

The Commission issued proceedings in December 2007 but only published its decision almost 3 years later. The delay was caused partly by the change of Commission in early 2010, and partly by a number of airlines pleading inability to pay the high fines they expected, based on adverse economic circumstances that the industry was facing (as a result of the financial crisis and the volcanic ash disruption). These pleas required extensive investigation by the Commission, but were rejected in each case.

The Commission did not issue any findings of infringement or impose any fines in respect of the other airlines and the consultancy company which it investigated.

The lessons and points of interest

The first lesson of the case is that price fixing will be punished harshly. While some "credit" was given to several airlines for cooperating with the investigation once implicated, the high level of fines indicates the continued seriousness with which price fixing is punished by EU regulators (as it is also by US regulators). The total fines imposed in the US and the EU, as well as the damages agreed in civil litigation, amount to a staggering £2 billion. This huge sum must exceed any illicit gains made by the cartel participants and brings into question the suitability of such punishment on an industry where profitability is at best thin.

Another important lesson is the requirement for independence of pricing strategy. A common practice in the airline industry is "follow the leader" pricing with rates being set by reference to pricing announcements of a perceived market leader. A key lesson is that market leaders must ensure that the timing and format of any announcement is not designed to influence the conduct of other smaller market players. Equally, market "followers" must also ensure that their pricing decisions are demonstrably independent, keeping proper records to prove that their decisions were made independently.

A controversial feature of the decision is the Commission's calculation of fines partly by reference to services sold to customers located outside the EU and therefore beyond EU jurisdiction. In recognition of this, the Commission took into consideration 50% of the turnover achieved on EU third country routes in calculating the fines. That 50% figure appears arbitrary and no doubt will be subject to appeals.

An interesting element of the case was the involvement of a consultancy firm as a defendant, although charges against it were dropped in the final decision. In recent times, the Commission has shown an increasing interest in third party "intermediaries" suspected of facilitating cartel conduct. Thus, in its Guidelines on Horizontal Agreements of January 2011, the Commission specifically highlights the dangers of "sharing of data between competitors through a common agency (eg, a trade association) or a third party", giving "a market research organisation" as an example of the latter (see paragraph 105 of the Guidelines). Compliance officers in transport companies should ensure contacts with, or

information supplied to, industry advisory entities is made with the strictest regard for EU competition law.

The final important lesson of the case is the need for rigorous compliance in any alliance meetings. Significantly, in announcing the decision, Commissioner Almunia recognised that coordination on surcharges could be part of legitimate airline alliance discussions, and said that such contacts were "ignored... for the purposes of this Decision". However, while accepting that surcharge coordination might be permissible alliance activity, the Commission found that there were also pricing discussions between alliance members which breached EU law. As the Commissioner warned: "*the existence of an alliance agreement cannot give a blank cheque for naked price coordination among the members*."

"The air cargo case has also been a reminder that EU competition law became fully applicable to routes between the EU and non-EU states from 1 May 2004 onwards"

The air cargo case has also been a reminder that EU competition law became fully applicable to routes between the EU and non-EU states from 1 May 2004 onwards. Airlines face higher risks because of their international operations both from parallel investigations by EU and non-EU competition regulators, who cooperate extensively and exchange information when investigating international cartels, as well as from civil claims in a number of countries. While in the US and in the EU airlines are more accustomed to competition law, many airlines whose countries do not even have competition law have now vividly been reminded of the importance, and application to them, of EU and US competition law.

Of particular interest was the Commission's decision to grant a 15% reduction of fines on account of the regulatory environment in non-EU countries which, in the Commission's view, "*encourage[s] anti competitive behaviour from the airlines*". In certain third countries, air transport services are still subject to a high degree of regulation, including active encouragement to arrive at common positions on surcharges. The Commission recognised the pressures airlines must have been facing from such non-EU governments and thus granted some leniency. However, as the Commissioner stated in his speech: "*none of the carriers was obliged to collude because of this regulatory environment (…) we consider this as a mitigating circumstance only, not as a valid excuse*". Standing up to governmental pressure can be problematic in some countries. The state compulsion defence has seldom been accepted by EU regulators, and this may be a rare, if grudging, example.

Civil damages actions

A novel feature of the cartel proceedings has been the important role of civil damages actions started by business customers of the air carriers. Whilst in the US most of the carriers which applied for leniency have settled their civil damages claims, in Europe the civil damages actions have just started. In 2008, two flower growers and exporters claimed damages against British Airways in the English courts, alleging breaches of EU and UK competition law in the context of the cartel. For procedural reasons, their claim was dismissed and is currently subject to appeal. However BA has recently joined parties to the EU cartel proceedings as third party contributors to any damages that might eventually be awarded by an English court, (under Part 20 of the Civil Procedure Rules). One would expect this list of "contributors" now to be narrowed down to those airlines fined by the Commission.

In October 2010, another damages claim arising from the same cartel proceedings was lodged in the Dutch courts by Ericsson and Phillips against Air France, KLM and Martinair. It remains to be seen how the potential clash between these two civil jurisdictions (ie, the UK and the Netherlands) will be resolved as, under the so called "Brussels Regulation" (Regulation 44/2001), parties cannot be sued for damages for the same claim in more than one EU Member State.

These claims are indicative of the increasing enthusiasm on the part of corporate customers to sue for damages in appropriate cases. Commissioner Almunia observed that such private actions were a matter of "basic justice" for customers harmed by the cartel. Particularly as there is a current proposal by the Commission for a Directive on civil damages for infringements of competition l
aw, it is likely that such private claims by business customers, something routinely seen in US courts, will become more prevalent in the EU.

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Forum non conveniens- a powerful tool in the defence of multi-jurisdictional aviation litigation in the United States

Introduction

On 4 October 2010 Judge Charles Breyer of the US District Court for the Northern District of California granted a motion for dismissal of all litigation arising from the accident of Air France flight 447 on 1 June 2009 on grounds of *forum non conveniens* (FNC). In his opening paragraph Judge Breyer stated: "*the Court has great sympathy for all the families who lost loved ones in this horrific accident and is interested in seeing those families fairly and timely compensated. But sympathy cannot be a substitute for an unbiased application of the law*." This significant decision, along with other decisions including the recent orders granting dismissals in the Kenya Airways KQ 507 and Adam Air DHI 574 cases, demonstrate that an FNC motion can be a powerful tool in the defence of multijurisdictional aviation litigation. This article will consider in particular the recent Air France decision.

FNC and its application in the United States

FNC is a common law doctrine of Scottish descent. It allows a court to decline to hear a case in favour of an alternative forum, if the interests of the parties and of justice so dictate.

"As a moth is drawn to the light, so is a litigant drawn to the United States"

In the context of international disputes, a claimant often has a choice between two or more countries in which to proceed against the defendant. The existence of such alternative fora has given rise to "forum shopping", a practice which has been defined (by Lord Reavson in *Boys v Chaplin* in 1971) as a claimant "*by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in his natural forum*".

A forum that is particularly susceptible to forum shopping is the United States, where there is an abundance of highly experienced litigation lawyers, and recoveries are perceived to be significantly higher than elsewhere. In the words of Lord Denning in his 1983 judgment in *Smith Kline* and *French v Bloch*, "*As a moth is drawn to the light, so is a litigant drawn to the United States*."

The field of aviation law is no exception to this. In recent years, there has been a steady rise in the number of foreign aviation claims being brought in the US. Frequently these claims arise out of aviation accidents that bear little or no connection to the US. Against this backdrop, FNC is increasingly significant in the defence of foreign aviation accident litigation in the US.

Plaintiffs' counsel are aware in commencing foreign aviation litigation in the US that defendants will seek dismissal on FNC grounds, and therefore employ a number of tactics in their continuing effort to defeat these motions. These include naming as many US based defendants as possible, including those with only a limited nexus to the accident, in order to establish a connection to the US.

It follows that it has become difficult for defendants' counsel to be confident of dismissal on FNC grounds. For this reason, FNC dismissal of the Air France litigation is highly significant.

Air France accident litigation

On 1 June 2009 Air France flight 447 left Brazil destined for France, and crashed over the Atlantic Ocean. All 228 passengers and crew lost their lives.

Over seventy foreign plaintiffs brought claims for the wrongful death of passengers and crew against Airbus, the French aircraft manufacturer, Thales Avionics, the French component part manufacturer, and more than one dozen US component part manufacturers.

Air France was sued directly in only one action arising from the death of two US citizens. None of the foreign plaintiffs were able to claim against Air France directly under the

jurisdictional terms of the Montreal Convention.

Both Air France and the manufacturing defendants sought dismissal of the claims pursuant to the FNC doctrine. The claims were consolidated for court purposes, and in a single judgment the court granted FNC dismissal of all litigation arising from the accident. While other motions were heard at the same time, the most important decision rendered by the court concerned FNC.

Legal standard of FNC

A party moving to dismiss on FNC grounds bears the burden of showing that:

(a) there is an adequate alternative forum; and
(b) the private and public interest factors favour dismissal.

The plaintiffs' choice of forum will not be disturbed by an FNC motion unless private and public interest factors strongly favour trial in the alternative forum. Further, the forum choice of a domestic plaintiff (in this case the two US plaintiffs) is entitled to considerable deference, whereas the forum choice of a foreign plaintiff is entitled to less deference.

a) Is France an adequate alternative forum?

"A party moving to dismiss on FNC grounds bears the burden of showing that there is an adequate alternative forum and the private and public interest factors favour dismissal"

When considering an FNC motion, it is relatively uncommon for a court to find that a proposed alternative forum is inadequate.

The litigation arising from the Air France accident proved to be no exception. It was noted by the court that "*Plaintiffs do not really contend that France is an inadequate alternative forum*", before it concluded that France was indeed an adequate, alternative forum.

b) Did private and public interest factors favour dismissal?

Having established France to be an adequate alternative forum, the Court went on to consider whether private and public interest factors favoured FNC dismissal.

Private interest factors

The court considered the following private interest factors:

- relative ease of access to proof;
- availability of compulsory process to secure the attendance of unwilling witnesses;
- the cost of obtaining the attendance of willing witnesses; and
- all other practical issues that make trial of a case easy, expeditious and inexpensive.

Although the Judge found that the fact that the domestic manufacturing defendants were situated in the US weighed against dismissal, the private interest factors as a whole pointed the other way. It was relevant that the criminal investigation and the official accident investigation conducted by the Bureau d'Enquetes et d'Analyses in France were taking place in France, and all physical evidence was located there. In addition, French civil courts could order the BEA to disclose the evidence in its possession, while a US court would only be able to obtain the evidence via a request pursuant to the Hague Convention or a Letter Rogatory, neither of which would necessarily be successful.

A further key factor in favour of dismissal was the ability to bring all parties together in France in a procedurally sensible fashion. In particular, under the jurisdictional provisions of the Montreal Convention, both the foreign plaintiffs and manufacturing defendants could sue Air France directly in France. However in the US, the foreign plaintiffs could not sue Air France, and there was a dispute as to whether the manufacturing defendants could bring a third party claim.

Public interest factors

The court considered the following public interest factors:

- administrative difficulties flowing from court congestion;
- local interest in having localized controversies resolved at home;
- interest in having the trial in a forum that is familiar with the law governing the action;
- avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and
- unfairness of burdening citizens in an unrelated forum with jury duty.

The court found that the public interest factors weighed in favour of dismissal for four primary reasons:

- France had a greater interest in the litigation than the US. The flight was operated by a French airline and was destined for France, and the majority of passengers were French citizens, while only two were from the US. The US interest in manufacturing standards and in protecting the rights of two US citizens was "*real and legitimate, but less significant than the French interest*".
- The court reiterated the point raised in relation to private interest factors that in France, unlike the US, the foreign plaintiffs could sue Air France directly. This would avoid potential jurisdictional difficulties created by the manufacturing defendants' attempts to sue Air France as a third-party defendant in the foreign plaintiffs' actions.
- Remitting the action to the French courts would avoid the prospect of a US court having to apply French law.
- The significant burden on the judiciary and potential jurors was considered disproportionate to the comparatively limited interest of the US in the litigation.

For the reasons outlined above, the court held that both private and public interest factors weighed in favour of dismissal of the claims to French courts on FNC grounds. Regarding the deference to be awarded to the plaintiffs' choice of forum, the court considered that the candid acknowledgement by foreign plaintiffs' counsel that they were participating in "forum shopping" reflected the reasons why little deference could be accorded to their choice of forum. In relation to the two US plaintiffs, the court accepted that while domestic plaintiffs' preferences were entitled to greater deference, this could not override the fact that private and public interest factors weighed heavily in favour of dismissal.

> "the court held that both private and public interest factors weighed in favour of dismissal of the claims to French courts on FNC grounds"

FNC and the Montreal Convention

In the direct claim brought against Air France by the representatives of the two US citizens, having found "fifth jurisdiction" (principal and permanent residence) in favour of the plaintiffs the court had to answer a threshold question before undertaking the traditional FNC analysis described above. Is the doctrine of *forum non conveniens* applicable under the Montreal Convention?

In the Air France litigation the plaintiffs argued that the Montreal Convention does not recognise the FNC doctrine on grounds that:

- the Ninth Circuit Court in *Hosaka* held that the Warsaw Convention, the predecessor to the Montreal Convention, did not recognise FNC, and the language used in both Conventions is the same in this respect; and
- FNC is incompatible with the fifth jurisdiction of the Montreal Convention, the purpose of which is to provide injured passengers with the option to sue in their home forum.

In addressing the first point, the court considered that there are two primary reasons why *Hosaka* does not compel the conclusion that FNC is not available in cases brought under the jurisdiction of the Montreal Convention.

First, in *Hosaka* the Ninth Circuit addressed the applicability of FNC under the Warsaw Convention, and explicitly stated that it was not considering applicability under the Montreal Convention. The FNC doctrine is a matter of procedure. The language used in the two Conventions regarding the applicability of procedural law is identical "*Questions of procedure shall be governed by the law of the court seised of the case*". However, Hosaka was decided not on the text of the Warsaw Convention, but on its drafting history, which is dramatically different from that of the Montreal Convention.

When the Warsaw Convention was drafted in 1929, FNC was relatively new and not well known. Therefore the Ninth Circuit's decision in *Hosaka* that FNC dismissal was not available absent an express statement to the contrary was explicable, albeit incorrect. However, by the time the Montreal Convention was drafted FNC was well established, and had even been employed in the US for dismissal of Warsaw Convention cases. In this context, the fact that the Montreal Convention reaffirms the incorporation of forum states' procedural law indicates a clear intention to allow FNC motions to apply. A brief examination of the Montreal Convention minutes confirms this approach; the delegates expressly acknowledge that as a matter of procedure FNC falls within the jurisdiction of the Convention. Indeed the Convention minutes indicate that the only reason the Convention does not explicitly incorporate the doctrine is due to concerns that certain nations would have difficulty ratifying the Convention where the doctrine is not part of their procedural law.

Secondly, other US courts had already addressed the issue of FNC under the Montreal Convention, and found that it is available (for example, in the litigation arising out of the West Caribbean accident in Venezuela in 2005, and *Khan v Delta* in 2010). These cases must surely provide greater authority on the applicability of FNC under the Montreal Convention than the case of *Hosaka*, where it was expressly declared that the Court was interpreting FNC under the Warsaw Convention, and *not* the Montreal Convention.

> "the court rejected the plaintiffs' arguments that *Hosaka* compelled refusal to grant dismissal pursuant to the FNC doctrine, and thus established the doctrine to be admissible"

In addressing the second point, the court gave little weight to the plaintiffs' argument that allowing an FNC dismissal under the Montreal Convention would render the fifth jurisdiction meaningless. It was held that the combination of the fifth jurisdiction and the application of forum states' procedural law demonstrated an intent to give plaintiffs more choice among fora, but also to allow the courts to constrain that choice where FNC was available and a different forum more appropriate. Moreover, the court noted that it did not have authority to ignore the clear policy choice of the Convention to incorporate FNC within its scope.

For the above reasons, the court rejected the plaintiffs' arguments that *Hosaka* compelled refusal to grant dismissal pursuant to the FNC doctrine, and thus established the doctrine to be admissible.

Conclusion

Having established the admissibility of FNC under the Montreal Convention, the court applied the legal standard of the doctrine and found that France was an adequate alternative forum, and that private and public interest factors favoured dismissal. On these grounds, the defendants' motion for FNC dismissal was granted, and the litigation was dismissed.

While significant legal hurdles must be overcome in order to successfully employ it, Judge Breyer's decision illustrates the powerful potential of the FNC motion in the defence of multijurisdictional aviation litigation in the US. The decision is now on appeal.

For further information, please contact Eloise Preston or Joe Goodridge

The new EU Regulation on accident investigation

On 2 December 2010, EU Regulation 996/2010 on the investigation and prevention of accidents and incidents in civil aviation came into force. This article discusses the background to this Regulation and summarises its main provisions.

Background to the Regulation

The Convention on International Civil Aviation signed in Chicago on 7 December 1944 provided for the implementation of measures necessary to ensure the safe operation of aircraft. Annex 13 sets out recommended standards and practices for aircraft accident and incident investigation. In 1994, the EU issued Directive 94/56/EC which adopted the Annex 13 principles for EU Member States. However, in 2009, the EU Commission noted that:

> "The Community system for civil aviation accident investigation and occurrence reporting as currently established functions below optimum efficiency. Especially the current regulatory framework dealing with accident investigation, i.e. Directive 94/56/EC, is now already 15 years old and no longer meets the requirements of the Member States…" (SEC(2009) 1477).

"The main innovative features are the involvement of EASA in investigations and the creation of the European Network"

The Commission also noted that, following the enlargement of the EU in 2004 and 2007, the investigating capacity was nevertheless concentrated in only a few Member States. Also, the international aviation market had increased substantially, and, as aircraft and their systems were becoming increasingly complex, the investigation of accidents required more diversified expertise and resources than in 1994. Further, the European Air Safety Agency (EASA) had been established in 2002, and it was considered desirable for EASA to be involved in investigations.

Accordingly, the 2010 Regulation was implemented. Its main innovative features are the involvement of EASA in investigations and the creation of the European Network of Civil Aviation Safety Investigation Authorities. These provisions are discussed below.

The scope of the Regulation

The Regulation applies to safety investigations into accidents and serious incidents:

- which occur in the territories of the EU Member States; or
- involving aircraft registered in a Member State or operated by an undertaking established in a Member State when such investigation will not be conducted by another state; or
- in which a Member State may, in accordance with international standards and practices, appoint a representative by virtue of it being the State of Registry, the State of the Operator or the State of Design; or
- in which a Member State has a special interest by virtue of fatalities or serious injuries to its citizens.

The Regulation does not apply to investigations into accidents or serious incidents involving aircraft in military, customs, police or similar services (Art 3).

The obligation to investigate

The Regulation provides the following "obligation to investigate":

> "Every accident or serious incident involving aircraft… shall be the subject of a safety investigation in the territory of which the accident or serious incident occurred." (Art 5.1).

> "When an aircraft registered in a Member State is involved in an accident or serious incident, but the location of which cannot definitely be established as being in the territory of any State, then a safety investigation shall be conducted by the State of Registration" (Art 5.2).

In essence, an "accident" is an occurrence associated with the operation of an aircraft in which:- a person is fatally or seriously injured; the aircraft sustains serious damage or structural failure; or the aircraft is missing or completely inaccessible. A "serious incident" is one involving circumstances indicating there was a high probability of an accident (Art 2).

The purpose of the safety inspection

Continuing with the philosophy of the 1944 Convention, the Regulation provides that the purpose of safety investigations is the prevention of future accidents and serious incidents. It is specifically stated that:

> "Safety investigations… shall in no case be concerned with apportioning blame or liability. They shall be independent of, separate from and without prejudice to any judicial or administrative proceeding to apportion blame or liability" (Art 5.5).

The extent to which the report may be used in evidence in civil or criminal proceedings will depend in each case on the law of the country in which the proceedings are brought. The Regulation provides that most of the background material collated during the investigation shall not be used for any purpose other than the investigation unless a court determines that they may be disclosed if appropriate (Art 14).

“"Safety investigations… shall in no case be concerned with apportioning blame or liability”

Independence of air accident investigations

One feature of the Regulation is its desire to ensure complete independence of safety investigations in order to seek to prevent any political or commercial pressure or other conflict of interests. Accordingly, the Regulation requires that each Member State shall ensure that safety investigations are conducted by a permanent national civil aviation safety investigation authority which is independent from other aviation authorities or other external interference, and which is given the means required and able to obtain sufficient resources (Art 4).

The investigators will also be given special status to ensure their independence and will have at their disposal a functioning budget and the relevant means necessary to carry out their investigations including offices and hangars to enable examination.

European Network of Civil Aviation Safety Investigation Authorities

A significant feature of the Regulation is the requirement that Member States are to ensure that their safety investigation authorities establish a European Network of Civil Aviation Safety Investigating Authorities. The Network will be composed of the heads of the safety investigation authorities in each of the Member States (Art 7). The broad objective of the Network is to improve the quality of investigations by strengthening cooperation between the safety investigation authorities and between the Commission and the EASA. National authorities will remain responsible for accident investigations, but the Network will provide training and certain other investigative resources in order to ensure a stronger overall investigative capacity. This will include a database of investigators, equipment and capabilities available to other Member States.

The role of EASA

EASA's mandate includes type-certification, implementing and monitoring safety rules (e.g. ramp inspections), approval of organisations involved in the design, manufacture and maintenance of aeronautical products, safety analysis and research and expert advice to the EU for drafting new legislation.

The Regulation provides that the safety investigation authority conducting the investigation shall invite EASA to appoint a representative to act as an adviser (provided there is no

conflict of interests), who is to be:- permitted access to the scene of the accident and to examine the wreckage; provided with all relevant information; and entitled to participate in off-scene investigative activities (Art. 8).

The safety investigation

The Regulation provides that each investigation shall be concluded by the publication of a report, which shall, where appropriate, contain safety recommendations. However, at any stage of the investigation, the safety investigation authority shall release details of any preventative action it considers necessary to be taken promptly to enhance safety (Art 16).

Before publication of the final report, the safety investigation authority conducting the investigation is required to solicit comments from EASA, the certificate holder for the design, the manufacturer and the operator.

> "The Regulation obliges EU airlines, and non-EU airlines operating flights from an airport in the EU, to provide , a validated list of all persons on board, at the latest within two hours of notification of the occurrence of an accident"

Passenger information

The Regulation imposes specific obligations on EU airlines, and non-EU airlines operating flights from an airport in the EU, to provide to the investigation authority in charge, and to other concerned entities, a validated list of all persons on board as soon as possible and, at the latest, within two hours of notification of the occurrence of an accident, and also a list of any dangerous goods on board immediately after notification of the occurrence of the accident (Art 20).

Passengers are also to be given the opportunity before they travel to give a name and details for any emergency contact.

Victim assistance

Every Member State is to establish a national aviation accident emergency plan which should include provision for assistance to victims and their relatives (Art 21). Further, each Member State should ensure that airlines established in their territory establish their own plans for assistance to the victims of accidents and their relatives. These plans must take particular account of psychological support for victims and their relatives.

Member States are also obliged to encourage third country airlines which operate in the EU to adopt a plan for assistance of victims and their relatives and also to appoint a reference person as a point of contact and information.

For further information, please contact Ross Williams or Imogen Dexel-Grainge

The blame game

The Concorde criminal proceedings

On 6 December 2010 a French Court in Pontoise ruled that Continental Airlines and one of its engineers were guilty of involuntary homicide as a result of the investigation into the cause of the 2000 accident involving the Air France Concorde that killed 113 people.

Judge Dominique Andréassier handed down a 15 month prison sentence upon John Taylor, the Continental engineer, although it was suspended, and a fine of USD$2,650. The airline was also ordered to pay a fine of USD$265,000.

The findings of the Bureau Enquêtes Accidents (BEA) issued in 2002 concluded that a small strip of titanium had detached from a Continental DC10 aircraft which had taken off minutes earlier and that this punctured a tyre on Concorde as it accelerated down the runway on 25 July 2000. According to the report, disintegration of the tyre caused shards of rubber to penetrate the fuel tanks and generate a catastrophic fire. However, this finding remains controversial in that the BEA, and later the Pontoise Court, appear to have ignored evidence from many witnesses who testified that the aircraft caught fire at a point on the *runway before* it reached the titanium strip.

The convictions which followed are therefore questionable and are subject to an ongoing appeal. For unintentional offences, French criminal law distinguishes between the criminal liability of a natural person and the criminal liability of a legal corporation. In the case of a private individual, a conviction can only be obtained if it can be demonstrated that an act of gross negligence ("*une violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement ou d'une faute caractérisée qui exposait autrui à un risque d'une particulière gravité que la personne ne pouvait ignorer*") occurred. Put simply, the higher the degree of danger or risk, the greater the possibility of finding an act of negligence to be "gross".

However, a minor offence committed by a legal entity or corporation is sufficient to attract a finding of involuntary homicide in such circumstances. Consequently, analysis of the available evidence, and the reasoning of the Pontoise Court in reaching its decision, has opened up a wide debate.

"the Pontoise judgments have sent shock waves through the aviation industry"

The replacement of a simple aluminium wear strip with a titanium component, and failure to secure this correctly in accordance with the manufacturer's instructions, was held to be sufficient evidence to convict Mr Taylor. However, in order to convict Continental Airlines, the Court had to determine if such negligence had been committed on behalf of the airline by one of its representatives. The reasoning in this case appears to be most unusual in that the Court found that Mr Taylor was not a representative of the airline, with the consequence that his gross negligence could not be attributed to the airline.

On the other hand, a maintenance manager, who was indicted and subsequently acquitted of involuntary homicide (but nevertheless found guilty of minor negligence), was deemed by virtue of his managerial status to have acted on behalf of Continental Airlines on the basis that he was responsible for the ultimate release to service of the aircraft ("*approbation pour remise en service*"). In such circumstances, his minor negligence was held to be sufficient to justify conviction of the airline.

Pending the outcome of the appeal, the current Pontoise judgments have sent shock waves through the aviation industry. The ultimate ruling could have profound effects upon the future exchange of safety information generally and cooperation of witnesses with accident investigators in particular.

Historial perspective

With this in mind, history reveals that this 'blame game' is nothing new. In fact, criminalisation of aviation accidents and incidents goes back over 200 years to the first ascent of the Montgolfier balloon on 5 June 1783. This was followed by an Order made by the Chief of Police in Paris on 23 April 1784 prohibiting the manufacture and use of balloons employing hazardous materials. Consequently, evidence of suitable precautions and prior police permission were required before all subsequent ascents.

Despite a subsequent lull in criminalisation of air accidents, the prosecution of aviation professionals has received significant media attention and publication in recent times. Many examples can be cited. The indictment of the crew of the ExcelAire Embraer Legacy corporate jet following the mid-air collision with a GOL Boeing 737 in Brazil is a prime example. The Legacy crew survived and were able to make a successful forced landing. However, before any technical or factual investigation had commenced, they were prevented from leaving Brazil and it was only after considerable political efforts that they were ultimately able to return to the US. The prosecution proceedings continue. The concept that someone should be punished for human activities which result in death or serious injury is as old as civilisation itself. The biblical talion law of "an eye for an eye" has been effectively transformed into acceptable criminal sanctions which, as indicated above, date back to breaches of aeronautical regulations ever since 1784.

Aviation is no different from any other form of transport where breaches of regulations attract criminal sanctions. Given this deep-rooted culture, any change is bound to take considerable time. Nevertheless, the chilling effect which potential prosecution has on openness and the flow of safety information following an aviation accident or incident is bound to have an adverse impact upon aviation safety and prevent lessons from being learnt.

"Just culture" initiatives by ICAO, IFALPA and EUROCONTROL

With this in mind, several practical initiatives have been taken in recent years by a number of aviation organisations, including ICAO, IFALPA and EUROCONTROL. All of these have been focussed upon developing a "just culture" with the aim of immunising honest mistakes from criminal and penal sanctions.

The tendency on the part of the authorities to resort to criminal sanctions more readily these days, and the response demanded by a worldwide public with a thirst for knowledge, resulted in the ICAO Assembly producing a resolution entitled "Protecting Information from Safety Data Collection and Processing Systems in order to Improve Aviation Safety" (Resolution A35-17). The intention was to generate an environment in which reporting and sharing of information is encouraged and facilitated.

"a "just culture" will only evolve when accidents and incidents are investigated by reference to systemic failures rather than individuals"

However, in order to succeed, a "just culture" will only evolve when accidents and incidents are investigated by reference to systemic failures rather than individuals. Blaming individuals has the effect of ignoring the importance of contributions made by systemic failures. Furthermore, the "blame game" generates negative side effects which lead to defensive posturing, protectionism and ineffective reporting systems.

In order to draw the line between acceptable and unacceptable behaviour, at an ICAO meeting in October 2008 IFALPA suggested an amendment to the provisions of Annex 13 to the Chicago Convention, which governs worldwide accident investigation, as follows:

> *"Proceedings to impose sanctions*
>
> *5.11 Recommendation - States should not impose criminal sanctions arising out of an aircraft accident against individuals unless there has been an independent judicial determination that the accident or incident was caused in whole or part by such default on the individual's part as, in accordance with the law of the Court to which the case is submitted, is considered to be the equivalent to wilful misconduct."*

In determining the type of expertise which should be used in judging whether behaviour is acceptable or unacceptable, EUROCONTROL attempted to define an honest mistake as "*one that is in line with people's experience and training*". This line of reasoning was, in turn, adopted by ICAO in striving to define a "just culture", which it suggested should be adopted worldwide through the Chicago Convention as "*a culture in which frontline operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training but where gross negligence, wilful violations and destructive acts are not tolerated*" (SAFREP TF Report to PC – November 2005).

The central ethos promoted by ICAO that accident investigation should be used solely for the purposes of establishing cause and preventing recurrence is sadly not working. As in the case of the Concorde disaster, if there is a suspicion of unlawful interference or criminal activity, the judicial authorities may take control of the site. Treating an accident site as a crime scene can clearly be counter-productive to establishing cause. In the aftermath of Concorde, one English investigator reported that he was compelled to examine critical components in sealed opaque plastic bags!

Standard of criminality

By its very nature, the aviation industry demands the highest professional standards from those who derive a living from the many and various disciplines involved. Pilots, engineers, airport authorities, air traffic controllers and other aviation professionals within the industry are all subject to frequent stringent checks and tests in order to determine their competence to carry out their respective occupational tasks. Despite this, accidents continue to happen in the best regulated circumstances.

Aviation professionals also owe a duty of reasonable care to those making use of or relying upon their services, a breach of which will be actionable in negligence. The question to be considered is what does "reasonable care" mean in the context of aviation activities? In a situation where a "reasonable" man could not be expected to have the

knowledge or expertise to perform a certain special service, the standard of care and state of knowledge is judged against that normally adhered to by others engaged in the same business. In the case of a qualified aviation professional, the test is whether his or her actions or inactions were those of a reasonably competent individual within that profession.

When is a breach criminal? When is a crime an accident and an accident a crime? These are essentially matters of evidence of the degree to which, if at all, the conduct was intended. Sabotage, wilful use of drugs, alcohol abuse and what is termed in legal parlance as 'egregious conduct' (i.e. falsification of log books and records etc.) would all qualify to justify criminal prosecution.

The central requirement at law is "mens rea" or "guilty mind", but this is not a concept normally associated with an "accident". Indeed, by definition an "accident" cannot be caused by an intentional act.

The right to silence

As a general rule, making an "honest mistake" does not make a person a criminal. With this in mind, immunity from self-incrimination is available as a form of protection. The right to silence takes many forms worldwide. For instance, by virtue of the Fifth Amendment of the US Constitution a person cannot be compelled to testify against himself. However, juries may (and usually do) draw an adverse inference from invoking such protection. Tactical care is therefore needed in taking such a step.

A mirrored position exists in Japan where, under Article 38 of the Japanese Constitution, it is provided that:

> *"No person shall be compelled to testify against himself. A confession made under compulsion, torture or threat or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession."*

"immunity from self-incrimination is available as a form of protection"

However, aside from any adverse inferences which a tribunal may draw if this is exercised, the right to silence is clearly counter-productive to air safety at the investigation stage. It can delay the issue of urgent safety recommendations or emergency directives in a situation where the people involved are the only ones who have knowledge of what happened in a particular situation. Without their testimony, clearly accident investigation authorities will be working at a significant disadvantage. The real losers in such a situation are the public.

Nevertheless, the underlying rationale for the right to silence stems from the severity and seriousness of criminal proceedings, which require the prosecution to shoulder the major burden of proof. It is not a case of guilty until proven innocent, although that is how it appears in most parallel criminal and civil investigations.

National measures on immunity

Against this background, a few States have adopted their own internal rules in categorically denying access to information for criminal prosecutions. An example is Norway where the current aviation legislation (Articles 12-24 Norwegian Air Law) provides:

> *"Prohibition on use as evidence in criminal proceedings: Information received by the Investigating Authority may not be used as evidence in any subsequent criminal proceedings brought against the persons who provided the information. "*

Whilst not ruling out criminal proceedings altogether, it protects aviation professional from self-incrimination and ensures that it is safe to report safety critical information arising from an incident without fear of criminal reprisal.

Likewise, a law was passed by the Danish Parliament mandating the establishment of a compulsory, strictly non-punitive and confidential system for the reporting of aviation incidents. Consequently, aviation professionals are ensured strict immunity against

penalties and disclosure. However, failure to comply with disclosure is effectively made a punishable offence.

The Danish legislation (Regulations on Mandatory Reporting of Flight Safety Occurrences BL8-10) goes further to grant freedom from prosecution even in circumstances where the reporter has committed an erroneous act or omission that would normally be punishable. Any written material or reports derived from this scheme are also granted exemption from the provisions of the local Freedom of Information Act (legislation which is normally regarded as sacrosanct in certain States).

Nevertheless, it is acknowledged by Danish politicians and aviation specialists that the public have a right to know the facts about the level of safety in Danish aviation. Accordingly, it is law in Denmark that statistics should be published twice a year based on de-identified data derived from mandatory occurrence reports. To date, this scheme has worked well and prosecutions in this jurisdiction have been minimal.

Conclusion

Elsewhere, the conflicting needs for accountability and promotion of air safety remain to be resolved. The decision of the Pontoise Court does little to assist. Pending maturity of the initiatives taken by ICAO, IFALPA and EUROCONTROL, as well as the Scandinavian initiatives referred to above, the appeal will no doubt be monitored with interest by the aviation industry.

"In the meantime, the "blame game" will continue to inhibit free exchange of air safety information"

In the meantime, the "blame game" will continue to inhibit free exchange of air safety information in an environment where "*those who do not learn from history are forced to repeat it*", as the US philosopher George Santayana said. Let us hope that in the future the aviation industry will continue to be able to learn from history, so that avoidable accidents are not repeated.

For further information, please contact Tim Brymer

A question of sovereignty: first instance judgment in the Cyprus case affirmed

Introduction

In the February 2010 issue of this Bulletin, we commented upon the first instance judicial review of the Transport Secretary's decision not to extend the operating licences of the Appellants – the airline Kibris Türk Hava Yollari and its wholly owned travel agent CTA Holdings. Wyn Williams J had to interpret and apply the principle of sovereignty under the Chicago Convention 1944 arising from the competing interests between the Greek and Turkish communities over flights between the United Kingdom and the disputed territory of Northern Cyprus, and concluded that the principle precluded the Secretary of State from granting the requested extension. The highly political issue of state sovereignty has now been revisited by the Court of Appeal, which reaffirmed the first instance decision in a judgment delivered on 12 October 2010.

Background

For context, it is worth repeating some brief points about Cyprus' historical background. The island was controlled by the United Kingdom from 1878 until 1960, when the Republic of Cyprus (RoC) became an independent state. However, several years of fighting between the Greek and Turkish communities led, on 15 November 1983, to the northern part of the island being declared as the Turkish Republic of Northern Cyprus (TRNC). The TRNC has never been recognised by any state except Turkey, whereas the RoC is widely recognised, and is a signatory to the Chicago Convention.

The Appellants are a Turkish airline and its English wholly-owned subsidiary travel agent. They arrange and operate flights under a permit issued pursuant to the Air Navigation

Order 2005, allowing for flights between Turkey and United Kingdom. Some flights used Turkey as an intermediate stopping point en route to Ercan Airport in Northern Cyprus. The airline applied for a variation to its licence to allow for direct flights between the United Kingdom and Northern Cyprus. The travel agent requested an operating permit for specified charter flights on the same route.

The RoC has never agreed to the operation of either scheduled or charter flights into Northern Cyprus, and, indeed, had taken decisions about the use of airports in Cyprus that prevented the Appellants from carrying out their preferred operations. Article 6 of the Chicago Convention provides that permission or authorisation from a contracting state is required before scheduled services may be operated over or into its territory. The RoC has refused such permission to the Appellants in relation to Ercan airport.

"The judge at first instance held that the Secretary of State was required to refuse the application in order to avoid placing the UK in breach of its obligation to respect the sovereignty of contracting states"

The Secretary of State, in a stance supported by the RoC, did not grant the requested licences, stating that the United Kingdom did not recognise governments but did recognise states and that he was obliged by law to act in accordance with the United Kingdom's obligations under the Chicago Convention, which meant respecting the rights of the RoC and its decision not to permit the Appellants to operate directly between the United Kingdom and Ercan airport. Wyn Williams J held that the Secretary of State was required to refuse the application in order to avoid placing the United Kingdom in breach of its obligation arising from Article 1 of the Chicago Convention to respect the sovereignty of contracting states.

The appeal

The Chicago Convention issue

The most substantive of the Appellants' challenges to Wyn Williams J's decision was on the basis that the RoC lost the entitlement to exercise sovereign rights because it did not have effective control of Northern Cyprus. The Court considered what was described as the "ethereal subtlety" involved in distinguishing the suspension of (or the inability to exercise) sovereign rights from an *entitlement* to exercise those rights.

The Vienna Convention on the Law of Treaties includes a number of provisions as to when the rules of a treaty do not apply. This includes, in Article 61, the impossibility of performing a treaty resulting from the permanent or temporary "disappearance or destruction of an object indispensable for the execution of the treaty". In considering this article, the Court concluded that the RoC was capable of exercising rights under the Chicago Convention even where it did not have effective control over the territory concerned, approving Wyn Williams J's conclusion that there is no principle of international law that suspends treaty rights against the will of the person upon whom those rights are conferred and in circumstances when the rights can be enjoyed. The RoC is entitled to rely on other states to honour their obligations under a treaty. In this case, only Turkey ignored the decisions taken by the RoC, and the suspension of sovereign rights under the Vienna Convention would need to have been invoked, and the RoC had not invoked it.

As to entitlement to exercise rights, the Appellants contention was that the TRNC replaced the RoC as the entity entitled to exercise rights under the Convention because of the transference of effective control over the territory. The Court dismissed this argument on the basis that the TRNC is not a recognised state and is not a party to the Convention, and that this position cannot be rectified by acts that mimic the function of a state with respect to airports.

Non-recognition issue: the "Namibia Case" exception

The UK has not recognised the TRNC as an independent state. Accordingly, the Secretary of State justified his decision to refuse the permits by the need to avoid any implied recognition that the acts of the TRNC were lawful. The Appellants also appealed on the basis of the exception articulated by the International Court of Justice in the "Namibia Case", that acts of non-recognised states may be given effect where to ignore certain acts would be detrimental to a territory's inhabitants. This exception applies in matters such as those involving private rights or the legal consequences arising from day-to-day activities (for example, registering births, deaths and marriages). The Court

dismissed this argument on the basis that the Secretary of State, by contrast, was dealing with a matter of public law in a dispute as to which of the competing authorities was to be recognised, where the RoC remained entitled to exercise its Convention rights.

Comment

"The Court of Appeal's judgment confirms that the principle of sovereignty is of paramount importance in the operation of international law"

The Court of Appeal's judgment confirms that the principle of sovereignty is of paramount importance in the operation of international law. For the second time, a court has upheld it (in support of the RoC) as the overriding principle in the context of an important political and practical issue. The UK Government has expressed a commitment to ending the isolation of Turkish Cypriots, in recognition of the *de facto* control exercised over Northern Cyprus. However, the Secretary of State is powerless to permit direct flights between the UK and Northern Cyprus, as the Court of Appeal has now affirmed.

For further information, please contact Nick Medniuk

EU/US aviation relations – the second stage

The Air Transport Agreement signed between the EU and the US on 30 April 2007 created "open skies" between the two largest aviation markets in the world, and led to a number of innovations – perhaps most visibly, the appearance of US airlines other than American and United at Heathrow.

The Agreement provided for negotiations on a second stage. Such negotiations took place, and resulted in the signing on 24 June 2010 of a Protocol to amend the Agreement. The main changes are as follows:

- Fitness and citizenship. In the first instance, determinations as to satisfaction of the requirements of financial, managerial and technical fitness and as to ownership, effective control and principal place of business are to be made by the designating party, although if the other party has a specific reason for concern consultations may be requested and, if the matter remains unresolved, either party may bring the matter before the Joint Committee.
- Environment. Cooperation provisions are strengthened, with obligations imposed on a party to consider the effect of proposed measures on the exercise of rights under the Agreement, provisions aimed at improved dialogue and exchange of information and procedures relating to the imposition of noise-based restrictions at airports.
- Social dimension. The importance of the social dimension is expressly recognised, as is the intention not to undermine labour standards or rights.
- Joint Committee. Its role is extended to review of further matters constraining the exercise of rights provided by the Agreement, and it is to develop further cooperation in a number of areas.
- Fly America. EU airlines are given the right to carry passengers for US Government Departments on flights other than domestic US flights.
- Ownership and control. The parties commit to continuing to remove market access barriers and the aim of full ownership and control of each other's airlines on a reciprocal basis. Upon this happening:
    - US airlines will have the right to operate scheduled passenger and combination passenger/cargo services between points in the EU and 5 other countries (to be determined by the Joint Committee) – i.e., 7th freedom services;
    - restrictions on US airlines operating 7th freedom cargo services involving points in the EU will be removed; and

- each party will recognise the right of nationals of the other to own and control airlines in third countries.

- Noise-based operating restrictions. Upon the Commission being entitled to review in advance proposed noise-based operating restrictions at airports in the EU, EU airlines will have the right to operate 7th freedom scheduled passenger and combination passenger/cargo services between points in the US and 5 additional countries (to be determined by the Joint Committee).

The Protocol is to enter into force one month after the exchange of diplomatic notes confirming that all necessary procedures for its entering into force have been completed, but the parties have agreed to provisionally apply it from the date of signature, i.e., 24 June 2010.

"While some progress was clearly made ... there was disappointment on the EU side, but little surprise, that greater liberalisation of ownership of airlines was not achieved

While some progress was clearly made, and the grant of access for EU airlines to the Fly America programme, at least in part, is a significant achievement, there was disappointment on the EU side, but little surprise, that greater liberalisation of ownership of airlines was not achieved. It was never very likely that the EU would use the nuclear option of suspension of rights (permitted under the original Agreement if either party was dissatisfied with progress in further talks). That provision has now been removed, and no timetable for further talks is specified. It may be questioned whether the quid pro quo of 7th freedom rights for US airlines on routes between the EU and five other countries provides a sufficient incentive for the US to make concessions on ownership, and thus whether there is any realistic chance of liberalisation of ownership in the near future. It looks as though the Agreement as amended by the Protocol will continue to provide the framework for EU/US aviation relations for some years to come.

For further information, please contact John Balfour

Montreal Convention new liability limits: to be or not to be?

Unlike the Warsaw Convention or Hague Protocol, Article 24 of the Montreal Convention 1999 provides for a review of liability limits every five years. The communication issued by the International Civil Aviation Organisation, as designated Depositary, on 30 June 2009 to States Parties about the revision of limits reported in our February 2010 Bulletin is the first time that limits of liability for the carriage of passengers, baggage and cargo have been increased since the Convention came into force on 4 November 2003.

The concept of reviewing limits every 5 years under the Montreal Convention raises the question as to how States Parties are required to amend their local legislation to reflect the changes.

One would be forgiven for thinking that States Parties do not need to amend local legislation in order for the revised limits to take effect, on the basis that notification by ICAO, as the designated Depositary, should be sufficient to put into effect the revision. Article 24(2) of the Convention states that unless a majority of States Parties register their disapproval to a revision of liability limits then any such revision "*…shall become effective 6 months after it is notified [by the Depositary] to the States Parties*".

Nevertheless, given that only States Parties receive the communication issued by ICAO in its capacity as Depositary and not the individual citizens of each country that has ratified the Convention, amendments to a country's local legislation are essential in order to protect individual citizens whom the increase in liability limits is intended to benefit, and to ensure that the public has access to information regarding the revisions.

In a recent study we have undertaken, we have found that most countries in the Asia-Pacific region who have signed up to the Convention issued Notices in a Government Gazette and/or passed enabling legislation to reflect the changes into local law. However, in Japan and China, where international treaties are self-executing, no implementing

legislation is required in order for the provisions of the Convention or its revisions to have the force of law.

In common law jurisdictions such as Australia, Hong Kong and Singapore the increased limits were notified by publication in a Government Gazette, whilst in the UK the changes were implemented directly by the Carriage by Air (Revision of Limits of Liability Under the Montreal Convention) Order 2009 (SI 2009/3018).

In Australia, no additional legislation is required as the increased limits are automatically imported into Australian law by virtue of the Civil Aviation (Carriers' Liability) Act 1959, which incorporates the Convention into Australian law, and in which the Convention is defined as the Convention as affected by any revision of the limits of liability in accordance with Article 24.

In Hong Kong and Singapore, the changes were published in a Government Gazette and also reflected in the Carriage by Air (Provision of Limits of Liability) (Montreal Convention 1999) Notice 2009 (L.N.251) and the Carriage by Air (Montreal Convention 1999) (Revision of Limits of Liability) Order 2009 respectively.

The manner in which States Parties have implemented the recent revisions depends on the wording of the measure implementing the Convention in that country.

For example, the UK Carriage by Air Act 1961, which incorporates the provisions of the Convention into English law, states that "*Her Majesty may by Order in Council certify any revision of the limits of liability established under the Montreal Convention*".

"whilst changes to a country's local legislation may not be mandatory in order for a revision of limits to be effective, they are necessary in order to ensure local legislation is kept up to date and the protection of citizens' rights"

In Australia, the Civil Aviation (Carriers' Liability) Act 1959 states that the Minister "*…may by notice published in the Gazette*" declare that a revision of the limits of liability has become effective. Similar use of the word "*may*" is used in Singapore's Carriage by Air (Montreal Convention 1999) Act which states "*…the Minister may by order published in the Gazette amend the Schedule to append thereto, immediately after the text of the Convention, an addendum specifying how the limit of liability has been revised and the date on which such revision is to take effect*". In Hong Kong, the Carriage by Air Ordinance which implements the provisions of the Convention states that the Director-General of Civil Aviation "*shall, by notice published in the Gazette, announce – (a) such revision; and (b) the date on which such revision becomes effective under Article 24 of that Convention*".

In Malaysia, despite the use of the words "*…may by order…certify any revision of the limits…*" in the Malaysian Carriage by Air (Amendment) Act 2007, the Agung (King) must pass an Order before the increased limits will have effect. To date, an Order has not yet been passed, so that it is currently uncertain whether the Malaysian courts will uphold the higher limits. If this is the case it would be at odds with the wording of the provision in the Convention mentioned above to the effect that an increase in limits shall become effective 6 months after it is notified to the States Parties by the Depositary.

In conclusion, whilst changes to a country's local legislation may not be mandatory in order for a revision of liability limits to be effective, they are necessary in order to ensure local legislation is kept up to date and to ensure a State Party's citizens' rights are protected.

ICAO can be expected to revisit the adequacy of liability limits again in 2014.

The table below summarises how each country in our study has implemented the revisions into local law:

Country	Enabling Legislation for Montreal Convention	Notice	Legislation implementing recent revision
Australia	Schedule 1A Civil Aviation (Carriers' Liability) Act 1959	√ Government Gazette	N/A
China	N/A Automatically incorporated into Chinese law	√ Civil Aviation Authority of China	N/A
Hong Kong	Schedule 1A Carriage by Air Ordinance (Cap500)	√ Government Gazette	Carriage by Air (Provision of Limits of Liability) (Montreal Convention) Notice 2009 (L.N.251)
Japan	N/A International treaties are self-executing	N/A	N/A
Malaysia	Malaysian Carriage by Air (Amendment) Act 2007	N/A	N/A
Singapore	Carriage by Air (Montreal Convention, 1999) Act	√ Government Gazette	Carriage by Air (Montreal Convention, 1999) (Revision of Limits of Liability) Order 2009
United Kingdom	Carriage by Air Act 1961	N/A	Carriage by Air (Revision of Limits of Liability Under the Montreal Convention) Order 2009 (SI2009/3018)

The increased limits (in Special Drawing Rights) as notified in our February 2010 Bulletin are as follows:

	Old (SDRs)	New (SDRs)	Approx. USD equivalent Old	New
Per kg limit for cargo	17	19	26	29
Per passenger baggage limit	1,000	1,131	1,512	1,710
Per passenger limit for delay claims	4,150	4,694	6,275	7,100
Strict liability threshold	100,000	113,000	151,210	171,000

For further information, please contact Kate Seaton

Phasing out the default retirement age

Introduction

The Age Regulations were enacted in 2006 to prohibit discrimination in employment because of age. Among other things, they introduced a national Default Retirement Age (DRA) of 65 and prohibited compulsory retirement at an earlier age unless it could be objectively justified. In order to be objectively justified, the employer would have to show that it was a proportionate means of achieving a legitimate aim. If a legitimate aim could be achieved by a less discriminatory means, the employer would have to opt for that route.

"From 6 April 2011 employers will no longer be able to require employees to retire at 65"

In July 2010 the Coalition Government launched a consultation programme in respect of its commitment to phase out the DRA. The Government's response to that consultation was published on 13 January 2011.

From 6 April 2011, employers will no longer be able to serve notice of the intended retirement of employees on the basis of the DRA. Any notice of intended retirement served prior to April 2011 will only be effective if the retirement date is before 1 October 2011 (and the employee must be 65 years old at the date retirement takes effect). By way of example, if an employer gave notice on 2 January 2011 that the intended date of retirement would be 2 October 2011, this notification will no longer be valid.

The Government will shortly bring forward regulations to put these proposals into practice. Meanwhile, ACAS has put in place guidance on managing without the DRA.

Transitional arrangements

During the transitional period (6 April to 30 September 2011), retirements that were already in train can continue through to completion, provided that:

- a notification of pending retirement is issued by the employer before 6 April 2011;
- the date of retirement falls before 1 October 2011;
- the DRA procedure, as set out in the Age Regulations, is followed (including serious consideration being given to any request to stay on made pursuant to the employee's right to make such a request); and
- the other requirements of the form of DRA procedure are met, including the employee being aged 65.

Employers can therefore still use the DRA until 6 April 2011, but if they do so they must use the short notice provisions, under which an employee could claim compensation (subject to a maximum of 8 weeks' wages).

Impact on unfair dismissal

Following the abolition of the DRA, an employer will have to follow a fair procedure and rely on one of the reasons set out in Section 98 of the Employment Rights Act 1996, namely: capability, conduct, redundancy, illegality or some other substantial reason. Retirement will no longer be a fair reason. While the cap for unfair dismissal will remain, if an employee brings a successful claim of age discrimination his loss is uncapped. Given the removal of the DRA, loss of earnings (when calculating damages) will not automatically cease at 65, which could potentially result in very high levels of damages being awarded.

Consequences of abolition

The changes that have been announced have been viewed with concern by some employers. Their primary concerns relate to the following:

- There will be an increased administrative burden, with extra time and money being spent to ensure the new procedures that are implemented are fair and in accordance with the new regime.

- The abolition may have a negative impact on employees; for example, if an employee has no intention of retiring but his/her performance is failing, this will invoke performance management issues, which itself will be an undignified way to end a career.

- There may be an impact on group risk insured benefits (for example income protection, sickness and accident insurance, private medical insurance). However, the Government has alleviated these concerns by announcing on 13 January 2011 that an exemption will be introduced for group risk insured benefits given the concern that employers would stop offering such benefits if it became too expensive to pay the premiums due to an ageing workforce. In general terms, these benefits will be exempt from the principle of equal treatment on the grounds of age, so that it will remain possible for employers to cease to provide or offer those benefits once a worker has reached the age of 65 or the state pension age for men, even if the employee decides to continue working beyond that age. It can be expected that the age at which group risk insured benefits can be withdrawn will increase in line with the proposed increases to state pension age.

In contrast, the Government and those who support the abolition argue that the changes will have a number of benefits for both employers and employees. These include:

- Employers will focus more carefully on what they have invested in employees in order to get the best out of them, especially in the latter years of employment.

- It will remove the rigid structure which makes people leave at a particular age. This may enable a better transition of workplace experience.

- It will give employees the opportunity to develop their careers in the latter stages of employment. This should result in better productivity amongst workers nearing the DRA.

"Employers will be able to operate an Employer Justified Retirement Age, but they will need to objectively justify it"

Can employers still operate an Employer Justified Retirement Age under the Equality Act?

Employers will be able to operate an Employer Justified Retirement Age (EJRA) going forward, but they will need to objectively justify that selected retirement age. If it cannot be objectively justified, any contract term permitting the employer to retire an employee will be unenforceable against that particular employee. In order to justify a retirement age, the employer will have to show that it was a proportionate means of achieving a legitimate aim. Objective justifications may include workforce planning (i.e., the need for an employer to recruit, retain and provide promotion opportunities and effectively manage succession) or the health and safety of individual employees, their colleagues and the general public. It is vital that employers always remember that they will need to adduce evidence to show "objective" justification, not "subjective" justification.

Current case law shows that EJRAs tend to be used in exceptional circumstances in which an employer has a retirement age below 65; for example, occupations which require exceptional mental and/or physical fitness such as air traffic controllers. It is also important to note that the DRA only apply to employees within the meaning of Section 230 (1) of the Employment Rights Act 1996. This means that a number of important groups will be unaffected by the removal of the DRA, including those governed by the statutory age limit; for example, commercial pilots.

Where an employer is able to establish an EJRA, the employer will need to follow a fair procedure in retiring people at the compulsory retirement age. This will include the employer giving the employee adequate notice of impending retirement and, if circumstances permit, considering any request by an employee to work beyond the compulsory retirement age as an exception to the general policy. Where such exceptions are permitted, it is important for employers to remember that it is vital to ensure consistency of treatment.

Removal of EJRA

If employers decide not to introduce an EJRA, they will need to establish a procedure for

the inevitable discussions with individual employees.

The Government's response is that it has deliberately avoided introducing statutory guidance on how to conduct these discussions in favour of a more flexible informal process. The Government argues that, to reduce the risk of discrimination against older workers, regular discussions between management and workers about their short, medium and long-term intentions should be a normal part of workforce management with all workers, no matter what their age or level might be. Accordingly, ACAS published on 13 January 2011 a revised version of 'Working without the Default Retirement Age'. ACAS' view is that these discussions could easily be incorporated into an annual review process, thereby removing the possible discriminatory effect.

Whilst some employers may currently allow below par performance when they know they are shortly going to be able to retire the employee in question, in future if an employee's performance begins to decline, it is going to be necessary for the employer to instigate the capability procedure.

"There will be a change in how employers manage an ageing workforce, and in particular careful consideration will need to be given to below par performance of older workers"

Conclusion

In summary, the removal of the DRA will have a significant impact on employers. Employers will need to consider whether they wish to:

- operate an EJRA – having given careful consideration to whether they can objectively justify that age; or
- have no fixed retirement age but introduce a procedure to deal with discussions as to future employment.

There will be a change in how employers manage an ageing workforce, and in particular careful consideration will need to be given to below par performance of older workers. No longer will an employer be able to allow such performance to decline in the knowledge that the employee is nearing 65 and will retire.

For further information, please contact Peter Roser

Is your data at risk? Data breaches and the air travel industry

The cost of dealing with breaches of confidential and personal data can be enormous. This article looks at the risks and ways in which an organisation can protect its data and limit exposure to fines and notification costs.

Airlines and other air travel operators hold large volumes of sensitive customer and employee data, as well as confidential business data. Such data is extremely valuable and the loss of that data, whether by carelessness (losing a laptop or disc on a train), theft (by internet hackers or physical theft from premises) or by employees taking data to competitors, can have extreme consequences for any organisation.

The UK regime

In the UK, the way in which organisations protect customer and employee data is governed by the Data Protection Act 2006 and regulated by the Information Commissioner, who since 2010 has the power to impose substantial fines of up to £500,000 for serious breaches of the Act. In November 2010, the first of such fines were imposed on two organisations in the UK: a fine of £100,000 on Hertfordshire County Council for faxing sensitive personal data involving a child sex abuse case to the wrong recipient, and a fine of £60,000 on an employment agency, A4e, following the loss of an unencrypted laptop containing personal information of 24,000 members of the public.

The US regime

As airlines operating in the US will already know, the regime governing data security in the US is significantly more onerous. There are strict laws at State level which require organisations to notify each and every person affected by a data breach and (in some States) also to notify the government. Any organisation, including airlines, operating in the US will be subject to these laws. Where records containing data relating to thousands of customers or employees have been lost, the notification costs can be huge. This is coupled with the cost to the organisation's reputation and the cost of offering credit monitoring facilities to each affected person, which has become the norm in these cases.

The position in the EU

The airline industry is particularly vulnerable due to the large volumes of data held. Recent breaches include the Transportation Security Administration's loss of personal information of over 33,000 air travellers following the theft of an unencrypted computer from its locked offices, and more recently the parent company of American Airlines' loss of personal information of 79,000 of its current and past employees contained on a disc stolen from its headquarters in Texas. Hackers were to blame for the loss of data relating to 45,000 of the Federal Aviation Administration's employees in 2009. In each of these cases, there was no evidence that the data had been used or compromised, but this had no impact on the massive reputational damage and financial and notification costs to the organisations involved.

Although compulsory notification laws are currently patchy within the EU, there are indications that the introduction of an US-style regime in Europe is only a matter of time. From May 2011, internet service providers and telecoms companies will be required to disclose data breaches in Europe, and a revised EU Directive extending the requirement to all organisations is currently under consideration.

When an organisation's confidential business data is put at risk by employees leaving to join competitors, the legal situation in the UK is already much more robust. Employment contracts should include strict confidentiality clauses to protect any breaches by employees. Once an employee announces his/her resignation, and particularly if the move is part of a team move to a competitor, swift action should be taken to identify (through computer forensics) whether any data has been taken. If evidence of breach is found, an injunction can be sought to prevent further breaches and to retrieve data. If competitors have gained an unfair advantage through the actions of an organisation's employees, these injunctions can be tailored to restrict them from competing with the organisation within a specified period of time. Investing in robust contracts and taking swift action in a breach situation can prevent confidential data breaches to competitors from causing significant financial loss.

Conclusions

In terms of customer and employee personal data breaches, the cost to an organisation is not just financial. The reputational damage caused by adverse publicity around whether customers can trust an organisation to hold their data can be the key concern, alongside the time involved in dealing with an investigation by the Information Commissioner and potential fines levied if a finding of breach of the Data Protection Act is made. Where the breach relates to activity in the US, the notification costs can be crippling and even in the UK and Europe voluntary notification may be required to counter the publicity issue.

> "Any airline holding customer data would be well advised to have a data breach management plan in place"

Any airline holding customer data would be well advised to have a data breach management plan in place, and insurance products covering cyber risks are becoming more common in the UK. Whatever protection an organisation has in place, the key will be to act swiftly upon learning of a data breach. Many organisations are currently working on the assumption that this sort of breach will not happen to them, but in an increasingly technological world this is a dangerous assumption to make.

For further information, please contact Heidi Watson

Airline brands – protecting, managing and extracting value

How does an airline differentiate itself from its competitors? There are, quite naturally, a number of possible answers to this question, but one which cannot be refuted is that an airline sets itself apart from its competitors by its brand.

A brand (which may comprise of a mark, symbol, colour and slogan, or a combination of these) is what gives goods or services a recognisable identity. Brands are increasingly becoming more sophisticated, not just in their form but also in the information they convey about the goods or services with which they are associated, and so, consequently, brands are used to develop a unique reputation that is relevant and attractive to customers.

However, in many cases the potential of a brand to work for its owners is often undervalued, undermanaged and underexploited. This article looks briefly at the essentials of protecting, managing and extracting value from a brand.

Protecting a brand

Establishing brand recognition requires investment but, if managed correctly, a brand can be an effective marketing tool and a valuable commodity. It is important therefore to ensure that others cannot "ride on the coattails" of this brand and use its reputation - which has taken time and money to build - for unjust gain.

Protecting a brand requires both registration and enforcement:

Registration

Registration of a mark, logo or insignia confers on the owner the statutory right to the exclusive use of the registered mark in relation to the goods or services for which it is registered.

A wide range of distinctive marks, logos, signs or graphics can be registered subject to meeting certain requirements. As well as the airline's insignia it is also worth considering whether the marks or names used to designate the airline's individual fare classes are distinct and capable of registration.

> "the potential of a brand to work for its owners is often undervalued, undermanaged and underexploited"

The procedures for registration will differ from country to country but, broadly speaking, registration is made by application to the relevant trade marks registry. If registered, the trade mark is added to a publicly available register which may be consulted and will hopefully serve to deter competitors who are considering using the same or a similar mark.

Enforcement

Registering a mark gives the brand owner exclusive rights that it can enforce. For example, in the UK section 10 of the Trade Marks Act 1994 provides that the owner of a registered mark has the right to sue any third party that uses, in the course of trade without the trade mark owner's consent, a sign:

- which is identical to the registered mark in relation to goods or services which are identical to the those for which the registered mark is registered; or
- which is:
    - identical to the registered mark in relation to goods or services that are similar to those for which the trademark is registered; or
    - similar to the registered mark in relation to goods or services that are identical to those for which the mark is registered,

  in such a manner that there exists a likelihood of confusion on the part of the public.

Although the statutory rights afforded to trade mark owners do make it relatively simple for trade mark owners to proactively and successfully protect their brand, care must be taken

when considering whether to take action against a third party as most jurisdictions have legal provisions which discourage the making of unsubstantiated threats with respect to trade mark infringement.

In many countries unregistered brands can still be protected, for example in the UK by an action for passing-off, and in other jurisdictions by actions for "palming off" or unfair competition. However, these types of claim are notoriously difficult to prove, with the claimant having a high evidential burden making it expensive and time consuming to pursue with no certainty of success. Although there are analogous actions available in most jurisdictions this is not true of all countries, for example China, where it is unlikely that a claimant would - at least currently - have any significant rights without having first registered its brand.

Managing the brand

As both a brand and its connected trade mark portfolio constantly evolve, a proactive brand management policy setting out the aims and objectives of the brand is strongly encouraged and should include periodic reviews to assess, amongst other things, whether:

- registrations are made and kept up to date in all the countries where the mark is used and exploited by the airline;
- there is a well thought out holding structure for the airline's intellectual property and the correct group company is the registered owner of particular brands. It is also vital that control is exercised over the licensing of the mark to other group companies and/or third parties (this is particularly important after a group re-structuring);
- there are any new slogans or marks which should be registered. Any alteration made to an existing registered mark would result in a new registration being required for the altered mark; and
- any of the registered marks are obsolete, for example where a service has ceased or a mark is no longer used. If a registered mark is no longer being used in a particular jurisdiction it may become subject to a challenge to its validity.

Given the global exposure that an airline's brand will inevitably have, particular consideration should be given to the consistency of the message taking into account cultural variations.

> “Intellectual property rights are increasingly being recognised as key business assets”

Getting value from a brand

Although a brand owner may seek to protect its brand, it often does so without appreciating the full potential of the brand it is protecting. It is this potential that enabled Sir Stelios Haji-Ioannou recently to reach a new branding arrangement with easyJet giving him significant revenues on an ongoing basis in return for his continuing to give the airline the rights to use the name "easyJet". Therefore it is important to realise some of the ways in which profit can be obtained from a brand.

At the most basic level, an airline's brand should be seen in as many places as possible, including on its advertisements, sponsorships, merchandise, correspondence, check-in kiosks, lounges, planes and so on right down to the drink mats, in-flight magazines, napkins, head rest covers, overnight bags and their contents. The branding should be consistent, appropriate and reflect the values of the airline.

The prominence and reputation attached to a brand can be a strong motivator in a business acquisition or merger. Air Asia underwent a major turnaround after it was bought in 2001 for just USD 25 cents. Air Asia's management has gone on record as saying that its acquisition and subsequent turnaround was in part due to Air Asia having a strong brand. This demonstrates that an airline can, with proper knowledge and understanding, use its brand for commercial gain even in tough economic times.

Intellectual property rights are increasingly being recognised as key business assets. More and more frequently brand owners have been generating cash on the back of

intellectual property backed securitisation. Although such securitisations have been growing in popularity over the last ten years, there are still a number of issues surrounding the use of intellectual property assets for such purposes which, although not insurmountable, would need to be considered further if an intellectual property backed securitisation was being contemplated.

Conclusion

In short and to summarise, although developing, managing, protecting and using a brand takes time and a certain amount of money and expertise, the potential benefits of doing this well are significant and should not be ignored.

For further information, please contact Alan Meneghetti

Important changes to the UK rules on VAT on aircraft

Introduction

On 1 January 2011 the UK's VAT rules in relation to the supply of aircraft, aircraft engines and parts changed substantially. This followed a ruling by the European Commission that the UK's previous rules did not correctly implement the provisions of the EU VAT Directive (Council Directive EC 2006/112).

"the zero-rated treatment provided for in the EU VAT Directive is tested by reference to the airline rather than the aircraft"

The UK rules previously provided that any supply of an aircraft with a take-off weight exceeding 8,000 kg and which was neither designed nor adapted for recreation and pleasure should be zero-rated (and the rule applied also to engines and parts for such an aircraft). However, the zero-rated treatment provided for in the EU VAT Directive is tested by reference to the airline rather than the aircraft, applying to supplies of aircraft and parts that are "used by airlines operating for reward chiefly on international routes". This test has now been implemented in the UK by section 21 of the Finance (No. 3) Act 2010.

Supply

The rules apply to the "supply" of an aircraft or aircraft equipment, i.e.

- sale, import or acquisition; and
- charter, including hire or lease.

The supply of a qualifying aircraft is zero-rated. Suppliers of other aircraft are standard-rated (at the rate of 20% since 4 January 2011).

Qualifying aircraft

As mentioned above, a "qualifying aircraft" is now any aircraft which is used by an airline operating chiefly on international routes. Following the decision of the European Court of Justice in the 2005 *Cimber* case (C-382/02), the test is whether the airline itself operates chiefly on international routes and not what route any particular aircraft is used for. Analysing each component of the test in more detail:

- "Airline"

  An airline is defined as "an undertaking which provides services for the carriage by air of passengers or cargo". An airline will need to operate at least one aircraft, which it may own, lease or hire. This definition will be of particular interest to business jet operators, who may have been concerned that they are not "airlines" under a colloquial definition.

- "Operating for reward"

  The airline must be providing either passenger or freight transportation (or both) on

scheduled or unscheduled flights (or a mixture of both) and receiving consideration for that supply. This must be a business operation in nature for VAT purposes. There is a significant body of case law in relation to the requirements for a taxpayer to be operating a business for VAT purposes. However, there is no requirement for an airline to be operating for profit – which is just as well!

- An "international" route

  An international route is any route that is not a domestic route within UK airspace. A non-UK airline that mainly flies between airports within its own territory should therefore be regarded nonetheless as international for these purposes.

- "Chiefly"

  "Chiefly" means that the non-UK domestic flights of an airline must exceed its domestic flight operations. This test can be based on the value of turnover attributable to international routes compared to that attributable to domestic routes, the relative number of passengers carried, mileage or "any other method that produces a fair and reasonable result" (HMRC Notice 744C, December 2010).

Leasing companies

Most aircraft are, of course, owned by special purpose companies set up by leasing companies or banks. If at the time of the supply to such an "intermediary" (as the HMRC Guidelines refer to them) it is known that the ultimate supply to the end user will be of a qualifying aircraft, then the supplier may "look through" the transaction (or series of transactions) and treat its own supply as zero-rated.

> "HMRC intend to permit, "in very narrow circumstances", suppliers to "look through" the supply to an immediate customer that is not an airline and on to the ultimate consumer of the supply"

For practical purposes HMRC intend to permit, "in very narrow circumstances", suppliers to "look through" the supply to an immediate customer that is not an airline and on to the ultimate consumer of the supply. The critical point is that the ultimate consumer of the supply of either goods or services must be an airline operating qualifying aircraft and that the entities in the supply chain are fully taxable for the purposes of the transaction so that no input tax restriction would occur anywhere in the chain were the zero-rating not to be permitted.

This will be of particular relevance when a special purpose company purchases an aircraft and leases it to an airline. The seller of the aircraft will need to be convinced that HMRC will treat such a transaction as a "flow through" transaction and that the lessee is an airline operating the aircraft for reward chiefly on international routes – otherwise it may seek to charge VAT on the purchase price. The lessor will similarly need to be convinced that its lessee is such an airline, otherwise it may seek to charge VAT on lease rentals. It should be noted also that an airline which satisfies the test at the commencement of a lease may cease to satisfy the test during the term of a lease, in which case the VAT treatment could change.

Evidence of entitlement to zero-rating

Normally the responsibility for determining the liability to VAT in relation to a supply rests with the supplier. HMRC recognise that, in the case of aircraft, this requires knowledge about the status of the customer and the use to which the aircraft is to be put. In cases of doubt, HMRC recommends obtaining evidence of entitlement to zero-rating, for example by way of a declaration (Note 744C, paragraph 12.2 suggests the format of this).

Impact on UK businesses engaged in repair, maintenance and modification of aircraft

One particular concern is how the revised rules on zero-rating would be applied by the significant number of UK businesses engaged in the repair, maintenance and modification of aircraft and the supply of spare parts. In order to zero-rate such supplies, the supplier would need to know at the time of the supply that the aircraft will be a qualifying aircraft. This may not always be straightforward, as the supplier may be engaged to make supplies to multiple customers at relatively short notice and may not always be aware at the time of the supply of the identity of the end user in the supply chain. To discharge that

responsibility the supplier may have to ensure that some form of documentary evidence of the airline's qualifying status is retained.

In its Guidelines, HMRC set a high standard for this evidence, giving the example of a declaration by the customer of its entitlement to zero-rating together with an undertaking to notify the supplier of any changes to that entitlement before the time of the supply and to pay any VAT properly due. However, HMRC state that the documentary evidence could take other forms, and it is expected that it will only be necessary to retain such evidence in cases where there is some doubt that the customer qualifies. If the airline in question is based overseas and operates only a small proportion of its flights within the UK, it may be abundantly clear that the supply qualifies for zero-rating and so it may not be necessary to retain any evidence. In addition, HMRC have noted that, in "normal circumstances", where a supplier is engaged by an airline to make multiple supplies, they would only expect the supplier to obtain one declaration from that airline each year to cover all of the airline's aircraft.

Business jets

"20% VAT is likely to apply to business jets used for private use"

In general terms, the UK VAT position in relation to business jets will be as follows:

- *Aircraft chartered out* – potentially zero-rated, provided the use is a genuine business use and not a disguised private use. The general consensus is that there will need to be some degree of serious marketing to third parties and records kept of genuine charters. Following analogies from the yachts market, the "business" might be deemed abusive if it sustained significant ongoing losses or the chartering to third parties "would not, alone, be of sufficient continuity and substance to comprise an economic activity". The ECJ case of Enkler (C-230/94) provides guidance on this.

- *Private use* – 20% VAT is likely to apply. It should be noted that many commonly used business aircraft registries only permit private use of their aircraft. There has been some commentary in the business jet community that "the VAT problem will go away" if an aircraft is placed on an AOC. However, in such a circumstance the beneficial owner would need to avoid being the main user of the aircraft. Further, it is in any event not currently possible under UK regulations for an AOC holder to operate a private flight.

- *Businesses owning aircraft for the transport of staff* – a business owning an aircraft used for the transport of its staff will not normally be considered to be an "airline". However, if the aircraft is operated by an associated company, separate from the main business, and otherwise the conditions set out in the rest of the Guidance are satisfied, HMRC have stated that they will normally accept that such associate company is an airline.

It is of course open to buyers of business jets to import an aircraft into the EU for free circulation within the EU through an EU country which has lower VAT rates, such as Luxembourg.

Conclusion

The new rules in the UK represent a substantial change and this article can offer only a short overview of those rules and the relevant HMRC guidelines. It is of course critical to obtain specific tax advice in respect of any particular transaction.

For further information, please contact Mark Bisset or Phil Norton

Bribery act: an employer's guide

The Bribery Act 2010 is due to come into force in April 2011. Every organisation operating in the UK will need to review its global working practices to avoid falling foul of this new Act. Under the Act it will be an offence for an individual or a company to bribe another person or be bribed, or to bribe a public official. For employers, it will also be an offence if an employer fails to prevent bribery within its organisation.

What constitutes a bribe?

> "The concept of a 'bribe' is very broad and can cover working practices which are common in some industries"

The concept of a 'bribe' is very broad and can cover working practices which are common in some industries. According to sections 1 and 2 of the Act it covers the offer, promise, giving or receiving of any financial or other advantage which is intended to induce or reward the improper performance of a public function or business activity.

What about business operations overseas?

The Act applies to any relevant commercial organisation. This carries a very wide definition that could catch any UK business entity and other entities headquartered elsewhere in the world but which carry out business in the UK.

The offence also applies to the conduct of relevant commercial organisations taking place outside the UK, and companies will have to carry out assessments to mitigate the risk of violation abroad, particularly in countries where bribery and corruption are customary. In the airline industry, operators will need to look at the methods used to maintain good relationships with airport and aviation officials. Where using brokers or intermediaries overseas, airlines will need to become much more aware of their working practices and crack down on the use of commissions, hospitality and gifts as a way of securing business.

What are the penalties?

A person found guilty of an offence under the Act is liable for a maximum term of 10 years imprisonment and a fine or both. An organisation found guilty of failing to prevent bribery faces an unlimited fine. The only defence for a corporate entity is if it has put in place "adequate procedures" to prevent the bribery occurring.

How should the aviation industry prepare itself?

The Government has issued some draft guidelines on complying with the Act. The Government has favoured a non-prescriptive approach and it is clear that application of the rules will depend on the size and activities of the organisation in question. The guidelines set out six principles which organisations are expected to follow. From an aviation industry employer's perspective, we would recommend the following:

- Appoint a senior manager to take responsibility for anti-bribery policy and ensure proper implementation.
- Carry out risk assessments to identify what risks are posed within the organisation.
- Implement an anti-bribery policy based on the Act and train staff on it.
- Publish a "code of conduct", together with a board resolution highlighting the organisation's commitment to anti-bribery practice. Engage in employee consultation and feedback, to ensure all employees understand and operate within the code.
- Manage the recruitment process to vet prospective employees and include into employment contracts express contractual obligations relating to corruption.
- Constantly monitor and review staff practice to include setting milestones and in appropriate cases using disciplinary action to act as a deterrent.

- Carry out due diligence on all countries where business is to be conducted and identify any problem areas to employees.
- Wherever possible an organisation should use procurement and contract management procedures which minimise the opportunity for corruption by sub-contractors etc.
- Develop and implement a "whistleblowing" policy for internal reporting of suspicious activity in a safe and confidential manner.
- Consider setting up staff forums so policy effectiveness can be reviewed and then evolve the policies and procedures based on the feedback.
- Seek external advice on the effectiveness of procedures.

> "It is unclear what effect the review that the Government has announced will have, but is unlikely to affect implementation in April"

Possible Government review

Many have argued that the draconian measures in this Act will put UK businesses at a disadvantage on the global stage. It is possible that, at this very late stage, the Government may have woken up to this concern. In mid-January, it was stated in a press meeting at 10 Downing Street that the Bribery Act is being looked at as part of the Growth Review which is examining all areas of government policy with a view to removing obstacles that hinder investment, amid fears the Act could damage economic growth. It is unclear what effect such a review might have on the scope of the Act but it is unlikely to affect implementation in April.

Conclusion

The Act is likely to affect airlines directly, so it is important for airlines to take action now. In order to prepare for the changes the Act will introduce, documents and systems will need to be ready to demonstrate "robust and effective anti-bribery measures", and it is advisable for that preparation to start now.

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