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RECENT CASES

Director of Civil Aviation v Air National Corporate Limited [2011] NZCA 3 (7 February 2011)

This case involved an appeal by the Director of Civil Aviation (NZ) against a High Court order staying the Director's decision to suspend the air operator's license of Air National Corporate Limited ["Air National"].

The decision to suspend Air National's operator's license had been taken under section 17 of the *Civil Aviation Act 1990*.

Factual background

The Director's decision arose out of a management audit of Air National on 26th January 2011. The audit revealed the following matters|:

(a) Falsification of training records in that they indicated that simulator training for two pilots in relation to the Westwind II aircraft had been on certain routes when other routes were used;

(b) A flight examiner who did not meet requirements of the relevant civil aviation rules had checked Air National's training manager for competency on the Jetstream J32 aircraft;

(c) An Air National pilot had operated an aircraft without possessing an airport identity card which was "an important element of the aviation security system".

In making his decision to suspend the license the Director pointed to the elevated risk profile of Air National "because of the number of serious findings by the CAA over recent years" noting that "there was little evidence to indicate a systematic and proactive approach by Air National to reduce risk". The Director also noted what he saw as "a lack of resource investment" and "a negative safety culture" and that the certificate holder bore responsibility for the actions of the individual responsible for the falsification of documents. The Director concluded "that continued operations pose[d] [an] unacceptable risk to aviation safety".

In its statement of claim Air National had argued for judicial review of proceedings alleging that the Director's decision was invalid because he had:

(a) failed to take account of relevant matters;

(b) breached procedural fairness by failing to give Air National an adequate opportunity to address the concerns raised by CAA officials; and,

(c) had made an irrational or unreasonable decision.

The Court of Appeal's Contemplations

In its judgment the Court of Appeal consisting of Arnold, Ellen France and Harrison JJ considered (a) the approach to be adopted under section 8 of the *Judicature Amendment Act* 1972 ("JAA"), (b) the relevance of Air National's appeal, (c) the likely impact of the suspension on Air National, and (d) the strength of Air National's case against the Director.

At ¶30 of its judgment the Court accepted that the High Court had jurisdiction under sections 4(1) and 8 of the JAA to make interim orders.

However, they emphasized that "courts do need to be cautious in this context" as "too ready a resort to s8 runs the risk of … creating an incentive for appellants to launch judicial proceedings simply to access the High Court's s8 jurisdiction".

In reaching its decision the Court noted the broad discretion given to the Director by section 17 of the Civil Aviation Act and again emphasized the need to respect the Director's assessment, especially "given his expertise and responsibilities under the Act". The Court paid particular attention to the wording of sections 15A (Power of Director to investigate holder of aviation document) and 17 (Power of Director to amend or revoke aviation document), emphasizing that they contained a "necessary in the interests of safety" test. The court at ¶36 (i) acknowledged that the Director could base his decision on the existence of "reasonable doubt" stating that "if the Director has reasonable doubt he may act to suspend the aviation document and (ii) argued that this concept assisted in understanding the scope of the "necessary in the interests of safety" test.

Application and Decision

Turning to the facts the Court observed that the Director (i) regarded the preparation of the erroneous training reports as a serious matter and (ii) saw the misrepresentations as a breach of trust, and (iii) noted the high risk profile of the operation as a result of past findings of infractions.

The Court observed that section 17 "allowed [the Director] to take a precautionary or risk averse approach" in the interests of safety.

As a consequence of its contemplations the Court concluded that the Director was justified in his decision and that Air National had not demonstrated a strong case that the decision to suspend was not open to him or that it was irrational. Hence the Court ruled in favour of the Appellant in finding that the interim order under section 8 should not have been granted.

Eds.

Smith v Air New Zealand Limited [2011] NZCA 20 (18 February 2011)

Valerie Smith, the appellant in the proceedings before the New Zealand Court of Appeal, suffers from a condition known as Ehlers Danlos Syndrome ("EDS"). This condition limits the expansion of her chest and the ability of her breathing muscles to move air into and out of her lungs. Smith has required oxygen when flying since 1997. Air New Zealand supplies oxygen on international flights but charges at the rate of US$75 per sector. Smith's complaint related to an international flight to Melbourne in 1999.

Procedural background

Smith's claim was under the Human Rights Act 1993 ("the Act") and heard by the Human Rights Review Tribunal. The Tribunal found in her favour in concluding that Air New Zealand had discriminated against her on the basis of disability when it required her to organize and pay for the oxygen supplied to her on domestic flights and in charging her for the oxygen supplied on international flights. The Tribunal concluded that Air New Zealand had breached section 44 of the Act in treating her less favourably than others in providing a service because of her disability. However, they also found that such prima facie unlawful discrimination was within the exception provided by s52 of the Act. Under s52 there is not a breach if the service is provided on more onerous terms where the

disability requires the services to be provided in a special way and the provider "cannot reasonably be expected" to provide the service "without requiring more onerous terms"[s52(b)(ii)].

Subsequently the High Court allowed Air New Zealand's cross-appeal against the decision that it breached s44. As a consequence the court ruled that Air New Zealand had not discriminated against Smith.

In its analysis the Court examined a number of cases from other jurisdictions including *Eaton v Brant County Board of Educators* (Supreme Court of Canada) ([1997] 1 SCR 241) and *Waters v Public Transport Corp*. ([1991] 173 CLR 349 [HCA]) where Brennan J counseled against asking anti-discrimination legislation to "carry a traffic it was not designed to bear".

Decision

After a thorough examination of arguments, instruments and cases the Court of Appeal agreed with the Tribunal's conclusion that the charge imposed by Air New Zealand for the provision of supplementary oxygen for international travel was reasonable. The Court considered it unreasonable that Air New Zealand be expected to provide oxygen without a charge. While the Court concluded that there was a prima facie breach of s44, it felt that Air New Zealand's approach was not unlawful because it fell within s52.

Eds.

U.S. Litigation Arising Out of the TAM Linhas Aéreas Flight 3054 Accident: Another Significant *Forum Non Conveniens* Setback for Plaintiffs in Federal Court

The decision by the U.S. Court of Appeals for the Eleventh Circuit in *Tazoe v. Airbus, S.A.S.*, No. 09-14847, 2011 WL 294044 (11th Cir. Feb. 1, 2011) arose from the TAM Linhas Aéreas Flight 3054 accident on July 17, 2007. Flight 3054 was a scheduled flight from Porto Alegre to São Paulo, Brazil. The accident occurred when the Airbus A320 aircraft overran the runway upon landing and crashed into a warehouse and fueling station, resulting in the death of all 187 passengers and crew on board the aircraft, as well as twelve (12) individuals on the ground. The decedents were all citizens or residents of Brazil with the exception of one U.S. citizen who resided in Florida.

The aircraft had an inoperative thrust reverser on the number two engine at the time of the accident. TAM was aware of this issue, but concluded that the aircraft could safely be flown if its pilots followed specific landing procedures. Prior to the accident, TAM had successfully operated approximately 40 flights without incident with the inoperative thrust reverser. The accident was alleged to have occurred because the flight crew did not follow the correct landing procedure.

Following the accident, the plaintiffs commenced approximately 80 lawsuits in the U.S. District Court for the Southern District of Florida seeking wrongful death damages. The plaintiffs named TAM, Airbus, Pegasus Aviation IV, Inc., International Aero Engines and Goodrich Corporation as defendants. Nearly all of these lawsuits were subsequently consolidated by the federal district court. TAM settled with

"almost all" of the plaintiffs. Seventy-six (76) plaintiffs then filed a consolidated lawsuit against the manufacturers. The manufacturing defendants subsequently moved to dismiss the litigation based on the doctrine of *forum non conveniens* ("FNC") in favor of litigation in Brazil. The district court granted the FNC motion.

The Eleventh Circuit affirmed the FNC dismissal of all of the Brazilian and U.S. citizen decedents' actions with the exception of a single complaint filed by Anna Finzsch on behalf of a single Brazilian decedent, which was reversed based on a procedural technicality. The Finzsch action, which had been commenced after the filing of the defendants' FNC motion, was dismissed before the Finzsch complaint had been served on the defendants. The Eleventh Circuit reversed the dismissal of the Finzsch complaint because it generally is disfavored for a court to dismiss a lawsuit on its own initiative without affording plaintiff either notice or an opportunity to be heard. In so finding, the Eleventh Circuit noted that it is "dubious" that the Finzsch complaint will survive a renewed FNC motion.

This decision contains several significant findings. First, the FNC dismissal included not only the actions commenced on behalf of the Brazilian decedents, but also the action on behalf of the U.S. decedent. The Eleventh Circuit stated that "[a] district court must find positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." The Eleventh Circuit concluded that the district court did not abuse its discretion in finding that the defendants' inability to compel non-party witnesses or the production of documents from those witnesses, or the inability to implead potentially liable non- parties if the litigation remained in the U.S. far outweighed the "somewhat more deference" applied to the action because the decedent was a U.S. citizen. The defendants had listed "dozens" of Brazilian non-party witnesses that they intended to call in support of their defense, but the witnesses were outside the subpoena power of the U.S. court. The plaintiffs argued that the defendants' "laundry list" of potential witnesses was evidence of defensive forum shopping. The Eleventh Circuit was not persuaded. It noted that the defendants might "reasonably call" eyewitnesses to the accident, government employees in charge of airport safety, TAM employees, accident investigators and other witnesses in their defense. The defendants also had represented that they intended to implead two potentially liable Brazilian entities, but could not do so if the litigation remained in the U.S. The plaintiffs argued that the defendants could seek contribution from the Brazilian entities in a separate proceeding in Brazil after trial in the U.S. if the defendants were found liable. Although the Eleventh Circuit recognized that the defendants could institute an action in Brazil for contribution against the Brazilian entities after a U.S. trial, it stated that their defense in the U.S. litigation would be less persuasive "when aimed at a set of empty chairs" and, as a result, if a U.S. jury were inclined to place blame at the defense table, the defendants present in the U.S. litigation would bear the brunt of any damage award.

Second, the Eleventh Circuit was not persuaded by the plaintiffs' attempts to divert the court's focus by arguing that their "theories of liability against the [United States] and French defendants have very little to do with Brazil." The Eleventh Circuit stated that its analysis

must contemplate not just the plaintiffs' theories of liability, but also the defendants' defenses (*i.e.*, the evidence necessary to disprove each element of the plaintiffs' causes of action). It found that the district court reasonably concluded that "[a] significant part of the defense is likely to revolve around the location of the airport and the particular runway which was overrun, as well as the length and condition of that runway."

Third, the Eleventh Circuit rejected the plaintiffs' argument that the U.S. had a greater interest in "regulating and deterring defective products," finding that potential liability arising from at least ten (10) prior runway incursions by Airbus aircraft with an inoperative thrust reverser diluted the deterrent value. Further, because the accident occurred in a foreign country and involved many foreign decedents, the local interest in the accident was greater than that of the U.S. The Eleventh Circuit also noted that cases tried in Brazil also would have a deterrent value because the defendants could be found liable in that forum.

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***In re Air Crash Disaster Over Makassar Strait, Sulawesi* (Jan. 11, 2011)**

Factual Background

Adam SkyConnection Airlines ("Adam Air") Flight DHI 574, between Java and Sulawesi, disappeared on January 1, 2007 over the Makassar Strait with the loss of life of all 102 persons onboard. Wreckage was located in waters off the coast of Sulawesi some 9 days after the flight disappeared.

The subsequent Indonesian investigation concluded that the pilots experienced "anomalies" with the Inertial Reference System ("IRS") during the flight. While the pilots were troubleshooting these anomalies, the plane's autopilot disengaged and the plane banked to the right and down. The pilots realized too late the need for correction as their attention was distracted by the problem with the IRS. They had stopped flying the plane.

In addition to pilot error, the report also cited Adam Air's inadequate pilot training and maintenance as contributing causes of the accident.

Subsequent to the accident Adam Air provided compensation to crash victims' heirs in exchange for signed releases of liability. Some 42 decedents signed such releases. Adam Air was not a party to this action.

Thirty-four representatives of the estates of fifty-two of the decedents brought consolidated claims for strict products liability, negligence, and negligent entrustment. Significantly, none of the decedents were U.S. citizens or residents, or their representatives. Defendants include several U.S. corporations and subsidiaries: Boeing, the plane's manufacturer; World Star Aviation Services, Inc. ("World Star"), the

company allegedly in charge of the plane's maintenance; Triton Aviation Ltd. ("Triton"), a subsidiary of co-Defendant Triton Aviation Business Services Holdings, LLC and an alleged owner and lessor of the plane; Wells Fargo Bank Northwest, N.A. ("Wells Fargo Bank"), a subsidiary of co-Defendant Wells Fargo & Company and an alleged owner and lessor of the plane; and Honeywell International, Inc. ("Honeywell"), the manufacturer of the plane's IRS.

Arguments

Predictably, the Defendants brought a motion to dismiss on the grounds of *forum non conveniens*.

The Defendants argued that (i) much of the essential evidence in the case was in Indonesia; (ii) their defences and the Plaintiff's own pleadings implicated Adam Air in improperly operating and maintaining the plane; (iii) all but two of over 105 beneficiaries were located in Indonesia; (iv) the executed liability releases were dispositive of the Plaintiff's claims against them; and (v) Adam Air and the other potential witnesses were located in Indonesia beyond the compulsory process of the Court. Consequently, the Defendant's contended that Indonesia had a far greater interest in the litigation than this forum had and that Indonesia was the *more convenient forum*.

The Plaintiffs in responding argued that:

(i) Indonesia was an inadequate alternative forum due to its allegedly corrupt judicial system;

(ii) crucial evidence about the design and manufacture of the downed plane was in the U.S.;

(iii) the U.S. had at least as great an interest in the litigation as Indonesia, because "the plane, its engine, its Inertial Reference System [IRS], and its other parts were manufactured in the U.S."

District Court's Analysis

The Court described its process of analysis as involving "weighing private and public interests in the litigation in determining whether the alternative forum is more convenient". The Court stated that it could consider the following private interest factors:

(i) the relative ease of access to sources of proof;

(ii) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

(iii) the possibility of view of premises, if view would be appropriate to the action; and,

(iv) all other practical problems that would make trial of the case easy, expeditious and inexpensive.

The Court also considered the following public interest factors:

(i) administrative difficulties stemming from court congestion;

(ii) the local interest in having localized disputes decided at home;

(iii) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action;

(iv) the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and,

(v) the unfairness of burdening citizens in an unrelated forum with jury duty.

Decision and Reasoning

The Court concluded that, in this case, dismissal on the grounds of *forum non conveniens* was appropriate, that it was "an available and adequate alternative forum for the litigation".

First, it was concluded that Indonesia was an available and adequate forum to which the defendants' consented.

Second, the plaintiffs did not contest the Defendants' argument, supported by an expert affidavit, that the Plaintiffs would have a remedy for their claims under Indonesian law.

Third, the Court rejected the evidence, mainly newspaper articles, alleging corruption of the Indonesian judicial system as providing an adequate level of proof. The Court cited the case of *Stroitelstvo, 589 F.3d at 421* where the Seventh Circuit held that "generalized, anecdotal complaints of corruption are not enough for a federal court to declare that a [European Union] nation's legal system is so corrupt that it can't serve as an adequate forum."

Having established that the threshold requirement of the existence of an alternative forum was met, the Court turned to whether the private and public interests in this litigation made the Indonesian forum more convenient.

First, they concluded that the private interest factors weighed heavily in favour of the Indonesian forum.

Citing *Clerides*, 534 F. 3d at 628, the Court felt that "the relative ease of access to sources of proof" and the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses" made the Indonesian forum far more convenient.

The Court also attached significance to the fact that those in possession of much of the proof, specifically Adam Air and the Indonesian government, were located in Indonesia and had not agreed to produce evidence in the litigation in the U.S. One of the "other practical problems" was that the Court lacked personal jurisdiction over the company.

Further, the public interest factors tipped "decidedly in favour of the Indonesian forum." In the words of the Court:

> Specifically, the greater interest of the citizens of Indonesia in this litigation and the unfairness of burdening the relatively disinterested citizens of this forum with jury duty support dismissal.

Additionally, the Plaintiffs had conceded that if the case were heard in the U.S. Indonesian law would have to be applied. The Court felt that doing so would not be *preferable*.

In conclusion, the Defendants' Motion was granted and the case dismissed on the grounds of *forum non conveniens*.

Eds.

Air India Ground Handling Achieves Safety Audit Certification

(March 2011)

Air India has become the first airline in India providing ground services in India to clear the IATA Operational Safety Audit for Ground Operations (ISAGO).

This followed an extensive audit that included examination of the airlines headquarters organization and

management systems and their management systems at various airports. These locations were assessed in areas such as passenger and baggage handling, load control, aircraft handling and loading, aircraft ground movement, cargo and mail handling.

Eds.

FOCUS ON MONTREAL CONVENTION

Montreal Convention's elusive 'not negligent' standard

Under the old Warsaw Convention, the requirement for an injured passenger to break through the liability cap involved establishing, on the part of the air carrier, "willful misconduct" (unamended convention) or an act done with "intent to cause damage or recklessly and with knowledge that damage would probably result" (Hague Protocol version). However, the Montreal Convention (1999) changed the both the burden of proof, now on the carrier, with a requirement of the carrier to defend the liability cap by establishing that he/she was "not negligent" (Article 21(2)(a)).

One of the issues in the Australian context was how a court would interpret negligence in this context. Would its analysis focus on the Civil Liability Acts' redefinition of negligence or would the court paint with a very broad brush alluding to a very general concept of what negligence is.

On this issue practitioners have been a little like the refugees depicted in the movie *Casablanca* who, in the words of the narrator, were "waiting and waiting and waiting" for cases to clarify. One U.S. case on the issue was *Wright v American Airlines* (2010 U.S. Dist. LEXIS 10516).

The facts of the case were that shortly after takeoff, and while the "fasten seat belt" light was still illuminated, a passenger got out of his seat and attempted to retrieve baggage from the overhead compartment. The bag containing the passenger's laptop computer fell from the overhead compartment and struck the plaintiff on the head, causing him immediate and severe pain in his head, neck, and upper back. Eventually the plaintiff spent time in a hospital in Switzerland and subsequently claimed for an amount in excess of the liability limit of 100,000 SDR.

The plaintiff alleged that his injuries resulted from the following acts of American Airlines:

a. Failing to take necessary precautions to anticipate the situation that caused the hazardous condition onboard Flight 322 that resulted in plaintiff's injury;

b. Failing to avoid the hazardous condition the caused plaintiff's accident onboard Flight 322 that resulted in plaintiff's injury;

c. Failing to adequately train and/or supervise its agents, servants, and employees in the proper security protocol and customer relations and violated their own rules, guidelines, and policies;

d. Failing to control all the embarked passengers and ensure that they adhered to Federal Aviation Regulations by remaining seated during the critical take-off phase of the flight.

In *Wright* the Court was not persuaded that the carrier's negligence was involved in the injury to the plaintiff. The court noted that, in the context of a summary judgment application, that a party is entitled to summary judgment on all or any part of a claim as to which

there is no genuine issue of material fact involved.

Despite the plaintiff's contentions they felt this was the case because American had "adduced evidence sufficient to prove that plaintiff's injuries were not caused by any negligence, omission, or other wrongful act on its part or on the part of its flight crew". This was because the crew made all of the standard pre-flight safety announcements including warning passengers to be careful in opening overhead bins. Further, the passenger who retrieved his laptop computer from the bin had risen while the aircraft was still ascending and "before the point when the flight attendants typically unbuckle themselves and begin performing their in-flight duties". Additionally, it was not possible for the nearest flight attendant to see this happening because her line of sight was obstructed by the wall of the aircraft lavatory.

Wright's case throws little light on the interpretation of the 'not negligent' standard under the Montreal Convention. What we need is an Australian case on the standard, but until then we must be patient, and "wait and wait" like the refugees in *Casablanca*.

Eds.

Two Year Limitation Period Not Applicable to Contribution and Indemnity Claims under Montreal Convention

In a decision that could have far-reaching implications for the air freight industry, the Ninth Circuit Court of Appeals recently held in *Chubb Insurance Company of Europe, S.A. v. Menlo Worldwide Forwarding, Inc.*, F. 3d, 2011 WL 451953 (9th Cir., Feb. 10, 2011) that the two year limitation period contained in Article 35 of the Montreal Convention does not apply to suits seeking indemnity and contribution, thus permitting those actions to be commenced after the expiration of the two year limitation period under the Montreal Convention.

The facts in *Chubb* are fairly straightforward: in November 2004, an engineering company in New Zealand shipped a turbine engine from New Zealand to the United States, utilizing a freight forwarder which, in turn, contracted with Qantas to perform the actual carriage of the engine to its destination in Los Angeles. When the engine arrived in a damaged condition in Los Angeles on November 19, 2004, the owner of the engine filed a claim with its insurer, the plaintiff Chubb, which eventually settled the case and commenced a subrogation against the freight forwarder's successor, UPS. Chubb argued that UPS was liable for the damage to the engine under the Montreal Convention and the parties eventually reached a settlement under which UPS paid Chubb $80,000. On September 18, 2007, nearly ten months after the two year limitation period under Article 35 of the Montreal Convention had expired, UPS filed a third-party Complaint against Qantas seeking indemnification and contribution for all or part of the $80,000 settlement it had paid to Chubb.

Following established precedent in cases from both New York and California, the District Court in California dismissed the lawsuit on the grounds that it was time-barred under Article 35 of the Montreal Convention since UPS' claims against Qantas had not been brought within two years of the date of the damaged engine's arrival in Los Angeles. This principle of law is well established in four Federal and State Court cases in both New York and California. However, the Ninth

Circuit found those cases to be "unpersuasive" and instead was guided by an Ontario Supreme Court case ruling that Article 29 of the Warsaw Convention (the predecessor to Article 35 of the Montreal Convention) did not apply to suits brought by one carrier against another.

Article 35 of the Montreal Convention provides that "The right to damages shall be extinguished if an action is not brought within a period of two years reckoned from the date of arrival at the destination . . ." The Ninth Circuit ruled that Article 35 extinguishes only a single right, the "right to damages". The Court agreed that Chubb's action against UPS asserted such a right to damages, but went on to hold that UPS' third party claim against Qantas did not constitute a "right to damages" since UPS was not seeking compensation for the damage sustained to the engine; rather, UPS, as the contracting carrier with the shipper, was seeking indemnification and contribution from Qantas, the actual carrier of the goods, for such compensation as UPS has paid to the shipper's insurance company.

The Court concluded that while the Montreal Convention does not create a cause of action for indemnification or contribution among carriers, it does not preclude such actions as may be available under local law. Article 37, entitled "Right of recourse against third-parties", provides nothing in the Montreal Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. The Court interpreted the right of recourse under Article 37 as referring to local law causes of action for indemnification, contribution, apportionment and set-off. Accordingly, the Ninth Circuit concluded that because an action between carriers for indemnification or contribution is premised on the right of recourse, rather than the right of damages, Article 35's two year time bar did not apply and, instead, the timing of such an action of recourse was governed by local law.

The Court further went on to note that Article 35 only mandates that the right of damages shall be extinguished if an action is not brought within the period of two years. The Court noted, somewhat sophistically, that Article 35 did not require that "all actions" related to a particular event must be brought within two years. Accordingly, it found that "the plain language of the Montreal Convention makes clear that actions for indemnification and contribution are not subject to Article 35's two-year statute of limitations."

Simply put, the *Chubb* decision is a poorly reasoned decision which will have a grossly unfair impact on the airline industry. In short, it is a bonanza for air freight forwarders and their insurers. No longer can an airline be certain that it will not be subject to a claim for damages once the two year limitation period under Article 35 of the Montreal Convention has expired. A carrier must now be aware that there is a distinct possibility that litigation may be commenced against them many years after the transportation of the consignment has concluded. For example, a right of contribution or indemnity generally does not arise until a wrongdoer has paid the judgment against it. Depending on the local law, the wrongdoer may have as long as six years to file an action against the actual carrier who performed the transportation of the goods. Accordingly, the *Chubb* decision, at least for cases in the Ninth Circuit Court of Appeals, which comprises California and some of the western states of the United States, will now require an

airline to maintain its cargo files for many years after the expiration of two years from the date the transportation stopped.

Particularly troublesome is that the Ninth Circuit disregarded four well-decided and well-reasoned decisions, going back more than a quarter of a century, which concluded that the limitation period in the Warsaw Convention, the predecessor to the Montreal Convention, applied as well to third-party actions for indemnity and contribution. The Court instead relied upon a discredited Ontario Supreme Court of Appeals decision which simply held that the Warsaw limitation period did not apply to suits brought by one carrier against the other.

The only possible step left to appeal this judgment further would be for the filing of a petition for writ of certiorari before the United States Supreme Court. Such a petition for writ of certiorari would have to be filed within ninety days from the Court's decision of February 10, 2011. It does not seem likely, given the amount of money involved, that a certiorari petition will be filed in this case. Assuming that no further review is sought, carriers must be alert in keeping their cargo files open for at least six and possibly ten years following the date of a cargo loss, even if the carrier is not aware of any claim which has been asserted.

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FOCUS ON SPACE TOURISM

SpaceShipTwo, the space vehicle designed for Sir Richard Branson's space tourism venture, Virgin Galactic, is a step closer to its first commercial space flight after a successful series of high altitude test flights in 2010. The company has also entered an agreement to take scientists into space for the purpose of conducting low-gravity experiments. Commercial flights could commence as early as next year. This means that the legal issues confronting suborbital space tourism, considered fanciful not too long ago, are now very real.

SpaceShipTwo attached to the mothership, White Knight: Virgin Galactic.

A spaceport is presently under construction in New Mexico, USA where Virgin Galactic will launch operations. The spaceport will double as a training centre for space tourists, of which there are presently 'several hundred' signed up to experience space for $200,000 each. SpaceShipTwo will be ferried to a height of 50,000ft (15km) by a purpose-built, conventional aircraft: the Virgin MotherShip ("White Knight"). Once released, the ship's rocket will propel it to a maximum altitude of 110km and

passengers will experience weightlessness for a number of minutes before re-entry into the earth's atmosphere.

Preliminary complications with the law occur in identifying whether SpaceShipTwo will be an aircraft, spacecraft, or both.

A "space object"?

First, it is necessary to characterize the term "suborbital". A suborbital flight is one which reaches an altitude of approximately 100km but does not attain enough speed to remain in orbit ("orbital velocity"). As a comparison, low earth orbit satellites typically orbit the earth at an altitude of 200 to 1500km. This raises a problem: at what altitude does space begin? While there is no international agreement on the delimitation line between air and outer space, there is support in some jurisdictions for demarcation at 100km above mean sea level. This is the approach Australia has adopted (*Space Activities Act 1998*, s 8).

Therefore, as things presently stand, a suborbital space launch from an aircraft will necessarily involve a transition from "air" to "space". It certainly seems clear that space law will be engaged; whether or not the whole journey of the spacecraft module, SpaceShipTwo, should be considered an outer space flight is not so clear.

Some academics contend for a practical approach, that is, apply space law to SpaceShipTwo from the moment it launches from the mother ship to the moment it touches down. But this application is not without difficulties. Article I(b) of the Registration Convention states that '[t]he term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof' (Convention on the Registration of Objects Launched into Outer Space). But the term "space object" is largely undefined.

Consequences – regulation and liability

The consequences of this important clarification include registration under the Registration Convention which requires a space object to be registered. Article VIII of the Outer Space Treaty (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies) provides:

"A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body."

In the US, the Federal Aviation Administration (FAA) issued applicable regulations in 2006 (*Human Space Flight Requirements*, 70 Fed Reg 75643-45). These cover flight crew qualifications and training (both of crew and participants), cabin environment control and life support systems, flight testing, providing information on risks to participants, and security. Additionally, there are licensing requirements for the organisation and each member of the crew and space flight participant must sign a waiver of claims against the FAA and Department of Transport. Whether or not these broad waivers will be enforceable remains to be seen, especially in the event of negligence by the operator.

Passenger and third party liability is critical to operators. An immediate problem with the applicability of the Montreal Convention is that it refers to the *international* carriage of persons by aircraft (Convention for the Unification of Certain Rules for International

Carriage by Air). At this stage Virgin Galactic's flights will be completed within the US. Hobe, Goh and Neumann note, however, that 'this may in practice not create much of a problem' because national air laws should be in conformity with the Montreal Convention (Stephen Hobe, Gerardine Meishan Goh and Julia Neumann, 'Space Tourism Activities – Emerging challenges to Air and Space Law?' (2007) 33 *Journal of Space Law* 359, 368).

As far as liability for the space component of the voyage is concerned, the Liability Convention clearly makes a "launching state" liable for various forms of damage, but it does not extend to commercial passengers (Convention on International Liability for Damage Caused by Space Objects). The *Commercial Space Launch Activities* code requires a licenced company to obtain insurance to compensate for claims by third parties and claims against the US government (49 USC § 70112 (2004)). This national legislation endeavours to fill the void in uncertainty in liability for space tourism.

The Rome Convention will apply to damage to third parties on the surface caused by the "aircraft" (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface). As soon as space law applies to the object, the Liability Convention will be invoked. It specifically excludes liability for damage caused to the nationals of the launching state (Art VII). Nonetheless the US legislation requires licensed companies to demonstrate financial capacity to pay third party claims and does not appear to restrict third party rights.

The legal status of persons aboard a commercial space flight is unknown and may have critical implications for rescue operations (especially in respect to the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space).

Conclusion

The uncertainty surrounding many legal issues in suborbital space tourism compounds difficulties for insurers and legislators alike. Although the US has taken significant steps to set up a legislative regime for space tourism, many important questions remain unanswered such as the delineation between space object and aircraft for suborbital launches. Safety must always be prioritized in space flight; however, the importance of the law in protecting space tourists, third parties, and states cannot be overlooked.

For further information, see Steven Freeland, 'Fly me to the moon: How will international law cope with commercial space tourism?' (2010) 11 *Melbourne Journal of International Law* 90 and the Virgin Galactic website: http://www.virgingalactic.com/.

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