

Newsletter

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Aviation and the new Trump Administration

Transportation policy issues played an important role in the recent United States presidential election. Amongst the often contentious and vitriolic debate, improving and modernising the transportation infrastructure of the United States was one area upon which the candidates, and most Americans, agreed.

Newly sworn-in President Donald Trump has called for a considerable transportation infrastructure initiative, indicating a particular interest in improving aviation infrastructure. While airport and air traffic control modernisation may be the early aviation focus of the Trump Administration, there are several other aviation issues which will need to be addressed.

President Trump signalled the importance he places on transportation issues by naming the experienced Elaine Chao as his nominee for Secretary of Transportation. Ms Chao served as head of the Federal Maritime Commission under President Ronald Reagan, as a deputy transportation secretary under President George H. W. Bush and as Secretary of Labour under President George W. Bush. Ms Chao is also married to Senate Majority Leader Mitch McConnell (a Republican Senator from Kentucky). Ms Chao's experience and familiarity with Capitol Hill may serve to smooth the inevitably difficult congressional transportation budget negotiations.

For the time being, it appears that Michael Huerta will continue in his role as Administrator of the Federal Aviation Administration ("FAA") and serve out his five-year term which is due to expire in January 2018. This will provide some consistency at a time when the FAA is undertaking many important initiatives, including the implementation and enforcement of new rules applying to the operation of unmanned aircraft systems.

It is worth recalling that President Trump has personal experience of the airline business; through his ownership of the Trump Shuttle some years ago.

Looking ahead, there are several areas in which the Trump Administration may have a significant impact on aviation issues.

Aviation infrastructure

President Trump has proposed a USD\$1 trillion spending initiative on transportation infrastructure over the next decade; specifically highlighting the need for improved airports and the long-overdue modernisation of the US air traffic control system.

Airport infrastructure in the US is badly in need of investment. Anyone who has flown into major international and domestic hubs in the US, such as LaGuardia or JFK in New York, O'Hare in Chicago or Dulles serving Washington, DC, recognises that these airports are overdue for improvement. This is particularly so in light of international airports competing with US airports for travel and trade business, such as Dubai International or Changi Singapore, which have surpassed the major US airports in terms of capacity and quality.

A major part of the proposed initiative promises to be changes to the US air traffic control system; however, what those changes may be is yet to be fully determined. Foremost will be efforts to finally provide the FAA with the funding and support needed to migrate to the satellite-based NextGen air traffic control system. This important modernisation of the antiquated national air traffic control system has long been held up over disputes regarding proposals to privatise or create a government-owned corporation to oversee the system. These proposals have met with a varying degree of support from aviation industry interests, but are strongly opposed by labour groups.

Of course, the overall price tag of this enormous initiative will be hotly debated in Congress. Congressional leaders and budget hawks will be very hesitant to add this cost to the Federal deficit; likewise, any proposed transportation (or general) tax increases will not be greeted favourably. Based upon these concerns, funding mechanisms such as public-private partnerships and private investments in return for tax incentives have been put forward. However, similar programs have historically met with little interest or success. Therefore, at this time, it is unclear how (or if) President Trump's proposed initiative may be paid for.

International agreements

Generally

During the campaign, President Trump signalled that he would seek to withdraw from or renegotiate international trade agreements entered into by the US by his predecessors. On his first full day in office he carried through on this promise by Executive Order, pulling the US out of the world's biggest trade deal, the Trans-Pacific Partnership. He has also indicated an interest in scrapping NAFTA and certain WTO agreements.

While the stated goal for attacking these trade agreements is the preservation and eventual re-growth of manufacturing jobs in the US, from an aviation industry perspective there are concerns that this may have the opposite effect. As international industries by their very nature, aviation manufacturing, transportation and cargo delivery rely on the free movement of goods. A strict protectionist trade policy may see aircraft orders decrease and parts supply chain issues increase for companies such as Boeing or Lockheed Martin, decreased airline traffic between certain regions for carriers such as Delta and United and decreased delivery opportunities for companies such as UPS and Federal Express – along with potential corresponding job losses within each sector.

It is yet to be seen how far the Trump Administration is looking to go in this regard. For instance, President Trump has indicated his dissatisfaction with major US aircraft manufacturers for the size of their defence contracts, and specifically called out Boeing's contract for delivery of future versions of Air Force One; however he has since met with representatives from these companies to negotiate proposed cuts in corporate tax rates and efforts to maintain manufacturing facilities in the US. These discussions may open the door to ensuring that aviation industries in the US are not significantly impacted by further protectionist policies.

Open Skies agreements

The US is a party to more than 100 Open Skies agreements which have resulted in greater competition, lower airfares and increased routes to hundreds of international destinations. For the most part, US airlines have supported Open Skies agreements as they provide rights to serve many key international destinations as often as they wish. However, the Big Three US carriers Delta, United and American have sought Executive action against the Gulf carriers Emirates, Etihad and Qatar arguing the Gulf carriers have significantly increased their US operations in violation of the terms of the relevant Open Skies agreements.

Specifically, it is alleged that the Gulf carriers have improperly received subsidies from their governments that put US domestic carriers at an unfair disadvantage.

Many US aviation interests do not agree with the Big Three on this issue; particularly airport interests who see increased passenger numbers, smaller carriers who gain open access to increased route opportunities and cargo companies who take advantage of Open Skies agreements to more efficiently operate their global delivery services.

The Obama Administration resisted calls from the Big Three to temporarily ban the Gulf carriers from adding new US routes, allowed loan guarantees through the Export-Import Bank for the purchase of Boeing aircraft by the Gulf carriers and did not engage in official consultations with the governments of Qatar and the United Arab Emirates to discuss unfair trading practices.

Given the Trump Administration's more protectionist leanings, the Big Three may receive a more sympathetic reception to their subsidy dispute with the Gulf carriers.

International sanctions

Sanctions in place against several nations greatly impact the aviation industry. These sanctions restrict the ability of aircraft manufacturers to sell their products to the subject nations and prevent air carriers from establishing potentially profitable routes to these countries. Further, the sanctions place broad general restrictions on individuals and companies from doing business with these countries; and likewise place financial and travel restrictions on individual and corporate nationals of the subject nations.

Russia

During the election, much was made of reports of supposed close relations between President Trump and Russian interests. Regardless of the veracity of these reports, all indications are that the US and Russia will have much closer relations under the Trump Administration than any other recent administration. What this means in terms of the international sanctions in place against Russia is yet to be seen; however, any softening of the sanctions regime will benefit the aviation sector, with increased aircraft orders and airline passenger and cargo traffic being likely consequences. Further, Russia has long been recognised as a major region for the business jet sector, which could see significant benefits from any relaxation of sanctions.

Iran

President Trump has indicated his concerns with the ground-breaking nuclear agreement reached between the Obama Administration and Iran which, among other things, opened diplomatic channels between the two countries and relaxed sanctions that have been in place since 1979. The relaxed trade restrictions permitted the Treasury Department to grant a license to Boeing to sell 80 aircraft to Iran's national carrier, Iran Air - which is estimated to amount to a USD\$16 billion deal.

President Trump has stated that he considers the nuclear agreement to be "the worst deal ever made", however, given the support it enjoys in the international community it may prove a difficult agreement from which to withdraw. It will be interesting to see in which direction the Trump Administration chooses to go forward.

Cuba

During the election, President Trump warned that he is prepared to roll back the Obama Administration's opening of diplomatic relations with Cuba that many see as a gradual and inevitable normalisation of relations. In response to these efforts, and in anticipation of eventual full freedom of movement between the neighbouring countries, US carriers have begun regularly scheduled commercial flights to Havana. Obviously, should President Trump choose to revert to the formerly icy relationship between the two countries, these aviation opportunities would be curtailed.

Climate change

While on the campaign trail, President Trump repeatedly indicated that he believes climate change to be a 'hoax' and that he would "cancel" the Paris climate change agreement.

An early indicator of President Trump's stance on climate change will come with the anticipated implementation of aviation emission rules. In October 2016, the general assembly of the International Civil Aviation Organization ("ICAO") adopted standards for new aircraft designs to take effect in 2020. This measure was supported by the US and dozens of other countries and requires a minimum level of jet engine fuel efficiency. Federal authorities must now write these standards into law; however, the Trump Administration may choose to delay their enactment.

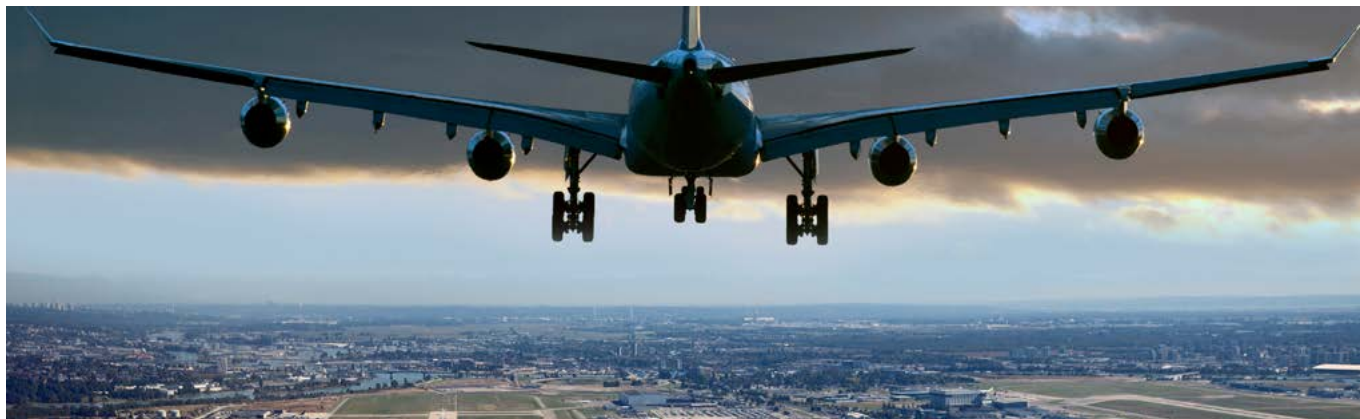
President Trump will be under some pressure from US aircraft manufacturers who supported these measures and fear that failure to adopt these standards would create uncertainty as to their ability to sell their aircraft overseas in countries which adopt the new rules. Further, powerful lobbying interests such as the National Association of Manufacturers have already called upon the Trump Administration to commit to the ICAO standards in order to maintain a level playing field among international aircraft manufacturers.

Aviation security

Other key policy areas for the Trump Administration are immigration and national security, which the Trump Administration sees as going hand in hand. This was dramatically brought into focus by President Trump's controversial Executive Order halting all refugee admissions into the US and temporarily barring people from seven Muslim-majority countries from entering the US. This move had the immediate effect of creating worldwide travel chaos for passengers and confusion for international airport security authorities, airports and air carriers; entities the Trump Administration then held responsible for the disorder. At the time this bulletin goes to print, it is unclear what long term impacts this decision, and the global reaction to it, may have on aviation interests, both domestically and internationally. What is clear from this decision and its fallout is that a significant increase in funding for aviation security and border controls at airports is a likely component of a first Trump budget.

Further, there will be a probable review and/or restructuring of the Transportation Safety Administration ("TSA"); moves which may be welcomed by officials on both sides of the political aisle. Following its creation by the George W. Bush Administration in the wake of the September 11th terrorist attacks, the TSA quickly developed and maintained a reputation for being overly bureaucratic, mismanaged, arbitrary and ineffective. As a result, President Trump may put forward proposals to address these shortcomings in either a national security initiative or as part of his interest in overhauling the federal employee system.

For further information, please contact **Dylan Jones** in the London office.



Brexit and aviation - update

In our special issue Bulletin issued on 27 June, we gave an early view of the main EU air law consequences of Brexit. Essentially, these are that, unless and to the extent that some replacement arrangement is agreed and put in place:

- UK airlines will cease to be Community carriers, and hence cease to benefit from the free access to routes in the EU given by Regulation 1008/2008
- the requirement that UK airlines be majority owned and effectively controlled by EU nationals will no longer apply, although the UK could continue to apply such a requirement, or could introduce a new, different requirement
- the UK will no longer be party to agreements between the EU and third countries (in particular the US) granting access to traffic rights
- the UK will no longer be a member of EASA
- the single sky legislation will no longer apply to the UK
- all the other various EU legislation affecting aviation (such as Regulation 261/2004 and other passenger protection legislation, and legislation relating to airports) will cease to apply to the UK.

Where are we now? And what is likely to happen?

Read the June Bulletin:

www.clydeco.com/blog/brexit/article/the-eu-air-law-consequences-of-brexit-for-the-uk

Although seven months have passed since then, it is not yet any clearer whether and if so to what effect such replacement arrangements will be proposed or sought, let alone whether they are likely to be agreed.

However, in her speech on 17 January, the Prime Minister gave some important indications as to the UK's general policy and approach. She made it clear that the UK is leaving the EU, including the single market, and that the UK will not seek to hold on to "bits of membership" or adopt a model already enjoyed by other countries. At the same time, the UK will pursue "a bold and ambitious Free Trade Agreement with the EU" that "should allow for the freest possible trade in goods and services between Britain and the EU's member states".

What does this mean for aviation (not specifically mentioned in her speech)? It could be said to suggest a somewhat contradictory approach - that on the one hand we would not wish to remain part of the European Common Aviation Area, while on the other we should seek some very similar sort of arrangement. However, the two objectives need not necessarily be contradictory, if continued effective membership of the EU single aviation market is achieved by way of a bespoke comprehensive free trade agreement, rather than by becoming party to an existing agreement such as the ECAA Agreement or by a specific aviation deal.

The crux will obviously be whether the remaining 27 EU Member States are willing to agree to this. While initial general indications from the EU side may not have appeared very helpful, the recent indication by Michel Barnier that there might be a case for a special deal relating to the City and financial services, because of its importance to the EU, opens the possibility of a similar constructive approach to aviation, for similar reasons, albeit as part of a comprehensive package.

If there is to be any real prospect of such a special deal for aviation, it will be important to get the message across to the Commission and the governments, electorates and business lobbies in the EU Member States that such a deal is in the interests of industry and passengers not only in the UK, but also in all EU Member States.

The single EU aviation market, in which UK airlines and passengers play a major role, brings significant benefits to users of air transport, airports and the tourism business throughout the Member States, which will be jeopardised if the UK is not permitted to continue to participate. Furthermore, UK exit threatens not only UK airlines and interests, but has direct possible adverse effects on non-UK airlines and interests in various ways, including in particular:

- Although they will continue to be Community air carriers, and benefit from other continuing provisions of Regulation 1008/2008, non-UK airlines which have significant 5th or 7th freedom services involving a point in the UK, such as Ryanair, Wizz Air and Norwegian, will no longer automatically be entitled to operate these services.
- Certain airlines are established in the UK but owned and controlled by other EU nationals - such as Thomas Cook and TUI. If the UK were to introduce a new requirement of ownership/control differing from that in Regulation 1008/2008, such airlines could be at risk of losing their UK operating licence.
- Unless continuing participation is agreed, the UK will no longer be party to the EU/US open skies agreement, and the Bermuda II Agreement between the UK and the US, which has been dormant, will come back to life - including its limitation to US carriers operating at Heathrow! Partly for this reason, it is highly unlikely that this situation will be allowed to arise. While also perhaps not very likely, it is not impossible - particularly given the apparent state of relations between the EU and the new US Presidency - that the US could seek and conclude a separate bilateral deal with the UK and, having secured its principal objective, continued access to Heathrow, give notice of termination of the rump of the agreement with the EU, or at least threaten to do so.

"In her speech on 17 January, the Prime Minister also made it clear that the European Communities Act 1972 will be repealed (and with it the body of existing EU law - the "acquis") but at the same time such acquis will be converted into British law, so that the same rules and laws will continue to apply unless and until the British Parliament decides on any changes.

Hence, laws such as Regulation 261/2004 will continue to apply as they do at present, with necessary consequential amendments, unless and until Parliament decides to repeal it (highly unlikely) or amend it (less unlikely). The retention of the EU 'acquis' will not of course have the effect of conferring rights under EU law on UK nationals, except to the extent that such rights are conferred by any trade agreement concluded with the EU."

Competition law

While the question of the continued application of EU aviation legislation will depend on the agreement reached between the UK and the EU, there will be less uncertainty and possibility of change as far as competition law is concerned. This is because EU competition law applies in any event to any agreement (formal or informal), including cartels, alliances, or abuse of a dominant position, which affects trade between Member States, irrespective of whether the party or parties are located within the EU. Agreements or abuses which produce effects confined to the UK would be outside the scope of EU competition law, but UK competition law on agreements and abuses closely mirrors EU law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)) so such practices would continue to be subject to those very similar national laws. ‘Block exemption’ regulations exempting categories of agreements such as vertical or technology transfer agreements, would no longer apply in the UK, but agreements which comply with them would remain exempt under EU law.

Articles 101 and 102 TFEU would, however, no longer apply in the UK and the jurisdiction of the European courts would cease. The UK would, therefore, have the ability to investigate and reach its own conclusions in cases which currently fall within the exclusive jurisdiction of the EU, which could be a benefit, but would require additional resources. It may be that the UK authorities and courts may be required, at best, to ‘have regard’ to the jurisprudence of the EU courts. This could potentially result in a divergence of jurisprudence. These and related issues are discussed in detail by the First Roundtable of the Brexit Competition Law Working Group (‘BCLWG’), a body set up to develop policy suggestions for the UK Government.

First BCLWG Roundtable, 23 November 2016, see:

http://www.bclwg.org/activity/bclwg-note-first-roundtable?_sf_s=roundtable

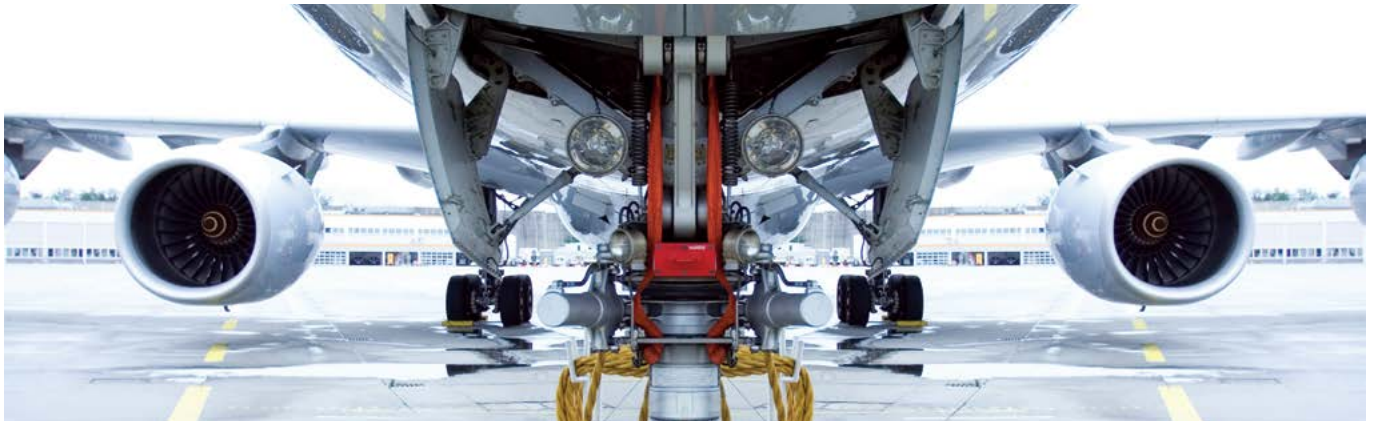
Mergers or joint ventures within the meaning of the EU Merger Regulation 139/2004 (‘EUMR’) would continue to be subject to the compulsory notification regime to the European Commission, if the relevant global, EEA and/or EEA Member State turnover thresholds are met. The ‘one-stop principle’, whereby EU national authorities have no jurisdiction over mergers caught by the EUMR, will no longer exclude the UK authorities from claiming jurisdiction over such mergers, thus requiring notification to both UK authorities and the Commission, unless it is provided for in the EU/UK agreement. The BCLWG has set out possible options to enable the Competition and Markets Authority to deal with the expected increase in workload, an anticipated 50 extra merger investigations annually. These have included the possibility of not conducting an in-depth investigation if it appears that a parallel review by the Commission would result in an effective remedy.

Second BCLWG Roundtable, 5 December 2016, see:

http://www.bclwg.org/activity/bclwg-note-second-roundtable?_sf_s=roundtable

As regards state aid (Articles 107-109 TFEU), the UK would no longer be prohibited by EU law from granting subsidies or other advantages to undertakings such as airlines or airports, nor would UK companies be able to invoke EU state aid rules as against other EU states or undertakings. It may be that such matters would be the subject of a trade agreement reached with the EU in the event of the UK leaving the EU. In any event, action could, in theory, be brought against the UK under Regulation 868/2004 which prohibits unfair subsidies granted by third countries to airlines. Regulation 868/2004 has never been invoked, let alone resulted in enforcement action by the Commission, and is currently subject to review.

For further information, please contact **John Milligan** or **John Balfour** in the London office



The disclosure of data arising from accident investigations

Following an Application by the Sussex Police for sight of various data items held by the Air Accidents Investigation Branch (“AAIB”) arising out of the tragic accident at the Shoreham Airshow, in *Chief Constable of Sussex Police v Secretary of State for Transport* [2016] EWHC 2280 (QB) the English High Court confirmed that it remains the sole authority for disclosure of data collected by the AAIB in its investigation of air accidents.

The decision was indicative that any future requests for disclosure are likely to be construed narrowly, with the Court more likely to conclude the adverse domestic and international impact of disclosure outweighs any benefit. However, pilots may still have areas for concern.

The request

On 22 August 2015 a Hawker Hunter crashed while performing at the Shoreham Airshow, West Sussex. The incident killed 11 people and injured several more, but the pilot survived. Pursuant to its authority under EU Regulation 996/2010, the AAIB investigated the incident, which included the retrieval of various items from the crash site, interviewing key witnesses (including the pilot himself) and undertaking various tests and analysis of the available data.

As part of the police investigation into the accident, the Chief Constable of Sussex (“the Chief Constable”) made an Application for disclosure of certain items pursuant to Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (“the 1996 Regulations”).

Specifically, the Chief Constable sought material which fitted into three categories. Firstly, there were witness statements made in response to interviews or discussions with the pilot. Secondly, contemporaneous evidence from the flight itself, specifically film footage of the flight recorded by cameras that had been installed on the aircraft on a voluntary basis; and thirdly, material produced by various people subsequent to the accident, for example experiments conducted and tests done on various aspects of the flight.

The AAIB, represented by the Secretary of State for Transport, did not resist the Application and the AAIB’s official position was that it was a matter for the Court to

determine whether disclosure should be made having carried out the balancing exercise between different public interests which is required by Regulation 18. The British Airline Pilots Association (“BALPA”) made submissions in opposition to the Chief Constable’s Application to the effect that the Court could not order disclosure in a case unless the criteria for issuing a Production Order in the Police and Criminal Evidence Act 1984 (PACE) were satisfied.

The legal regime

The background to the investigation of air accidents can be found in international treaty, namely the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, better known as the Chicago Convention (“the Convention”). Of particular relevance is Annex 13 (now in its 10th edition) to that Convention.

Paragraph 5.12 of Annex 13 states that, amongst other things, all statements taken from persons by the investigation authorities during the course of their investigation, cockpit airborne image recordings and any part of transcripts from such recordings, and opinions expressing the analysis of information including flight recorder information shall not be disclosed by the State conducting the investigation of an accident unless the appropriate authority for administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations.

Section 60 of the Civil Aviation Act 1982 provides for the making of an Order in Council for carrying out the Convention and any Annex thereto relating to international standards and recommended practices and generally for regulating air navigation. Further, Section 75 provides that any person who contravenes regulations made under Section 60 shall be guilty of an offence. The Secretary of

State has indeed made regulations under Section 60 about air accident investigations – the 1996 Regulations.

The 1996 Regulations themselves originally implemented the obligations of the UK under Council Directive 94/56/EC of 21 November 1994 (“the Directive”) establishing the fundamental principles governing the investigation of civil aviation accidents and incidents. The Directive has now been repealed and replaced by Regulation 996/2010 (“the EU Regulation”), which came into force on 2 December 2010.

It is a fundamental feature of the Convention, and the subsequent EU and UK regime, that investigations into air accidents have a single objective. That objective is the prevention of accidents and incidents, and importantly not to apportion blame or liability. This is clearly set out in Article 3.1 of Annex 13 to the Convention, Article 5(5) of the EU Regulation and Regulation 4 of the 1996 Regulations.

Of particular importance to the Application in this matter were the relevant provisions in the EU and UK regimes, namely Article 14 of the EU Regulation and Regulation 18 of the 1996 Regulations.

Both contain broadly similar wording (although not identical) enshrining into both English and EU law that all statements taken from persons by the safety investigation authority in the course of the safety investigation, material subsequently produced during the course of the investigation and cockpit voice and image recordings and their transcripts should not be made available or used for purposes other than safety investigation unless the administration of justice or the authority competent to decide on the disclosure of records according to national law decides that the benefits of the disclosure of the records outweigh the adverse domestic and international impact that such an action may have on that or any future safety investigation.

The Chief Constable (and the AAIB) accepted when making the Application that the records sought and held by the AAIB were given a protected status under the applicable legal regime. Accordingly, the AAIB was unable to disclose the items unless an Order was made by the High Court.

Legal precedents

What was remarkable about this Application was that this was the first of its kind under English and Welsh law and there were only a handful of similar cases in other jurisdictions, including a decision in the Outer House of

the Court of Session in Scotland in which it was ordered that disclosure should be made of the cockpit voice and flight data pursuant to Regulation 18 of the 1996 Regulations. However, that decision was carefully worded to ensure that there was no precedent created. Internationally, there have been cases in Australia, New Zealand and Canada, all of which turned on their own facts or were concerned with the country in question. Accordingly, as this Application was the first of its kind to have been made in England and Wales the High Court was forced (with the assistance of the parties) to devise the appropriate procedure for an Application. As part of this process, some of the hearing (and accordingly some of the judgment) was conducted (and reported) confidentially to prevent any prejudice to a subsequent criminal trial.

The Court’s decision

Witness statements made by the pilot

The Court decided that the Application for disclosure of statements made by the pilot when interviewed by the AAIB would not be disclosable to the Chief Constable. This was for two main reasons. Firstly, there would be a “*serious and obvious chilling effect*” which would deter people from answering questions by the AAIB with the candour that was necessary when accidents had to be investigated by the AAIB. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which might help to prevent similar accidents. It was very clear, according to the Court, that disclosure would be contrary to the fundamental purposes of the Convention regime which was carefully designed to encourage candour in the investigations of air accidents in order to learn lessons and prevent future accidents.

Secondly, it would also be unfair to require such disclosure. This is because the powers of the AAIB compelled witnesses to answer questions, which is quite different to the powers of the police. Further, there was no clear practice of giving a caution to any individual being interviewed by the AAIB. The manner of an AAIB interview (used to obtain the fullest possible information for an accident investigation) contrasted dramatically with a police interview being used to illicit evidence which might be capable of being used in a subsequent criminal trial.

There was nothing to prevent the police from conducting their own interviews with the pilot and accordingly it was described as “*almost inconceivable*” that the statements could be ordered for disclosure.

Cockpit film footage

The Court ordered that the AAIB were to disclose the film footage from the aircraft in question to the Chief Constable. The Court distinguished between the film footage in the accident as separate from cockpit voice and flight data recording the latter being normally required as a matter of legal duty (distinguishing this case). The cameras concerned were installed on a voluntary basis and for leisure and private commercial reasons. It appeared that the intention was to use the film footage obtained during the Airshow as part of a broadcast.

Accordingly, the Court was not persuaded that pilots would be deterred in the future from installing such equipment on a voluntary basis as they would continue to do so for their own private and potentially commercial reasons.

Therefore, the Court concluded that the balance fell in favour of disclosure and the film footage had significant potential value for the police investigation as it was a contemporaneous recording of what happened during the flight.

Subsequent material created

This category was the part of the Application which was subject to strict confidentiality and this part of the hearing was heard privately. The judgment merely indicates that the Chief Constable's Application for disclosure was unsuccessful for the reasons set out in a confidential Annex to the judgment.

The material requested is simply detailed as data from test flights conducted by a specialist pilot and engineering reports on the mechanical state of the aircraft.

Conclusion

As part of the judgment, which clearly required a narrow amount of disclosure from the AAIB, various conditions were imposed on any further disclosure of the information by the Chief Constable, limiting it to a select number of uses.

What is abundantly clear from the decision is that the High Court is likely to take a narrow view of any disclosure request made by the police. In particular, it would appear that witness interviews conducted by the AAIB are extremely unlikely ever to be the subject of an Order for disclosure. While the Court did not go so far as to say that it would never order disclosure it seems that the circumstances would have to be truly extraordinary before such disclosure would ever be required.

The required disclosure of the film footage is not surprising as this would no doubt assist the police in their investigations and act as a purely factual contemporaneous record of the flight.

Having carefully considered the balance of interest the Court was not prepared to order disclosure with regard to the expert reports. While the exact reasons for the refusal to order disclosure are unknown, it is submitted that the decision is not surprising in that the police are more than capable of seeking their own expert advice in relation to the engineering state of the aircraft and / or conducting test flights if so required.

Following on from the decision in *Rogers v Hoyle* [2014] EWCA Civ 257, in which the Court of Appeal decided that AAIB reports were admissible in civil proceedings, and the effect that decision had on the candour of witnesses required by the AAIB to fulfil its function, the current case was of real importance to the aviation community to determine whether there would be any further erosion of the protection afforded to AAIB investigations and reports.

It is therefore reassuring for pilots and those involved with aircraft accident investigations that it has now been confirmed that the Court will pay careful attention to the balance of interest as required by the Convention. Further, there is clearly a significant hurdle for any applying police force to overcome in the event disclosure is requested. While the decision probably ensures that witnesses will continue to speak to the AAIB with candour, it remains to be seen whether the installation of cameras in the cockpit will decrease as a result of it. The High Court thought that this would not be the case, but now this legal precedent exists the advice provided to pilots may affect the manner in which flights are recorded above and beyond a pilot's legal duty.

For further information, please contact **Adam Tozzi** or **Alex Stovold** in the London office.



Is there a lawyer on board? Anticipating, preparing for and coping with in-flight medical emergencies

Medical emergencies, whether minor or major in nature, frequently occur 33,000 feet up in the air. In the US, medical emergencies occur on around 50 commercial flights a day.

The number of passengers travelling by air is increasing, with the International Air Transport Association (“IATA”) predicting that 7.2 billion passengers will travel by air in 2035, a near doubling of the 3.8 billion air travellers in 2016. This, combined with an aging population who are more mobile than ever before, and advances in medicine making air travel possible for those with medical conditions, is likely to lead to an increase in medical emergencies on board.

The key difficulty when looking at medical emergencies in the air and the potential legal repercussions arising, is the huge number of variables at play: different airlines with different procedures, different staff with differing skills, different training, different passengers on board (sometimes medically trained passengers are on board, sometimes they are not), different equipment requirements, different nationalities often with language barriers, pre-existing medical histories, contraindications to treatment, and the list goes on.

Medical emergencies in the aviation context present a challenge for carriers; practically, financially and legally. Staff must be trained, equipment must be supplied and maintained, and clear procedures must be in place.

What is a medical emergency?

It is a simple fact of life that people become unwell; but with an increase in air travel comes an increased risk that a passenger may become unwell whilst up in the air. A passenger may be struck down with an acute illness, creating a practical problem of caring for that passenger whilst keeping them segregated from other passengers to prevent the spread of infection. Alternatively, a passenger may require medical attention as a result of a pre-existing condition flaring up or somehow being exacerbated by the stress or conditions of flying.

The most common types of in-flight medical emergencies are syncope (temporary loss of consciousness from a sudden fall in blood pressure), gastrointestinal complaints

and respiratory symptoms. Common symptoms experienced by passengers include dizziness, shortness of breath, nausea, vomiting, chest pains and headaches. These can be directly correlated with the conditions on board and the actual experience of flying. These minor medical situations can and should be anticipated by carriers. However, such situations can be (relatively) straightforward to deal with by utilising medicines on board and by crew activating basic first aid training.

The environment on board an aircraft is unusual with reduced pressure, which is of particular significance for passengers with cardiovascular or pulmonary pathology, affecting respiration. In addition, the physical space constraints can cause medical problems, an issue well ventilated in the courts through the *DVT litigation*.

However, a medical situation on board can rapidly descend into an emergency with fatal consequences where a passenger suffers, for example, a heart attack, seizure, stroke or asthma attack, or even goes into premature labour. Such medical emergencies are a cause of concern as the ‘passenger-patient’ will require medical treatment and possible diversion of the flight. There are practical space constraints and limited medical equipment on board. There is also the added need to manage other passengers who may witness harrowing medical scenarios.

When illness or injury occurs on board, the crew are the first line of response and their actions can be the difference between life and death. Training of crew is vital: they suddenly have to be able to spot whether a passenger is drunk and unresponsive, or suffering a major brain haemorrhage; whether a passenger has acute appendicitis or just ate something dodgy at the holiday buffet. It is a huge responsibility and one which does not naturally fit into the role of cabin flight attendant. Situational based training with problem solving medical scenarios is therefore recommended, rather than a purely academic approach to learning procedure and the contents of a medical kit.

When training crew members, it must be remembered that passengers will have their own medical history which may complicate any treatment required, particularly if the passenger is uncommunicative and travelling alone. This may lead to a simplistic approach necessitated by the urgency of an unknown situation and the lack of information available.

However, crew members are not completely alone in dealing with medical emergencies on board. 'MedAire' was established in 1985 to provide assistance to carriers in preparing for and coping with medical emergencies. As part of this service, 'MedLink' was created to provide a 'call a friend' option to crew members, except this 'friend' is a qualified emergency doctor with an understanding of the environment on board and the equipment available. MedLink is the world's first global emergency response centre for aviation providing a direct link to ground medical staff via the aircraft satellite phone, radio or the aircraft communications addressing and reporting system. These doctors on the ground can provide guidance to crew members and assist with diversion decisions. It is a 24 hours a day, 7 days a week service with doctors able to communicate in over 140 languages. It is certainly a service that saves lives and one which should be utilised by the crew where appropriate.

The law of 'accident'

In terms of liability for a medical emergency on board, the key question is whether there was an 'accident' under Article 17 of the Montreal Convention 1999 ("MC99"). This article does not seek to focus on this legal topic but a brief outline is required in order to highlight the potential for legal consequences if proper procedure and training is not in place.

A carrier will be liable for death or bodily injury to a passenger if the accident which caused the death or injury took place on board the aircraft, or in the course of embarking or disembarking. 'Accident' was defined by the US Supreme Court in the case of *Air France v Saks* to be: 'an unexpected or unusual event or happening that is external to the passenger'. Therefore, in simple terms, if a passenger has a heart attack or suffers a stroke, this would, appear to be *internal* to the passenger and not an 'accident'.

However, difficulties may arise where the passenger has reacted to an external event which is unusual or unexpected in the circumstances (for example, a bump to the head following violent turbulence, resulting in a

neurological complaint), or if the carrier's own reaction to a passenger's medical emergency is regarded as an 'accident' under this definition (i.e. the crew fail to follow procedure).

In the case of *Olympic Airways v Husain*, the carrier's reaction to the claimant's asthma (in failing to move him into a non-smoking seat) was considered to be unexpected and unusual and therefore an accident under MC99. The court also stated obiter that a carrier's failure to react to a passenger developing an adverse medical condition may amount to an accident; however, this suggestion that a pure omission can amount to an accident under Article 17 has received judicial criticism.

Nevertheless, *Husain* highlights the importance of staff training to ensure that a medical emergency is dealt with in an expected and usual way in order to minimise future legal repercussions.

Further, clear procedures are needed to ensure medical conditions are not missed and that each situation is dealt with appropriately and in line with standard practice. The problem is that 'standard practice' does not exist. There is no statutory or binding guidance indicating an industry standard for reacting to medical emergencies on board; there is no 'gold standard' for carriers to adhere to.

Therefore, the crew need to be trained and clear guidance needs to be in place to reduce the level of criticism that can be directed at a carrier where decisions are made in relation to a patient's health. If a carrier is able to point to a guideline that each crew member is trained on and show that a passenger was treated in accordance with that guidance, in difficult circumstances, then it will be easier to argue that the actions taken were usual and expected.

Given the potential liability under MC99 and the potential damage to a carrier's reputation, medical emergency guidance, training and equipment should aim to meet the highest of standards.

Guidance and medical equipment on board

There is limited international guidance in the area of medical emergencies and equipment on-board aircraft.

The UK Civil Aviation Authority does not classify a medical emergency as an 'emergency' for the purposes of their generic guidance on handling emergencies. It will be classified as an emergency only if the pilot declares it as such, and then the usual guidance applies: *aviate, navigate and communicate* (see CAP 745 Aircraft Emergencies).

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Furthermore, the decision whether to divert a flight due to a medical emergency on board rests with the pilot.

There is an International Civil Aviation Organisation (“ICAO”) Standard (which is mandatory) for on board medical supplies and this requires that an aircraft is equipped with ‘accessible and adequate medical supplies’ including one or more first aid kit. If the aircraft is to carry more than 100 passengers on a sector length of more than two hours, then a medical kit is required for the use of medical doctors or other qualified persons in treating in-flight medical emergencies. However, the types of medical supplies to be carried within each kit are contained in non-mandatory recommended practices and guidance material; therefore, medical kits can vary hugely between carriers.

The ICAO recommendations are supported and should be complied with despite their lack of mandatory force.

The closest there is to an industry standard is in the form of the first aid and emergency kits recommended by the Aerospace Medical Association (“AsMA”) and the International Air transport Association (“IATA”), and endorsed by the International Academy of Aviation and Space Medicine, the American Osteopathic Association, the American College of Emergency Physicians and the American Medical Association. Both kits have been approved by the chief of ICAO, subject to the Council’s approval which is expected to be forthcoming.

AEDs on board aircraft

Focusing on the emergency medical kit, there is no legal requirement to carry an Automatic External Defibrillator (“AED”). An AED is a device that gives a high energy electric shock to the heart and is used when someone is in cardiac arrest. AEDs can be frequently found in public places, such as shopping centres or train stations.

Many airlines carry AEDs on board their aircraft. However, it is not mandatory because, according to ICAO guidance, only a very small number of passengers are likely to benefit from the carriage of an AED and therefore it is a decision for the carrier based on the duration of sector lengths and the number of passengers carried.

First aid kit	Emergency medical kit
Antiseptic swabs (10/packs)	Sphygmomanometer (electronic preferred)
Bandage adhesive strips	Stethoscope
Bandage, gauze (7.5cm x 4.5cm)	Airways, oropharyngeal (appropriate range of sizes)
Bandage Triangular (100cm) folded and safety pins	Syringes (appropriate range of sizes)
Dressing, burn (10cm x 10cm)	Needles (appropriate range of sizes)
Dressing, compress, sterile (7.5cm x 12cm approximately)	Intravenous catheters (appropriate range of sizes)
Dressing, gauze, sterile (7.5cm x 12cm approximately)	System for delivering intravenous fluids
Adhesive tape, 2.5cm standard roll	Antiseptic wipes
Skin closure strips	Venous tourniquet
Hand cleanser or cleaning towelettes	Sharps disposal box
Pad with shield or tape for eye	Gloves (disposable)
Scissors, 10cm (if permitted by applicable regulations)	Urinary catheter with sterile lubricating gel
Adhesive tape, surgical (1.2cm x 4.6m)	Sponge gauze
Tweezers, splinter	Adhesive tape
Disposable gloves (several pairs)	Surgical mask
Thermometer (non-mercury)	Emergency tracheal catheter (or large gauge intravenous cannula)
Resuscitation mask with one-way valve	Umbilical cord clamp
First aid manual	Thermometer (non-mercury)
Incident record form	Torch (flashlight) and batteries
	Bag-valve mask
	Basic life support cards

However, it is well known that the risk of a cardiac event may increase due to the cabin environment, for example, reduced oxygen pressure in the cabin, disruption of circadian rhythms, and apprehension of the passenger. If a cardiac event occurs, any delay in starting resuscitation and using a defibrillator to deliver a shock when needed will reduce the passenger's chance of survival. It is estimated that the number of sudden deaths from cardiac events during scheduled flights is actually greater than the number caused by aircraft accidents. Survival of cardiac arrest without the use of an AED is extremely unlikely due to the time that it takes to divert and land the aircraft to obtain the treatment needed.

Indeed the European Aviation Safety Agency recommends that AEDs should be on any aircraft which is capable of carrying more than 30 passengers and travelling more than 60 minutes away from medical assistance on the ground.

Thus, carriers should carefully consider the use of AEDs despite the lack of legal requirement, particularly considering the growing use of AEDs on airlines around the world which may make it possible to argue that an aircraft without an AED is operating unusually and unexpectedly, triggering potential liability under MC99.

In the US, the Federal Aviation Administration ("FAA") requires all US registered commercial aircraft weighing 7,500 pounds or more and serviced by at least one flight attendant to carry an AED and an enhanced medical kit. This kit is based on recommendations by the AsMA. Under the FAA regulations, a flight may not take off if it is missing the medical kit or an AED and flight attendants may only use equipment or medication under the direction of a licensed medical provider. They may use the first aid kit for minor situations without such supervision.

It is clearly not practicable to provide the same equipment and level of medical care on board as one would expect to receive in a hospital. But, as far as possible, passengers should have access to appropriate medical equipment and well trained cabin crew proficient in first aid and lifesaving procedures.

Is there a doctor on board?

In addition to the equipment on board and well trained crew, carriers may take advantage of medically trained passengers on board.

The existence of a doctor on board may come as a huge relief for cabin crew in dealing with a complicated medical emergency; however, the very involvement of a doctor can cause difficulties. For example, a non-emergency specialist

may be a qualified doctor and hold himself out as a medical professional but may not necessarily be competent to deal with a patient in cardiac arrest when compared with, for example, an Accident and Emergency consultant. This simple example highlights that it is crucial that crew, in requesting assistance from a medically qualified passenger, enquire as to the passenger's specific medical expertise to ensure that they are aware of the limits of that passenger's medical competency.

Some airlines have ingeniously harnessed the expertise of medical professionals travelling on board their aircraft, for example, Lufthansa set up a 'Doctor on board' programme in 2009. Doctors sign up to the programme and receive air miles, a handbook on aviation medicine and in-flight medical emergencies as well as other promotional items. Austrian Airlines have also signed up to the scheme. As part of the programme, Lufthansa save the details and expertise of each professional when they sign up so that if a medical emergency occurs on board, the flight crew can approach them specifically for assistance. These doctors are covered by third-party insurance taken out by the airline for this particular purpose. Furthermore, Lufthansa offers aviation medical courses for their doctor members. This approach is a welcome development within aviation medicine and could save lives. Other carriers could adopt a similar programme by asking passengers to declare any medical expertise when booking their flight (verified with the relevant ID).

The Good Samaritan in the UK

In the UK there is no legal obligation to intervene or give assistance by way of a 'Good Samaritan' act; for example, a doctor is not legally obliged to assist an individual suffering a heart attack in the street, unless such a duty is contracted for. However, there may be a moral or ethical duty to assist.

Most medical insurance providers will continue to provide cover in the event that its insured doctor assists as a Good Samaritan, including the Medical Protection Society ("MPS") and the Medical Defence Union ("MDU"). This is important as an 'off duty' doctor flying home from a holiday abroad will owe a duty of care to the passenger-patient as soon as they intervene to assist cabin crew.

A doctor assisting on board will be held to the standards of a reasonable practitioner in the normal way, although the General Medical Council has suggested the standard of care expected is the same as what a reasonable practitioner would have done in that situation.

In contrast, in France, Germany and Japan, there is a requirement or duty to assist in an emergency unless doing so would endanger your own life. There is also a possibility that Article 2 of the European Convention on Human Rights (the right to life) might provide grounds for action if there were consequences arising from non-involvement of a doctor. Carriers should keep this in mind as some medically trained passengers may feel obliged to assist in a medical emergency on board.

There is a distinct lack of legal authority on the relationship between a Good Samaritan, patient and a carrier. It is common sense that a medically trained individual should refuse to intervene and act as a Good Samaritan if they are outside of their competency or incapacitated (for example, they have consumed alcohol during the flight or just before). Ideally, crew should also ask for evidence of qualifications and see identity documentation.

In practice, the MDU and the MPS have never encountered a case (in either the aviation or non-aviation context) of a healthcare professional being sued after providing emergency assistance as a Good Samaritan.

If a medical emergency does occur on board, and a medically trained passenger is assisting, they would be advised to:

- Provide assistance, within the scope of their professional competence, where the individual regards it is their ethical or professional duty to do so;
- Seek the patient's informed consent prior to any treatment (if possible);
- Not perform treatment if not equipped to do so in that situation or if not competent to do so, and instead leave it to other professionals (e.g. other medically trained passengers, crew or medical staff on the ground);
- Make a detailed note of any incident; and
- Inform their insurer of any incidents of this nature.

Medically trained passengers in the US

In the US, the Aviation Medical Assistance Act 1998 applies to carriers and individuals who are sued within the US. It states that a carrier shall not be liable for damages in any action arising out of performance of the air carrier in obtaining or attempting to obtain the assistance of a passenger in an in-flight emergency. This includes the acts or omissions of a passenger assisting (if not an employee or agent of the carrier) and if the carrier acts in good faith in believing the passenger is medically qualified.

The individual assisting with the medical emergency, under this legislation, is not liable unless they are guilty of gross negligence or wilful misconduct.

Therefore, US lawmakers have defined the duties of a doctor who intervenes in this context and have decided that a professional is to be held harmless by law, even where they are negligent, provided they are not grossly negligent.

Conclusion

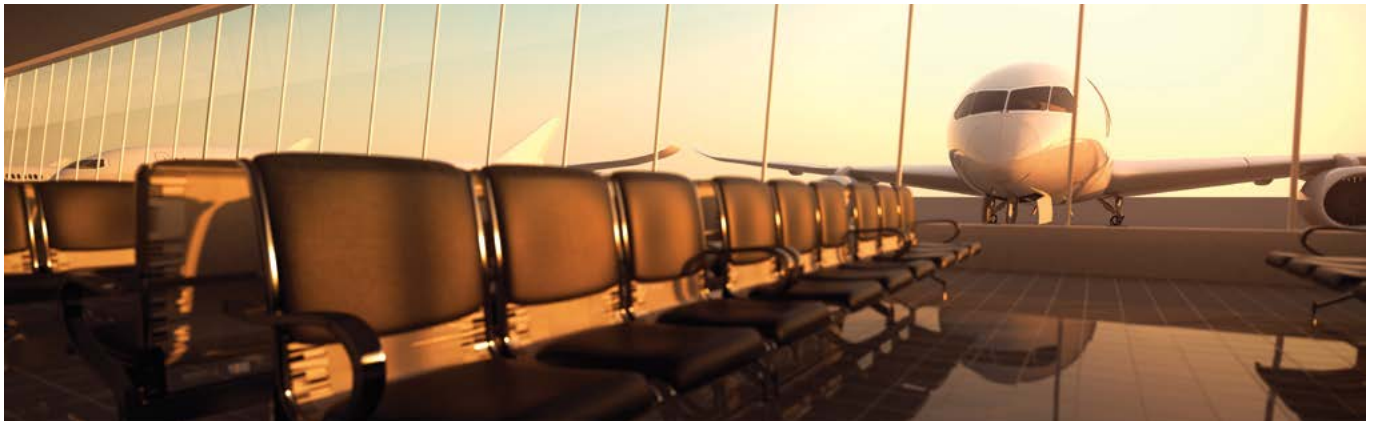
One of the key challenges is the lack of shared data on aviation medical emergencies and minor incidents.

Airline specific studies give some indication, for example, in one year (1998-1999) a British Airways study showed that 3,386 medical cases were reported, which was approximately 1 case in every 11,000 passengers. In another study between 2003 and 2008, one airline (based in Hong Kong) had 4,068 reported cases within a 5 year period, and out of those cases 46 resulted in diversions (1.1%) and 30 in cardiac arrest or death (0.7%). However, there is a need for better data collection by individual carriers and globally with a central registry of medical emergencies which could inform future practice, assist with training of crew and ultimately enhance passenger safety.

Carriers would do well to adopt risk management procedures and plan for all eventualities, as far as reasonably possible, given the almost infinite variables involved with air travel. In an ideal world, there would be an authoritative guide with every possible medical emergency that could develop on board but this is an impossible task and therefore general principles should be applied.

Carriers should consider following the medical equipment guidance recommended by AsMA and IATA, as set out above, and consider the use of AEDs on all flights, irrespective of distance and passenger capacity.

For further information, please contact **Sarah Pearson** in the London office



Passenger Rights come to Asia: an overview of the Malaysian Aviation Consumer Protection Code 2015

The Malaysian Aviation Commission (“the Commission”), an independent adviser to the Malaysian Ministry of Transport, recently established the Malaysian Aviation Consumer Protection Code 2015 (“the Code”) to protect passengers’ rights in Malaysia. The Code came into operation on 1 July 2016 and affects all air carriers operating domestically, and all international carriers flying into or out of Malaysia. Its provisions are mandatory.

A first in Malaysia’s aviation industry, the Code sets out minimum service standards of performance for air carriers and imposes obligations on air carriers to inform passengers of their rights. The Code also provides for passengers’ basic rights of recourse against air carriers which breach the Code. The Code is adapted (sometimes word for word) from international laws and regulations such as the Montreal Convention 1999 (“MC99”), Regulation (EC) No 261/2004 (“EC261”) and relevant publications produced by the International Civil Aviation Organisation (“ICAO”).

As an overarching obligation, air carriers are to “make efforts” to raise awareness of passengers’ rights as reflected in the Code, as well as the relevant complaint procedures (paragraph 19 of the Code). This includes a requirement to prominently publish minimum service levels and standards of performance in the General Conditions of Carriage (“GCC”), and display signage at airport counters to highlight this information.

Key provisions of the Code

Part II: Minimum Service Level and Standard of Performance for Air carriers and Aerodrome Operators

As a basic requirement, the provisions of the GCC must be clearly disclosed to passengers before the time of purchase of the ticket (subparagraph 7(1) of the Code). This may be done through the incorporation of the GCC by reference on the ticket or boarding pass. As a matter of good practice, air carriers should ensure that their GCCs are published prominently on their respective websites.

The Code specifically provides for passengers with disabilities (paragraph 9 of the Code). The Code draws its definition of disability from the definition developed by ICAO. In particular, air carriers are to make all reasonable

efforts to provide assistance to disabled passengers, and guidelines are set out to ensure such assistance. The Code also sets out the requisite compensation levels for disabled passengers whose mobility equipment and/or assistive devices are lost or damaged while being handled by the air carrier (paragraph 14 of the Code).

Air carriers should ensure that their employees undergo relevant training on a regular basis (subparagraph 9(17) of the Code). This requirement summarises the more detailed guidelines reflected in Chapter 2 of ICAO Doc 9984. Given the specific provisions imposed on the carriage of persons with disabilities, air carriers should conduct a review of their GCC to ensure that all requisite provisions are incorporated.

Part III: Passenger’s Rights

Liability for lost, damaged or delayed baggage is set out in paragraph 13 of the Code. The language used and the maximum liability limit of SDR1,131 have been taken from the relevant MC99 provisions. Paragraph 13(7) of the Code also reflects similar time frames for passengers to submit their complaints to an air carrier.

Air carrier liability for flight delay and/or cancellation is set out in paragraph 12 of the Code. This paragraph draws from the relevant provisions in MC99 as well as EC261. In particular, the separate exoneration defences used in MC99 and EC261 have both been incorporated into the Code and whilst the scope of the EC261 defence has been severely eroded over the last few years, it remains to be seen what effect case law will have on the defence in the Code. For ease of comparison, a table setting out various provisions is provided (below):

Flight delay/cancellation			
	The Code	MC99	EC261 applies to Community carriers and other carriers flying out of the EU
Compensation	Delay Para 12(1) – (3) read with First Schedule <ul style="list-style-type: none"> – Operating air carrier to offer compensation of up to SDR4,694 – Further compensation for the delay depends on length of delay (more than two or five hours) and includes meals, refreshments, limited telephone calls, internet access, hotel accommodation and transport free of charge 	Delay Article 22(1) <ul style="list-style-type: none"> – Air carrier to offer compensation of up to SDR4,694 per passenger 	Delay Article 6 read with Articles 8 and 9 <ul style="list-style-type: none"> – Fixed compensation amounts based upon length of journey – Similar delay compensation provisions to the Code although more stringent conditions on the length of delay vis-à-vis travel distance must first be met – In case of delay of at least 5 hours, air carrier must also offer reimbursement of ticket and return flight to the original point of departure or re-routing
	Cancellation Para 12(1) read with First Schedule <ul style="list-style-type: none"> – Air carrier to offer reimbursement of ticket or re-routing 	Cancellation No provisions for cancellation of flights	Cancellation Article 5 read with Articles 8 and 9 <ul style="list-style-type: none"> – Similar provisions to the Code – Additional assistance in the form of meals, refreshments, limited telephone calls and internet access Hotel accommodation and transport in certain specified cases
Exoneration	Delay Para 12(2) <ul style="list-style-type: none"> – Air carrier is liable unless it took all reasonable measures to avoid damage or it was impossible for air carrier to take such measures 	Delay Article 19 <ul style="list-style-type: none"> – Air carrier not liable if it took all measures that could reasonably be required to avoid delay or that it was impossible for air carrier to take such measures 	
	Delay/Cancellation Para 12(5)/(7) <ul style="list-style-type: none"> – Air carrier not obliged to compensate passengers if delay / cancellation was caused by “extraordinary circumstances” which could not have been avoided even if all “reasonable measures” had been taken – “Extraordinary circumstances” defined to include war, weather, security risks, unexpected flight safety issues and strikes 	Cancellation No provisions for cancellation of flights	Cancellation (and as per Sturgeon judgment delay) Article 5(3) Similar provision and definition to the Code on the “extraordinary circumstances”

Part IV: Consumer Complaints

Part IV of the Code sets out mechanisms for the submission of consumer complaints. In particular, paragraph 17 provides for direct passenger complaints to air carriers. Air carriers must acknowledge each complaint within 24 hours of receipt. Air carriers must also “send a substantive written response to the complainant and provide a resolution to the complaint within 30 days from the receipt of the complaint”. In order to ensure compliance with paragraph 17, air carriers should ensure that a mechanism is put in place for automatic responses to be sent acknowledging passengers’ complaint submissions. A calendar system should also be put in place to ensure that substantive responses are sent to passengers within 30 days.

Paragraph 18 provides for the submission of complaints to the Commission, following a failure of an air carrier to provide a solution acceptable to the passenger. If the Commission accepts the passenger’s complaint, it will forward this complaint to the responsible air carrier and the air carrier will have a further 30 days from the receipt of the complaint to resolve it. Passengers have up to a year from the date of the incident giving rise to the complaint to submit such a complaint to the Commission (paragraph 18(2)).

It should be noted that air carriers which fail to comply with the Code will be subject to a financial penalty of not more than MYR200,000 (approx. USD44,700) (paragraph 22). Any subsequent non-compliance will be subject to a penalty of up to ten times the amount of the original penalty. It is currently unclear whether air carriers will be able to appeal such decisions.

The interaction of the Code with existing domestic and international laws

In general, the Code is silent on its interaction with existing domestic and international aviation laws. On a preliminary analysis, these international conventions are considered exclusive in application and have been incorporated into Malaysian law through various legislative statutes governing domestic and international carriage. These conventions should therefore take precedence over the Code in any instance of conflict. However, the exclusivity of the conventions under Malaysian law may only be conclusively established if a claim is brought in a Malaysian Court regarding the application of the Code vis-à-vis the existing laws.

The Code also does not indicate or imply that it should take precedence over the air carriers’ GCC, or that it will render any inconsistent provision of the GCC invalid. In general, international conventions allow for freedom of contract between air carriers and their passengers, as long as the provisions of the GCC do not conflict with the conventions. While air carriers should ensure that the provisions of their respective GCC incorporate various provisions laid out in the Code, air carriers would likely have the freedom to include additional terms and conditions in the GCCs, in line with the general principles and provisions of the Code.

The Code in practice

The Code has only been in force for half a year and it is therefore difficult to draw any conclusions in terms of its effectiveness. However, the following observations have been made to date:

1. Passengers sometimes file multiple claims with the Commission, leading to extra time and/or manpower being spent on a single claim;
2. Some claims which are clearly not compensable are revived by the Commission as passengers are afforded a second chance following a rejection of their claim;
3. The Code indicates that air carriers should provide a “resolution” to passengers in respect of their claims. However, it is unclear what “resolution” refers to because in many instances passengers are not entitled to any or any significant compensation pursuant to the applicable laws.

Conclusion

It is too early to be definitive, but given the trend in many parts of the world towards increased consumer protection, it seems inevitable that the Commission’s powers will be enhanced and the penalties and burdens imposed on carriers, with ever decreasing abilities to defend their position, increased.

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Aviation emissions – the scheme agreed at the 2016 ICAO General Assembly

Despite doubts that it would be able to do so, at its 36th General Assembly in September 2016 the International Civil Aviation Organisation (“ICAO”) succeeded in reaching agreement on a global market based measure (“MBM”) to control future carbon dioxide emissions from aviation.

Aviation and carbon emissions

With over 100,000 flights every day and more than US\$211 billion in fuel payments, the aviation industry emits 705 million tonnes of carbon dioxide (CO₂) annually, contributing 2% to global human emissions of around 36 billion tonnes. Nearly 80% of the aviation industry emissions come from flights which are over 1,500 kilometres in length and for which there is no alternative means of transport.

In total, 3.4% of global GDP is supported by the aviation industry, and if aviation was a country it would have the 21st largest GDP in the world, and would rank 7th, between Germany and South Korea, in terms of the highest emitters of CO₂ in the world. According to an analysis by the ICAO Committee on Aviation Environment Protection (“CAEP”), the average annual growth in aviation traffic will range from 4.2% to 5.2%. This means that the fuel consumption growth rate will be between 2.8 to 3.9 times higher in 2040 than it was in 2010. ICAO data already show that CO₂ emissions from aviation have grown from 185 million tonnes in 1990 to approximately 705 million tonnes in 2012. This figure will continue to rise exponentially unless strict measures are put in place to control and regulate emissions from aviation.

Brief history of measures to control aviation emissions

Article 2(2) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (“UNFCCC”) charged ICAO with the responsibility for the reduction of emissions from aviation. This was the cue for ICAO to develop globally applicable measures to tackle climate change.

The ICAO took the first step in 1983, when the Council created the Committee on Aviation Environment Protection (“CAEP”) to explore ways to reduce aviation emissions.

After being criticised for failing to develop a global emissions trading scheme (“ETS”) to cut aviation emissions, ICAO formulated the Group on International Aviation and Climate Change (“GIACC”).

The major part of ICAO’s work towards creating an MBM was set out in the General Assembly Resolution A37-19 in 2010, which put forward a comprehensive structure for a proposed MBM for aviation, and encouraged the Council to conduct a feasibility study on the available MBM options, and to explore the possibility of the application of the Clean Development Mechanisms (“CDM”) of the Kyoto Protocol to international aviation.

The International Air Transport Association (“IATA”) and the Air Transport Action Group (“ATAG”), which together comprise the majority of the world’s airlines and many key supply chain companies such as airframe and engine manufacturers have also played an important role. IATA has a four pillar strategy for addressing climate change by means of a) improved technology; b) effective operations; c) efficient infrastructure, and d) positive economic measures. Furthermore, IATA and ATAG have introduced three very ambitious targets, for which IATA passed a resolution in June 2013:

- to put a cap on aviation CO₂ emissions from 2020 (“CNG2020”);
- to have on average improvement in fuel efficiency of 1.5% per year from 2009 to 2020;
- to reduce CO₂ emissions by 2050 to 50% of the 2005 level.

These targets are very costly. For example, to meet the goal of 1.5% fuel efficiency annually until 2020, airlines would be required to spend around 1.3 trillion US dollars to purchase around 15,000 new aircraft.

Due to ICAO's slow progress in establishing global measures, regional organisations such as the EU have laid down their own measures to deal with emissions from aviation, which have played an important part in the development of a global MBM.

An MBM serves as a financial incentive for the aviation industry to strive towards carbon emissions reductions, by putting a price on carbon and hence making it economically burdensome for the industry to emit an excess of CO₂ over a specified limit. More than being simply an incentive, an MBM also allows the industry to collectively reduce its carbon foot print through mutual cooperation within the industry and possibly even with other sectors.

Both ICAO and CAEP have concluded that the implementation of new aircraft technology, operational improvements and the move towards bio fuels will not by themselves be enough to turn aviation into a sustainable industry. The former Director General of IATA, Giovanni Bisignani said that "a global industry (requires) a global solution". Thus, it became incumbent on ICAO to develop a global MBM.

ICAO considered many options, and at its 2013 Assembly narrowed down its consideration to three different schemes – global emissions trading; global mandatory offsetting; and global mandatory offsetting with revenue.

The emphasis on the need to tackle the growing issue of climate change was amplified by the 2015 United Nations Climate Change Conference ("COP21") held in Paris which resulted in the Paris Agreement, although the Conference and the Agreement completely ignored the aviation industry, and again left the responsibility of reducing aviation emissions to ICAO.

The 2016 ICAO General Assembly

Despite there being some scepticism as to whether or not ICAO Member States would be able to reach an agreement, it was expected that the Assembly would introduce a global mandatory carbon offsetting system as its chosen MBM to take effect by 2020, to go along with IATA's CNG2020 approach, setting the industry's emissions in 2020 as the baseline above which all emissions would need to be offset through emission credits.

On 6 October 2016 this was indeed what happened, with one major exception. ICAO agreed upon the Carbon Offsetting and Reduction Scheme for International Aviation ("CORSIA") which aims to make all aviation growth after 2020 carbon neutral, with a pilot phase from 2021 to 2026 based on voluntary participation and then a second phase with mandatory participation from 2027 to 2035 for all States with a revenue tonne-kilometre ("RTK") of over 0.5% in 2018.

The Assembly also agreed to adopt new standards for aircraft designs, requiring a minimum level of jet engine fuel efficiency, to take effect in 2020.

The agreement on a global MBM was an important achievement for the aviation industry and in the fight against climate change in general. It is the first time that the international community has agreed to impose restrictions upon the amount of CO₂ emitted from international civil aviation, and is seen as a major step towards limiting the damage to the environment caused by aviation.

Many commentators are, however, critical of this deal, in particular its voluntary nature until 2027 and the fact that major aviation powers such as Russia, Brazil and India have expressly stated that they will not sign up before 2027 at the earliest. Furthermore, the very concept of an offsetting scheme is seen by some as not ambitious enough, as it essentially only seeks to compensate for CO₂ emissions and not reduce them.

Conclusion

ICAO has said that 86.5% of international aviation activity will voluntarily take part in its new offsetting MBM. It is expected that such participation will only marginally affect the international aviation industry's growth and costs. ICAO projects that in 2036 the additional cost per seat of an MBM on a flight of 10,000-12,000 kilometres would be approximately US\$10 and only US\$1.50 on flights between 900 and 1,900 kilometres.

Prior to the 2016 Assembly, ICAO was under immense pressure to reach an agreement and there was still considerable difference of opinion as to which MBM option to go for. There was also the threat of the EU reinstating its ETS globally if ICAO failed to do enough. The fact that the ICAO Assembly responded to all this pressure and agreed upon a global MBM is promising, although the agreement may be seen as only the first step towards the development of a scheme to reduce emissions from aviation.

A global offsetting scheme requires an efficient system to determine the quality of offsets and a mechanism in place to prevent problems such as double-offsetting, as well as a well-developed monitoring, reporting and verification system. Many key decisions still need to be made with regards to the implementation. Questions of how it will be implemented, how it will be enforced and how it will be regularly updated are all very important and need answers.

Another important question is the future of the EU ETS, given that the Commission's "Stop the Clock" decision (limiting the application of the EU ETS scheme to intra-EU flights only) was due to expire at the end of 2016, after which the scheme was to apply to all flights. There have been suggestions that the EU is not satisfied with the scheme agreed by ICAO, and hence that it might re-apply the EU scheme to all flights. However at the present time the "Stop the Clock" decision has been informally extended, and it seems that the Commission will in the near future propose a formal extension until 2020.

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The continuing debate regarding complete preemption and the Warsaw/Montreal Convention

In the United States, there has been uncertainty for decades in respect of the Montreal Convention 1999 (“the Montreal Convention”) and the Montreal Convention’s predecessor, the Warsaw Convention 1929 (“the Warsaw Convention”). This uncertainty stems from divergent United States court decisions as to the application of a doctrine called complete preemption to certain claims that are not expressly brought pursuant to the Conventions, but fall within the Conventions’ scope.

With little binding precedent on the issue, differences in individual judges’ interpretation of the Conventions have led to divergent opinions issued by different judges, sometimes in the same court, leading to unnecessary confusion as to whether US federal courts can hear these claims.

The Warsaw and Montreal Conventions

Like its predecessor, the Montreal Convention is a treaty that governs air carrier liability in the international transportation by air of passengers, baggage and cargo. Specifically, Articles 17 through 19 of the Convention address an air carrier’s liability for death and injury to passengers “[taking] place on board the aircraft or in the course of any of the operations of embarking or disembarking,” for damage to checked baggage and cargo when such checked baggage and cargo is in the air carrier’s charge, and for “delay in the carriage by air of passengers, baggage, or cargo.”

Prior to the Montreal Convention going into effect in 2003, the Warsaw Convention, the Montreal Convention’s predecessor, had been subject to four Protocols amending its original text, one supplementary Convention, denunciation by the United States (subsequently withdrawn) and supplemental “private” agreements amongst carriers. Signed in 1999 and ratified in 2003, the Montreal Convention sought to update and “harmonize the hodgepodge of supplementary amendments and intercarrier agreements of which the Warsaw Convention system of liability consists”, and, like the Warsaw Convention, sought to achieve uniformity of the rules governing international carriage.

In US courts, an issue arose as to whether plaintiffs, asserting a claim within the Conventions’ scope, must assert a claim pursuant to the Warsaw/Montreal

Convention or whether they could assert any claim consistent with the Conventions. This is a significant issue because it could determine what court possesses jurisdiction to hear a plaintiff’s claim.

The doctrine of complete preemption

Pursuant to its authority to determine the scope of federal courts’ jurisdiction within the limits of Section 2 of Article III of the Constitution, the United States Congress enacted 28 U.S.C. § 1331, which provides federal district courts with original jurisdiction, known as “federal question” jurisdiction, over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Further, pursuant to 28 U.S.C. § 1332, federal district courts also possess original jurisdiction, known as “diversity jurisdiction,” over civil actions between citizens of different states where the amount in controversy exceeds US\$75,000.

Although the plaintiff, as the master of his/her complaint, can choose between filing an action in state or federal court, in general a defendant may remove an action filed in state court to federal court pursuant to 28 U.S.C. § 1441, which provides in pertinent part:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Thus, generally, where a federal court has federal question or diversity jurisdiction (among other bases for original jurisdiction), a defendant may evoke 28 U.S.C. § 1441 to remove a case from state court to federal court.

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However, under the “well-pleaded complaint rule,” federal question jurisdiction does not exist unless a plaintiff affirmatively alleges a federal claim in his/her complaint (*Caterpillar v. Williams*, 482 U.S. 386, 392 (1987)). Thus, a plaintiff can avoid federal question jurisdiction by exclusively relying on state law in asserting his or her claims. An exception to the well-pleaded complaint rule is the doctrine of “complete preemption,” which applies when “the pre-emptive force of [a federal law] is so powerful as to displace entirely any state cause of action [addressed by that law].” (*Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 7 (2003) (“*Beneficial*”)).

The *Beneficial* decision is the latest United States Supreme Court decision addressing the “complete preemption doctrine.” In holding that provisions of the National Bank Act, a federal law setting forth the amount of interest a national bank may charge and the elements of a usury claim, completely preempted state law, the Court focused its inquiry on whether the US Congress intended that a federal cause of action would be exclusive. Finding such an intent, the Court, analyzing the text found that the provisions “provided an exclusive cause of action” and also “set forth procedures and remedies that govern that cause of action.” The Court found further support for complete preemption in decisions it rendered in the late 19th and early 20th centuries finding the National Bank Act to exclusively govern this area of law and noting the “special nature” of national banks and the need for “[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges...”.

The Warsaw and Montreal Conventions’ exclusivity provisions

A debate amongst US courts as to whether the Warsaw and Montreal Conventions completely preempt state law centers on the Conventions’ exclusivity provisions - Article 24 of the Warsaw Convention and Article 29 of the Montreal Convention.

An English translation of the governing French text of Article 24 of the original Warsaw Convention provides:

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 24, as amended by Montreal Protocol No. 4, provides:

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or tort or otherwise, can only be brought subject to the condition and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

As seen above, Article 24, as amended by the Montreal Protocol No. 4, removed the phrases “[i]n the cases covered by Articles 18 and 19” and “in the cases covered by Article 17” and added the phrase “whether under this Convention or in contract or tort or otherwise” in Article 24(2).

In 1999, the United States Supreme Court in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161, 175 (1999) (“*Tseng*”) held that Montreal Protocol No. 4 merely clarified, and did not alter, the Convention’s rule of exclusivity and the Convention provided the exclusive remedies for claims brought within its scope. In so finding, the Court determined that the Montreal Convention preempted state law claims within its scope; the Court did not directly address whether the doctrine of complete preemption applied to the Montreal Convention (see *Fadliah v. Societe Air France*, 987 F.Supp.2d 1057, 1062 (C.D. Cal. 2013), noting that the Court considered the Convention’s preemptive effect, but not in the context of complete preemption).

In *Tseng*, the Court considered state-law assault and false imprisonment claims brought by Tsui Yuan Tseng against El Al Israel Airlines within the Convention’s scope, i.e., claims arising from injuries allegedly sustained during Tseng’s international carriage in the course of embarking. Tseng alleged that she sustained mental injuries from an intrusive security search that was conducted as part of El Al’s boarding procedures. Tseng and El Al agreed that Tseng was unable to recover under the terms of the Warsaw Convention because Tseng did not sustain the requisite “bodily injury” and the alleged search was not an “accident”; however, Tseng brought state-law-based claims asserting

that she was entitled to recover under state law within the Convention's scope even when the Convention did not permit recovery.

In response, *El Al*, with support from the United States Department of Justice, argued that Article 24 of the original Warsaw Convention precluded a plaintiff, whose claim arose within the Warsaw Convention's scope but did not meet the Convention's conditions pertaining to liability, from bringing a state-law claim.

After a review of the "text, drafting history and underlying purpose of the Warsaw Convention," the Court agreed with *El Al* holding that:

Recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking, if not allowed under the Convention, is not available at all.

Thus, the Court held that the Warsaw Convention preempted *Tseng's* state-law claims and that *Tseng* was not entitled to recovery.

Drafted the same year as *Tseng* and ratified four years later, Article 29 of the Montreal Convention is the successor to Article 24 of the Warsaw Convention providing:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any non-compensatory damages shall not be recoverable.

Article 29 of the Montreal Convention is similar to Article 24 of the Warsaw Convention, as revised by Montreal Protocol No. 4, combining the two paragraphs in Article 24 and preserving most of Article 24's wording. In fact, several US courts have found Article 29 of the Montreal Convention to clarify, not change, Article 24 of the Warsaw Convention, (see *Paradis v. Ghana Airways Ltd.*, 314 F.Supp.2d 106, 111 (S.D.N.Y. 2004)).

The Warsaw/Montreal Convention complete preemption debate

US courts have debated the issue of whether the doctrine of complete preemption applies to the Warsaw and Montreal Conventions. An examination of case law on this issue reveals conflicting interpretations of the *Tseng* decision as well as the exclusivity provisions in the Warsaw and Montreal Conventions.

Courts finding complete preemption

The United States Supreme Court directs courts interpreting the language of a treaty to "begin with the text of the treaty and the context in which the written words are used." (*Eastern Airlines v. Floyd*, 499 U.S. 530, 534 (1991)). For interpreting "difficult or ambiguous passages," courts are allowed to look beyond a treaty's text "to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Likewise, the Court, noting that a treaty ratified by the US is not only US law, but "an agreement among sovereign powers," has "traditionally considered as aids to its interpretation [of a treaty] the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties."

Several courts holding the Warsaw and/or Montreal Conventions to completely preempt state law, and thus finding an intention that the Convention be the exclusive cause of action for claims within its scope, have looked beyond the text of the Conventions' exclusivity provisions to the Conventions' negotiating history, drafting history and the post-ratification understanding of fellow signatories.

For instance, in *Jack v. Trans World Airlines, Inc.*, 820 F.Supp. 1218 (N.D. Cal. 1993), the Northern District of California held that the Warsaw Convention completely preempted state-law claims after a thorough review of the Warsaw Convention's drafting history going back to draft convention text submitted to the International Technical Committee of Aerial Experts ("CITEJA") in the mid-to-late 1920s. Reviewing the Warsaw Convention's governing French text and noting that there were a variety of potential meanings that could be given to the word "conditions" as used in Article 24, the court found the review of the drafting history of the Warsaw Convention at CITEJA to indicate that the term "conditions" actually meant "fundamental basis", supporting a finding that actions must be brought "on the basis of the convention."

The *Jack* court further reviewed the drafting history of the Warsaw Convention at the Warsaw Conference in 1929, finding remarkable the “lack of discussion” regarding the Convention’s exclusivity. In fact, the court found that a delegate of the United Kingdom, Sir Alfred Dennis, was the only individual directly addressing the issue, stating:

We have at the beginning of the article: “any action in liability, however founded, can only be brought subject to the conditions and limits set out in this Convention.”

This is a very important stipulation which touches upon the very substance of the Convention, because it excludes recourse to common law; originally it was a separate article.

According to the court, this statement further supported the Court’s finding that the Warsaw Convention completely preempted state law.

Likewise, in *Fadhliah v. Societe Air France*, 987 F.Supp.2d 1057 (C.D. Cal. 2013), noting the divide among courts over the meaning of the phrase “whether under this Convention or in contract or in tort or otherwise” in Article 29 of the Montreal Convention, the court turned to the drafting history of the Montreal Convention — its travaux préparatoires. While some courts finding no complete preemption interpreted the phrase to mean that a state law contract or tort action could be brought within the scope of the Convention, the court read a statement by the Chairman of the Montreal Conference on Article 29 to indicate that the phrase actually bolstered, not diluted, the Convention’s preemptive effect.

The *Fadhliah* court also examined the post-ratification understanding of signatories to the Montreal Convention and found support for complete preemption from British Courts’ interpretation of Article 29, specifically noting that in *Hook v. British Airways Plc* the court took the position that “there are no exceptions to the exclusivity of the Convention” and, on appeal, it was held that Article 29 “both provided and limited” the plaintiff’s rights and remedies.

Moreover, courts holding that the Montreal Convention completely preempts state law have found complete preemption to be consistent with the Warsaw and Montreal Conventions’ purpose of achieving uniformity (see *Moran v. American Airlines, Inc.*, 2011 WL 13115633, at *5 (S.D. Fla. 2011) and *Fadhliah*, 987 F.Supp.2d at 1062). These courts tend to point to the *Tseng* decision, in which the Court found:

Given the Convention’s comprehensive scheme of liability rules and its textual emphasis on uniformity, [the Court] would be hard put to conclude that the Warsaw delegates meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.

Consistent with the *Tseng* court’s finding that “reasonable views” expressed by the US Executive Branch should be given “great weight” in interpreting the Montreal Convention, courts have found information provided by the US Executive Branch to Congress during ratification to support a finding of complete preemption (see *Fadhliah* and *Schaefer-Condumari v. U.S. Airways Gp., Inc.*, 2009 WL 4729882). In *Fadhliah*, the court noted the testimony of the Deputy Assistant Secretary of State for Transportation Affairs who testified:

in the clear language, [the Convention establishes] its exclusivity in the area of claims for damages arising in the international transportation of passengers, baggage and cargo.

Likewise, in *Schaefer-Condumari*, the court cited an explanatory note to Article 29 submitted by the US Executive Branch to the US Congress during ratification which stated that the “Convention and its limits shall be applicable to all actions for damages arising in the carriage of passengers, baggage and cargo...” and that air carriers, as well as their servants and agents could not be “held liable outside the Convention under alternative tort or contract law theories.”

Courts finding no complete preemption

In contrast, there have been several US courts, including those issuing recent decisions, holding the Warsaw and/or Montreal Convention to not completely preempt state law claims, (see *Hoffman v. Alitalia-Compagnia Aerea Italiana S.P.A.*, 2015 WL 1954461 (D. N.J. April 28, 2015); *Greig v. US Airways Inc.*, 28 F.Supp.3d 973 and *Oganesyan v. American Airlines Cargo*, 2013 WL 6229173 (C.D. Cal. 2013)); *Constantino v. Continental Airlines, Inc.*, 2014 WL 2587526 at *3 (D.N.J. June 9, 2014); and *Jensen v. Virgin Atlantic*, 2013 WL 1207962 at *4 (N.D. Cal. March 25, 2013).

These courts found that the Warsaw and/or Montreal Convention’s provisions apply under ordinary preemption, not complete preemption, and, as a result, the Convention is not a basis for removal to federal court. Some of these courts emphasize that the *Tseng* decision did not address complete preemption and that arguments citing *Tseng* in support of complete preemption conflate the doctrine of complete preemption with ordinary preemption.

Recent decisions finding against complete preemption tend to base their conclusions on the text of Article 29 of the Montreal Convention on its face – especially the phrase “whether under this Convention or in contract or in tort or otherwise” – finding it clearly allows for claims to be brought under both the Convention and local law.

US courts should find for complete preemption

US courts should resolve the longstanding debate in favor of a finding that the Warsaw and Montreal Conventions completely preempt state-law claims. Such a resolution would take into account the courts’ differences in their interpretation of the Conventions’ exclusivity provisions and a thorough analysis of the Conventions’ text and drafting histories as well as the post-ratification understanding of other signatories and treaty interpretations provided by the US executive branch to Congress during the ratification process. Such a resolution would also be consistent with the Court’s *Beneficial* decision.

As noted above, when interpreting treaties, courts are allowed to look beyond the treaty’s text “to the history of the treaty, the negotiations, and the practical construction adopted by the parties” when interpreting “difficult or ambiguous passages.” The decades-long debate as to the meaning of the Warsaw and Montreal Convention’s exclusivity provisions with respect to complete preemption indicates the need to go beyond the text to determine whether complete preemption applies. Compare *Rosenbrock*, 2016 WL 2756589 at *19 (finding that “[b]y mandating that any action, no matter the basis, ‘can only be brought’ subject to its provisions, the Convention plainly establishes itself as the ‘exclusive cause of action’ for claims within its scope.”) with *Hoffman*, 2015 WL 1954461, at *3 (D.N.J. April 28, 2015)(finding that “the inclusion of the phrase ‘whether under this Convention or in contract or in tort or otherwise’ in Article 29 implies that claims may be brought both under the Convention and not under the Convention.”). However, recent decisions in which courts have found no complete preemption have gone no further than the face of the Conventions’ text.

Further, recent decisions appear to overlook the fact that Article 29 of the Montreal Convention derives from the governing French text of Article 24 of the original Warsaw Convention. In fact, Article 29 of the Montreal Convention contains a lot of the same wording as the English translation of the governing French text of Article 24, including the phrases “any action for damages, however founded” and “brought subject to the conditions.” As noted above, the *Jack* court, reviewing the French text, found ambiguity as to

the word “conditions”, ultimately finding that the wording supported a finding of complete preemption.

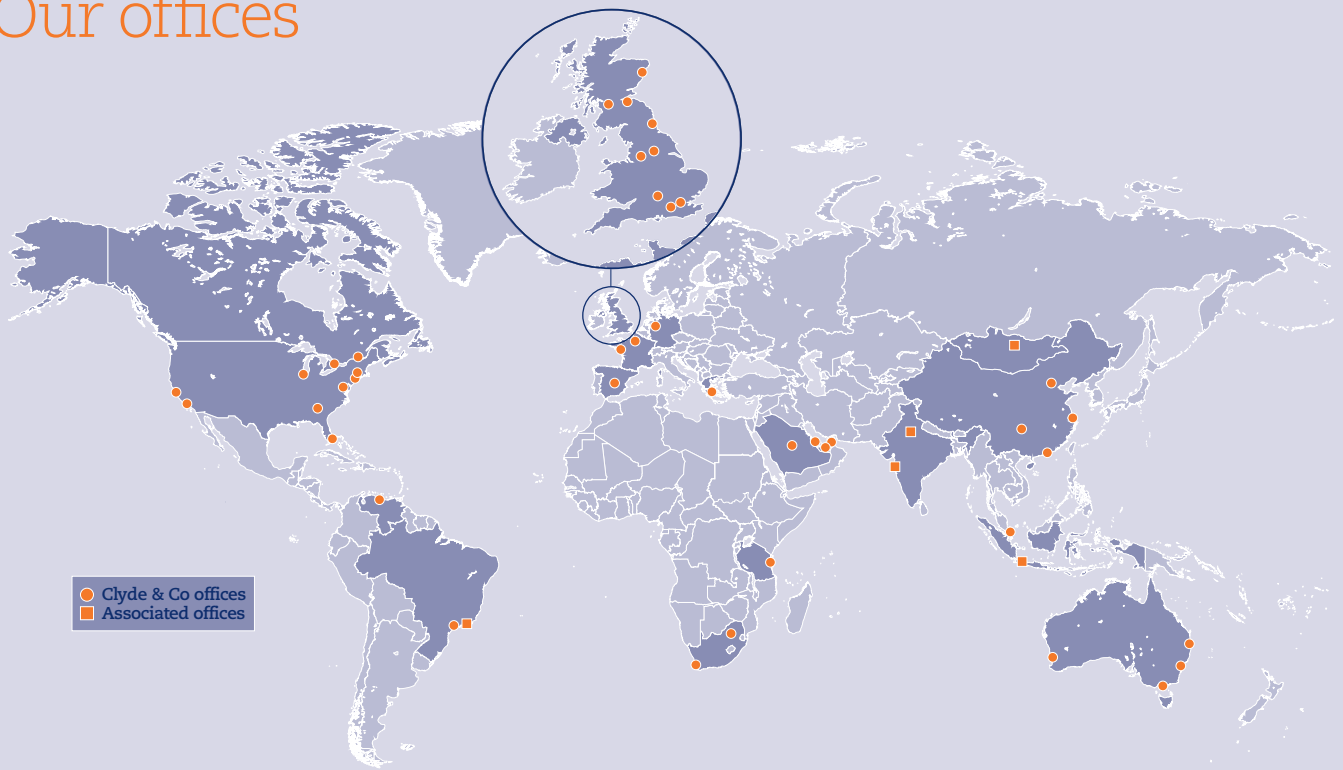
A finding of complete preemption is also consistent with the *Beneficial* decision. Like the statute at issue in *Beneficial*, an overarching purpose of the Warsaw and Montreal Conventions is achieving uniformity in an area of law. Moreover, like the National Bank Act in *Beneficial* which “form[ed] a system of regulations... all the parts [of which] are in harmony with each other and cover the entire subject,” the Montreal and Warsaw Conventions establish “a detailed and unique system for adjudicating carriers’ liability for personal-injury claims, their defenses to those claims, and the damages that passengers may recover.” (*Moran*, 2011 WL 13116533 at *5; *Beneficial*, 539 U.S. at 10).

Conclusion

The decades-long debate as to whether the doctrine of complete preemption applies to the Warsaw and Montreal Conventions should end in favor of finding that the doctrine applies. Courts that have recognized the difference of opinion and have conducted a thorough review of the Conventions’ drafting histories, post-ratification understanding of fellow signatories, and the US executive branch’s interpretation of the treaty have found the doctrine of complete preemption to apply. A finding that the complete preemption doctrine applies to the Warsaw and Montreal Conventions would provide much needed clarity as to which US courts have jurisdiction over claims arising under the Conventions’ scope.

For further information please contact **Philip Weissman** in the New York office

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