Clyde&Co

Aviation newsletter

Summer 2020

Contents

Foreword

The world has undergone a dramatic upheaval since our last Aviation Newsletter in February as a result of COVID-19, with the aviation sector suffering considerably due to restrictions on and collapse of demand for carriage by air.

Sadly for us, this included cancellation of our Clyde International Aviation Conference last month. As our sector begins its recovery, interesting questions arise as to the effects of this pandemic and what the 'new normal' might look like. In this edition of our Aviation Newsletter we have a wide variety of articles from members of our Aviation Global Practice Group that explore these issues, as well as others with a broader coverage of topical developments. Its diversity reflects the unparalleled breadth that we can offer in terms of aviation knowledge and experience, both geographically and in practice area. We hope you find it useful.

Chair of Clyde & Co's Aviation Global Practice Group

South America: Aviation and COVID-19 – a brief overview

The aviation industry has obviously been drastically affected by the COVID-19 pandemic. Economic commentators have opined that the aviation industry was one of the first areas of business to be financially affected by the pandemic and is likely to be one of the last to recover.

Such comments are supported by recent publications by IATA which predict that only in 2023 might passenger transportation numbers reach the levels of 2019. It is estimated that globally, airlines' operations have been reduced by up to 90% for both domestic and international flights, given a mixture of passengers not wishing to fly and governments imposed restrictions such that airlines are not permitted to fly.

Adverse economic effects continue to take their toll. Some major airlines, including one of the oldest in the world, Avianca Holdings and the largest in South America, LATAM Airlines Group (now including the Brazilian subsidiary, which later joined on 9 July 2020), have filed for bankruptcy protection in the US under Chapter 11.

Governments in South America have taken different approaches towards assisting the industry. Some countries understood the seriousness of the situation and issued relief measures through resolutions and emergency laws in an attempt to reduce the damage to the industry. There is also ongoing analysis of the possibility of direct assistance to airlines through loans by state banks or States acquiring shares of local airlines, similar to the approach being considered by countries in Europe,

By contrast, some countries have adopted an unfavourable position towards airlines, providing no direct State assistance. Unfortunately, some governments have taken measures that may further complicate the financial recovery of airlines.

Different approaches towards health measures and social distancing have also been imposed by countries in South America. For instance, while the Federal Government in Argentina imposed an early lockdown, the Federal Government in Brazil has not adopted a unified approach towards social distancing, such measures being at the discretion of each state and municipality.

We now present a brief overview of key measures adopted, focussing on four prominent aviation markets in South America. We also comment on the effect of the pandemic on claims arising out of aviation and some of the principal legal issues which arise.

Argentina

Social distancing was established by Federal Law in Argentina relatively early in the pandemic, on 20 March 2020. Lockdown in Argentina appears to have thus far controlled the spread of the virus

Aviation industry developments

Argentina has restricted domestic and international flights, only allowing airlines to operate cargo and rescue flights. Argentina also closed its borders to specific countries such as Brazil and Chile.

On 27 April 2020, the Argentine government prohibited tickets sales by airlines until 1 September 2020. The measure was criticised by industry stakeholders as many airlines appear to be relying on a recovery in the second half of the year and advance sales would have assisted with their recovery.

At the beginning of the year, the aviation industry was already struggling with the implementation of a new tax of 30% on international flight tickets purchased by Argentine citizens. Surprisingly, despite the pandemic, the Argentine government is not considering lifting this tax.

To date, it appears that no direct financial aid or easing of State imposed costs (taxes and tariffs) to airlines is being considered in Argentina. Its economy has been in recession since before the COVID-19 pandemic and assistance to the aviation market is likely to be complicated by this. On the other hand, Argentina has enacted relief such as reduction by up to 95% or postponement of employer contributions to the Argentinian Social Security System and coverage of employees' wages by the government to critically affected businesses.

An interesting development in Argentina was the announcement of the merger of State owned Aerolineas Argentinas and Austral. The sister airlines, while part of the same group, operated under different names. Several previous attempts to merge the two carriers have been thwarted due to resistance by unions. The ostensible intention of the merger, stated in an open letter, is to allow both airlines to survive the current crisis.

In an unfortunate development, the LATAM Airlines Group announced that after 15 years it will no longer operate in Argentina. LATAM Argentina had 12 domestic destinations and 4 international flights to the US, Brazil, Chile and Peru. The group informed that international flights purchased by passengers will be operated by other branches of the group but purchasing new flights will not be possible.

Court status and legal landscape

Court activities in Argentina have been generally suspended due to the pandemic, including time-periods to file pleadings notwithstanding having part of its legal system and proceedings on-line. Recently, the Ministry of Justice enacted a resolution allowing online mediation hearings: Mediation in several jurisdictions in Argentina, including Buenos Aires, is a mandatory pre-procedural step.

Brazil

The Brazilian Supreme Court ruled that the federal, state and municipal authorities had concurrent powers to regulate and impose policies regarding the population's health and safety. Accordingly, social distancing measures were not ordered by the Federal Government but have been imposed by several state and municipal authorities. As at July 2020, several states are easing social distancing.

Aviation industry developments

A pro-active and pro-business position has generally been adopted to assist the aviation industry and an array of measures has been put in place by the Civil Aviation Authority (ANAC) and the Federal Government. On 18 March 2020, the Government issued Provisional Measure nº 925 (MP925) which, inter alia, allows airlines to postpone payment of air navigation tariffs for 6 months. Airlines will also have 12 months from the date on which the flight was due to take place to reimburse passengers in case a refund is requested. MP925 confirms that the refund is subject to applicable contractual arrangements. According to previous dispositions, airlines had to reimburse the passengers within 7 days.

In addition, it was not uncommon for Courts to decide that applicable contractual arrangements, such as a non-refundable ticket, would contravene the Consumer Defence Code and the Civil Code and therefore should not be applied.

MP925 also states that any contractual fines or charges normally due to the airline for changes of scheduling must be waived if the passenger accepts a credit/voucher for future use. ANAC also recently amended the Brazilian passengers' right resolution (Reso. 400 of December 2016) adapting the airline's obligation to provide material assistance in certain conditions.

On 8 July 2020, the lower house of the Brazilian senate approved amendments to MP925 with the intention of further assisting the aviation industry. Among other amendments, the most notable were: further details regarding tickets refunds and options for passengers who opt for receiving vouchers; allowing the government to directly access a State fund to assist the industry and amendments to the Brazilian Aeronautical Code to include provisions to exempt airlines from liability in, for example, *force majeure* events. These amendments are subject to analysis of the Senate (upper house), with the possibility of further changes, and Presidential approval.

The above measures aim to alleviate airlines' cash flow; they are initially valid until the end of 2020 but may be extended.

In addition, there are ongoing discussions between domestic airlines (including LATAM in Brazil) and the Brazilian National Development Bank (BNDES) regarding broader financial aid (loans) to assist them to survive the pandemic.

Several measures are being considered by domestic airlines but in a recent move, LATAM Brazil and Azul Linhas Aéreas Brasileiras (Azul) announced a code-share agreement to start in August 2020. LATAM Brazil and Azul commented that their networks are complementary and it made sense for both airlines to be united during current hardships.

In a very recent development, LATAM Brazil, which initially did not join the Chapter 11 proceedings in New York filed in May 2020 by the LATAM Airlines group, filed to join the proceedings on 9 July 2020.

Notwithstanding the pandemic, the Federal Government has stated that it will maintain the public bid for private companies to operate certain additional airports in Brazil through concessions, scheduled for the last quarter of 2020. The Ministry of Infrastructure has informed that international and domestic private operators have confirmed that they remain interested in bidding for these airport concessions and on 1st July 2020, the Brazilian Civil Aviation Authority approved the terms of the auction and proposed concession contract drafts. The round of 2020, if it does take place, will include 22 airports divided between 3 blocks: North, Centre and South of Brazil.

Court status and legal landscape

Court houses in Brazil have also been physically closed. Reopening from mid-June 2020 onwards is being considered on a state by state basis, with consideration being given to each state´s COVID-19 infection and death ratio. However, most lawsuits are processed electronically, which has allowed Courts to keep proceedings moving forward regardless of the closure of the Court houses. Accordingly, following a short period of suspension of procedural deadlines during which the parties could

adapt to working remotely, the Courts have not suspended proceedings altogether, albeit they are advancing with more delay than usual. Proceedings that are still in hard copy remain with procedural deadlines suspended and are only expected to restart once the Court houses reopen.

Even prior to the pandemic, Brazil had one of the highest numbers of lawsuits (per passenger flown) against airlines on a worldwide comparative basis. Judgements by inexperienced lower courts often ignored aviation specific legislation. Not even force majeure events such as adverse weather conditions or airport closures could be guaranteed to exempt airlines from liability. That said, as mentioned above, the Brazilian senate is attempting to amend the Brazilian Aeronautical code to establish situations where a force majeure event occurred. The amendments include situations such as adverse weather conditions, operational restrictions ordered by aviation authorities (or for lack of operation infrastructure at destination airports) and when a pandemic or other restrictive decision by the government is in place, disallowing or restricting the air carriage or airport activities.

In this sense, it remains to be seen if Courts will maintain the same consideration of *force majeure* in times of a pandemic when the argument is raised by airlines in claims involving flight cancellation and ticket reimbursement. Arguably, MP 925 should give better protection to airlines in these cases, especially if the amendments are approved. However, for instance, there are already precedents where Courts have ordered reimbursement of tickets prior to the 12 months allowed by MP 925.

In other words, the application of the defence of force majeure in Brazil remains far from straight-forward.

It will be noted that the pandemic has focussed discussions between aviation specialists, regulators and lawmakers regarding how such general positions are detrimental to the aviation industry in Brazil. Efforts towards reducing litigation and seeing the Courts apply the specific and correct aeronautical legislation are ongoing and one silver lining of the pandemic may be if it assists in changing the currently prevailing culture and mentality.

Chile

The Chilean Government ordered strict social distancing in several urban areas of the Santiago province and most populated areas in mid-March 2020. The measures were structured to apply at different times between rotating provinces. A nation-wide easing was expected to start on 5 June 2020 but social distancing measures were kept in place given the current increasing numbers of the pandemic. Mandatory quarantine was ordered for groups at particular risk (elderly people over 75 years-old). There are no signs to date of easing of social distancing despite constant discussion in the Chilean media regarding how maintaining the current status quo will affect the country's economy.

Aviation industry developments

All international borders were closed on 18 March 2020 and the Government has prohibited entry of all non-Chileans or permanent residents to the country. Airlines are operating minimal domestic flights with few international routes.

The LATAM Group's filing for Chapter 11 bankruptcy protection in the US has been the most significant news: the Brazilian subsidiary TAM Linhas Aereas, was not initially included in the request. The group's subsidiaries in Argentina (Lan Argentina) and Paraguay were also not included. As mentioned above, the subsidiary in Argentina announced in June 2020 that it will cease operations and the Brazilian subsidiary joined the proceedings in New York on 9 July 2020.

In its press release, the LATAM Group informed that prior to the COVID-19 pandemic it was financially healthy and profitable. However the unexpected had occurred, changing not only the landscape for the group but also the whole industry.

It is not uncommon for South American companies to seek recovery under Chapter 11 in the US. Possible reasons for this are that their domestic legislation regarding bankruptcy may not allow as broad protection as Chapter 11. Also, filing the procedure in the US may guarantee a better forum to discuss possible debts owed to international creditors, such as aircraft lessors or financiers.

The announcement stated that the application for Chapter 11 aims to allow restructuring of debts, particularly to aircraft lessors and finance parties, mitigate damages, and assist the group navigate through the effects of the pandemic. The Chilean Government continues to discuss the possibility of providing financial aid to the group.

On 5 June 2020, the Chilean Court formally acknowledged and accepted the reorganization procedure requested by the LATAM Group in New York. This means that any ongoing claims against LATAM in Chile and enforcement against its assets in Chile are suspended. It also temporarily prohibits any new indemnity suits in Chile against the group.

Stakeholders such as the Cueto and Amaro families and Qatar Airways agreed, on 30 June 2020, to invest in the group approx. USD 900m, which was formalised in the Chapter 11 proceedings in New York. The group also expects to receive the amount of USD 1.9 billion in view of Delta's acquisition of 20% of its share, which occurred in late 2019.

Courts and legal landscape

The Courts in Chile have not suspended operations but, unsurprisingly, proceedings are moving much more slowly in view of the quarantine restrictions and to cope with the rotating social distancing system. Unlike Brazil, Chile does not conduct most of its Court procedures online although the pandemic may encourage development in this regard.

Colombia

The Colombian Government established social distancing measures on 20 March 2020. These measures should be maintained until 15 July 2020 while elderly people (over 70-years old) must remain with limited access to open areas until 31 August 2020. An easing of social distancing started on 1 June 2020 with the opening of shops, museums and libraries.

Aviation industry developments

In mid-March 2020, the Colombian Government suspended domestic carriage of passengers until 30 June 2020. From 1st July 2020 onwards, the cities where airports are located will be allowed to request permission from the Federal

Government to restart passenger domestic flights. The cities will have to submit a plan demonstrating compliance with new health safety protocols for transportation before flights are authorised. International flights have also been suspended since mid-March 2020 and the suspension has been extended until 31 August 2020 – these measures are not applicable to cargo flights; repatriation flights for Colombians and permanent residents are also allowed but passengers must go through a mandatory 14-day quarantine. The Government has also restricted drone operations to those that may assist health safety measures.

The Federal Government through the Ministry of Transportation enacted Decree 575 of 15 April 2020, which provided relief measures for the aviation business. The decree focussed on tax relief such as reducing income taxes for parties that make qualifying investments in the aviation industry. The decree also reduced taxes on aviation fuel and passenger transportation. These economic measures will remain valid until 31 December 2021, which imply that the Government envisages a relatively slow recovery for the industry.

Airlines are also negotiating with the Colombian Government regarding possible loans and emergency coronavirus-related assistance.

In early May, Colombia´s Avianca Holdings Group filed for Chapter 11 protection in the US - Avianca Colombia is the second oldest airline (after KLM) operating in the world. Similar to the LATAM Group in Chile, Avianca's intention is to reorganise its debts and preserve operations.

In addition to filing for Chapter 11, Avianca has announced that it will close its operations in Peru (Avianca Peru formerly Taca Peru), reducing the overall size of the group. Concurrently, Avianca Holdings was delisted from the New York Stock Exchange.

This is the second time that the airline has filed for Chapter 11 protection. The first was in March 2003, from which the airline was able to emerge as a result of investments by the Synergy Group. For the plan to be successful, the airline was also supported by the Colombian government which allowed the Chapter 11 proceedings in the US to be the main source of reorganization of the airline.

As in Chile, the advantage of Chapter 11 in the US is broader protection for the company to recover. In mid-May 2020, the US court agreed on an interim basis to Avianca Holdings SA's initial motions to voluntarily reorganize under Court-supervised bankruptcy protection.

Courts and legal landscape

Court activities in Colombia were suspended until 30 June 2020 including time-periods to file pleadings. While the Colombian Government extended social distancing measures to July 15th, the reopening of court activities has gone ahead. This may be based on the fact that online proceedings are not developed in Colombia and that a plan to establish videoconference hearings did not move forward. In recent years, Colombia has discussed to move towards digitalised proceedings although discussions were still in early stages prior to the pandemic. Such developments may well now be expedited.

Conclusion

South America is facing a constantly changing scenario and each country has established a different approach to fighting the COVID-19 pandemic.

The strength and timing of the industry's recovery will be determined by the evolution of restrictions arising out of the pandemic and also by passengers' confidence in flying again. The availability of a vaccine to combat the virus may also be a crucial factor. Unfortunately, the World Health Organisation mentioned that the region would be the new focus of the pandemic in the southern hemisphere winter, which may lead to tighter restrictions on flights from the region, such as the recent prohibition in June 2020 of non-US citizens flying from Brazil entering the US. From South America, only Uruguay was allowed to re-start flights to the European Union.

Regarding the survival of the industry in the region, the overall analysis of aviation specialists is that the measures taken by governments are insufficient and they must act more effectively and cohesively to ensure the future of essential air transport services. Social assistance such as basic pay-outs for low income citizens and broader laws such as allowing reduction to salaries, bringing forward holidays and furlough have been enacted by most countries in South America. Brazil, the largest aviation market in the region by far, appears to have taken the most wide-ranging steps to protect its aviation industry. Recently, IATA included Brazil as one of the leading countries to discuss measures to be implemented to assist with the recovery of the aviation market worldwide in the wake of the pandemic.

However, as it currently stands, the assistance offered by South American governments may not be sufficient to ensure the survival of all airlines in the region. If not all the current carriers survive, it seems likely that new players will move in to take up demand, as and when that returns. For example, relative newcomer Viva Air has announced it intends to take up any and all capacity cuts on viable routes in Colombia and Peru.

From a legal perspective, Courts in South America are likely to take different approaches to claims regarding flight cancellation and ticket refunds depending on how consumer rights are perceived and how aviation specific legislation and regulation is applied.

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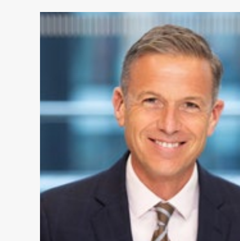

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Prepare for take-off: pre-flight health checks for the digitally transformed aviation industry

As countries tentatively reopen their borders and airlines move to ramp up passenger flight schedules, things are starting to look up for aviation. We cannot be certain of the shape and rate of the market's recovery, given its dependence on the ongoing global battle against COVID-19; but the industry will inevitably recover, and restoring consumer confidence will be key to emerging intact from the turbulence ahead. Given the critical need to prevent contagion and manage the vast staff redundancies necessitated by this financial crisis, airports must come back 'smarter' than ever before.

As aviation businesses across the board have capitalised on this rare downtime to cut costs, reimagine their services, and develop new and improved passenger experiences, digital transformation strategies have reigned supreme. The incoming wave of new technology can bring revitalising opportunities that transform aviation for the better. However, as the recent global surge in cybercrime has already demonstrated (as businesses rushed to implement remote working setups overnight at the outset of the pandemic), a rapid move to relatively untried and untested technology introduces extraordinary business risk. We explore the steps that aviation businesses should be taking now to mitigate security, regulatory, and litigation risk down the line.

Brave new world?

Increasingly sophisticated AI-driven biometrics – e.g. facial, iris, voice, and vital sign detection software – will play a leading role in ID verification and infection detection as airports resume operations. Star Alliance airlines will be the first to roll out pre-authenticated 'biometric identities' in late summer, enabling enrolled passengers to navigate check-in, bag drop, security, lounge access and boarding at the airport without needing to show their passports or boarding passes.

Self-service solutions and touchless controls are being implemented wherever possible – from familiar ID/pass scanning; to virtual queuing, gesture-controlled devices, and redeveloped applications enabling passengers to control existing infrastructure (e.g. touch screen kiosks and inflight entertainment) from their own devices.

Existing security surveillance infrastructure is also being redeployed to assist in tracing potentially unwell passengers.

Airport processes are moving off-airport wherever feasible, with an increased emphasis on online check-in, early passenger processing (supported by e.g. e-Tags/home-printed baggage labels, and baggage delivery services), and pre-arrival infection risk screening/health declarations. In another world first, an upcoming flight in Spain will be the first to test the 'digital health passport' concept – a blockchain-secured smartphone app which draws data from health authorities to certify that passengers are COVID-19-free.

Increased automation will feature robots for everything from cleaning to baggage handling and parking cars; an ever greater Internet of Things (IoT) architecture will monitor and share information on airport/airline processes in real time to enable predictive operations, maximise terminal/runway capacity, and ease communications between ground crew, cabin crew, air traffic control, and airport personnel; and aviation businesses will accelerate efforts to migrate their mainframe applications to the cloud. These innovations introduce a wealth of opportunity – but aviation businesses must be aware of the corresponding risks.

Aviation in the virtual crosshairs

Aviation is a prime target for cyber attackers as a critical infrastructure sector. Airlines and airports are often strongly associated with their host countries, so they can also represent symbolic targets for nation-state threat actors. Despite this, the state of the industry's cyber security is often criticised – recent high-profile data breaches at major international airlines, and ransomware attacks targeting airport systems, spring to mind. Given the complexity of the industry, as a rule, the "attack surface" (the sum of entry points attackers can exploit to gain unauthorised access to information systems) of aviation businesses are incredibly wide and difficult to map out – even airline loyalty programs have emerged as targets in recent years.

Another viral threat

This pre-existing industry vulnerability will only be exacerbated by its rapid acceleration of digital transformation in response to the pandemic – which has required an unprecedented expansion of open networks and IoT connected devices; strategic partners and supply chain networks; services delivered; and data handled across the industry. Given the sector's known cyber risk exposure, as things return to normal in the coming months, we can also expect a rise in scrutiny of the aviation businesses' conduct in managing the associated risks, and a corresponding rise in legal and regulatory action.

Digitise and document compliance

Such rapid technological acceleration requires a lot of symmetry and a cohesive approach, right down to the simplest of documents or reports. In particular, the following points should be addressed:

- Increase workflow automation so that personnel across key disciplines (e.g. legal/compliance, IT security, tech product developers, procurement, and operations) can collaborate seamlessly and continuously review, approve, and adapt new technology and procedures at pace to fit the evolving requirements imposed by COVID-19
- Formally document vendor due diligence; ensure all contracts contain appropriate data security, transfer, and protection provisions; and implement a third-party risk management programme that guarantees continuous monitoring and auditing of all vendors and suppliers
- Keep thorough and up-to-date data processing records and conduct data protection impact assessments where necessary
- Escalate security-related incident reports and complaints to the right personnel to prioritise, investigate, and close them out promptly

Invest in cyber resilience

Just one vulnerability can enable contagious malware to invade, scale, and spread across connected systems to potentially devastating effect (think Maersk and NotPetya). We recommend that aviation businesses invest in the following defences:

- Implement continuous discovery of "shadow IT" (technology employed without explicit IT/compliance department approval) to map your attack surface and risk exposure as completely as possible
- Install enhanced user authentication (e.g. MFA and IAM) and endpoint monitoring by default across all networks to control access, detect infections, and collect data on the scope of potential incidents
- Apply end-to-end encryption to data held wherever possible to mitigate the impact of any cyber breaches, and protect avionic systems and ground-to-air communications from electronic warfare tactics e.g. eavesdropping, jamming, and message modification/deletion
- Employ proactive threat intelligence, and conduct regular penetration testing and patching across your operating systems and applications
- Be mindful of shared responsibility for security of information and programmes migrated to cloud servers, and destinations served that can be riskier than others
- Build cyber security awareness (from prevention through to incident response) into your company culture and employee training, and instil the 'privacy by design' concept for personal data collection into your development processes
- Recruit and invest in cyber security professionals to manage your infrastructure. According to the (ISC)² 2019 Cybersecurity Workforce Study, the global shortage of cybersecurity experts has now surpassed 4 million (up from 2.93 million the previous year) – posing a growing risk to businesses worldwide struggling to find, hire and retain skilled employees. Such personnel are therefore worth their weight in gold
- Prepare for the worst: buy comprehensive cyber insurance cover; establish a dedicated in-house incident response leadership team and response module (prioritising safety and business continuity); and have external experts on call to advise on the immediate response, containment, and management of a cyber incident

Communicate and collaborate

To rebuild public confidence as the industry returns with an abundance of unfamiliar technologies, aviation businesses should proactively address passengers' legitimate concerns over potential human rights infringements by reassuring passengers that any extraordinary monitoring measures used to temporarily contain the COVID-19 threat are secure, and will not become permanent fixtures or state-sanctioned mass surveillance tools. Opt for visibility and transparency around mandatory new technologies wherever possible – for example if passengers are required to download and use an application to access certain airport/airline services, consider publishing its source code for public auditing.

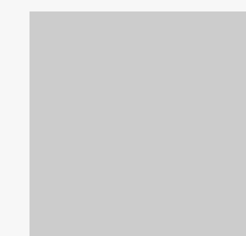
It is important to maintain the momentum of unprecedented and innovative collaboration between industry stakeholders, including governments and regulators, that has been witnessed over the past months. Continuing to pool resources to solve common security threats and encourage best practices internationally will put the industry in the best possible position to regenerate. More importantly, it is likely to be an overt legal requirement in many jurisdictions.

For example, under the Singapore Cybersecurity Act 2018, the Cybersecurity Law of the People's Republic of China dated 7 November 2016, and the EU Directive on security of network and information systems (NIS Directive EU 2016/1148), 'transport' is deemed to be an essential service or critical sector. We anticipate that such laws that address preparedness obligations on operators of 'Critical Information Infrastructure' will only proliferate over time in other parts of the world.

Any good cybersecurity strategy is rooted in a strong industry framework, and regulatory harmonisation creates a more stable international infrastructure for businesses to operate in while increasing consumer confidence. Though several cyber frameworks exist, their coverage is either patchy, compliance voluntary, or they are not tailored to issues unique to this sector (e.g. the rise of smart airports, or potentially lethal in-flight cyberattacks). The introduction of an industry-wide cyber security framework is overdue.

IATA is looking to introduce an Aviation Cyber Security Strategy. However, no date has been announced for its introduction and the last formal announcement regarding its development is a position paper from June 2019. Unless and until an industry-wide global framework is introduced, it is up to aviation businesses to ensure that they are adopting best practices in line with their specific requirements and risk profiles. There is no better time to get our digital house in order.

For further information, please contact **Manisha Bains** in our Singapore office and **Alastair Long** in our Hong Kong office.



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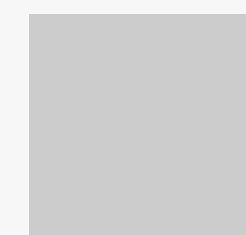

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‘No-show’ clauses: Getting the balance right? An overview of the different positions across the globe

One of the founding principles of civil aviation in the 1944 Chicago Convention was that of State sovereignty. States established flag carriers, bearing the name of their country, with the purpose of reflecting the greatness and economic performance of the country. Activity was heavily regulated by governments with fixed fares imposed for both domestic and private carriers.

The US deregulation in 1978 followed by the European liberalisation starting in 1992 changed the rules of the aviation market and enabled the introduction of a new pricing policy, the Revenue Management. Historically, BOAC (British Airways’ predecessor) had experimented with differentiated fare products by offering capacity controlled discounts to stimulate demand for seats that would otherwise fly empty. Revenue Management policy is the application of analytics that aim to predict consumer behaviour at micro-market levels and optimise product availability and price to maximise revenue growth for airlines.

This policy allows airlines to have a diversified range of fares, with sometimes up to 200 for one flight. This can only be made possible by having an accurate view of the market demand. Therefore, in case of multi-sector journeys, airlines usually impose a requirement of a sequential use of coupons, binding the passengers to respect their journey in the same order as when they booked it. If the sequential use is not respected, the airline can impose a penalty or cancel the remaining sectors altogether. This scheme generates more reliable data for the carrier. Such ‘no-show’ clauses ensure the profitability of Revenue Management while improving the no-show passenger forecasts and help reduce oversupply. While this policy benefits the carrier by maximising its revenue, it also benefits consumers with a wide range of fares.

Over the years, this type of clause has been reviewed by airlines (from unused coupons cancellation to fixed-rate fee penalty) and has been targeted by a few consumers’ associations.

This article will look at the state of play in jurisdictions across the globe, as their decisions rely on sometimes very different domestic consumer protection rules. Indeed, there is no single international or European regulation, except for the IATA recommended practice 1724, which states that “the ticket may not be valid and Carrier may not honour the passenger’s ticket if the first flight coupon for international travel has not been used and the passenger commences his or her journey at any stopover or agreed stopping place”.

United Kingdom

James Dove v. Iberia

In the UK, the question of no-show clauses has yet to be dealt with by higher Courts. However, in 2017, the Central London County Court considered the issue in the case of *James Dove v. Iberia*, which gained significant media exposure. Mr Dove had bought a return ticket for carriage from London to Madrid. He arrived a few minutes late for check-in at Gatwick and missed the outbound flight. The agreed contract terms stated that “(…) independently of the fare applied, if one of the segments is not used, remaining segments in the same ticket will be automatically cancelled.” There were also fare rules which formed part of the contract, stating that “The ticket (…) is not valid if the first coupon has not been used and will not be honoured if all the coupons are not used in the sequence provided in the ticket or electronic ticket.”

In this instance, the carrier followed the contractual no-show clause to the letter, cancelled the return leg from Madrid to Heathrow scheduled two days later, and did not offer Mr Dove a refund. The basis of Mr Dove's claim for a refund of the unused return leg was that the term of the contract entitling the carrier to do so was "unfair" pursuant to s.62 of the Consumer Rights Act 2015 ("the CRA 2015"). The Deputy District Judge referred to Paragraph 5 of Part 1 of Schedule 2 of the CRA 2015, which contains an indicative, non-exhaustive list of terms of consumer contracts that may be regarded as unfair. Paragraph 5 provides that "A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied."

The Deputy District Judge came to the conclusion that, in the circumstances, there was a "significant imbalance" to the detriment of Mr Dove, as he was paying for services which had not been supplied, and that this imbalance was significant enough to determine that it was an unfair term and one, therefore, which, pursuant to s.62, Mr Dove should not be bound by. Accordingly, the Court ordered the carrier to refund Mr Dove the cost of the unused sector of his ticket. The carrier did not appeal this first instance decision, and, as such, this unfavourable interpretation is not binding on other Courts.

Consumer organisations' initiative

Perhaps as a result of the publicity of the Dove decision, the 'no-show' policy of airlines has been targeted by consumer organisations, in particular, "Which?", the largest consumer organisation in the UK. In December 2018, Which? sent letters to several major airlines (including British Airways, Virgin Atlantic, Emirates, Qatar and Air France-KLM) asking them to withdraw their no-show clauses on the basis that the practice of cancelling remaining segments of a ticket where one segment has not been used is in breach of the CRA 2015 and the EU Unfair Terms in Consumer Contracts Directive 1993.

CAA's review of airline contract terms

In June 2019, the CAA published a review of airline contract terms (CAP 1815). It referred to the IATA's view, which is very much that market segmentation enhances competition (which leads to lower fares), allows for better connectivity (including for smaller communities), and reduces wasted capacity (and therefore over-booking). However, the CAA's adopted a more balanced. Whilst the CAA considered that it is reasonable for airlines to protect their revenue, it also considered that the cancellation of a passenger's ticket as a result of a no-show is disproportionate to achieve this objective. The CAA did not go as far as suggesting a complete ban of no-show clauses from airlines' General Conditions of Carriage.

Instead, its preferred option is to set out exceptions to such clauses. Firstly, it refers to an exception applied by Air France for tickets purchased in Italy and for which passengers are not required to pay the normal fixed-rate fee to reinstate their return ticket if, within 24 hours after the departure time of the missed outbound flight, they contact the airline to inform them that they wish to use the return ticket. Secondly, it refers to an exception applied by Lufthansa in Austria where passengers are not required to pay a fee if they were prevented from boarding the outbound flight due to 'force majeure', illness or other reasons beyond their control. The CAA's position on this matter is that a total ban of no-show clauses is not the solution, but that airlines should be more transparent and flexible. Its rationale is to distinguish situations where passengers are trying to use and abuse ticketing rules to their own advantage from situations where the passenger had intended to use their tickets in the manner required by the airline but, for legitimate reasons, they had no option but to miss their flight. However, this balanced approach may be difficult to implement in practice.

Overall, the last few years have shown that some UK airlines have voluntarily changed their position by either scrapping the no-show close altogether, or at least allowing some flexibility. It's easy to see that with today's widespread use of social media, catchy headlines picturing airlines as being unreasonable, regardless of the specific circumstances, will not do commercial carriers any favours.

European Union

The European Commission has not yet adopted a position on this matter. BEUC, the European Bureau of Consumers' Unions, which comprises 45 members from consumers' association of 32 European countries (EU, EEA and applicant countries), drafted a proposal to the European Commission in 2013 to reinforce passengers' rights in Europe. This proposal, which was updated in 2019, recommends a full ban of no-show clauses. This organisation considers that this type of clause creates a significant imbalance between the rights and obligations of airlines and consumers, to the detriment of the latter.

Many of BEUC consumers' associations, such as Which? or Test-Achats (Belgium) have sent pre-actions letters to airlines asking them to withdraw the no show clause from their General Conditions of Carriage. The letter from Which? sent in the UK in 2017 and discussed above was part of a joint action coordinated by consumer groups in eight European countries. Some of these organisations have filed a complaint with the relevant national authority.

Meanwhile, multiple High Courts in Europe have upheld decisions relying on domestic consumers' rules, and some have reached very different outcome. This lack of uniformity between European jurisdictions leads to legal uncertainty for airlines and complicated schemes as no show clauses could be legal for passengers arriving from one European country but not for passengers arriving from another one.

France

France's highest Court, the *Cour de Cassation*, ruled on this matter in a decision dated 26 April 2017, which concerned the complaint of a national consumers' association against Air France. Between the first instance judgement and this final decision, the airline modified its policy from cancelling unused coupons to imposing fixed rate fees (from EUR 125 for a short-haul coupon to EUR 3,000 for a long haul coupon in business class). This new policy was held legal by the Court.

In this case, the judges had to determine if multiple clauses in the airline's General Conditions of Carriage, including the no-show clause, complied with French domestic consumer protection rules. The Court held that the consumer was merely required to respect the terms of the contract by using the coupons in order and that the parties' respective obligations had been assessed according to a specific pricing policy. As a result, the Court rejected the consumer group's argument that the clause amounted to the carrier being able to unilaterally modify the terms of the contract relating to the price. What is really interesting in this decision is that the Court quoted and took into account the specificities of air transport and the importance of such clauses for airlines' pricing policy.

Around the same time, Air France also had another litigated matter pending before a first instance Tribunal (of Auch). In this case, the Court found against the airline, not on the ground of the clause being abusive towards the consumer, but because in practice the airline could not apply it properly to passengers at an airport.

Belgium

As mentioned above, Air France and KLM was targeted by Test Achat, a Belgian consumers' association which filed an injunction against both carriers. The Tribunal in Brussels held a different position to that of the French Cour de Cassation. In its decision, the Court ordered the airlines to cease applying the no-show clause forthwith with an accruing penalty of EUR 2,500 per day, subject to a cap fixed at EUR 10 million.

Contrary to the French Court, the judges held that the no show clause was not formulated in a clear or understandable manner. Notwithstanding, they acknowledged the possibility of a shortfall for the airline as the unused coupon had not been cancelled and therefore could not be sold again.

Since this decision in September 2019, Air France and KLM have changed the language of the clause using a clearer wording as requested by the Court.

Germany

On 28 April 2010, the Federal Court of Justice, BGH, considered the issue in a matter opposing a German consumer protection association against British Airways, and decided that the airline's no-show clause violated consumer rights.

At the time of the lawsuit, the airline would cancel any unused coupon. The Court held that excluding a passenger's right to make only partial use of the transport service would put them at a disproportionate disadvantage and go against the principle of good faith.

The judges went as far as suggesting an alternative scheme to the carrier: that instead of cancelling the unused coupons, the airline could request the payment of a fee by the passenger for the partially used service. The Court added that such scheme would not be unreasonable towards the airline because it would lead to additional remuneration in the event of partial use of the service.

In light of this decision, it is legal and sufficient for a German resident to pay an additional fee at the airport if the coupons have not been used in the booked order.

Following this judgment, most European airlines have changed their schemes for no-show for German passengers, although this has led to the increase of the practice of 'skiplagging', whereby passengers book tickets for a place of arrival beyond their intended destination, as it is sometimes cheaper.

In December 2019, Lufthansa sued a passenger in a Berlin District Court for skipping the last leg of his reservation, claiming EUR 2,112 in compensation. The passenger had booked a return flight between Oslo and Seattle with a stopover in Frankfurt. The passenger did not use the last leg between Frankfurt and Oslo and instead flew on a separate booking between Frankfurt and Berlin. The judges dismissed the claim but Lufthansa has appealed against this decision.

Austria

The Highest Court in Austria, the Oberster Gerichtshof, considered this issue in 2013 in a matter opposing VKI (an Austrian consumers' organisation) against Lufthansa. It ruled that the practice of cancelling an unused coupon was illegal.

In a decision dated 29 March 2019, the Commercial Court (HG) of Vienna also decided that several clauses of the General Conditions of Carriage of Brussels Airlines, including the airline's no-show clause, were illegal. The Court disapproved of the wording of the clause which purported to calculate the fare according to the new routing where the passenger did not use their trip as booked. For the judges, the main issue with the wording was the lack of differentiation between passengers. Indeed, according to the Court, the clause should distinguish between passengers who are targeting the airline's fare structure and not boarding flights on purpose, and those who are unable to take a flight due to a sudden serious illness. This lack of differentiation was considered unfavourable to passengers under Austrian consumer rules.

This decision shows the balance Austrian Courts are seeking to strike between airlines' revenue and consumer rights. Carriers such as Lufthansa have subsequently changed their General Conditions of Carriage by adding a paragraph to their no-show clauses for passengers living in Austria, which includes the possibility of alleviation in the case of a sudden serious illness.

Italy

The Italian Supreme Court has not ruled on the question of no-show clauses. However, the Italian Competition and Market Authority fined Alitalia EUR 45,000 for unfair commercial practices in a decision dated 30 September 2016. The Authority highlighted the fact that the airline's no-show clause did not provide a specific procedure to allow a passenger to take a return flight which had been cancelled as a result of that passenger failing to use the previous leg.

As a result, several European carriers have added a paragraph to their General Conditions of Carriage specific to passengers living in Italy. The wording generally states that, in case of a disease and inability to fly the first or last leg of their journey, the passenger can postpone their travel without having to pay additional fees.

Spain

The Spanish position on this matter emphasises the disparity between European Jurisdictions. In a decision dated 13 November 2018, the Supreme Court confirmed previous judgements and ruled that the no-show clause in Iberia's General Conditions of Carriage was illegal. The judges decided that the clause created an unfair balance between the rights and obligations of the parties, contrary to the principle of good faith. Indeed, the Court held that a consumer who has fulfilled their obligation, i.e. the payment of the price of the ticket, cannot be deprived of the enjoyment of the service, whatever the reason, or compelled to enjoy it only partially.

The Court based its decision on article 1169 of the Spanish Civil Code, which states that the creditor cannot be forced to receive only partial services and also be deprived of their right to only partially use the benefits they are entitled to, as long as it does not cause undue harm to the debtor. The judges considered that Iberia had not evidenced any prejudice as a result of a passenger not flying a booked leg.

In 2016, the General Directorate of Consumer Affairs of the Ministry of Health had already fined Iberia, Iberia express, Air Europa and Air Berlin approximately EUR 120,000 for applying such a clause. Following the fine and various judgments, Air Europa changed the wording of its no-show policy, warning that not using the first leg of a journey would "lead to an increase in price". This wording has been criticised by consumers' association, accusing the airline for hiding its no-show clause.

Other jurisdictions

United States of America

The position in the US is slightly different from that in Europe. Indeed, most US airlines still cancel passengers' tickets where a sector has not been used.

US Regulators have refused to intervene and have consistently supported airlines in fixing their own rules. Some US carriers have sought to proactively recover fees from individuals playing and abusing their pricing system. In addition, there is no binding case law restricting the use of no-show clauses.

Some of the steps taken by United Airlines illustrate the different approach taken in the US compared with that taken in Europe. In late 2014, United and the travel website Orbitz filed a civil claim against the founder of a website which seeks to assist people in finding cheap flights through skiplagging. Whilst Orbitz swiftly dropped its claim, United pursued it on the basis that the website tried to defraud it out of USD 75,000 in lost revenue. In May 2015, the Illinois Court hearing the dispute dismissed the claim for lack of jurisdiction, since the defendant was based in New York. United did not pursue the matter further and therefore no US Court has addressed the issue substantively. In one further instance, United Airlines identified that an individual had purchased a ticket to a destination more distant than their actual destination on 38 occasions. United requested reimbursement of over USD 3,000 on the basis that this practice amounted to fraud and a violation of their Contract of Carriage, and threatened the individual to instruct debt collectors. However, it is understood that the carrier did not go ahead with this.

Australia

The position in Australia seems to be taking a trajectory with increased consumer protection. In December 2016, CHOICE, the leading consumer advocacy group in Australia, published a report commenting on the Terms and Conditions in Australia's airline industry. This report concludes that no-show clauses are unfair contract terms and should be eliminated from airline contracts. It recommends that the Australian Competition and Consumer Commission should both make clear that no-show clauses are unfair contract terms and take action against airlines that continue to use them.

In September 2017, the Local Court of New South Wales ruled in the matter of *Meyerowitz-Katz v American Airlines* that a no-show clause was an unfair contract term, within the meaning of the Competition and Consumer Act 2010. In this case, the Court found that the no-show clause in question was "buried" on page 43 of a 98 page document, all of which was written in block capitals. Whilst this case has no binding effect, and a clearly drafted no-show clause may well have led to a different decision, the winds of change might be blowing towards more consumer protection.

Israel

The Israeli flag carrier El Al adopts a position on no-show which is similar to many European airlines. However, the issue of no-show clauses has yet to reach the Supreme Court of Israel. Unlike the UK or other European jurisdictions, Israel has not, to date, seen significant pressure from consumer groups to ban no-show clauses.

However, since 2006 Israeli law has been allowing for class actions to be submitted in a wide array of circumstances. This legislation very much transposes American principles of class action into Israeli domestic law. The scope of the Class Actions Law is very wide and has made these types of claims popular in Israel, with several thousand class actions brought every year.

As advised by fellow Aviation lawyer Moshe Leshem of Leshem-Kipperman, attempts to challenge no-show clauses in Israel are usually made by groups of individuals bringing a class action, so far without the support of consumer groups. Of course, very few class actions go all the way to trial, since defending such claims exposes carriers to significant risks, not only in terms of litigation costs but also in terms of adverse publicity and potentially unfavourable decisions. However, it may only be a matter of time before Israel starts seeing high-profile class actions targeting no-show clauses.

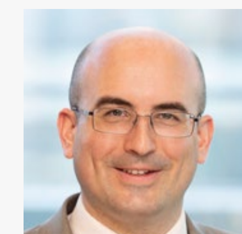
Conclusion

No-show clauses have played a key role in airlines' Revenue Management for decades. Regardless of the merits and reasons behind such clauses, they can remain difficult to understand for passengers, especially where they have missed a sector unintentionally. In addition, the development of consumer rights in the EU and many jurisdictions, and the absence of no-show clauses for most low-cost carriers, mean that it is likely that no-show clauses, in their traditional form, might become more and more difficult for airlines to maintain, and a Revenue Management overhaul is likely to become necessary.

Topical issues may bring such changes forward even quicker. In light of the COVID-19 pandemic, the imposition of quarantines, the increasing climate change awareness and the spreading movement of "flight-shaming" popularised by Greta Thunberg, airlines face difficult challenges and the very existence of many carriers is at risk. Carriers are already implementing new strategies to maintain their operations. Even in the US, which traditionally provides less flexibility to passengers, several airlines have updated their policies to allow new bookings made until the end of June 2020 to be changed to a later date with no fee.

The COVID-19 Aviation Health Safety Protocol issued by EASA on 20 May 2020 states that airlines "should ensure, to the extent possible, physical distancing among passengers. This may be achieved by leaving at least one seat empty between passengers, increasing the distance between the seats or leaving every other row empty." It is inevitable that aircraft will, at least for some time, often fly at reduced capacity. Therefore, it is essential, perhaps now more than ever, that no-shows are kept to a minimum. It may be useful to educate passengers and explain that not showing up for their flight wastes capacity and is therefore not environmentally friendly. In any event, airlines will need to adapt quickly and remain flexible to show that they are safe and attractive in order to secure bookings in the coming months if they are to survive.

For further information, please contact **Francois Guillot** and **Sophie Dorion** in our London office.



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Alternative resolution for air transportation disputes in Spain: an imminent reality?

The coronavirus pandemic is showing that it has the same ability to spread as it does to devastate when it comes to the different economic sectors in our country: tourism, industry, financial, and now, judicial. In this context, Spain's General Council of the Judiciary takes a stand and proposes the urgent implementation of an alternative system for the resolution of disputes through the State's Aviation Security Agency regarding claims of air passengers.

On 20 April 2020, Spain's General Council of the Judiciary ('CGPJ') proposed to the Ministry of Justice an Emergency Plan for the Administration of Justice, aimed at taking measures to streamline the return to judicial activity, and in order to minimize the work overload that our Courts and Tribunals will have after the lifting of the COVID-19 State of Emergency.

Among the thirteen measures proposed, and taking up an old initiative whose completion has been pending due to the succession of governments in recent years, the CGPJ proposes the implementation of an alternative dispute resolution system (ADR, by its English acronym), by which the State Aviation Safety and Security Agency ('AESA') is assigned the study and resolution of most claims by air transport passengers (those that are under the application of Regulation (EC) No. 261/2004 (on denied boarding, cancellation and long delay), which represent the vast majority of cases). In relation to this, let us remember that Spain is one of the European countries with the highest number of passenger claims, and that these claims place a considerable burden on our Courts and Tribunals.

It should be noted that in 2013, the European Directive 2013/11/EU on alternative resolution of consumer disputes was enacted, and it was implemented in Spain through Law 7/2017, of November 2nd, regarding the alternative dispute resolution of consumer disputes; and that based on these rules, in 2018, the Ministry of Development published a Draft Order to regulate the ADR system that would be entrusted to AESA.

The CGPJ now suggests the urgent implementation of the system proposed in 2018, whose main characteristics are the following: (i) a free and voluntary system for consumers, who must have previously made a claim to the airline; (ii) the mandatory submission of the airline to this system's procedure; (iii); the binding nature of the AESA's resolution –which must be issued in 90 days– for the airline, but not for the passenger; (iv) in the event of disagreement, the right to appeal against the resolution issued through the contentious-administrative route; and (v) AESA's sanctioning power in the event of non-compliance with the resolution by the airline.

The purpose of this article is not to dwell on the criticisms that may be made of the Draft Order - we do invite you to read a thorough analysis made by Professor Irene Nadal Gómez in "The alternative resolution of consumer disputes, Aranzadi, 1st Edition, September 2018." Rather, this article aims to analyze the momentum and convenience of the proposal that is currently on the table at the Ministry of Justice.

In first place, although in our opinion the Royal Decree-Law should not be the instrument to articulate a modification of this depth in the Spanish system, it seems reasonable to accept that, due to the situation caused by COVID-19, there is an urgent and extraordinary need required by article 86 of the Constitution to use such legislative mechanism. Consequently, and although we believe that this matter should have been regulated in another way, we understand the reasons that led the CGPJ to propose its modification through the Royal Decree-Law.

Regarding the content of the CGPJ Proposal, we must point out that it establishes three important modifications to the Draft Order, namely: (i) the resolution is binding on both parties; (ii) the passenger must first exhaust the AESA's procedure before going to the Court; and (iii) the Commercial Courts will be the judicial body before which the resolutions issued by AESA may be appealed.

As for the first modification of the proposal, there is no apparent reason that justifies that the airline must bear the verdict of AESA but that the passenger, on the other hand, does not have to (as was the case in a previous draft proposal). In fact, the AESA technicians who will resolve the disputes will be equally fair to both parties and, most importantly, forcing the airline to defend itself twice under the same facts – and with the consequent cost – lacks any justification.

In addition to the above, if this mechanism is intended to reduce work for the Administration, it would be illogical to allow passengers to claim before AESA and, later or simultaneously, before the Courts, as this will double the workload –as it is currently happening–and cost for public services.

Secondly, the requirement to initially exhaust the procedure before AESA -thereby preventing the filing of the claim before the Court- directly constitutes, in our opinion, the only way to achieve an effective discharge of the workload that the Judicial System bears.

Indeed, if filing the claim with AESA was optional, passengers would surely continue to seek protection of their rights in court, rendering the CGPJ's attempt to alleviate their workload useless.

As for the third limitation between the proposal and the draft, we consider that it would require an amendment to Organic Law 6/1985 on the Judiciary and Law 39/2015 of Administrative Procedure -perhaps temporarily through a transitional provision- in order to endow the Commercial Courts with competences in a matter that, by nature, is reserved to the contentious jurisdiction (since AESA's decision will be administrative).

In relation to the above, it should be noted that by allowing a change of jurisdiction under appeal, we would not be faced with a remedy in the strictest legal sense; rather, we would somehow be before a new procedure, in which the Commercial Courts would resolve again the dispute on the merits, applying its own criteria. This solution seems correct to us, since it is evident that the commercial courts have the knowledge of the subject matter and therefore, it is to be expected that their resolutions would be more accurate than those of the contentious courts –to whom the subject matter is foreign– although the disparity in criteria that currently exists also constitutes a problem that, sooner rather than later, must be solved.

On the other hand, it is necessary that the rule exactly defines what the scope of what is binding, along with the potential for appeal or challenge, and, where appropriate, whether the approach of taking the judicial route (regardless of what jurisdiction it is) will mean the end of the AESA's procedure, or if, on the other hand, AESA will initiate sanctioning proceedings –provided for in the Draft– for the airline, if the airline decides to appeal the AESA's decision and not compensate the passenger in the voluntary period stipulated for this purpose. Let us not forget that the minimum penalty would be €4,500, which certainly fits poorly with the principle of proportionality, in view of the amounts of the disputes to be resolved through this procedure (€250, €400 and €600).

Leaving aside the proposal put forward by the CGPJ, the question arises as to whether AESA is sufficiently prepared and structured to face the magnitude of the work entrusted to it. Regarding its preparation, we are referring to its structure and personnel, not to its technical-aeronautical knowledge; mainly to the impartiality criteria required by Article 6 of the aforementioned Directive, which is especially relevant when, as in our case, the same body has been assigned both the observance of passenger rights and the resolution of the ADR mechanism in case of non-compliance.

And in terms of its size we must point out that, in 2019, AESA handled more than 40,000 passenger claims and that, according to the Council, the Spanish courts accepted 60,000-70,000 lawsuits of this type, and so, AESA will have to face probably more than 100,000 claims each year.

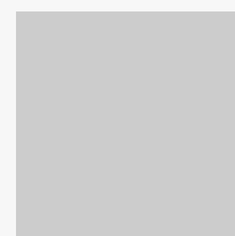
As if these numbers were not high enough, it must also be taken into account that during the State of Emergency, more than 100,000 flights have been cancelled in Spain, which, on an average of 150 passengers per flight, would mean the existence of 15 million affected passengers –and potentially complainants in the short term. It should also be borne in mind that the majority of claims today are filed through online mediation platforms, and that many take advantage of the imperfections of our procedural regulation and the collapse of the courts, so we should ask ourselves how will AESA protect itself against these problems?

This being said, there are certain aspects that could be very positive if the ADR system were to be implemented in Spain. However, those will largely depend on how things are executed from now on. Among these, it is worth highlighting the eradication of the disparity in judicial resolutions with identical circumstances that we face on a daily basis, and that the use of technological systems –such as the electronic platforms– can help modernize and expedite the resolution of these matters, reducing the administrative workload, speeding up the resolution of matters and centralizing claims in a single technical body which knows well the "jargon" and all aeronautical operations.

To finish, we must emphasize the importance of the decisions that will be made by the Executive and the Legislative bodies regarding this issue from now on. After all, we are facing a large problem that involves millions of euros and could negatively affect the viability of the -already damaged- aeronautical industry in our country, as would happen for example, with the implementation of a disproportionate sanctioning regime or by forcing the airlines to defend themselves twice on these matters and to bear costs accordingly.

For all the above, and from the inevitable skepticism we feel by the rush behind this formal decision – after seven years from the European Directive, three from the Law and two from the first draft of the project– we must all remain alert to the next steps taken by the Executive and the Legislative bodies in this matter.

For further information, please contact **Diego Olmedo** and **Azahara Garcia** in our Madrid office



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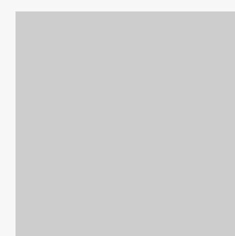

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The COVID-19 pandemic and the Aviation Finance Sector

It goes without saying that the COVID-19 pandemic has had an unprecedented impact across all economic sectors around the world. However, as this newsletter attests, few sectors have been as negatively impacted as the aviation industry.

Background

It is predicted that airline revenues will nosedive by 70% over 2020. Unlike previous catastrophic events such as September 11, 2001 or economic downturns such as occurred in 2008, the COVID-19 pandemic has created an exceptional degree of uncertainty making it extremely difficult to predict when airlines operations might return to pre-pandemic levels (or even what would be considered the lowest level of previously normal operations).

Further, unlike in response to those past events, whilst governments have provided some support for airlines generally to meet salary and operational expenses, they have been reluctant to extend full economic relief efforts to individual airlines because of the broad scope of the economic relief required at national levels across virtually all economic sectors. The combination of severely decreased operations, lack of available financial assistance and deep uncertainty as to what the future might bring has raised fears of widespread airline insolvencies.

One thing is for certain, the wider aviation industry will look much different from what we have grown used to for a significant period of time.

General impact on Aviation Finance

The aviation finance industry is amongst those sectors of the broader aviation industry most suddenly and significantly hit by the COVID-19 pandemic. Put simply, if airlines and other aircraft operators aren't flying and bringing in revenue then they aren't leasing aircraft – and are increasingly unable to meet their current rent obligations for those aircraft they already lease.

Further, in the likely event of airline bankruptcies, there will be widespread default under aircraft lease agreements, as well as corresponding issues surrounding aircraft return obligations. At the moment, leased aircraft are sitting unused at airfields across the globe subject to various levels of storage, maintenance and preservation which could serve as the basis for other future disputes.

Prior to the spread of the COVID-19 virus aircraft fleet managers, lessors and financiers were looking forward to the return to service of the B737-MAX and the continued global growth of passenger airline operations and the booming global market; in particular the continued growth of low-cost carriers and expanded seasonal routes, which are more likely to employ leased aircraft than to enter into high-value aircraft purchase agreements. However, in a very short time, these interests are now looking for ways to simply survive the devastating effects of the pandemic – defending the future viability of their underlying businesses, as well as protecting their aircraft assets and interests.

The current situation

Airlines are facing an unparalleled fall in current and future revenue as a result of the drastic global decrease in operations and the loss of consumer confidence in respect of near-future bookings. This severe loss of revenue makes it difficult to make lease payments from steadily dwindling cash reserves. Only those airlines with sufficient cash are likely to be able survive and meet continuing rent obligations at a pre-pandemic level.

Aircraft lease agreements are typically viewed as having extremely strict terms whereby airlines and operators must perform their obligations no matter what and remain liable for regular rent payments even under circumstances where it is difficult or impossible to do so.

The terms and provisions of an aircraft lease agreements will vary from one agreement to another, however standard commercial aircraft operating lease agreements are ordinarily governed by English law and are generally referred to as requiring payment "come hell or high water" – in other words, effectively rendering an airline or other aircraft operator unconditionally responsible for payment of rent notwithstanding any unforeseen circumstances.

However, putting aside the often harsh terms of an aircraft lease agreement, if an airline clearly does not have the ability to meet its financial obligations under an aircraft lease agreement it does not benefit a lessor to squeeze its customer, particularly under the unique circumstances presented by the COVID-19 pandemic – and for the most part lessors are not doing so.

Available options

In general, the options available to both airlines and lessors are very limited and are not particularly advantageous for either party under the present circumstances.

As mentioned above, airlines can choose to apply their diminishing cash reserves to continue paying rent and keep their fingers crossed that passenger reservations and operations bounce back strongly and quickly.

Alternatively, lessors can offer rent payment holidays, rent waivers, or temporary rent reductions to airlines.

In the event that neither of the above options is available or achievable, an airline faces the choice of applying for, obtaining and relying on lines of credit or conditional government assistance to continue paying rent or the unwelcome option of simply ceasing to pay rent altogether and being in breach of its aircraft lease agreements. In addition, it is equally undesirable under current circumstances for lessors to accept or demand early return of aircraft or the termination of lease agreements — or to otherwise consider any of the usual enforcement actions in the event of lessee default under an aircraft lease agreement.

Current practical and market conditions make the return and re-leasing of any repossessed aircraft extremely difficult. In addition, with national authorities and courts out of operation, any enforcement actions would necessarily be delayed, perhaps to the point of rendering such action effectively useless in the first place.

However, lessors and airlines are working to develop solutions to these unprecedented concerns.

Developments

In light of the current situation, lessors (as well as their financing parties) have been proactive to adopt innovative solutions together with their customers to either waive or restructure financial obligations under aircraft lease agreements.

Interested parties are exploring any and all avenues. For instance, there is evidence that sale and leaseback transactions are being pursued by lessors and financiers, as well as other interested investors, to generate short-term cash flow.

Airlines and operators are also claiming indemnities under their business interruption insurance to provide liquidity and/or seeking protection under so-called force majeure clauses either expressly or impliedly included within aircraft agreements themselves to defer rent payments.

Whilst recoveries under business interruption insurance have proven to be successful in certain instances, force majeure clauses have for some time been increasingly looked upon with disfavour. Such clauses are very rarely included in an aircraft lease agreement in the first place and courts, particularly in common law jurisdictions such as the US and the UK, are very highly unlikely to infer such a clause into an aircraft lease agreement between experienced commercial parties, and if one is included expressly they are likely to interpret it conservatively. Because of this, in the alternative, an airline may seek to argue that an aircraft lease agreement has been frustrated by the COVID-19 pandemic.

The common law contractual doctrine of frustration effectively discharges all or certain obligations under a contract because those obligations have become impossible to perform, circumstances have caused them to become illegal or the very obligation itself has now changed so dramatically from that originally envisioned that performance no longer makes sense.

However, the underlying circumstances relied upon in claiming frustrating must be so essential to the obligation at issue that performance of the obligation would be absolutely impossible to complete, would now be illegal perform or performance becomes nonsensical in relation to the original obligation. This is a very difficult standard to meet. Whilst some civil law jurisdictions have codified a general principle of force majeure in contract law, the standards applied to take advantage of this principal are considered similarly high.

Payment deferral agreements

Many lessors and airlines have spent the past few months negotiating payment deferral agreements. From what we have seen reported in the market, the range of support offered by lessors varies widely and the picture that emerges is of considerable inconsistency.

The market reports complete deferrals of rentals for between 3 and (exceptionally) 6 months, sometimes without maintenance reserves being payable also, and sometimes with maintenance reserves remaining payable during the deferral period. Our impression is that 3 months is average, which presumably will mean that many airlines are going to be looking for a further extension shortly. At the less helpful end, we have heard of short-term discounts for 1 to 3 months from 5 per cent to 20 per cent. We have also heard of substitution of lease payments for power-by-the-hour options. It seems that interest is usually payable on deferred rental during the deferral period.

The deferral agreements also tend to provide that deferred rental is payable in full at the end of the period, though some provide (more helpfully) that repayment is staggered after the "catch-up" date. An alternative that we have seen reported is an extension of the lease period at the end, though most of the airlines appear to find that the end of lease term extension insisted on by the lessor is longer than the deferral period.

In addition, it appears to be standard for lessors to include a representation from the lessee that the arrangement that is agreed is no worse from the lessor's perspective than has been agreed with any other lessor and that the deferral will be terminated if the airline receives a government bail-out or equity injection (in our view this is to be resisted as it cannot be the purpose of government bail-outs or other exceptional support to pass even part of the benefit to lessors).

Another consideration for the airline is whether a waiver of financial covenants / material adverse effect clauses is also required. These sort of provisions will not necessarily be included, and if included the content will vary widely. If included, an airline will need to analyse the relevant provision and consider whether it is applicable in its own financial circumstances arising from the COVID-19 crisis. There is a wide body of English case law on material adverse effect ("MAC") clauses: as a generalisation, a lessor/financier may be reluctant to default a lease/financing on the basis of a MAC clause without another event of default also being applicable.

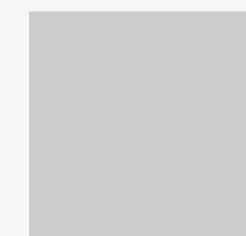
The main issue that we have seen reported in airline surveys is where the lessor has an aircraft specific financier behind it and struggles to agree equivalent arrangements with its financier, which makes the lessor reluctant to agree deferral with the airline. It seems reasonable to assume that the approach of most lessors is, at least to some extent, dictated by their own financial position, since the majority of them will have been in receipt of finance to establish and run their businesses and that finance in its turn may be more or less willing and/or capable of responding to the lessor's own financial situation

Conclusion

It unfortunately remains early days in the COVID-19 pandemic and it is unclear just how much of an impact it will ultimately have on the aviation finance sector. However, what is clear is that solutions exist and innovative avenues are being pursued to ensure the continued survival of airlines and aircraft operators, and the protection of aircraft assets and interests.

Assistance in exploring options and developing solutions is available and we welcome the opportunity to support the aviation finance sector in its successful recovery as the impact of COVID-19 subsides and airlines are once again able to fully and freely lease aircraft in support of their increased operations.

For further information, please contact **Mark Bisset** and **Dylan Jones** in our London office.



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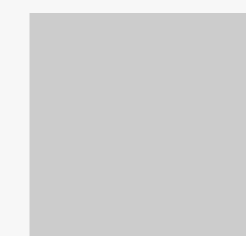

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Dealing with requests to transfer passenger data to third-party countries

While the COVID-19 pandemic has drastically reduced international travel in 2020, we have seen a sharp increase in the demand for data on peoples' movements in order to combat the spread of the virus. As countries in Europe relax their stay-at-home orders and other restrictions on movement, a myriad of new measures to trace new infections of the virus have been imposed across the continent. In this context we have also seen a rise in national authorities from third-party countries outside the EU lobbying airlines for access to passenger data, which includes the Passenger Name Record ('PNR'). The appropriate response to such requests depends on the purpose of the transfer.

Fighting serious crime or terrorism

When the purpose of the request concerns fighting serious crime or terrorism then Directive 2016/681 ('the PNR Directive') may apply. The PNR Directive authorises a transfer of PNR data only if the purpose of the transfer is to prevent, detect, investigate, or prosecute terrorist offences or serious crime; public health reasons are excluded. Transfers to third-party countries are expressly provided for in its article 11, which limits these to exceptional circumstances decided on a case-by-case basis. Prior authorisation should be obtained from the Member State from which the PNR data is obtained, unless authorisation cannot be obtained in good time in which case the transfer must be essential to respond to the specific and actual threat related to the offence; transfers subject to this derogation are verified and recorded ex-post. In all cases, transfers to third-party countries are also subject to Directive 2016/680 ('the Police Directive'), regarding the processing of personal data for the purposes of criminal offences. The Police Directive outlines the principles that the transfer must comply with, which broadly resemble those of General Data Protection Regulation 2016/679 ('GDPR').

Crucially, whenever the PNR Directive applies, airlines should not grant access directly but refer the request to the passenger information unit ('PIU') in the relevant Member State, which is responsible for collecting, analysing and transferring PNR data when required.

To give an example, a (fictitious) airline Sovereign Airways, based in the EU, receives an urgent request from the Ministry of Home Affairs in Fantasia, a (fictitious) non-EU country, seeking access to the PNR data Sovereign Airways processes. The Ministry requires the data to verify intelligence it has received suggesting a terrorist attack in Fantasia is imminent. In this scenario, Sovereign Airways should immediately relay the request to the relevant PIU, which may in turn grant access under the derogation in article 11(2) of the PNR Directive.

Complying with domestic regulation

When the purpose of the third-party country's processing is to comply with any other domestic regulation, including tax, customs or indeed the fight against COVID-19, the PNR Directive does not apply and the processing will rather be subject to the GDPR.

Transferring the data to the third-party country is possible only if the purpose of the requested processing is compatible with the purpose of the airline's initial processing (known as purpose limitation), and the transfer itself complies with the conditions set out in Chapter V of the GDPR.

Purpose limitation

The principle of purpose limitation is to ensure that the secondary purpose is compatible with the initial purpose for which the data is collected, namely the airline's commercial and contractual obligations, as well as general legal and regulatory requirements, including law enforcement. The GDPR sets out in article 6(4) certain compatibility criteria, further explained by EU guidelines, notably the Working Party Opinion 03/2013 on purpose limitation. To perform this compatibility test, airlines should consider each criteria in turn; for example, the reasonable expectations of passengers to determine if the secondary purpose (i.e. the fight against COVID-19) is compatible with the initial purpose. The test is flexible: while a passenger could not reasonably have expected their data to be collected for this purpose before March 2020, the regulatory changes brought about by the pandemic have radically altered expectations around questions of data collection. Today, a passenger can reasonably expect temperature checks before boarding an airplane and that this data may be processed to combat the spread of the virus.

Cross border transfer requirement

Provided the compatibility test is satisfied, data transfer to third-party countries is permitted in two situations. Firstly, under article 45 of the GDPR, the European Commission has the power to determine whether a country offers an adequate level of protection regarding data protection.

If an adequacy decision has been taken regarding the third-party country in question, then a transfer may be authorised. In the absence of an adequacy decision, the third-party country should implement appropriate safeguards. Currently, the relevant tool is the Standard Contractual Clause, designed by the EU Commission, which must be entered into by both the airline and the authority requesting the data.

Finally, as the regulatory regime that applies is the GDPR, airlines should additionally comply with all other data protection requirements, specifically the data minimisation principle, and ensure to inform data subjects of this secondary processing in privacy notices or otherwise.

Returning to our example, the European Commission recently issued an adequacy decision for Fantasia after the country passed extensive data protection legislation. Sovereign Airways has now received a new request from Fantasia's Ministry of Home Affairs for access to certain passenger data, including temperature checks. Since the beginning of the pandemic, Sovereign Airways is required to collect this data in accordance with its domestic law. The purpose of the Ministry's processing is also to prevent the spread of COVID-19 in Fantasia. As the compatibility test is highly likely to be satisfied, Sovereign Airways may grant access provided the data transferred is limited to that which is strictly necessary for the stated purpose (unrelated data should not be transferred). Sovereign Airways should expressly inform its passengers travelling to Fantasia that their data will be processed in this way.

Airlines must be vigilant when faced with requests for passenger data from third-party countries, as different regulatory regimes may apply. Since countries around the world have introduced domestic legislation to combat the spread of COVID-19, such requests require even greater scrutiny, particularly given the potentially sensitive nature of the data transferred.

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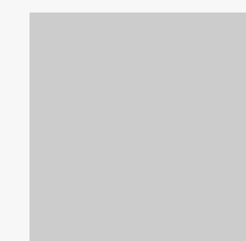

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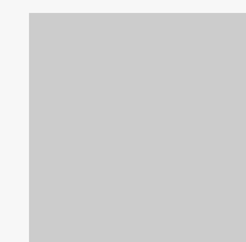

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Terrorist attack is within the armed conflict defence

The High Court of Singh, the highest judicial institution of the province of Sindh in Karachi, Pakistan, in a recent judgment held that a carrier is not liable for the destruction or loss of, or damage to, cargo that resulted from a terrorist attack.

The incident

On 8 June 2014, a group of 10 militants armed with automatic weapons, hand grenades, rocket-propelled grenades and other explosives attacked Pakistan's largest and busiest airport, Jinnah International Airport in Karachi, Pakistan ("the Attack"), causing the destruction of, amongst other things, a cargo warehouse used by an air carrier. Over 230 sets of proceedings were brought in Pakistan by cargo interests' subrogated insurers for losses said to arise out of the Attack in respect of cargo that was allegedly in the warehouse at the time.

The legal position

The Montreal Convention 1999 ("the Convention") is incorporated into Pakistan's local law by its Carriage of Air Act 2012 ("the CAA"). By Article 18(1) of the Convention (and Rule 18(1) of the CAA), the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon the condition only that the event which caused the damage so sustained took place during the carriage by air.

Whilst this may seem overly burdensome and unjust, the carrier's strict liability for cargo is balanced by the defences made available and contained in Article 18(2) of the Convention, one of which being that the carrier should not be liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from "an act of war or an armed conflict". It is worth noting that such defences are not available under either the Warsaw Convention or its successor, the Warsaw Convention as amended by the Hague Protocol.

Arguments

The claimants pleaded that the term "armed conflict" should be interpreted narrowly and that a terrorist attack should not fall within the purview of Article 18(2)(c) of the Convention. They sought to convince the High Court that because the Attack was between the State of Pakistan and an armed group of militia it was certainly neither an act of war nor an armed conflict. It was further argued that this incident "cannot be viewed as large scale violence" and therefore the gravity and scale of the event should fall outside of an "armed conflict" definition.

Conversely the carrier interests argued that it would be nonsensical that a terrorist attack should not be considered to come within the definition of an "armed conflict". They drew on the interpretation(s) utilised by international bodies, courts and tribunals in several other, albeit persuasive, jurisdictions to assist. It was submitted that the Attack should not be considered in isolation but as a continuation in a continuum of organised and unlawful activities in that jurisdiction.

Judgment

The Judge examined what constituted "armed conflict" within the meaning of the Geneva Conventions. Understandably, international armed conflict was ruled out, however, the Attack was deemed to be a non-international armed conflict ("NIAC"), i.e. a conflict between a State and an armed group within the territory of a State or States.

The Judge stated that the Attack could not only be considered as a terrorist attack, but it was part of a wider armed conflict within Pakistan. The Attack "would constitute part of a large-scale violence perpetrated against the State of Pakistan by proscribed organisations, and it would not constitute isolated terrorist activities but rather NIAC, or at least it may be categorised as a hybrid phenomena; where repeated acts of terrorism in furtherance of defined objectives translated into a non-international armed conflict". It was held that the terms "act of war" and "armed conflict" included NIAC, and thus the defendants were entitled to an absolute defence under Article 18(2)(c) of the Convention.

Comment

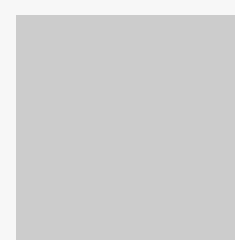
It appears that despite the limited international jurisprudence regarding Article 18(2)(c) of the Convention, the High Court's common sense prevailed. If this particular defence was intended to cover only acts of war between different countries, we would suggest that Article 18 would have included only the term "act of war" and not also the further term "armed conflict". As a result, we consider the latter term should be interpreted widely.

The aviation community should welcome this judgment, which undisputedly provides carriers with more clarity as to how courts should interpret the meaning of "armed conflict" under the Convention. It will be interesting to see whether such a decision will be appealed and how courts in other jurisdictions would interpret the term "armed conflict" going forward.

There is a powerful argument that a terrorist attack of this nature should be deemed "armed conflict" regardless of whether it is conducted by internal or external militia groups, and we believe a similar approach would likely be followed by the Courts of England and Wales.

As a final thought, and considering the Attack from an equitable perspective, it would seem rather unjust if instead a carrier, or a ground handler, caught in such a circumstance as this were to be held legally liable for something so outside of its control, akin to force majeure.

For further information, please contact **Maria Cetta**, **Charles Röbin** or **Sotiris Tzintanos** in our London office.



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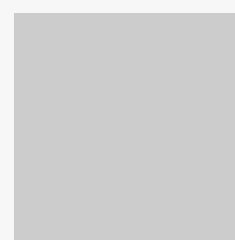

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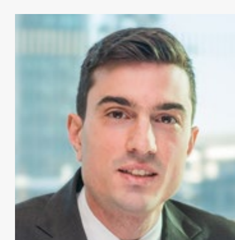

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Is COVID-19 a Force Majeure event?

An analysis of force majeure and how it may be used by parties and interpreted by domestic courts and International Arbitration tribunals in the resolution of national and international disputes arising from the COVID-19 disruption of contractual relations. The article also provides practical suggestions for clients to preserve their rights.

The Aviation sector was one of the first industries to be heavily impacted by the rapid spread of the COVID-19 virus. Government regulations on travel restrictions have forced airlines to reduce or suspend their operations. Due to country lockdowns, airspace closures and aircraft groundings, airlines are facing unprecedented financial difficulties, liquidity problems, risks and liability issues and are struggling to meet their contractual obligations. This might lead to a whole range of disputes. A frequent question is whether the Coronavirus pandemic could constitute a force majeure event to justify the inability of a party to perform its contractual obligations.

Defining Force Majeure

Force Majeure in Common law countries

There is no generic definition of *force majeure* in common law. It is a civil law concept, but is used in common law contracts. The only similar common law concept – the doctrine of frustration - has limited application because it only applies when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment the contract was entered into.

General force majeure provisions

Traditionally, *force majeure* clauses, in referring to circumstances beyond the control of the parties, were intended to deal with unforeseen acts of God or of governments and regulatory authorities. More recently, *force majeure* clauses have been drafted to cover a wider range of circumstances that might impact the commercial interests of the parties to the contract. It is now quite common for *force majeure* to deal not only with impossibility of performance, but also with questions of commercial impracticability. The term force majeure has been construed in *Matsoukis v Priestman* & Co to cover acts of God, war and strikes even where the strike is anticipated, embargoes, refusals to grant licenses and abnormal weather conditions.

The underlying test

The underlying test in relation to most *force majeure* provisions is whether a particular event was within the contemplation of the parties when they made the contract. The event must also have been outside the control of the contracting party. Despite the current trend to expressly provide for specific force majeure events, case law actually grants an extensive meaning to the term *force majeure* when it occurs in commercial contracts. There are generally three essential elements to *force majeure*: (1) it can occur with or without human intervention; (2) it must not have been reasonably foreseen by the parties; and (3) it must be completely beyond the parties' control and such that they could not have prevented its consequences.

In *Lebeaupin v Crispin*, *force majeure* was held to mean all circumstances beyond the will of man and which it is not in his power to control. Therefore, war, floods, epidemics and strikes are all cases of *force majeure*. An important caveat to the above is that parties cannot invoke a force majeure clause if they are relying on their own acts or omissions. Additionally, the *force majeure* event must be a legal or physical restraint and not merely an economic one [*Yrazu v Astral Shipping Company*, 1904; *Lebeaupin v Crispin*, 1920]. The burden of proof is on the defaulting party, who must prove that one of the events referred to in the *force majeure* clause has occurred, the defaulting party has been prevented, hindered or delayed from performance by that event, its non-performance was due to circumstances outside its control and there was no reasonable steps that the party could have taken to avoid or mitigate against the event.

Civil law countries (The French model)

Before the 2016 Contracts law reform, *force majeure* was defined by French case law as an irresistible event that could not be foreseen by the parties at the time of conclusion of the contract and outside the control of the debtor of an obligation. Since 2016, Article 1218 of the French Civil code provides:

"There is *force majeure* in contracts when an event outside the control of the debtor that could not reasonably be predicted at the conclusion of the contract and its effects could not be avoided by appropriate means, impedes the execution of an obligation by the debtor."

It is worth noting that the unpredictability of the event is assessed at the time of conclusion of the contract. Consequently, if the event such as a pandemic pre-existed the contract, the unpredictable criteria is not satisfied. If the impediment is temporary, the execution of the obligation is suspended and should resume as soon as the impediment is over. If however the impediment is permanent, the contract is terminated as of right and the parties are liberated from their obligations arising from the contract. (Article 1224 of the French Civil code).

COVID-19, an Event Capable of Constituting Force Majeure under conditions

France

French case law has held that the existence of an epidemic or virus alone is insufficient to qualify as an event of *force majeure*. All prongs of force majeure must be satisfied. The Paris Court of Appeal found that an epidemic due to the Ebola virus did not constitute a *force majeure* event because no causal link had been established between the virus and the decline in business activities of the company [CA Paris, 17 March 2016, RG 15/04263]. In another Ebola related case, the Paris Court of appeal refused to recognise the Ebola virus as a *force majeure* event because it did not render the parties obligations impossible to perform [CA Paris, 29 March 2016, RG 15/05607]. The parties to a new contract can however agree on what constitute *force majeure* and its effects.

Common Law countries

In Common law, contractual terms, the degree of impediment to the performance of the contract and the duty to mitigate the consequences of the virus will determine whether the Coronavirus could be a *force majeure* event on a case-by-case basis.

The Event

Many contractual provisions designate a list of events deemed to be events of *force majeure* beyond the control of the parties, such as "pandemics," "epidemics" or "diseases." Although a specific reference to a "pandemic" will favour a *force majeure* claim, the other criteria for a *force majeure* test will still need to be satisfied. However, in the absence of a provision including language to that effect, then it will be necessary to consider whether COVID-19, or its impact on a business, is captured by a different concept, such as an "Act of God," "action by government" or a catch-all provision. Most *force majeure* provisions contain "catch-all" language in respect of events "outside the reasonable control of the party affected". A pandemic such as COVID-19 would have strong chances to qualify as *force majeure* under such a provision. The relevant *force majeure* event needs not be COVID-19 itself. It is the consequences of this virus and its impact upon the ability of the affected party to perform its contractual obligations that will be relevant.

Performance impairment

The degree of impairment of the affected party's ability to perform its contractual obligations will determine whether it can trigger the operation of the *force majeure* provision. A *force majeure* provision typically relieves a party from what would otherwise be a breach of contract, i.e. its failure to perform an obligation due to the effects of the event of *force majeure* in question. The party must establish the causal link between the event and its inability to perform. A provision that requires a party to be "prevented" by the *force majeure* event from performing its obligations will likely be more difficult to rely upon than one which only requires the party to be "impeded" or "hindered" in the performance of its obligations.

In the aviation sector, the suspension of a significant number of flights and related operations due to the virus outbreak would be likely to have the necessary impact and causal link to qualify as a *force majeure* event under many *force majeure* clauses, subject to the party affected having taken all reasonable measures to avoid or mitigate the event and its consequence. A disruption that merely impacts the profitability of a contract may not be sufficient for a *force majeure* claim unless there is express contractual provision for such a situation. Nor would an economic downturn or other general adverse business conditions be likely to be sufficient, even if it could clearly be shown that a key trigger for the downturn was COVID-19.

Duty to mitigate

Lastly, a party will need to show that it has taken reasonable steps to avoid or mitigate the event and its consequence, and that there are no alternate means for performing under the contract. A reasonable mitigation measure is fact-specific and depends upon the nature and subject matter of the contract in question. However, the reasonableness of a mitigation measure will be considered in light of any additional burdens and costs that the party incurs, as well as availability of alternatives at that time and the overall impact of any delays that a mitigation measure could have upon the contract schedule. Given the continued impact that the spread of COVID-19 is having upon global businesses, it is possible that there may be limited mitigation measures available to parties.

However, it will be important to follow all relevant official guidelines and to consider all reasonable measures to contain or limit the spread of the virus so as to allow contractual performance to continue.

Notice Requirements

A party seeking relief for *force majeure* under the contract must usually issue a notice to the other party, supported by the required evidence. A contractual provision may additionally require the notice to state the anticipated consequences and duration of the *force majeure* event. Some contracts include a "time-bar" clause that requires notice to be provided within a specified period from when the affected party first became aware of the *force majeure* event, failure of which will result in a loss of entitlement to claim. In view of COVID-19's dynamic nature and ability to proliferate rapidly and unexpectedly across multiple countries, some parties have therefore adopted the approach of issuing "protective" or "rolling" *force majeure* notices that take into account the developing impact that the COVID-19 outbreak has upon the performance of their obligations under their contract.

The Consequences of *Force Majeure* Claims

Where a valid *force majeure* event has occurred, the consequences for the parties will depend on the nature of the affected party's obligations under the contract, as well as the consequences and remedies expressly contemplated by any applicable *force majeure* provision. Contractual remedies for *force majeure* typically include an extension of time to perform those obligations or suspension of contractual performance for the duration of the *force majeure* event. If the *force majeure* event extends over a longer period, some provisions may entitle the parties to terminate the contract.

Practical Steps if seeking to rely on a *Force Majeure* Clause

There are several practical steps that a party can take if seeking to rely on a *force majeure* clause:

First, review your contract to determine whether it includes a *force majeure* provision and, if so, carefully review the *force majeure* definition in that contract to determine whether there is any express reference to a pandemic such as COVID-19 and, if not, whether the general language is sufficient to include COVID-19 and its consequences. If in doubt, it may be helpful to seek legal advice early in the process.

Second, verify that the inability to perform is due to the direct or indirect consequences of COVID-19 and not a different reason. Consider and review what steps you are taking as a business to avoid or mitigate the effects of COVID-19 on your ability to continue to perform your obligations under the contract and that you have taken all reasonable measures to avoid or mitigate the event and its consequence and are compliant with all official guidelines.

Third, consider if there is any notice requirement to trigger entitlement to relief particularly any notice time limit, and if so ensure it is satisfied.

Fourth, determine whether insurances, such as business interruption insurance or force majeure insurance, may cover any of the expected losses.

A party should only make a force majeure claim with care, because a wrongful claim could have serious consequences, including amounting to a breach or even repudiation of the contract. In such circumstances, the other party may be entitled to claim damages or to terminate the contract.

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The effects of COVID-19 on slots at coordinated airports in the European Union and the United Kingdom

Under Regulation (EEC) 95/93 (the "Slot Regulation"), the so-called 'use it or lose it' rule requires air carriers at coordinated airports to use allocated slots at least 80% of the time during a given IATA season. Under a principle known as 'grandfathering', where a carrier complies with this utilisation target, Art.10 of the Slot Regulation guarantees them the re-allocation of those slots for the next equivalent IATA season. However, where this target is not met, the Slot Regulation provides for those slots to be returned to the pool (and thereby made available for use by other carriers).

Due to the COVID-19 pandemic and the resulting travel restrictions imposed by governments, there has been an unprecedented drop in passenger air traffic. By way of example, during the week of 23 to 29 March 2020, EUROCONTROL noted an 80.8% drop in air traffic compared to the same period in 2019. The 'use it or lose it' rule therefore left numerous air carriers with a stark choice between cancelling flights at the risk of losing their slots, or operating unprofitable 'ghost' flights with few (if any) passengers in order to maintain a slot utilisation of 80%. The second option evidently has harmful financial effects for air carriers and a negative environmental impact, but the Slot Regulation offered no alternative to air carriers wishing to protect their slot portfolios as Europe's busiest airports (with slot coordinators only having limited latitude to dis-apply the 'use it or lose it' rule in specific circumstances (including the grounding of an aircraft type or airport/airspace closures)). Wider intervention was therefore necessary.

Following significant lobbying efforts from the aviation industry and pressure from various EU member states, the European Commission published a proposal on 13 March 2020 which provided for the temporarily suspension of the 'use it or lose it' rule under the Slot Regulation in order to mitigate the economic impact to airlines due to the ongoing COVID-19 crisis. That proposal was adopted by the European Parliament and the Council of the European Union as Regulation (EU) 2020/459 (the "Alleviation Regulation").

The Alleviation Regulation entered into force on 1 April 2020, with the suspension of the 'use or it lose it' rule applying retrospectively from 1 March 2020 until the end of the IATA Northern Summer season on 24 October 2020 (including in the UK, by virtue of the ongoing Brexit 'transition period'). It should be noted that such a suspension is not unprecedented, with the European Union having adopted similar emergency measures to deal with terrorist attacks of 11 September 2001, the Iraq War, the global financial crisis of 2008 and the outbreak of Severe Acute Respiratory Syndrome ("SARS") in 2013.

The Alleviation Regulation provides that slots allocated for the period from 1 March until 24 October 2020 (which therefore includes the latter end of the 2019/2020 IATA Winter Season and all of the 2020 IATA Summer Season) shall be considered as operated by the air carrier to which they were allocated regardless of whether they are actually used. Further, for slots used to operate air services between airports in the EU/UK and airports in China or Hong Kong, an extended protection period has been provided for slots allocated for the period of 23 January 2020 until 29 February 2020. This reflects the severe impact caused by COVID-19 to operations to/from those markets early in 2020, starting from the date on which the first airport in China was closed by authorities.

Importantly, in order to benefit from the provisions of the Alleviation Regulation, as of 8 April 2020 all slots which will not be used must be returned to the relevant slot coordinator for reallocation to other air carriers on an ad-hoc basis. This is aimed at facilitating air connectivity, particularly for air services related to essential cargo and medical supplies.

Due to the difficulty of predicting the duration of the current COVID-19 crisis, the Alleviation Regulation also delegates power to the European Commission to extend the measures beyond 24 October 2020 as necessary. The European Commission has stated that it is monitoring the situation and will report to Member States in relation to a possible extension by 15 September 2020.

The suspension of the 'use it or lose it' rule has been welcomed by the industry, as it provides air carriers with legal certainty regarding suspending operations on certain routes, and the ability to cut capacity without losing future entitlements to slots whose operation in the current crisis would be both financially and environmentally unsustainable.

It will be interesting to see what impact, if any, the circumstances surrounding COVID-19 and the approach adopted under the Alleviation Regulation will have on the existing debate regarding possible amendments to the Slot Regulation.

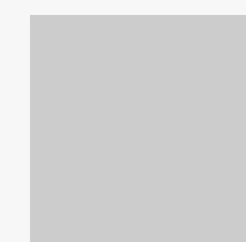
On the one hand, the present crisis may well add fuel to the existing calls for an overhaul of the Slot Regulation, which some commentators consider is no longer fit for purpose. Certain industry bodies and governments have already suggested that changes be made to the existing slot allocation regime, which is based on the guiding principles set out in IATA's Worldwide Slot Guidelines. It has been argued that the Slot Regulation may no longer be suitable to regulate the growing and congested markets at Europe's airports. Since the time of the adoption of the Slot Regulation in 1993, the air transport market in Europe has grown exponentially and in ways unpredicted at the time. In the summer season of 2019, 104 of the 204 coordinated airports in the world were within Europe.

Amendments to the Slot Regulation that have already been suggested include (amongst others):

- Applying special provisions for the allocation of slots at extremely congested airports, such as London Heathrow Airport and Amsterdam Airport Schiphol;
- Providing an explicit right to Member States to allow secondary trading of slots where it may enhance competition. Such a market already exists in a limited number of locations, most notably in respect of London's congested airports. Whilst the English High Court has confirmed the legality of slot exchanges for consideration, the Slot Regulation does not explicitly allow for this, and the European Commission's 2008 communication on the subject stopped short of confirming its legality (and instead confirmed that the Commission did not intend to pursue infringement proceedings against carriers engaging in slot trading for consideration); and
- Incentivising airlines to hand back unused slots to the coordinator for reallocation to improve the efficient use of existing airport capacity.

On the other hand, given the unprecedented impact that COVID-19 has had on air traffic, it is questionable whether any slot allocation and management regime would have been successful at protecting airlines from the harsh economic impacts experienced in 2020. Albeit some might argue (in our view not unreasonably) that action could have been taken sooner, the flexibility that the Commission, Parliament and Council have shown in adapting the Slot Regulation to cope with the significant economic impact caused to the industry by the COVID-19 pandemic is certainly to be welcomed.

For further information, please contact **Grégory Laville de la Plaigne** and **Ionna Poiret** in our Paris office and **Tom van der Wijngaart** and **Jess Harman** in our London office.



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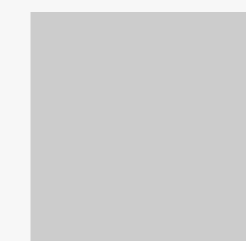

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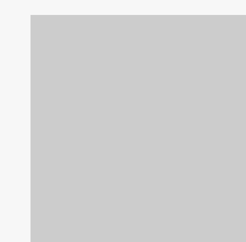

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COVID-19 – Advice & guidance update for General Aviation activities

Updated government coronavirus advice means that recreational GA flying in the UK is now allowed if social distancing measures are strictly observed. In practice, this means that only solo flights or flights where everyone is from the same household are permitted. This is because it is generally not possible to observe social distancing measures during most GA flights.

It is anticipated that the UK government will seek to further relax social distancing measures over the next few months and so the position may change. Meanwhile, all pilots who return to flying after a long break will experience some degree of skill degradation regardless of their experience. There are also a number of maintenance issues that could potentially arise from aircraft being grounded for an extended period of time. The UK Civil Aviation Authority and the Light Aircraft Association have released some guidance to ensure the safe return to GA flying operations. Some of the main takeaways are discussed below, which are also relevant generally. All aircraft surfaces that have been touched should be cleaned and disinfected after each flight. This is particularly relevant in a flight training environment where different pilots will be touching the controls. In addition, PPE equipment (i.e. gloves, face masks or protective screens) must not create a flight safety hazard or inhibit safe operation of the aircraft. If a protective screen is installed in the cockpit to separate pilots, it is important that the screen is approved by the CAA or delegated organisation as these screens may impact the safety and airworthiness of the aircraft.

All licences, documentation and equipment should still be valid and in date i.e. airworthiness certificates, insurance policies, radio licences, fire extinguishers, first aid kits, pilot licences and currency requirements. The CAA has recently issued several temporary exemptions extending the expiry dates for certain licences, ratings and medical certificates to support pilots through the coronavirus pandemic. Even if pilots are able to utilise the exemptions, the CAA encourages all pilots (including instructors) to complete appropriate refresher training or a check flight prior to flying. Most flying clubs will have a recency requirement clause in their insurance policy where pilots are required to complete a club flying check if they have not flown solo for a defined period. Operators should be familiar with similar clauses in their insurance policy to avoid possible coverage disputes in the event a claim is made.

Aircraft and maintenance issues can arise if an aircraft has been grounded for an extended period of time. Some common problems include:

Engines - Most aircraft engines will continue to operate normally if they have not run for two to three months. However, if unused for any longer, condensation, corrosion and camshaft problems can develop. GA operators should check their aircraft maintenance manual which will most likely include further advice about measures to take during periods of disuse and how to bring the engine back into service after being inhibited.

Fuel - The octane rating of aviation gasoline ('AVGAS') dissipates when exposed to sunlight, moisture and oxygen. As a general rule any AVGAS that is over six months old should be treated with caution. The shelf life of motor gasoline which is also used in some light aircraft is even less. It is also common for water, condensation and contaminants to build up inside aircraft fuel tanks. This is especially so if the aircraft has been exposed to rain or if the fuel tanks have been not full whilst the aircraft was grounded. The presence of water, condensation or contaminants in aircraft fuel can cause significant damage to an aircraft and engine which can lead to a complete engine failure. Pilots should pay special attention to their pre-flight fuel drain checks for the presence of water, condensation or contaminants. It may be necessary to completely drain and replace the fuel in the aircraft tanks before the first flight.

Airframe – Another problem with aircraft being grounded for a considerable period of time is the possibility of wildlife such as birds or rodents nesting inside the airframe. Rodent urine can corrode aluminium airframes and rodents are also known to chew through airframe components. Smaller insects can also block fuel tank vents which can cause an engine failure. Aircraft pitot and static ports can also become blocked with insects which can cause cockpit instruments to malfunction. Aircraft tyres may develop a flat spot if they are not used which could create problems during the take-off roll. Binding of aircraft brakes may occur after long periods of disuse. The propeller can also develop corrosion and cracks depending on how the aircraft has been stored or covered.

With many GA pilots understandably keen to get back into the skies after a long layoff, it is vitally important that this guidance is followed to ensure a safe return to GA flying. If operators are unsure about any maintenance requirements or the airworthiness of an aircraft, they should obviously speak with an engineer or inspector before flying. Safety, of course, remains paramount, but as GA pilots increasingly return to recreational flying compliance with these guidelines will become part of the "new normal".

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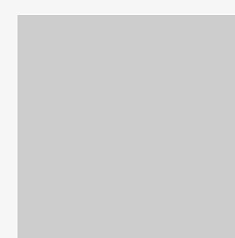

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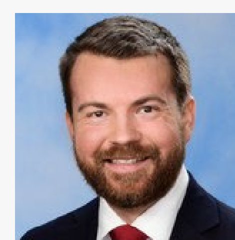

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Like Heathrow, Like…: The impact of climate change on aviation infrastructure projects and current trends

Aviation's impact on climate change has long garnered the attention of the media, climate activists and the aviation industry itself. Turning to the effects of climate change on the industry, aviation stands to be affected by changes in temperature, precipitation, storm patterns, sea level and wind patterns.

Temperature change affects aircraft performance, infrastructure and demand trends, while changes in precipitation patterns may cause an increase in flight delays and cancellations. More frequent and stronger storms will disrupt flights, as well as rising seas levels, could reduce airport capacity and cause network disruption. Changing wind patterns could increase turbulence and affect travel times. The aviation sector has committed to carbon-neutral growth from 2020. However, air traffic growth is currently outpacing efficiency improvements, with the result that carbon neutrality will require airlines to offset climate impacts, increasing their costs. A further naturally flowing consequence of air traffic growth is the need for more airports, larger airports and additional runways to support that growth. This leads us into the topic of this article, namely the recent landmark judgment relating to Heathrow Airport's proposed third runway.

In the most consequential step in what seems to be the never ending tale of Heathrow's third runway (indeed, it is still not over), on 27 February 2020 the Court of Appeal of England and Wales handed down a judgment finding against the current Heathrow expansion project and in favour of climate activist organisations in the case of R (*Friends of the Earth) v Secretary of State for Transport and Others* [2020] EWCA Civ 214 (the "Heathrow decision"). The court held that the Airports National Policy Statement ("ANPS") supporting Heathrow's proposed expansion plans was unlawful due to the fact that it did not consider the UK Government's commitment to the 2015 Paris Agreement (the "Paris Agreement").

It should be stressed that the action (which was instituted in 2018) was not specifically directed at the Heathrow expansion itself but at the ANPS' support of the expansion plans, which it said failed to consider the Paris Agreement and the UK's commitments thereunder. The issue whether the third runway was incompatible with the UK's commitments under the Paris Agreement or indeed if a third runway should be built or not, was not addressed by the Court. Nevertheless, the Court's decision has brought the Heathrow expansion project to a grinding halt (at least, for the time being).

The Heathrow decision was the first UK judgment rooted in climate change and the first to establish that the Paris Agreement has a binding effect on the UK Government. As noted by the Court of Appeal in its decision, climate change is a matter of great importance and concern, both nationally and internationally. Notwithstanding the impact of COVID-19 restrictions and the effect of the pandemic on the aviation industry, as well as the fact that Heathrow has suspended its capacity expansion plan for the time being, Heathrow has indicated that it will still pursue an appeal to the Supreme Court. The Secretary of State has confirmed the Government will not appeal the decision, but on 7 May 2020 Heathrow was granted permission to appeal by the Supreme Court.

Whilst the Heathrow decision is of great importance for infrastructure projects within the UK, its implications have resonated globally as it stands as a symbol for judicial intervention in clashes between climate action commitments (from a governmental, corporate and activist standpoint) and large infrastructure projects. Around the world, multi-sectoral and societal change is

occurring at a rapid pace with increased pressures such as climate change, health and economic consequences of global pandemics, political variables and the advancement of disruptive technologies. As legislative cogs tends to turn slowly around the globe, progress on relevant and necessary legislation and regulation is being outpaced by the above-mentioned pressures with the result being the increased role of the judiciary in these matters.

In providing some foreign examples of similar issues to those addressed in the Heathrow decision, the Canadian Federal Court in the case of *Pembina Institute for Appropriate Development and Others v Attorney General of Canada and Imperial Oil* [2008] FC 302 rejected a large energy infrastructure project during 2008 based on similar reasons. One of the big differences of course, is that the Canadian decision pre-dates the Paris Agreement and the Court instead made reference to the Kyoto Protocol. Since the handing down of this decision, there have been no cases involving climate change based legal challenges, but the Canadian government seemed to be approaching the issue, at least in part, in a post-legislative manner and has insisted on higher carbon emissions performance from certain major energy projects than is prescribed by local law. Whilst we appreciate that the above is not directly related to aviation, climate change litigation, regulation and legislation cannot be seen in sector bubbles and must be considered holistically to truly understand how future aviation infrastructure projects may be affected.

A more pertinent, yet more nascent example is that of the proposed Schiphol Airport expansion in the Netherlands, which has resulted in various clashes between climate change activists and the Dutch government. In this ongoing situation, activists have requested Schiphol Airport to prepare a climate action plan which they propose should include fewer flights than is currently envisaged, the closure of Lelystad airport, replacing short-distance flights by train journeys, and supporting a fair price for flying as they state that "Schiphol Airport is the largest tax free gas station" in the Netherlands. Despite these protests, Dutch authorities seem to have doubled down on their conviction to proceed with the Schiphol Airport expansion. It will be interesting to see if any climate action litigation results from this, given not only the similar facts to the Heathrow decision, but also in light of the infamous case of *Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689; aff'd (Oct 9, 2018), in which the Dutch Supreme Court rendered the first Supreme Court order to a State on its climate obligations based on human rights, the UN Framework Convention on Climate Change and the European Convention on Human Rights. In this case, the Court ruled that the Dutch government has an obligation to reduce greenhouse gas emissions by 25% compared with 1990 levels by the end of this year.

What appears appurtenant is that climate change solutions in the aviation industry will require the involvement and collaboration of all industry participants, including aircraft operators, airports, air navigation service providers, aircraft manufacturers and regulators, as well as active participation by governmental authorities. A piece-meal and discombobulated approach will not stand the test of time and will only serve to resign the sector into the unfavourable side of the history books in a post-climate-revolution world. If the last couple years are anything to go by, and when considering the global shift in governmental outlook on climate change, it safe to say that disputes in relation to climate change commitments, government targets and environmental legislation will most likely increase tenfold in the next few years, with climate change policy, targets and legislation gradually taking center stage in Supreme Courts across the world.

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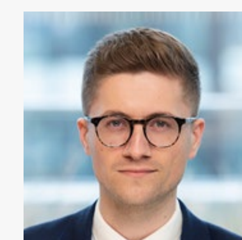

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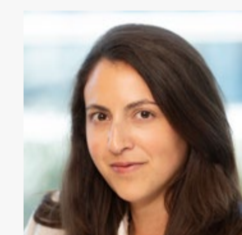

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Wave of COVID-19 consumer class actions filed against air carriers in the US

In the last several months, passengers have filed more than twenty consumer class actions in the United States against domestic and foreign air carriers for claims related to COVID-19 flight cancellations.

The following carriers have all been named in such actions: Allegiant Air, All Nippon Airways, American Airlines, British Airways, Cathay Pacific, China Eastern Airlines, Condor, Copa Airlines, Delta Air Lines, Emirates, Frontier, Hawaiian Airlines, Iberia, KLM Royal Dutch Airlines, Norwegian Air Shuttle ASA, Southwest Airlines, Spirit Airlines, TAP Air Portugal, Turkish Airlines, and United Airlines. These actions are similar and typically allege a failure to provide prompt refunds and assert causes of action for breach of contract, fraud, and violations of state consumer protection laws. In fact, plaintiffs have filed a motion to transfer and consolidate these actions before a single court with the Judicial Panel on Multidistrict Litigation ("MDL Panel"). The MDL Panel is a special body that determines whether actions pending in different courts should be consolidated before a single court. Pursuant to 28 U.S.C. Section 1407, the MDL Panel may transfer and consolidate actions to a single court for pretrial hearings when the actions involve common questions of fact. This procedure is designed to promote convenience and efficiency by centralizing similar litigation in a single forum and is regularly utilized in mass tort events such as aviation accidents and products liability litigation.

Notwithstanding the possible transfer and consolidation of these cases, many non-contractual claims in these COVID-19 class actions may be susceptible to preemption under the Airline Deregulation Act ("ADA") and merit-based defenses based on terms in the airline's conditions of carriage. Nonetheless, class certification is a critical threshold issue because the potential liability increases dramatically if the court certifies a class. The majority of these class actions are pending in federal court and Federal Rule of Civil Procedure 23 ("Rule 23") governs class certification. Class certification typically occurs before the court hears any dispositive motion on the merits of the claim, but an amendment to Rule 23 in 2003 changed the time for determining class certification from "as soon as practicable" to "at an early practicable time." Thus, asserting merits-based motions early in the litigation is now easier than it was in the recent past. In any event, to certify a class under Rule 23 plaintiffs must satisfy all prerequisite requirements in Rule 23(a) and, once those requirements are met, plaintiffs must show that the proposed class falls within a recognized category of classes under Rule 23(b), which defines different types of class actions.

To satisfy the threshold prerequisite requirements in Rule 23(a), plaintiffs must establish that: (1) there are common questions of law or fact (i.e., commonality); (2) the claims of the representative parties are typical of the class (i.e., typicality); (3) the representative parties can adequately represent the class (i.e., adequacy); and (4) the claims are so numerous that joinder of individual claims is impractical (i.e., numerosity). Further, though not an explicit requirement, most US courts have held that the proposed class must be "ascertainable." A class is ascertainable if: (1) class members are readily identifiable by objective criteria; and (2) it is feasible to determine whether a particular person is a member of the class.

Assuming plaintiffs satisfy these prerequisites, the court will evaluate the proposed class under Rule 23(b), which provides for three types of class actions. Under Rule 23(b)(1), a court may certify a class based on either the risk that the adjudication of individual actions would create

inconsistent standards of conduct for the defendant or that adjudication of individual actions could impair the interests of individual proposed class members. For example, claims against government entities that must treat citizens according to uniform standards and claims against limited funds (e.g., a bank account or insurance proceeds) that are insufficient to satisfy all claims fall into this category. A court may also certify a class under Rule 23(b)(2) where the remedy is injunctive relief for the benefit of the entire class. These are often civil rights or environmental pollution cases. Further, pursuant to Rule 23(b)(3) a court may certify class actions where common questions of fact or law predominate over individual questions and where class resolution is superior to other methods of adjudication. The scope of this type of class action — often referred to as a "superiority" class action — is somewhat ambiguous and frequently litigated.

Most of the COVID-19 class actions against air carriers rely primarily on class certification under Rule 23(b)(3). Nonetheless, most of the complaints also claim class certification under Rule 23(b)(1) and (2). Moreover, the proposed classes in these cases are very similar and purport to include US passengers who purchased tickets for travel on a flight to be operated by the subject carrier and did not receive refunds after the flight was cancelled or significantly delayed. While there are not many reported decisions addressing class certification in actions against air carriers for ticket refunds, there is some favorable case law.

For example, in *Mullaney v. Delta Air Lines, Inc.*, a passenger filed a class action against Delta and sought certification of a class that included 139 individuals who allegedly did not receive refunds or new tickets after a labor strike impacted 2,777 Delta passengers. 258 F.R.D. 274, 277-78 (S.D.N.Y. 2009). While the court found that plaintiff satisfied the threshold requirements of Rule 23(a), the court concluded that plaintiff had not satisfied Rule 23(b)(3) by showing that common questions predominate. *Mullaney*, 58 F.R.D. at 277-79. In this regard, the court found that passengers' individual interactions and communications with Delta meant that there was no way to use generalized proof to determine whether the entire proposed class was or was not entitled to a refund. *Mullaney*, 58 F.R.D. at 279.

Aside from defenses to class certification, the ADA may also preempt many of the non-contractual claims. The ADA generally preempts claims that relate to carrier's rates, routes or services except those claims based on a carrier's self-imposed undertakings as stated in the conditions of carriage. For example, in *Robinson v. American Airlines, Inc.*, the trial court held that the ADA preempted non-contractual claims related to a carrier's ticket refund policies. 743 F. App'x 233, 235 (10th Cir. 2018). Accordingly, the non-contractual claims in the COVID-19 class actions are likely susceptible to federal preemption.

Notwithstanding ADA preemption, which will generally limit plaintiffs to asserting contractual claims, many of the COVID-19 class action complaints cite US Department of Transportation ("US DOT") regulations.

These regulations are generally not incorporated into carriers' conditions of carriage. While US DOT regulations require carriers to make certain commitments regarding refunds (see 14 C.F.R. 259.5 governing Customer Service Plans), there are generally no grounds to assert a private cause of action based on US DOT regulations. Rather, passengers would need to file a consumer complaint with the US DOT.

In this regard, the US DOT has issued guidance concerning COVID-19 passenger complaints. In April 3, 2020 guidance, the US DOT stated that it, "will refrain from pursuing" enforcement actions against carriers that initially provided passengers with "vouchers for future travel in lieu of refunds for cancelled or significantly delayed flights during the COVID-19 public health emergency so long as" carriers meet certain requirements such as timely contacting passengers to offer refunds. See Dep't of Transp., *Enforcement Notice regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel*, (April 3, 2020), available **here**.

Further, in May 12, 2020 guidance, the US DOT again stated that airlines may "offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed." See Dep't of Transp., *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel*, (May 12, 2020), available **here**.

Notably, in the May 12, 2020 guidance, the US DOT stated that carriers may develop "reasonable interpretations" of the terms "cancellation" and "significant change" for purposes of their refund policies, but that carriers may not retroactively apply new refund policies that are different from the policies that were in effect at the time the passenger purchased the ticket. To date the US DOT has not issued any enforcement orders concerning refunds for flights affected by COVID-19.

In sum, the COVID-19 pandemic has generated a significant regulatory response in the US as well as a substantial number of consumer class actions. The US DOT preliminarily appears to be taking a lenient approach to consumer complaints related to COVID-19 provided that carriers comply with specific guidance on handling COVID-19 issues. Regarding the consumer class actions, there are likely to be significant individualized issues concerning communications between passengers and carriers that may provide grounds to defeat class certification. Further, the merits of the class actions are likely to be limited to interpreting and applying carrier's self-imposed undertakings as stated in the applicable conditions of carriage.

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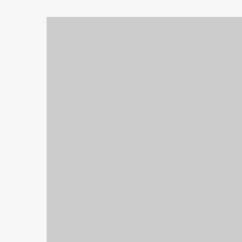

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Aviation data and competition law

The aviation industry is alive to the value of big data and will seek to extract value where possible. However, it is important to be mindful that data-driven services within the sector, particularly in respect of aircraft maintenance are at risk of anti-competitive practices emerging.

Introduction

In this third article, forming part of the series of articles on data use and ownership in the aviation industry, we briefly look at another growing debate on the topic of big data. In the age of the 'big data' economy and use of enhanced technology to manage and control it (for an example of this please see our February 2020 article Blockchain in Aviation) - there are growing concerns on how access to big data may create barriers to competition and should be restrained by competition law.

According to the Economist in May 2017, the world's most valuable resource in the world is not oil, but data. If data is the 'new oil', it is unsurprising that as we discussed in our article in June 2019 *(Big Data Challenges in Aviation)* there is continued friction between OEMs, MROs, airlines and other stakeholders in the supply chain about who owns the data and the terms governing the extent that companies are able to leverage and monetize such data.

The global MRO market is a competitive industry with thin margins. In October 2019, facing fierce criticism across the MRO network and airlines worldwide, Airbus quietly withdrew a proposed royalty fee structure. Airbus intended to charge independent MRO customers royalty fees on actual maintenance revenues on Airbus aircraft in addition to existing charges payable to access the technical data available in the Airbus World platform. Airline MROs who serviced their parent company only would be exempt from royalties. The perceived price discrimination raised eyebrows and could very well have made some competition authorities look at whether anti-competitive practices might emerge from such a proposal.

Big data and competition law considerations

Currently, the use of big data and possible competition law issues has so far been focused on big technology and information service providers, notably Google, Microsoft and Facebook. Competition authorities have scrutinised how companies use data to consolidate their ability to grow and expand a broad range of services by processing vast data sets compiled from customers, subscribers and other users. The EU Commission has for example turned its attention to the risks posed by Google's acquisition of DoubleClick (March 2008), by Facebook's acquisition of Whatsapp (August 2014) and the Microsoft/LinkedIn transaction (December 2016) on data use services, privacy and personal data. However, we can expect similar questions being considered in the context of the aviation industry – especially where there are perceived advantages held by parties holding large sets of valuable maintenance, engineering and flight control data that cannot be replicated easily.

The Airbus proposal raises complex policy issues arising in a digital economy of how big data should be managed to strike the right balance between preventing behaviour that truly harms competition and limiting the 'chilling effect' that increased competition law may have on innovation. It cannot be assumed that all agreements or business practices implemented by companies governing the use of big data (such as OEMS holding valuable aircraft data sets) are inherently anti-competitive. Whether an arrangement is anti-competitive has to be assessed on the basis of its objective, or its effect on competition.

Although not specifically related to big data use, the industry will seek to address such competition concerns more broadly where necessary. In March 2016, IATA (on behalf of its member airlines) filed a formal complaint with the European Commission regarding alleged abuses of a dominant position by OEMs with respect to their control of aftermarket repairs, including parts and services, with airlines arguing that such control provided little flexibility in negotiations for aftermarket services. Ultimately, in response to the complaint, IATA entered into an agreement in July 2018 with CFM International (a joint partnership between GE and Safran Aircraft Engines) designed to increase MRO competition on engines manufactured by CFM.

The continuing challenge for OEMs, MROs, airlines and other stakeholders alike is to consider carefully how to create viable business models on partnerships, collaboration and the use of big data to compete more effectively, which meet their respective interests while taking into account competition law concerns.

Anti-competitive data agreements

Agreements that make big data available on an exclusive or restricted basis may have the effect of distorting competition. In an MRO context, that might mean that the only way independent MROs will ever be able to provide services is if they are beholden to an OEM who receives a flow of engineering, maintenance and airworthiness data accrued from a myriad of aircraft sensors and then crunches and presents that data in a particular format. The OEM has a legitimate right to recover its investment in time and resources expended to analyse and develop the data into something meaningful. It will wish to own and exploit the intellectual property in the end product. But each aircraft has a rich source of performance information and maintenance providers could reasonably exploit that raw data for other purposes. If the OEM reserves the right to turn the tap off at the source unless independent MROs agree to factor payment of royalties into their business plans then many might consider that a fetter to market entry.

At the more extreme end, larger OEM, MROs and airlines might be tempted to agree to reduce access to certain raw data, agree that certain data is too valuable to be shared or make such data available at a fixed price. In light of the current COVID 19 pandemic, the industry may dress this up as 'co-operation' for the good of aviation but it from an anti-trust law perspective it would be foolhardy and get short shrift from regulators in the US, EU, Singapore and jurisdictions such as Hong Kong where the Competition Commission is becoming increasingly more alive to breaches of the Competition Ordinance (Cap 619) since its inception in 2015.

Dominant position abused?

It would be easy to shout abuse of dominance at any of the big airframe manufacturers or MROs since there are so few. However, that would be too simplistic.

Firstly, it depends entirely on how the market is defined. It could be classified as a market for aircraft data which would be much bigger than a market in which only one or two makers of airframes might operate, reducing the risk of even the biggest manufacturers having a dominant position in terms of ownership and use of industry data. Alternatively, a narrower market definition of say specific services using particular data sets derived from a particular aircraft type would naturally increase the risk of inherent dominance. For example, an organisation may be found to have market power because it owns valuable data, despite having a low market share.

Secondly, dominance in itself does not automatically equate to abuse. Data are not goods in the conventional sense. Even if an organisation holds a large amount of data, where data can be replicated easily and independently of that dominant player then this is unlikely to be a barrier to competition and does not cause an impact on any downstream supply chain operations. On the other hand, a comparatively smaller business may be found to have market power in terms of its data, despite having a low market share in the specific goods and services market in which it operates, because it owns valuable data which is not freely available to others.

The focus of the relevant market therefore shifts to the data itself as the tradable commodity. The same could be said of data sets with respect to airline passengers and their purchasing habits. An airline will always immediately claim ownership of their customers' data but might run into difficulty if it starts to impose onerous or unreasonable commercial terms to its distribution network in order to grant access to that data.

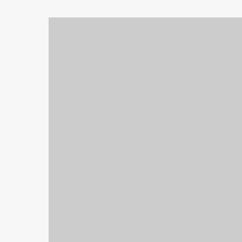
Ultimately, assessments to define abuse of dominance within a defined market will always be very fact specific. In the context of merger control for example, future assumptions about the amount of valuable data to be acquired and pooled will arguably become as important a threshold measurement as annual turnover.

Conclusion

If services using big data become exclusionary then arguments about anti-competitive behaviour will grow louder. This is especially so if data are an 'essential facility' to providing a particular service, whether that relates to maintaining aircraft parts or to promoting and selling airline tickets. As we saw above, IATA has already intervened on the aircraft engine aftermarket with its agreement with CFM.

It would not be surprising to see a similar position being adopted with respect to data use and exploitation if it means leveling the playing field and promoting healthy competition for the benefit of the industry at large.

For further information, please contact **Alastair Long** and **Melissa Tang** in our Hong Kong and Singapore office respectively.



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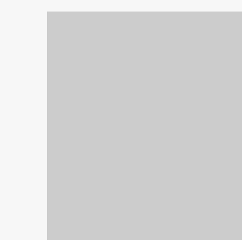

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Passenger rights under EC Regulation 261/2004 in the ever evolving global COVID-19 pandemic

We are all now sadly familiar with the dreaded COVID-19 disease, an infectious virus which causes respiratory illness in those it infects. Whilst the majority of COVID-19 patients experience mild symptoms including a temperature and cough, we have seen that the virus can result in more serious symptoms, particularly in the elderly and those with underlying medical conditions, which can require special treatment and may even result in death.

The global reported death toll from COVID-19, at the time of writing, stands at over 504,000 with over ten million confirmed cases worldwide.

For obvious reasons, the aviation industry has been hit particularly hard by this outbreak. As countries began to lockdown borders and introduce travel restrictions, demand fell rapidly, flights were cancelled, fleets were grounded, and the industry has been forced to furlough staff and consider redundancies, a situation that is ongoing. The potential loss in passenger revenue as a result of COVID-19 is estimated at USD 84.3billion and carriers now face the monumental task of restructuring their business operations in the ever evolving global pandemic.

As we approach the summer holidays, families all over the world are beginning to realise that their travel plans will likely have to change with flights and holidays being cancelled.

This article will provide an overview of EC Regulation 261/2004 ("the Regulation") in the context of COVID-19 and the European Commission's guidance and recommendations for the use of vouchers as a form of reimbursement.

EC Regulation 261/2004

The Regulation applies to passengers departing from an EU member state or arriving into an EU member state, providing that in the latter case, the carrier is headquartered in the EU.

The Regulation provides compensation, in certain prescribed circumstances, to passengers in the event of a flight delay, flight cancellation or denied boarding, as well as obligating carriers to provide certain care and assistance to passengers.

For cancellations and delays of over three hours, a passenger could typically expect to recover compensation of: EUR250 (for short distance flights below 1,500km); EUR400 (for flights between 1500km and 3,500km); or EUR600 (for flights over 3,500km).

The above compensation entitlement will only be triggered if:

a) In the case of cancellation, the passenger was not informed of the cancellation more than 14 days before departure; and

b) There were no 'extraordinary circumstances' (Article 5.3 of the Regulation).

The above prescribed compensation is in addition to the right to a refund for any cancelled and therefore unused flight (as discussed further below).

Extraordinary circumstances

Under Article 5.3, an airline may be exempted from paying compensation if it proves that the cancellation was due to 'extraordinary circumstances' i.e. circumstances that could not have been avoided even if all reasonable measures had been taken.

These two words 'extraordinary circumstances' have attracted a huge amount of judicial attention in recent years with a number of notable decisions seeking to define what circumstances might be covered. It is generally accepted that the following circumstances will be regarded as 'extraordinary' under the Regulation: bird strikes; political or civil unrest; security risks; certain meteorological conditions or natural disaster making safe operation of the flight impossible; airport closure; medical grounds such as serious illness or death of a member of crew at short notice; and air traffic management decisions suspending or restricting operations.

The key question is: will the COVID-19 pandemic be regarded as 'extraordinary circumstances' under the Regulation?

The answer is more complex than a simple 'yes' or 'no'. It will depend on the exact reason a flight is delayed or cancelled, for example, whether there are government measures in place preventing air travel or a more acute situation of a passenger exhibiting symptoms prior to a flight departing, leading to passengers being disembarked and the flight being cancelled.

The European Commission issued Guidelines on 18 March 2020 which, whilst not binding, indicates that 'extraordinary circumstances' could be established in the below three COVID-19 related scenarios:

- Where public authorities prohibit certain flights (such as the entire country being placed on a 'lockdown')
- Where public authorities prohibit the movement of persons in a manner that, as a matter of practical reality, means the flight in question cannot be operated
- A cancellation which is shown to be justified on the ground of protecting the health of the cabin crew

An extraordinary circumstance may also be deemed to exist where no person would take a particular flight so that it would remain empty if it was not cancelled; the Commission has remarked that it would be appropriate for airlines to act in good time in these circumstances.

To be clear, if a flight is cancelled then passengers will still be due a refund and carriers will remain obligated to provide care and assistance, even in the event that those passengers are not entitled to compensation due to there being an 'extraordinary circumstance'.

The interpretation of 'extraordinary circumstances' in the context of COVID-19 is likely to evolve as we move into a post-COVID-19 world with the resumption of air travel. Carriers are likely to be faced with many different scenarios where flights are delayed or cancelled due to issues related to COVID-19.

Each cancelled flight will need to be assessed on an individual basis as both the EU Commissioner for Transport and the CAA have emphasised that airlines cannot use COVID-19 as a blanket excuse. Carriers will need to consider whether a clear link can be established between the extraordinary circumstances relied upon and the cancellation, and whether it took all reasonable measures to avoid having to cancel that flight.

Reimbursement and rerouting

The Regulation requires carriers to provide the following options in the event of a cancellation: reimbursement (refund); rerouting at the earliest opportunity; or rerouting at a later date at the passenger's convenience.

It may of course prove impossible to offer rerouting of passengers during the pandemic, particularly rerouting at the earliest opportunity i.e. within a reasonable time. It might even be impossible for air carriers to give an estimate as to when it can resume operations to certain countries.

Reimbursement or voucher?

Pursuant to the Regulation in its current form, a passenger is entitled to a full refund of the cost of the ticket, at the full price paid for the ticket, within seven days. This includes for parts of journeys which have already been made, if the outstanding part of the journey is cancelled. There is, however, the provision in Article 8 that confirms that payment of any reimbursement to the passenger shall be in accordance with Article 7(3) which allows for the airline to provide travel vouchers to passengers, where the passenger has provided their signed agreement to the same.

The European Commission's guidance published in March 2020 emphasises that passengers will be entitled to a full cash refund, and not just a voucher, where their flight is cancelled.

The non-binding nature of the Commission's guidance and the alleged lack of clarity of the recommendations has resulted in criticism from the industry represented by International Air Transport Association (IATA), Airlines International Representation in Europe (AIRE), Airlines for Europe (A4E) and European Regions Airlines Association (ERA) which all advocate for the Regulation to be temporarily amended to allow carriers to defer reimbursement by providing vouchers during these unprecedented times.

There is growing debate around this temporary voucher solution with Thomas Reynaert (managing director of A4E) stating that whilst passengers have a "clear right to reimbursement of their tickets, we believe refundable vouchers, or a delayed reimbursement, represents a fair and reasonable compromise given the unprecedented liquidity situation airlines are currently facing".

Montserrat Barriga, Director General of ERA has gone as far as to say that "amending EU261 is key to survive this catastrophic situation that will otherwise ultimately damage the consumer and lead to higher prices and fewer routes".

Despite the ongoing debate, the Commission published guidance on 13 May 2020 confirming that passengers have the choice between reimbursement and a voucher for those flights cancelled by carriers which fall under the Regulation. The Commission highlights within this guidance that there is a growing concern that vouchers may never be honoured in the event of a carrier becoming insolvent. The guidance suggests that the aviation industry

works towards making vouchers a more attractive option to passengers, alluding to the need for vouchers to be protected against any insolvency situation, potentially via insurance arrangements or even government backed arrangements.

The Commission has made some recommendations to assist airlines in making vouchers more attractive to passengers. These recommendations include: that vouchers have an extended validity period at a minimum of 12 months; where a voucher with an extended validity period has been issued, passengers should have the right to request reimbursement no later than 12 months following the issue date of the voucher; passengers should be able to use vouchers against a new booking made before the expiry of the voucher, even if travel takes place after the expiry of the voucher; passengers should be able to use the vouchers towards payment for any transport or package travel offered by the carrier; airlines should ensure that (irrespective of any fare/price differences) the passenger is able to travel on the same route under the same services conditions as their initial booking; and issuing vouchers with a higher value than the amount of any payments originally booked (this could be an additional lump sum or additional service elements).

The Commission has also recommended that consumer and passenger organisations at both union and national levels encourage passengers to accept vouchers that include the above characteristics. It remains to be seen whether the aviation industry will now begin to lobby the UK government to create a public backed temporary voucher scheme to ensure full protection for passengers in the event of airline insolvency and to ensure eventual reimbursement is provided in those circumstances. However, the Commission's guidance is currently that passengers are entitled to a choice between reimbursement rather than a voucher if they so choose. Therefore, whilst making vouchers a more attractive option, ultimately the vast majority of passengers are likely to choose a cash reimbursement given the uncertain future of air travel.

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New proposal for the revision of Regulation (EC) n°261/2004: what could be the main changes for airlines?

Background

Regulation (EC) 261/2004 ("Regulation EU261") was introduced to protect the quality of service delivered to air passengers in Europe and by European carriers by implementing rules on compensation and assistance in the event of denied boarding, cancellations, long delays and involuntary downgrading. The scale of its potential impact is considerable. According to Steer, in 2018, among flights within the scope of Regulation EU261, 1.4% of flights were delayed over 2 hours and 1.7% of flights were cancelled. Among 1,120,837,000 passengers who travelled in 2018, 3.1% of them were affected by these events.

Throughout the years, this Regulation has proved contentious and this has led to a large number of considerations of it by the Court of Justice of the European Union ("CJEU"). The CJEU has in turn extended the scope of the regulation, interpreting it in ways that can be said to violate legal certainty. Most notoriously, the CJEU extended Regulation EU261's Article 7 right to compensation to situations of long delay in arrival by its *Sturgeon* decision, a right not contained in the Regulation itself and which has extended its scope significantly.

A 2019 study into Regulation EU261 by the European Regions Airline Association ("ERA") shows that the airlines considered in their report have increased by 326% the amount spent on passengers in respect of Regulation EU261 compensation, care and assistance costs since 2016. Furthermore, those costs spent were approximately 296% more than the price the passengers pay for their tickets.

The compensation payable under Regulation EU261 is almost automatic as the passenger does not need to prove a prejudice to obtain it and the only available defence (the 'extraordinary circumstances' defence) has been severely cut down by successive decisions of the CJEU. The main consequence has been the establishment of claim agencies, and according to the ERA study, 50% of compensation is given to agencies, rather than to passengers directly, with the passenger then, in some cases, having to pay up to 50% of their compensation to the claim agency. A number of their practices have also been highlighted as problematic by passenger representatives.

The controversies listed above demonstrate the urge to revise this regulation. The European Commission have had this revision on their agenda since 2012, and submitted their first proposed revision in 2013. Despite two years of debate in the European Parliament, this proposal was dropped. The Commission mandated Steer in 2019 to complete a study which reported the main developments in air passenger rights since the Commission's revision proposal in 2013. For this report Steer interviewed the stakeholders of the industry such as airlines, airports, consumers associations, passengers and authorities. On 13 February 2020, the Croatian presidency of the Council of the EU released a new proposal amending the Commission's proposal from 2013.

New proposal

The main proposed amendments to the current Regulation EU261 are the following:

- The passenger does not receive compensation in these cases:
  - The cancellation or delay is caused by extraordinary circumstances or unexpected flight safety shortcoming and could not have been avoided even if all reasonable measures had been taken;
  - The cancellation or delay occurs on the connecting flight operated entirely outside the EU; and
  - The cancelled or delayed flight arrives at/departs from an airport: (a) with an average passenger traffic of less than 1 million per year; or (b) situated in an outermost region of the EU; or (c) served on the basis of public service obligation as prescribed by Article 16 of Regulation (EC) 1008/2008.
- The passenger can claim compensation if upon cancellation they are offered re-routing which results in an arrival time, or otherwise suffers a delay in arrival, of more than:
  - 5 hours for journeys of 1500km or less;
  - 9 hours journey between 1500 and 3500km, as well as for intra-EU journeys over 3500km; and
  - 12 hours for extra-EU journeys of 3500km or more.

- Amounts of compensation are the same for each category of journey (rather than increasing with journey length as at present)
- Compensation should be paid within 10 days of the passenger's request
- If the cancellation, missed connection or long delay is caused by extraordinary circumstances, the air carrier may limit the accommodation to be provided to a maximum of 3 nights

This proposal also provides an exhaustive list of circumstances considered as extraordinary, which could be a major change for airlines and jurisdictions if it is adopted by the EU Parliament. Among this list of twelve extraordinary circumstances are the environmental disasters, a meteorological condition, a collision of birds or other animals, a disruptive passenger behaviour endangering the safe operation of the flight or a hidden manufacturing defect.

Comment

As explained above, Regulation EU261 is a financial burden for carriers and its revision is necessary. One of the reasons is the uncertainty of what is considered to be an extraordinary circumstance, along with the limitation of situations in which this defence can be used in practice. The exhaustive list of these circumstances in the revision should finally cease the discussions between European jurisdictions and give airlines legal certainty. Moreover, European courts have been congested over the years with claims relating to this regulation and this revision could reduce considerably the number of litigated claims.

The proposed revision on the extraordinary circumstances defence to expressly include an unexpected flight safety shortcoming also puts safety back at the centre of passengers' interests. Unlike the ongoing CJEU approach, which creates a potential conflict between the interests of safety and commercial interests by putting unnecessary pressure on the carrier proceeding with a flight so as to avoid incurring any compensation obligation and by doing so risk compromising flight safety.

This proposed revision also extends the timeframe for delays qualifying for compensation, which is currently 3 hours. Passengers would only be entitled to claim compensations for delays of 5 hours, or up to 12 hours for extra-EU journey of 3500km or more. This will significantly reduce the number of claims eligible for compensation.

Another considerable change for airlines would be the 10 days period after the passenger's request for the airline to answer and pay compensation. This is especially so for major carriers selling journey with stop overs, rather than simply selling point-to-point tickets. Airlines will have to set up a new process to respect this time requirement. This brings up another problem as to whether airlines could be sanctioned if they do not manage to comply with it. Furthermore, the 10 day time requirement would reinforce a contradictory timeframe between airlines and consumers. The time limit for passengers to bring an action depends on national rules. These are varied and long, for example in England the time limit is six years, and in France it is 5 years.

A carrier therefore remains exposed to claims for a considerable time but with this revision the airline would have to answer the claim within 10 days and gathered evidences of an extraordinary circumstance for a flight that could have been cancelled several years ago.

Conclusion

Since its implementation, Regulation EU261 has had a major impact on airlines finances. The extension of its scope by the CJEU has generated a violation of legal certainty for carriers whom cannot anticipate outcome of judgments as they should be able to.

The decision of the CJEU dated 11 June 2020 in *LE v. Transport Aéreos Portugueses* is a further example of the burden that the Court places on carriers. The third ruling of the judgment is about what constitute a 'reasonable measure' which releases the carrier from its obligation to pay compensation. The judges held that this element of the extraordinary circumstances defence would not be satisfied unless there was no other possibility of direct or indirect re-routing by a flight operated by the carrier itself or by any other air carrier and arriving at a time which was not as late as the next flight of the air carrier concerned, or unless the implementation of such re-routing constituted an 'intolerable sacrifice' for that air carrier in the light of the capacities of its undertaking at the relevant time, which is a matter for the national court to assess. Once more, the ambiguous drafting of the Regulation has therefore led to an extensive interpretation, to the detriment of the carrier.

Thus, the revision of this Regulation is crucial for the carriers and despite some weak points in the proposed revision such as the 10 days claim response requirement, it represents a step towards a fairer balance between the interests of passengers and airlines. Many of the new elements if there are adopted would alleviate the financial costs for carriers. Hopefully this revision will not suffer the same destiny as the 2013 proposed revision.

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Fall down airstairs not an 'accident'

On 13 December 2019, the District Court of Western Australia held in *Anderson v Network Aviation Pty Ltd* [2019] WADC 175 that a slip on airstairs that are not defective is not an 'accident' under Article 17 of the Montreal Convention 1999 (MC99), which is given force in Australia by the *Civil Aviation (Carriers' Liability)* Act 1959 (Cth).

In *Anderson*, the claimant was disembarking a Fokker 100 aircraft at Solomon Mine Airport in Western Australia via a set of airstairs which were wheeled up to the door of the aircraft. As the claimant went to leave the aircraft he placed his foot on the top platform edge of the airstairs and reached out to grab the handrail with his right hand when he felt his heel catch on something. The claimant could not explain what his foot caught on but said that '*it sort of stopped me stepping onto the next step*'. The claimant subsequently lost balance and fell down eleven steps hitting his left shoulder and head on the tarmac.

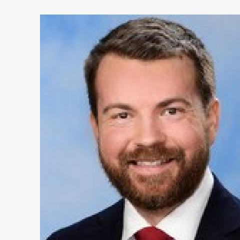
The evidence at trial revealed that the airstairs were constructed with an aluminium tread plate which had a regular diamond pattern. The airstairs had a yellow coloured anti-slip tread made of fibreglass which was applied to the leading edge of each step. The airstairs were inspected daily by the ground crew and there was no evidence suggesting that the airstairs malfunctioned or that there was any defect with the anti-slip tread.

The trial Judge, finding for the defendant, applied the international decisions of *Air France v Saks, Barclay v British Airways and Chaudhari v British Airways* and held: "Instances of tripping or slipping, where no part of the aircraft malfunctions and no item of equipment is defective and causative in the incident, do not come within the convention".

This decision is welcome news for airlines and air carriers as there was some uncertainty to how common slip and fall cases would be treated by courts following the English High Court decision in July 2019 in *Labbadia v Alitalia* (the subject of an article in our Newsletter of February 2020). In *Labbadia*, a slip on airstairs at Milan Airport in snowy weather conditions was found to be an 'accident' under MC99 because the airport personnel decided to use a set of uncovered airstairs and did not clear away compacted snow and ice from the airstairs prior to disembarkation. These events were contrary to the requirements set out in the airport operations manual and were found to be 'unexpected and unusual'.

The *Anderson* decision can be contrasted with the very specific chain of events in *Labbadia* and maintains the general legal position that slip and fall incidents on airstairs will not constitute an 'accident' under MC99 unless there is something 'unusual or unexpected' about the situation external to the passenger.

For further information, please contact **Brent Fowler** in our London office.



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Aviation risk and insurance webinars

IATA and Clyde & Co were delighted to recently host a series of three Coronavirus risk and insurance-related webinars. Please use the links below if you were unable to attend any of the sessions or forward this if any of your colleagues might find the topics interesting.

COVID-19 - The risks of (near) insolvency

COVID-19 - Risk & insurance implications for employers & for remote operations

COVID-19 - Passenger liability implications and mitigation

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