Volume 62: Q1(2013)

ALAANZ Aviation Briefs

Published for the Aviation Law Association of Australia and New Zealand Ltd ABN 47 083 689 641

Editors
Nick Humphrey
Dr Vernon Nase

Contributions and Feedback to
Nick Humphrey
nick.humphrey@emirates.com
Associate Professor Dr Vernon Nase
vernon.nase@curtin.edu.au

ALAANZ Secretariat:
Mecca Concepts Pty Ltd
meccaconcepts@bigpond.com
Tel: +61 409 336 804

RECENT CASES

Ailsa Walker-Eyre v Emirates [2012] QDC 364

In this application before the District Court of Queensland, the Court considered whether the plaintiff's claim for damages under the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the **Federal Carriers' Liability Act**") was subject to the pre-litigation procedures of the *Personal Injuries Proceedings Act* 2002 (Qld) ("**PIPA**").

The question of applicability of the PIPA regime to the Federal Carrier's Liability Act had been a matter without any judicial guidance until the present case.

Factual Background

The alleged accident occurred during the course of an international flight from the United Kingdom to Brisbane, Australia. The plaintiff alleges that on arrival in Brisbane, while waiting to disembark from the aircraft, she was struck on the head by luggage falling from an overhead locker as a result of the actions of another passenger, causing her personal injury.

On 7 November 2011 the plaintiff filed a claim and statement of claim in the District Court of Queensland, claiming damages for personal injuries under the Federal Carrier's Liability Act. The plaintiff did not comply with the requirements of Pt.1 of Ch. 2 of PIPA before doing so on the basis of which the defendant submitted that the claim should be struck out by the Court. Under Pt.1 of Ch. 2 of PIPA, within certain timeframes, a claimant is required to give a prospective respondent written notice in an approved form verified by statutory declaration which sets out the circumstances of the incident giving rising to a personal injury supported by certain documentation.

Under the Federal Carriers' Liability Act, ss9B and 9F give force of law to the 1999 Montreal Convention which applies and governs the liability of the air carrier (if any) to passengers, which would be the applicable Convention in this case. In particular the claim falls to be decided under Article 17 of the Convention which declares the carrier to be "*liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking*."

Court's Analysis

District Court Judge Douglas McGill stated that the starting point was that PIPA did not apply of its own force because of s 109 of the Australian Constitution. The relevant question was "*whether and to what extent PIPA is applied to the proceeding by s 79 of the Judiciary Act 1903*." The *Judiciary Act* provides in s 79(1) that:

> "*The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable*." (Emphasis added).

His Honour viewed the issues as being (i) whether PIPA is applicable in this case, and (ii) whether the Constitution or the laws of the Commonwealth otherwise provide. If PIPA were to be applied, which would depend upon the answers to these questions, it would do so pursuant to s79.

His Honour noted that State provisions "*may be expressed in terms that makes it impossible for them to be picked up*" as in *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168 "*where it was held that a state act dealing with something like the appeal costs fund did not permit an indemnity certificate to be granted to an unsuccessful respondent in the High Court*."

Judge McGill then observed that the provisions in PIPA dealing with its scope are "*cast in wide terms*" although its section 6(2) excludes the operation of PIPA in various circumstances where other legislation applies. Significantly subsection 6(5) provides that the Act does not affect

"*the seeking, or the recovery or award*" of damages for personal injury arising under four Queensland statutes including the *Civil Aviation (Air Carriers' Liability) Act 1964* (Queensland) ("the **State Carriers' Liability Act***").* His Honour also noted that State Carriers' Liability only applied to carriage entirely within Queensland and is complementary to the Federal Carriers' Liability Act which applies to inter-state and international carriage by air. His Honour concluded that "*the legislature proceeded on the basis that it was appropriate for the application or otherwise of State legislation like PIPA to claims under Commonwealth Acts to be determined by the applicable provisions of the Constitution and federal law*."

Judge McGill further suggested that the exclusion of the State Carriers' Liability Act from PIPA "*strongly suggests to me a legislative assumption that claims for damages in relation to personal injury under the Act would not be subject to PIPA*."

His Honour also examined an argument that "*notwithstanding the terms of s 7, the provisions of Pt I of Ch 2 should be treated as procedural provisions for the purposes of the Convention*." Judge McGill was of the opinion that if s7 provides to the contrary then effect ought to be given to the section. It was felt that section 79 of the *Judiciary Act* would pick up s 7.

Consideration also was given to the issue whether the Federal Carriers' Liability Act "*otherwise provides*" so that this part at least will be excluded from the operation of s 79 of the *Judiciary Act*. The defendant argued that the Act did not "*otherwise provide*" because there would in practice have been no difficulty in complying with the requirements of PIPA and still satisfying the requirements of the Act and the Convention.

In its contemplation the Court referred to an earlier decision of the High Court in *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1, where it was held that the provisions of a Commonwealth Act requiring a license for an aircraft to operate within controlled airspace did not have the effect of excluding a requirement under a New South Wales Act in relation to the licensing of aircraft operating solely within New South Wales. This was because the Commonwealth Act concerned safety, regularity and efficiency of the flight of aircraft, while "*the State Act was concerned with the economic control of transport for reward of passengers and cargo within the State; the two Acts operated in different fields, and served different ends*."

The Decision

Judge McGill conducted an in-depth exploration of the jurisprudence dealing the meaning of the words "*otherwise provides*" from Section 79 of the Judiciary Act. His Honour saw the need to focus on the words of the Federal Carriers' Liability Act, in particular Article 17 of the Convention which it incorporates. In particular, His Honour placed emphasis on the use in Article 17 of the word "only" with the carrier being liable "*for damage sustained … upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking*."

> *"The significant word is "only". Article 17 is I consider expressed so as to require no other condition for the liability of the carrier, and in that way "provides otherwise" than the provisions of State legislation which in its operation has the effect of imposing as a matter of substantive law additional conditions upon the liability of the carrier."*

Alluding to the effective operation of, and "fundamental requirement" that is the two year liability limit under Article 35 of the 1999 Montreal Convention, Judge McGill resolved that the imposition of pre-litigation impediments would "[derogate] from the operation of the Act and the convention."

Judge McGill further concluded that the whole scheme of the Federal Carriers' Liability Act and the Convention did "*otherwise provide*" and that the whole scheme was inconsistent with the operation of Pt 1 of Ch 2 of PIPA. Significantly, the Convention "*imposes no obligation for notice prior to a claim for damages for personal injury*" and this is an important part of the wider scheme it creates. His Honour cited other provisions from the convention in

asserting its self-contained nature, such as Articles 33, 21 and 23.

After detailing some of the fundamental inconsistencies between the Federal Carriers' Liability Act and PIPA Judge McGill decided as follows:

> "*[T]he Act does provide otherwise for the purposes of s 79, so that that section does not make Pt I of Ch 3 of PIPA applicable, and there was* ***no requirement*** *on the plaintiff to comply with those provisions prior to commencing the present proceeding*."

Editors.

AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd [2012] NSWDC 220

In this proceeding before the District Court of New South Wales, the plaintiff claimed the recovery of damages for economic loss under the *Civil Liability Act 2002* (NSW) ("**CLA**") which arose following the collision of civil helicopter collision with unmarked suspended electricity wire located in a restricted military area.

The plaintiff was the aircraft owner and the defendant was the bailee (or hirer) of the aircraft whose employee, Mark Harrold, was the pilot of the aircraft during the collision.

Facts

Following a period of negotiations, on 28 January 2009, the plaintiff's EC120B helicopter was delivered to the defendant's heliport at Rosehill.

The next day, in conditions of deteriorating weather and increasing cloud, while on flight from Scone to Sydney, the pilot, Mr Harrold, decided to descend in order to fly under the cloud. Following a descent below cloud level near Broke, and after several minutes, the helicopter struck an 11kV powerline from Rothbury that was suspended over a valley located in restricted military airspace on Mt Broken Back, near Singleton Army Base, in New South Wales. The presence of the powerline was not indicated on the map comprising the current visual navigation chart ("**VNC**") that was available to the defendant's pilot. The wire struck the aircraft in the middle of the windscreen breaking through the centre window strut and breaking the Perspex windscreen of the helicopter. The wire then broke when it struck the front window side supports. The pilot managed to land the helicopter safely at a quarry inside the Dochra area. The helicopter was running quite normally on landing and there were no injuries.

In examining the facts Levy DCJ agreed that if it were not for the presence of the unmarked and uncharted powerline, the pilot, Mr Harrold, would have cleared the area without incident.

Expert Evidence

Expert evidence was tendered by four experienced pilots with significant flight time and both military and civilian flying experience. In consideration of this expert evidence, Levy DCJ observed that a *"pilot in the position of Mr Harrold is required to make reasonable aviation and navigational decisions, commensurate with the prevailing circumstances, in accordance with learned theory, applicable regulations, and practical training.*"[1] His Honour further acknowledged that "[t*]he expectation is not that pilots must necessarily always make the correct decision. However, pilots are expected to exercise reasonable skill, care and judgment in all the circumstances to avoid making wrong decisions*." His Honour acknowledged two areas of concern arising out of the expert evidence. They were "*the fact that he flew into the restricted area at all, and, secondly, that he flew into that area in circumstances where the prevailing conditions were considered to be unsuitable for safe flying*."

Breach of contract issue

The plaintiff argued that the agreement between the parties included a number of implied terms (which had been breached) relating to (i) safe operation of the aircraft by pilots so as to avoid collisions with powerlines; (ii) the pilots would exercise due care and skill; (iii) operation of the aircraft in compliance with the *Civil Aviation Act 1988 (Cth)* (**"CA Act**") and the *Civil*

[1] At 141.

Aviation Regulations 1988 (Cth) ("**CAR**") and the Civil Aviation Safety Regulations 1998 ("the **Civil Aviation Legislation**"); and (iv) the pilots flying the helicopter in compliance with the Civil Aviation Legislation.

Because the implied terms were examined in the context of a damages claim for breach of contract, which, in his Honours view, was also governed by the *CLA*, (with the exception concerning the onus of proof in the case of a bailment) Levy, DCJ observed that "*there [was] no difference to the claim framed in alleged breach of duty of care arising from contract or from negligence"*. In this context His Honour cited the case of *Booksan Pty Ltd & Ors v Wehbe*[2] in support of this proposition. As a consequence of this conclusion, His Honour considered "*the claim for breach of implied terms of the contract as part of the evaluation of the claim framed in negligence*."

In these circumstances it was concluded that the onus fell onto the defendant as bailee of the helicopter, to establish that the damage in question did not arise from his negligence.

Given the manner in which the case was conducted, with pilot and expert evidence provided, it was concluded "*that the fabric and structure of the evidence would have been the same on both formulations of the claim, whether framed in bailment or negligence*."

His Honour then proceeded to focus on the requirements of s 5B of the *CLA.*

Section 5B (General Principles) of the New South Wales *CLA* is in its essence about breach of duty of care. It features the classic Ipp Report formulation that the risk needs to be foreseeable, not insignificant and that *"a reasonable person in the person's position would have taken those precautions*". In determining whether a reasonable person would have taken precautions against the particular risk of harm the court then examines the calculus of negligence factors, namely:

(a) the probability that the harm would occur if care were not taken;
(b) the likely seriousness of the harm;
(c) the burden of taking precautions to avoid the risk of harm; and,
(d) the social utility of the activity that creates the risk of harm.

In application to the facts of this case and engaging in the balancing of risk assessment required by Section 5B, District Court Judge Levy suggested at #165 that the requirements of s 5B(2) of the *CLA* "*amount[ed] to no more than a requirement that [the pilot] take precautions amounting to reasonable care in the circumstances, especially where the risk of serious harm occurring was ever present whilst the helicopter was in the dynamic process of being flown*." In so alluding Judge Levy also noted that the risk of a collision of some kind was an ever-present one, as was the risk of the occurrence of serious harm, if reasonable precautions were not taken to avoid collisions, including a collision involving a wire strike.

In his subsequent analysis of the evidence offered by both sides, including the expert evidence, His Honour emphasised the need to not impose on the pilot a "*counsel of perfection*" that disregarded the "*reasonable prospective judgments Mr Harrold was required to make at the time he was confronted with the problematic circumstances*." In close analysis Judge Levy was of the view that the critical decisions of the pilot were reasonable in the circumstances. In particular it was considered that the pilot was "*in a better position than the experts for the purpose of making judgments concerning the significance of weather observations, including the perceptions of depth, and including the perception that the weather was closing in*." In his analysis Judge Levy emphasised the reasonableness of critical decisions made by the pilot and that he did not have the luxury of time in the circumstances prevailing.

On the issue of the pilot's breach of the prohibition on flying into restricted airspace under CAR 140, Judge Levy placed emphasis on the exigencies of the situation facing the pilot. He observed in the circumstances "*that incursion and regulatory contravention does not confer a private right of action in negligence and, on my analysis of the circumstances, that*

[2] [2006] NSWCA 3 (per Ipp JA at [167]).

particular of negligence does not survive to sustain the plaintiff's claim of either breach of contract or negligence."

Under CAR 157 it is an offence for a pilot to fly an aircraft at a height lower than 500m from the highest point of the terrain immediately below the aircraft. It was argued by the plaintiff that the pilot, Mr Harrold, had flown substantially beneath this height. In this context Levy J observed that:

> "*I have come to the view that the evidence does not reasonably permit such finely honed arguments in the circumstances in which Mr Harrold found himself*."

His Honour further emphasised that (i) the presence of the helicopter was due to the stress of weather and unavoidable circumstances and (ii) the regulations did not assist the plaintiff's case on breach of contract or negligence. On an argument associated with the alleged excessive speed of the helicopter Levy J emphasised that the speed selected "*was reasonable for the cloud situation he was trying to fly away from*" and that the pilot "*had no notice of the presence of the wire after viewing his VNC map*." Judge Levy concluded that the wire strike was not due to the defendant's negligence.

The Defendant raised a defence under Section 5O of the CLA, arguing that the pilot has acted at a professional statdard precluding him being negligent. His Honour, in cocnsidering what constituted a professional in leading cases such as *Perpetual Trustees Australia Limited v Paladin Wholesale Funding Pty Ltd*,[3] and *Prestia v Aknar*,[4] saw the defence as not being available in this case.

Proportionate liability issue

Notwithstanding his conclusions, Judge Levy briefly dealt with arguments relating to the applicability of proportionate liability under the CLA.

The defendant had claimed that in the event of a liability finding against it, there was proportionate liability due to the acts, neglects and defaults of the electricity supply company, Energy Australia, which was responsible for the wire. The argument made was that economic loss was an "*apportionable claim*" within the meaning of s 34(1) of the *CLA* and Energy Australia was a "*concurrent wrongdoer*" within the meaning of s 34(2), although not a party to the proceedings, and not an "*excluded concurrent wrongdoer*" within the meaning of s 34A of the *CL Act*. There was also a claim along these lines made against Air Services Australia who were the supplier of the VCN map used by the pilot. In dealing with this argument His Honour concluded that Energy Australia, if sued, would not have been found to be liable for breach of duty of care and negligence in leaving the wire in an unmarked state.

His Honour concluded that it is highly probable that Air Services Australia would have been found liable for that omission, had they been joined in the proceedings. This was particularly so given a prior collision of an aircraft with the wire "which would have drawn attention to the need to have the location of the wires identified on the relevant VNC map." Judge Levy stated that, if his primary liability findings required the entry of judgment in favour of the plaintiff, the damages awardable to the plaintiff against the defendant, would have been reduced by 80 per cent as a result of his findings relating to the proportionate liability.

In accordance with his reasonings above Judge Levy found for the defendant with the plaintiff to pay the defendant's costs.

Editors.

---

[3] [2011] FCR 473; (2011) 83 ACSR 140.
[4] (1996) 40 NSWLR 165.

Attia v Jetstar Airways Pty Ltd [2013] NSWADT 28

Anti-Discrimination Claim Against Jetstar

The Administrative Decisions Tribunal of New South Wales recently ruled on an application for leave to proceed in the case of *Attia v Jetstar Airways Pty Ltd*. The application resulted from an incident that saw a passenger and his family refused permission to board a Jetstar flight to the Gold Coast.

Pre-history

It was uncontentious that Mr Amir Attia had been denied boarding subsequent to his yelling at an employee of Jetstar Airways. Prior to the proceedings before the Administrative Decisions Tribunal, the Anti-Discrimination Board had declined Attia's complaint of race discrimination as 'lacking in substance.'

Complainant's Version of Incident

Magistrate Hennessy, in ruling on the application, noted that for the purposes of the present proceedings he fell under an obligation to presume that the complainant would be able prove his account of events.

Mr Attia's version of events was outlined in paragraphs 3-7 of the judgment and, in précis, are as follows:

On 23 January 2012, Attia and his family arrived at the airport for their flight to the Gold Coast. The Attia family joined the queue at Gate 53 but a Jetstar employee, upon looking at their boarding passes, said, "This is not your flight, you are on the next one." Despite Mr Attia's efforts to find out what time his flight was due to depart, the employee said she did not have time to answer. When Mrs. Attia heard an announcement calling on passengers to go to Gate 57 as their flight was ready for departure, the family hurried to the departure gate. Upon arrival there, Mr Attia's mother, who was carrying his infant child, had an asthma attack and collapsed. Attia stated that he advised Jetstar employees of the problem but that no one offered any assistance. Attia's wife asked the attendant at Gate 57 to tell her the name of the Jetstar employee at Gate 53 because she wanted to make a complaint about her behaviour. The attendant indicated that she did not know her name. When Mr Attia asked again the attendant said, "Shhushhh." After Attia complained about her failure to respond to his mother's condition, he was told, "Don't be silly, she's not going to die." Attia felt degraded and humiliated which caused him to yell out, "Why are you treating us like that, we should be treated with the same respect you treat other passengers with."

Shortly afterwards, Attia noticed that a police officer had been called. Subsequently he was approached by the manager, Anj, who after discussion agreed that Attia and his family could board the flight. Attia offered his apology to the attendant on Gate 57 which was declined. At that point the attendant at Gate 57 started to break up in tears hiding her face under the desk and telling the manager that she will not allow us to board the flight. The manager then reversed her decision and advised Attia that under no circumstances would they be accepted onto the flight.

In response Jetstar alleged, and Attia denied, that Attia swore at staff at Gate 57 and pounded his hand on the counter numerous times in an aggressive manner. Jetstar's policy is that they may refuse to carry a passenger where "the passenger has used threatening, abusive or insulting words towards its ground staff or a member of the crew of the aircraft or otherwise behaved in a threatening manner."

Decision

Magistrate Hennessy ruled that if Attia was able to prove that his conduct did not justify Jetstar's decision, a Tribunal hearing this case may draw an inference that his race was a factor. Consequently, in the circumstances it was fair and just to allow Attia's complaint to go ahead.

Editors.

FLIGHT DELAYS

Following on from the previous edition of Aviation Briefs, we continue our analysis on the review of the claims malaise created by the European Court of Justice's interpretation and application of European Union Regulation 261/2004 ("**EC 261**") on flight delay.

The growing trend of EC261 delay claims has most recently motivated the launch of Bott Aviation, which espouses to be a "user friendly" no-win no-fee claims process managed by consumer rights law firm, Bott & Company, and EU flight compensation claim company, EUclaim.

On 13 March 2013, the EU issued a press release which outlines the proposed changes to be introduced to revise EC261 which the EC suggests will:

> "*clarify[y] key aspects of EU law which have been a source of difficulty for passengers and air carriers alike. It introduces new passenger rights where necessary. It provides passengers with effective complaint handling procedures and strengthens enforcement, monitoring and sanctioning policies to ensure a better application of all passenger rights. It also ensures that the obligations remain financially realistic. In addition, measures are proposed on price transparency and to enhance passengers' protection in case their airline becomes insolvent*."[5]

In addition, under an early tabled draft revision to EC 261 which has been viewed by the author, it is proposed that national law and contractual provision may not restrict the air carriers' right to seek compensation from third parties responsible for delays or cancellations. It is purportedly designed to create an economic incentive for third parties such as airports, air navigation service providers, ground handlers, to find ways to reduce delays in particular, the proposed new Article 13 on "*Redress*" provides:

1. *In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of EU or of national law and no contractual provisions may restrict its rights to seek compensation for costs incurred under this regulation from any person, including third parties, in accordance with applicable law.*
2. *In particular, no provisions of EU or national law and no contractual provision shall restrict the operating carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of EU or of national law and no contractual provision may restrict the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to see reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.*
3. *Paragraphs 1 and 2 shall be immediately applicable to relevant provision of contracts concluded after the date on which this Regulation enters force and shall be applicable to relevant provisions of existing contracts five years after this date. However, paragraphs 1 and 2 shall not be applicable to contractual provisions in cases where contract between the air carriers and the concerned person or third party includes measures for share responsibility such as penalties or other economic incentives for the person or third party to reduce delays.*

Therefore, notwithstanding that an airport or other air service providers may have contractual liability limitation in place, unless the contract also includes some sort of "*penalties or other economic incentives*" to avoid any delay those contractual limitations will not be applicable. In the case of most air service providers contracts, for example, ground handling agreements, the arrangement is most commonly prefaced on a service level agreement which provides financial disincentive for events causing delays. However, if this revision proceeds, it will be essential that the provisional are sufficiently robust to avoid the otherwise unforeseen recourse from the carrier.

The at times fractious relationship between the carrier on the one hand and the air service providers on the other may well be further strained should this revision proceed. Furthermore, this is a sign that the pro-passenger interpretation of EC 261 will continue as more pockets of compensation are opened.

The following contributions include a very useful summary of most recent EC 261 decisions and also two more detailed reviews of cases from Germany.

Editors.

[5] Refer to: http://europa.eu/rapid/press-release_MEMO-13-203_en.htm (Last accessed on 8 April 2013).

EC Regulation 261/2004 update

Holman Fenwick Willan examine below recent judicial decisions on various aspects of EC Regulation 261/2004 (Regulation 261).

Extraordinary circumstances

In its *Wallentin-Hermann v Alitalia* decision (dated 22 December 2008), the European Court of Justice ruled that a technical problem is not covered by the concept of "extraordinary circumstances", unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and are beyond its actual control.

In a decision of 24 October 2012, a Dutch court in Haarlem did not award compensation to passengers as it considered that technical problems in relation to one of the engines on an aircraft, which caused the cancellation of the flight, had to be qualified as "extraordinary circumstances". Due to bad weather conditions, ice which had accumulated in one of the engines caused the tips of the blades within that engine to curl. The engine was examined, and had to be replaced. The Dutch court accepted the air carrier's arguments, and qualified the technical problem as an extraordinary circumstance under Regulation 261. The court decided that the air carrier had provided sufficient evidence to demonstrate that the technical problem had not arisen due to inadequate maintenance of the aircraft. The replacement of the engine and the substitution of another aircraft to operate the flight concerned did not fall under the scope of "reasonable measures" to be taken by the air carrier. The court also referred to the fact that flight safety would be endangered by the technical problem.

In another Dutch case, the Utrecht court held, in a decision given on 24 August 2011, that the air carrier had sufficiently proved that the cancellation of a flight was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. On landing, a foreign object damaged the blades in one of the engines, with the result that the aircraft could no longer be operated. Since no spare parts were available, replacement blades had to be flown in. As the repairs to the engine would take time, the carrier therefore decided to cancel the flight. The Utrecht Court based its decision on the following grounds: the carrier had sufficiently demonstrated that (i) the foreign object damage could not have been avoided by covering the engines, since an engine requires free airflow to function; (ii) repairing the engine was impossible since no spare blades were available; and (iii) no substitute aircraft was available.

The Amsterdam court reached a similar conclusion in its decision of 23 June 2011, when it concluded that FOD incidents have to be qualified as extraordinary and beyond the air carrier's control. This case concerned a flight that was cancelled due to a foreign object puncturing the inner lining of the tyre, eventually leading to tread separation and damage to the body and wing. The Amsterdam court was persuaded that this was an extraordinary circumstance, based on a report of the resulting damage and a report from Goodyear.

Obligation to provide care to passengers

In *McDonagh v Ryanair*, the Claimant's Ryanair flight from Faro to Dublin on 17 April 2010 was cancelled as a result of the closure of airspace due to volcanic ash. Flights between continental Europe and Ireland did not resume until 22 April 2010 and Ms McDonagh was unable to return to Dublin until 24 April 2010. During the seven days in which the claimant remained in Faro, Ryanair did not provide her with any care. The claimant made a claim under Regulation 261 for the costs of meals, refreshments, accommodation and transport incurred whilst she waited in Faro. Ryanair sought to argue that, whilst care and welfare had to be provided when a flight was cancelled due to "extraordinary circumstances", the airspace closure went beyond that and instead constituted "super extraordinary circumstances" which relieved it of its care obligations under the Regulation.

On referral from the Dublin Metropolitan District Court, in a ruling given on 31 January 2013, the European Court of

Justice held that there is no separate category of 'particularly extraordinary circumstances' which would exempt carriers from their care obligations under Regulation 261. Whilst the closure of airspace due to the volcanic eruption constituted 'extraordinary circumstances' which relieved Ryanair of any obligation to pay standard compensation under Regulation 261 for the cancelled flight itself, it did not relieve Ryanair from the obligation to provide care and assistance in terms of refreshments, accommodation and the like. The Court also confirmed that there is no temporal or monetary limitation on the care obligation (which was recognised to be particularly important when extraordinary circumstances persist over a long time). However, where a carrier does not provide the care required, affected passengers may only obtain reimbursement of costs that are proved to be necessary, appropriate and reasonable.

The European Court also held as a threshold issue (and in line with previous case law) that, in addition to the powers of National Enforcement Bodies to enforce Regulation 261, passengers are entitled to seek reimbursement through the courts of expenses they incur due to a carrier's non-compliance with its welfare obligations.

Limitation period for claims

In *Moré v Koninklijke* (22 November 2012), the European Court of Justice confirmed the applicable limitation period for bringing claims under Regulation 261. The claimant had reserved a seat with the defendant airline on a flight from Shanghai to Barcelona, scheduled for 20 December 2005. The flight was subsequently cancelled, forcing the claimant to travel the following day. On 27 February 2009, the claimant brought an action under Regulation 261.

The European Court of Justice rejected the defendant's argument that the 2 year limitation period under the Montreal Convention applied. It held that the measures laid out in Articles 5 and 7 of Regulation 261 fall outside the scope of the Warsaw and Montreal Conventions. Since the Regulation did not contain any limitation period of its own, the Court concluded that the limitation period should be determined in accordance with the domestic limitation periods of the relevant Member State.

Whilst not establishing new principles, this case is an important reminder to carriers of the need to be aware that different limitation periods will apply to claims under Regulation 261 depending on the Member State in which the claim is brought.

Limitation of remedies

In *Graham v Thomas Cook Group UK Ltd* (23 July 2012), the English Court of Appeal considered a claim made by a claimant who had booked a flight with Thomas Cook, which was subsequently cancelled due to the volcanic ash airspace closure in 2010. Although the claimant was given a refund, he also requested an alternative flight under Regulation 261. This was refused, and the claimant issued proceedings. Subsequently, Thomas Cook offered an alternative ticket as a goodwill gesture, which was accepted. However, the claimant continued proceedings claiming general damages for distress caused by the cancellation, a sum for wasted expenditure incurred by a third party and punitive or exemplary damages.

The Court of Appeal held that there was no right to the compensation which was being sought for a breach of Regulation 261. It concluded that, this being a simple contract of carriage, there could not be any claim for damages at common law for distress resulting from the cancellation of the flight. The Court of Appeal said that damages for disappointment and distress are allowed in contract law only in rare instances, such as there is a breach of contract to provide a holiday.

The judgment in *Graham* confirms that it is not possible to claim for an additional loss caused by a breach of Article 8 of Regulation 261 over and above the remedies which are provided under Article 8.

Air France v Folkerts, European Court of Justice, Grand Chamber, 26 February 2013 [6]

In this, the most recent example of the CJEU extending EU 261 beyond its express language and provisions, the Court held Air France liable to pay EU 261 delay compensation for a delay at final destination caused by a missed connection. The passengers were through booked from Bremen to Asuncion via Paris and Sao Paulo. The flight from Bremen took off around two and a half hours late - a delay insufficient to trigger *Sturgeon* delay compensation in its own right (for which a 3 hour delay would have been necessary). The passengers however missed their connecting Air France flight from Paris to Sao Paulo; they were rebooked on a later flight but, as a result of the delay, also missed their subsequent connection from Sao Paulo to Asuncion. Ultimately they arrived in Asuncion 11 hours after their original scheduled arrival time.

The Court determined that, for the purposes of *Sturgeon* delay compensation, the only relevant factor was delay at final destination and it was not necessary for there to have been a delay to the scheduled departure time sufficient to trigger obligations to provide assistance to the passenger under Article 6 of EU 261. That conclusion is not altogether surprising. However the finding of a liability to pay delay compensation for missed connections causing delayed arrival at the conclusion of the passenger's journey is an unwelcome development for airlines. It might be regarded as a logical next step from the flawed legal analysis of the *Sturgeon* and *Nelson* judgments. However it flies in the face of previous CJEU and other EU Member State case law which has held that, in construing to what flights EU 261 applies, the regulation is to be applied on a flight by flight, sector by sector basis and not by reference to the passenger's whole itinerary. The draft proposals to revise EU 261 look set to legislate expressly for liability for missed connections; however in the meantime, this latest judgment will receive some significant consideration.

Revision of Regulation 261

Work within the European Commission and governments of Member States on long-awaited proposals to amend Regulation 261 is continuing, with draft amendments shortly expected to be published formally. Proposed amendments are likely to be significant and are expected to include: express drafting for delay compensation; an attempt to define "*extraordinary circumstances*" in more detail; and some limitation on the care and welfare obligations in certain circumstances. Once the draft revisions are in the public domain, we will issue further briefings on them but, in the meantime, carriers are urged to liaise closely with their industry associations to ensure that their input is made known to government and the Commission as the revisions are being finalised.

Sue Barham, Partner, Pierre Frühling, Partner, Elisabeth Decat, Associate, and Stéphanie Golinvaux, Associate, Holman Fenwick Willian

ECJ broadens application of *Sturgeon*

On February 26 2013 the Grand Chamber of the European Court of Justice (ECJ) handed down its much-awaited judgment in *Air France SA v Heinz-Gerke Folkerts* (C-11/11).

Facts

Ms Folkerts had booked tickets for flights from Bremen (Germany) to Asuncion (Paraguay) via Paris (France) and Sao Paolo (Brazil). She held boarding cards for the entire journey when departing Bremen. The departure of her flight from Bremen to Paris, operated by Air France SA, was delayed by approximately two and a half hours. As a result, Folkerts reached Paris when her Sao Paolo flight had already departed. She was thus rebooked on a subsequent flight to Sao Paolo and arrived in Sao Paolo later than planned, missing her flight to Asuncion. She had to take another flight and eventually arrived in

[6] A more detailed review of this case from a German perspective is provided in the next contribution.

Asuncion 11 hours after the originally scheduled arrival time.

Air France was ordered to pay Folkerts damages of €600 at both first and second instance pursuant to Article 7(1)(c) of EU Regulation 261/2004.

Air France appealed to the German Federal Court of Justice, which took the view that Folkerts would be entitled to compensation only if the ECJ case law in *Sturgeon* (C-402/07 and C-432/07) was also applicable to cases in which the final destination was reached three hours or more after the originally scheduled arrival time (although there was no delay in this case beyond the scheduled departure within the terms of Article 6(1) of the regulation). The Federal Court of Justice took the view that this was unclear from *Sturgeon*.

The Federal Court of Justice thus referred the following questions before the ECJ for a preliminary ruling:

> "*1. Does a passenger have a right to compensation under Article 7 of Regulation (EC) No 261/2004 in the case where departure was delayed for a period which is below the limits specified in Article 6(1) of that regulation, but arrival at the final destination was at least three hours later than the scheduled arrival time?*
>
> *2. If the first question is answered in the negative:*
>
> *For the purpose of determining whether there was a delay, within the terms of Article 6(1) of Regulation No 261/2004, in the case of a flight consisting of several stages, should reference be made to the individual stages or to the distance to the final destination?*"

Decision

After hearing the advocate general decided to announce a judgment without an opinion. This is unusual and could be seen not to bode well for the decision.

As expected, the ECJ once again decided in favour of the consumer.

Regarding the first question, the ECJ held that Article 7 must be interpreted as meaning that compensation is payable to a passenger on directly connecting flights who is delayed on departure for a period below the limits specified in Article 6, but who arrives at the final destination with a delay of three hours or more.

The ECJ reasoned that the purpose of the regulation is to grant minimum rights to passengers when faced with denied boarding, cancellation or delay. While denied boarding and cancellation are defined in Article 2, delay is not. The regulation contemplates two different types of flight delay: delayed departure pursuant to Article 6 and delayed arrival at the final destination (eg, Article 5(1)(c)(iii)). Reference in the regulation to different types of delay is compatible with Article 19 of the Montreal Convention.

The ECJ previously held that where flights are subject to a long delay (ie, a delay equal to or in excess of three hours on arrival), passengers are entitled to compensation pursuant to Article 7 (*Sturgeon* and *Nelson*). Since the inconvenience of loss of time with regard to delayed flights materialises on arrival at the final destination, the ECJ held that the delay must be assessed for the purpose of compensation pursuant to Article 7 in relation to the scheduled arrival time at the destination (*Sturgeon* and *Nelson*). In case of directly connecting flights, this is the delay beyond the scheduled arrival time at the final destination only.

Article 6 seeks to establish only the conditions giving entitlement to measures of assistance and care provided in Articles 8 and 9. Thus, fixed compensation, to which a passenger is entitled under Article 7 when his or her flight reaches the final destination three hours or more after the scheduled arrival time is not dependent on meeting the conditions laid down in Article 6. Any other approach would constitute an unjustified difference in treatment, as it would treat passengers on flights arriving at their final destinations three hours or more after the scheduled arrival time differently depending on whether their flights were delayed beyond the scheduled departure time by more than the limits stipulated in Article 6, despite the fact that the inconvenience suffered by those passengers is the same.

Statistical data was presented at the hearing regarding the substantial volume of connecting flights transporting passengers

through European airspace and the recurrent nature of delays of at least three hours in arriving at the final destination affecting such flights because connections are missed. In this respect, the ECJ acknowledged that the obligation on carriers to pay compensation for long delays entails financial consequences. However, the ECJ emphasised that such financial consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers. It further stressed that the extent of such consequences is likely to be reduced in light of the extraordinary circumstances defence, the carrier's right to seek compensation from any party that caused the delay - including third parties - as well as the fact that the amount of fixed compensation may be reduced by 50% for flights of over 3,500 kilometres where the delay is less than four hours on arrival at the final destination. That aside, case law reveals the importance of the objective of consumer protection, which may justify substantial negative economic consequences for certain economic operators.

Seeing that the first question was answered in the affirmative, the ECJ made no rulings on the second question.

Comment

There has been a string of successful decisions in Germany at both local and regional court level regarding the requirement of delay on departure within the meaning of Article 6 in order to seek compensation pursuant to the regulation further to *Sturgeon*. This decision - albeit not unexpected - therefore came as something of a blow.

Despite the ECJ's reasoning, it is still believed that it is apparent from the wording of the regulation, as well as from *Sturgeon* itself, that delayed departure (as defined in Article 6) must occur cumulatively with delayed arrival in order for claims for delay to be compensated pursuant to the regulation further to *Sturgeon*.

Article 6 expressly stipulates what qualifies as 'delay'. The regulation therefore lacks the necessary unintended gap in legislation which would allow for an analogous application of Article 7 in case of compensation claims for delay where no delayed departure occurred.

Further, in *Sturgeon* the ECJ clearly defined the term 'delay':

> "*Thus, a flight is 'delayed' for the purposes of Article 6 of Regulation No. 261/2004 if it is operated in accordance with the original planning and its actual departure time is later than the scheduled departure time.*" (C-402/07 and C-432/07, Paragraph 32)."

Therefore, by the ECJ's own definition, a flight is not delayed if its actual departure time is not delayed in comparison to its scheduled departure time. Notably, the Federal Court of Justice followed the ECJ on this point and specifically listed Article 6(1) as a requirement for claims made for compensation for delay pursuant to Article 7 further to *Sturgeon* (Federal Court of Justice, February 18 2010, Xa ZR 95/06). It is therefore clear that 'delay' as defined in Article 6 must occur in conjunction with delayed arrival as stipulated in *Sturgeon*.

It is arguably illogical to ignore the provisions of the regulation for the purposes of defining the term 'delay' within the meaning of *Sturgeon* regarding compensation claims for delay pursuant to the regulation further to *Sturgeon*. Following the ECJ's decision in this case, the regulation will be applied to delay scenarios as a result of *Sturgeon* without even fulfilling the requirements of the decision itself.

Ulrich Steppler, Partner, and Katharina Sarah Meigel, Associate, Arnecke Siebold Rechtsanwälte

This article has been reproduced with the kind permission of the authors and first appeared in the International Law Office Newsletter on 13 March 2013. For further information refer to www.arneckesiebold.de.

No compensation for delay on connecting flight outside EU territory

On January 3 2013 the Federal Court of Justice published its reasoning in the Cases X ZR 12/12 and X ZR 14/12 of November 13 2012. The court held that passengers were not entitled to compensation under EU Regulation 261/2004 if the delay occurred on a connecting flight departing outside EU territory.

Facts

In the first case, the plaintiffs booked flights with a non-European airline from Frankfurt, Germany to Belem, Brazil via Sao Paulo. The flight from Frankfurt to Sao Paulo was operated as scheduled. The connecting flight was not operated as a non-stop flight - contrary to the scheduled route - but had a stopover in Fortaleza. The plaintiffs arrived in Belem with a delay of eight and a half hours.

In the second case, the plaintiffs booked flights with a non-European air carrier from Frankfurt to Bangkok, Thailand via Muscat, Oman. While the flight from Frankfurt to Muscat was operated as scheduled, the connecting flight from Muscat landed in Bangkok with a delay of approximately eight hours.

The underlying scenarios are similar and the plaintiffs argued in both cases that they were entitled to compensation for the delay, as the European Court of Justice (ECJ) ruled in *Sturgeon* that passengers on delayed flights have the right to compensation if an arrival delay of more than three hours occurs at the final destination. The plaintiffs argued further that the term 'flight' referred to the concept of journey or travel rather than a single flight segment.

Decision

The court refused the plaintiffs' considerations in both cases with the exact same wording, based on the following arguments.

The court stated that the meaning of the term 'flight' could not be determined by national air law, but was defined autonomously by the regulation. The regulation, in particular Article 2, does not provide for an express definition. In these circumstances, the term 'flight' must be interpreted in light of the regulation as a whole, including the objectives of that regulation (*Emirates v Schenkel*, C-173/07).

An indication to what the term 'flight' means, in the sense of the regulation, is contained in Article 3(1). According to this provision, the regulation shall apply to passengers departing from an airport located in the territory of an EU member state. It will also apply to passengers departing from an airport located in a third country to an airport situated in the territory of an EU member state if the operating air carrier of the flight concerned is a community carrier.

The concept of 'flight' within the meaning of the regulation must be interpreted essentially as an air transport operation, a unit of such transport performed by an air carrier which fixes its itinerary. It follows that an outward and return journey cannot be regarded as a single flight. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision (*Emirates v Schenkel*).

The individual journey or itinerary of a passenger cannot be taken into consideration, as the regulation refers to the rights of the passengers on a flight as a collective, rather than to an individual right. Further, in *Emirates v Schenkel*, the ECJ pointed out that irregularities may occur once in connection with each flight. Thus, this finding would be contradicted if delays on the first and second flight had to be construed as a single delay. The passenger's individual itinerary and final destination are relevant only for determining the amount of compensation (ie, €250, €400 or €600).

The court concluded that according to Article 3(1), the regulation was not applicable. The plaintiffs did not commence a flight within the EU territory. The court therefore upheld the dismissal of the claim by the lower courts.

Comment

The Federal Court of Justice emphasised that a claim for compensation under the regulation must be rejected under these

circumstances, as even though the first flight of the outward journey departed from Frankfurt, the flights were booked together and were operated by the same air carrier.

If two or more flights are offered by an air carrier and each flight has been assigned a specific flight number for a particular route, then the applicability of the regulation must be determined for each of those flights separately. This segmentation of flights is the logical continuation of the ECJ's considerations in *Emirates v Schenkel*. The ECJ decided that the outbound and return journey were distinct and could not be regarded as one flight in the sense of the regulation. The Federal Court of Justice analysed the principles established by the ECJ and transferred them to the smaller units (ie, each separate flight of the outbound and return journey).

The court's judgment is convincing, as it closely parallels the ECJ's considerations. Further, it is in line with the court's earlier judgments, in particular in BGH Xa ZR 113/08.

With its judgment the Federal Court of Justice has reaffirmed that the applicability of the regulation must be determined for each flight separately, while interpreting the term 'flight' as being the smallest unit of transport performed by an air carrier which fixes its itinerary.

Katja Helen Brecke, Associate, Arnecke Siebold Rechtsanwälte

This article has been reproduced with the kind permission of the author and first appeared in the International Law Office Newsletter on 20 February 2013. For further information refer to www.arneckesiebold.de.

SPECIAL REPORT

Dreamliner Fleet Grounding: The Legal Angle

The recent temporary grounding of the world's first all-composite construction airplane, the Boeing 787 Dreamliner, is relatively unusual in that it has affected the worldwide fleet.

We have been watching these developments with interest and discussing the consequences that a fleet grounding of a specific aircraft model can have for aircraft operators, including airlines, and the knock-on consequences for their financiers and lessors.

All new airplanes entering service will at some point experience complications . The 787 Dreamliner is no exception. Since the delivery of the first Dreamliner in September 2011, this technologically advanced aircraft has experienced a number of teething problems in service. These have included fuel leaks, a cracked flight deck window, brake issues and a fire in lithium-ion batteries. The US, European and Japanese aviation authorities have ordered the grounding of all Dreamliners currently in service, until they have completed their investigations into the causes of the problems and are satisfied that they have been resolved.

The grounding of the B787 fleet has affected eight airlines, together operating 49 Dreamliners. There are currently 799 B787-8 and B787-9 aircraft on order.

Mitigating the consequences of a Fleet Grounding

What contractual and other safeguards should airlines consider to mitigate against the loss of the use of their fleets?

Firstly, this particular occurrence highlights the importance of obtaining from the manufacturer an adequate Guarantee against Fleet Grounding and its commercial consequences. The commercial consequences of grounding an entire fleet of aircraft can be severe in terms of lost use and revenue, additional costs and damage to passenger confidence. There may also be further costs incurred in making modifications to aircraft to regain a certificate of airworthiness. Every effort must be made to try to match the financial compensation provided under the Guarantee against the likely losses.

When negotiating Fleet Grounding-related Guarantees, care must be taken regarding framing events that qualify as a Fleet Grounding, quantifying remedies and dealing with the aircraft operator's obligations to modify the aircraft so that the grounding can be lifted. These modifications often have cost consequences in terms of performance and future direct operating costs, so are of importance to the operator's business model.

Fleet Grounding can also have serious implications for aircraft lessors and financiers. The economics of financing an aircraft are generally dependent on the income earned by that aircraft. If that income flow is disrupted this may cause a default under the loan documentation, unless the owner makes up the shortfall from an alternative source. Fleet Grounding-related Guarantees can therefore be of importance as financiers look for security for their loans.

Depending on the contract wording, the mandated grounding of an entire aircraft type may entitle the lessee under an operating lease to stop making rental payments to the lessor while the aircraft is grounded. Whilst this is usually resisted by the lessor we have seen such terms negotiated into contracts. This may have serious implications for the lessor's finance arrangements which the lessor may in turn look to mitigate through Fleet Grounding-related Guarantees.

Dreamliners in use:

- Air India - 5
- All Nippon Airways (Japan) - 17
- Ethiopian Airlines - 4

- Japan Airlines - 7
- LAN Airlines (Chile) - 3
- Lot Polish Airlines - 2
- Qatar Airways - 5
- United Airlines (US) - 6

Total: 49[7]

Airlines should also consider the potential impact on any chartering and/or code sharing arrangements and whether a fleet grounding would constitute a "force majeure" or other event entitling the airline to suspend or delay performance of its obligations under these agreements.

An airline that has publicly listed shares, bonds or other securities, needs to be ready to make regulatory and public announcements in relation to a fleet grounding. As well as being aware of and ready to comply with its legal requirements, airlines would be well advised to have a communications plan in place in respect of any fleet grounding to seek to manage the public relations (and securities price) impact. Recent events both within and outside the aviation industry amply demonstrate the perils for share price of (inept or) unprepared responses to events with a high media profile.

As a means to resolve any disputes which may arise as a result of the groundings, all the relevant agreements will provide for a dispute resolution clause. This is usually a reference to arbitration which is confidential, rather than a preference for open Court, which is not. It is also now common to have an escalation clause, which sets out a series of agreed steps which the parties may take before commencing arbitration. Those involved can choose whether the escalation clause allows either party to arbitrate at any time, which some think can operate to negate some of the usefulness of an escalation clause; others prefer to require the parties to go through the procedure outlined in the escalation clause as a means of requiring "jaw, jaw" to take precedence over "war, war".

In our experience the time periods set out in an escalation clause for the relevant personnel of each party to seek to resolve the dispute are often too short to be meaningful, especially if the matter requiring resolution is significant. Most claims of this type do get resolved through discussions, although often these can themselves rightly be protracted as the relevant issues are fully explored. It is interesting to note that All Nippon Airways have already said publicly that they will be adopting just this route in relation to their claims against Boeing.

Chris Walsh, Partner, Ben Conway, Senior Associate, and Stephen Marais, Partner, Ince & Co, London

[7] Source: Boeing.

UPDATE FROM THE UNITED STATES

The Second Circuit Holds That County's Emergency Response to Airplane Crash Is Not Subject to Reimbursement

The U.S. Court of Appeals for the Second Circuit recently affirmed the district court's dismissal of the claims of Erie County, New York against Colgan Air, Pinnacle Airlines, and Continental Airlines, seeking to recover costs the County incurred responding to and cleaning up the February 1, 009 crash of Continental Connection Flight 3407, operated by Colgan Air.[8]

The County originally commenced its action against the airlines in the U.S. District Court for the Western District of New York, asserting liability based in negligence and public nuisance. The airlines moved to dismiss the County's action in its entirety based on New York's general rule barring recovery by a municipality for costs incurred in the performance of governmental functions, also known as the Free Public Services Doctrine. In response, the County argued that New York

Public Health Law provides a statutory exception to the Doctrine. Specifically, §1306 of Public Health Law requires a landowner to reimburse a municipality for recovery of costs associated with abating "*a nuisance or conditions detrimental to healt*h."

Judge Skretny of the Western District of New York issued a thorough and well-reasoned decision holding that the County failed to state a claim for which recovery of costs for police, fire, and emergency services could be granted; and further, that the County failed to plead sufficient factual allegations to sustain a cause of action for recovery of expenses incurred to abate a so-called nuisance. Accordingly, Judge Skretny granted the airlines' motion to dismiss. The County appealed the dismissal.

On appeal, the Second Circuit noted that the Free Public Services Doctrine is a matter of local law and New York precedent has upheld the Doctrine as barring recovery by a municipality for costs associated with such events as a city-wide blackout, a nuclear accident, an oil spill, and the dumping of a large quantity of tires. Courts recognize that the public policy behind the Doctrine is that the cost

of public services in responding to fire or safety hazards should be borne by the public as a whole, not the tortfeasor who may have created the hazard.

The Second Circuit then addressed "[t]*he heart of the County's theory on appeal*," *i.e.*, that an exception to the Free Public Services Doctrine resides in either a general exception for public nuisance or a statutory exception under New York Public Health Law §1306. The Second Circuit, agreeing with Judge Skretny, declined to recognize a general exception to the Doctrine for public nuisance because the exception would swallow the rule.

As to Public Health Law §1306, the Second Circuit also agreed with Judge Skretny in declining to find the crash or its immediate aftermath to be a public nuisance within the meaning of New York law: a nuisance is a conscious and deliberate act involving continuity or recurrence and some degree of permanent harm.

The Second Circuit made clear that "*an accidental airplane crash is entirely different*" from the concept of nuisance. Unlike abating a nuisance, where a municipality performs the duty of the landowner in the interest of public safety and thus is entitled to reimbursement by that landowner, when responding to an emergency, a municipality performs its own duty and thus is not entitled to reimbursement.

Finally, the Second Circuit rejected the County's argument seeking recovery of costs incurred abating "*conditions detrimental to health*." The court interpreted the phrase "*conditions detrimental to health*" within the context of Article 13 of the New York Public Health Law, which deals with nuisances and sanitation, and found that "*conditions detrimental to health*" deals with the same kinds of circumstances addressed by nuisance. Ultimately, the

[8] *County of Erie, New York v. Colgan Air, Inc.*, Docket No. 1-1600-cv, slip op. at 1 (d Cir. March 4, 013) (Wesley, C.J.).

Second Circuit was not persuaded by the County's attempt "to shoehorn the immediate results of a catastrophic accident into this limited category."

In affirming Judge Skretny's dismissal of the action, the court concluded, "*public services in response to an emergency are just that – public services – and therefore are not subject to reimbursement*."

David J. Harrington and Allison M. Surcouf, Partners, Condon & Forsyth LLP

This article has been reproduced with the kind permission of the authors and first appeared in the Condon & Forsyth LLP's March 2013 Client Bulletin. For further information refer to www.condonlaw.com

Ninth Circuit Addresses Federal Preemption

In a recent decision, *Gilstrap v. United Airlines, Inc.,*[9] the Ninth Circuit addressed the scope of preemption of the *Air Carrier Access Act* ("**ACAA**") of 1986, which is an amendment to the *Federal Aviation Act* ("**FAA**") and was enacted to extend certain federal prohibitions to air carriers relating to discrimination against the disabled. The Court held that where the FAA has pervasively regulated a particular field of aviation safety and commerce, those regulations will establish the applicable standard of care, but not the other elements of a negligence claim or the remedies available to the plaintiff.

The plaintiff in *Gilstrap* alleged that she requested wheelchair assistance from the airline because she was unable to walk long distances or stand in line due to osteoarthritis and various degenerative back conditions. She further alleged that the airline failed to provide the requested wheelchair services, forced her to stand in line, ridiculed her, and accused her of exaggerating her disability. Plaintiff claimed that, as the result of the airline's failure to provide her with adequate wheelchair assistance, she sustained severe pain, necessitating an epidural injection, and also suffered emotional distress.

Plaintiff brought several causes of action against the airline under California tort law, including negligence, negligent misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Although she did not attempt to bring a private cause of action under the ACAA,[10] plaintiff cited to the ACAA in her Complaint as evidence of the standard of care for her state law negligence cause of action. Plaintiff also brought one additional federal cause of action for violation of Title III of the Americans with *Disabilities Act* ("**ADA**").

The district court dismissed plaintiff's Complaint on the grounds that her claims were completely preempted by the ACAA. The district court first concluded that Congress intended the FAA administrative enforcement scheme to be the exclusive remedy for violations of the ACAA, and that to allow state personal injury lawsuits against airlines for failure to provide services to those with disabilities would conflict with that Congressional intent. The district court also concluded that the plaintiff's claims were preempted by the comprehensive ACAA regulations pertaining to wheelchair assistance and dismissed plaintiff's claim for violation of the ADA on the ground that that statute expressly excluded airports from its application.

After a lengthy discussion of the history of the ACAA and its enforcement scheme, as well as prior Ninth Circuit decisions interpreting FAA preemption of state law personal injury claims, the Court of Appeals concluded that the FAA, which includes the ACAA, preempts state law **standards of care** with respect to circumstances under which airlines must provide assistance to passengers with disabilities in moving through the airport, and thus the FAA may be dispositive of the "duty" issue in a negligence claim.

However, the Court also held that the ACAA does **not** preempt any state remedies that may be available when airlines violate those standards. The Court

[9] Docket No. 2:10-cv-06131 (9th Cir. Mar. 12, 2013) (Berzon, C.J.).

[10] The Ninth Circuit has not decided whether or not the ACAA provides a private cause of action in addition to its administrative enforcement scheme, and declined to address that issue in the *Gilstrap* decision.

of Appeals explained that in evaluating whether a given personal injury case is preempted by the FAA, it first must be determined whether the particular area of aviation commerce and safety implicated by the lawsuit is governed by "pervasive federal regulations." If so, then any applicable state standards of care are preempted. Even in those areas, however, the scope of field pre-emption extends only to the standard of care; state law still governs the other negligence elements (breach, causation and damages), as well as the choice and availability of remedies.

Applying the above framework to the plaintiff's case, the Court of Appeals held that the FAA, and specifically the ACAA, pervasively regulates the instances in which carriers must provide wheelchair assistance, and thus preempted the standard of care applicable to plaintiff's state law causes of action. However, the Court held that the plaintiff could rely on California tort law to prove the other elements of her state law claims, and remanded the case for further proceedings. The Court also noted that it was unclear whether a court applying California law would hold that the state law provides a tort remedy for the largely dignitary injuries alleged by the plaintiff.

The Court of Appeals also held that the ACAA would not preempt state law claims involving how airline agents interact with passengers with disabilities who request assistance in moving through the airport, and noted that the plaintiff's causes of action for negligent and intentional infliction of emotional distress would be decided entirely under California law.

The Court upheld the dismissal of plaintiff's claims under the ADA, on the grounds that the statute explicitly excludes airports from the definition of "public accommodations" falling within the ambit of that statute.

Gilstrap clarifies previous Ninth Circuit case law, which had been unsettled regarding the FAA's scope of preemption. However, *Gilstrap* could be problematic for airlines because it appears to allow personal injury plaintiffs to bring state law claims that at least were arguably preempted by the FAA under the Ninth Circuit's old interpretations. This decision means that cases implicating the FAA will remain in state court, unless an alternative basis for federal jurisdiction exists.

Ivy L. Nowinski and Evan Kwarta, Partners Condon & Forsyth LLP

This article has been reproduced with the kind permission of the authors and first appeared in the Condon & Forsyth LLP's March 2013 Client Alert. For further information refer to www.condonlaw.com

Dismissal of Spanair Litigation in United States Affirmed by Ninth Circuit Court of Appeals

On August 20, 2008, a Boeing MD-82 aircraft operated by Spanair crashed on takeoff from Madrid-Barajas Airport, killing 154 people and injuring 18 others. While the injured and deceased were domiciliaries of various countries, none were United States citizens or residents. Nevertheless, some 204 plaintiffs, principally Spanish citizens, brought wrongful death and personal injury actions in various United States federal courts against the Boeing Company, the manufacturer of the aircraft, and several component manufacturers. The complaints alleged that a takeoff warning system was defective in that it failed to alert the Spanair crew as to the misconfiguation of the plane's wing flaps and slats, failures which the plaintiffs contended caused the plane to crash, resulting in the deaths of and personal injuries to all aboard the aircraft. Significantly, plaintiffs did not sue Spanair, the operator of the aircraft. After the accident, Spanair filed for bankruptcy in Spain.

Boeing filed a *forum non conveniens* motion in the Central District of California (Los Angeles), arguing that the courts of Spain were an adequate alternative forum and that the private interest and public interest factors to be considered in determining where a case should be tried favored trial of the actions in Spain rather than the United States. The District Court agreed and the Circuit Court of Appeals for the Ninth Circuit, after hearing oral argument on the appeal, affirmed the dismissal by the District Court.[11]

[11] *Fortaner v. The Boeing Company*, No. 11-56179 (9th Cir., Jan. 10, 2013).

In deciding a *forum non conveniens* appe al, the Court of Appeals considers whether the DistrictCourt properly exercised its discretion in weighing the private interest and the public interest factors. The Ninth Circuit found that there was no abuse of discretion by the District Court.

The first inquiry in determining a *forum non conveniens* motion is whether there is an adequate alternative forum to the United States. Boeing agreed to litigate and defend these cases in Spain, a concession which ordinarily makes the foreign forum an adequate alternative forum. While Boeing made such a concession in this case, plaintiffs argued that Spain would not be an adequate alternative forum because the civil proceedings could be stayed during the pendency of criminal proceedings arising from the crash. However, the Court found that plaintiffs' concern was unjustified since the criminal proceedings in Spain arising from the accident had been concluded and that issue was now moot. After finding that Spain was an alternative adequate forum, the Court then went on to the weigh the private interest and public interest factors of *Gulf Oil Corp. v. Gilbert*[12] which the courts have determined must be evaluated in determining a *forum non conveniens* motion.

The private interest factors to be considered include the residence of the parties and the witnesses, the forum's convenience to the litigants, access to physical evidence and other sources of proof, whether unwilling witnesses can be compelled to testify, the cost of bringing willing witnesses to trial, the enforceability of the judgment and the catchall provision of "all other practical problems that make trial of a case easy, expeditious and inexpensive".

The Ninth Circuit agreed that the District Court carefully considered each of these factors in granting a dismissal on *forum non conveniens* grounds. Plaintiffs argued that they were willing to come to the District Court in Los Angeles for a trial, and therefore, the convenience of witness was not a factor to be considered. However, the District Court noted that another relevant consideration was the cost of bringing other unwilling witnesses to trial. The District Court's conclusion that the greater cost of proceeding in the United States favored dismissal was not an unreasonable conclusion to be reached given the evidence in the case.

Plaintiffs also argued that the District Court unfairly and improperly focused on physical evidence in Spain. They characterized such evidence as unimportant because plaintiffs agreed to stipulate to the negligence of the flight crew, leaving for litigation only the question of whether the takeoff warning system was defectively designed. That evidence, said the plaintiffs, was located in the United States, not Spain. Boeing argued that the negligence of flight crew caused the accident and that the fault of the various Spanish actors reduced the extent of its liability, if any. The District Court found that the cockpit voice recordings and the Spanish authorities' investigation into the accident were important

pieces of evidence and that the information about the crash available in Spain would be more difficult to access here than in Spain.

The public interest factors include the local interest in the lawsuit, the court's familiarity with governing law, the burden on the judicial system and juries, court congestion and the costs of resolving a dispute which has no relation to the forum.

The Court of Appeals concluded that the District Court also correctly and carefully balanced these factors in granting the dismissal. While it conceded that California had an interest in the case since the United States was the place where the aircraft manufacturer was located, Spain had a greater interest in this matter since it was the locale of the crash site and the home of the vast majority of the decedents and injured parties. Finally, plaintiffs argued that even if the case were dismissed to Spain, the District Court in California should retain jurisdiction to resolve discovery disputes. The Court found that discovery disputes were not unusual in complex litigation and that no showing had been made that Boeing would not fully cooperate in any discovery that was permitted under the laws of Spain. Accordingly, finding that there had been no abuse of discretion by the District

[12] 330 U.S. 501, 508 (1947).

Court, the Ninth Circuit affirmed the dismissal of the litigation arising from the Spanair accident on the ground of *forum non conveniens*. Plaintiffs now have 90 days within which to file a petition for writ of *certiorari* with the United States Supreme Court. It does not appear, based on the facts of the case, that a petition would be successful since the Court of Appeals' decision is consistent with those of other Courts of Appeals interpreting *forum non conveniens* issues as applied to non-United States aviation accidents.

This case marks another significant victory for defendants in seeking to keep foreign air crash cases out of the United States judicial system where plaintiffs are likely to recover more favorable verdicts and larger settlements than if these cases were litigated outside the United States.

Michael J. Holland, Partner, Condon & Forsyth LLP

This article has been reproduced with the kind permission of the author and first appeared in the Condon & Forsyth LLP's January 2013 Client Bulletin. For further information refer to www.condonlaw.com

UPDATE FROM CANADA

Litigation Privilege Denied in Aviation Insurance Case

Jetport v. Global Aerospace, 2013 ONSC 235

Jetport Inc., an executive aircraft charter operation, took delivery of a Bombardier Global Business Jet 5000 in July 2007. The aircraft was insured for $40 million by a consortium of insurers in which Global Aero-space was the lead underwriter. The policy had a pilot training clause requiring any pilot operating the aircraft to have completed a certain amount of classroom and flight training hours.

The aircraft was to be flown by, among others, Jetport's Chief Pilot, Roger Adair. Upon Jetport's purchase of the aircraft, Capt. Adair took part in Bombardier classroom and simulator training. After this training was complete, both Transport Canada and Bombardier certified Capt. Adair as qualified to fly the aircraft.

On November 11, 2007, while being piloted by Capt. Adair, the aircraft was rendered a total loss after it touched down short of the runway at Fox Harbour, New Brunswick. The occupants of the aircraft were injured, but there were no fatalities. Airclaims was retained to conduct an investigation into the accident.

Jetport sought recovery for the $40 million loss from the insurers under the insurance policy, through its broker, Jones Brown.

On December 7, 2007, Grant Robinson (of Jones Brown) advised Jetport that Global might deny coverage because Capt. Adair's training may have been insufficient to meet the requirements of the pilot training clause. More specifically, Global was alleging that Capt. Adair had not completed the required number of hours. Jetport retained litigation counsel the next day.

In January 2008, Airclaims delivered its report to Global — part of which was an investigation into whether Capt. Adair's training complied with the requirements of the pilot training clause.

On January 28, 2008, Global delivered a "reservation of rights" letter indicating that Jetport had violated the terms of the policy. A number of email communications ensued between Timothy Armstrong (Jetport's President and General Counsel) and Mr. Robinson.

On February 15 and March 19, 2008, Global advised Jetport that it was denying the claim. In the following weeks, representatives of Jetport and Jones Brown convened a meeting to discuss, according to Mr. Robinson, "*strategizing about getting facts in order so that we could figure out how to get the claim paid*".

Three actions were commenced as a result of the insurance dispute, namely:

1. Jetport claimed against Global and the following insurers for denying the claim;
2. Global sued Jones Brown and Robinson (personally) for contribution and indemnity in the event that Jetport succeeded in the above referenced action. Jetport was added as a third party to this action; and
3. Jetport sued Jones Brown for negligence, breach of contract and its costs in the first action referred to above.

All three actions were consolidated on consent.

In the course of determining which documents to produce in the litigation, counsel for Jones Brown and Robinson located the emails exchanged between Messrs Armstrong and Robinson in February and early March 2008. They were surprised that Jetport had not produced these documents in its productions. Jetport's explanation was that they were not produced because they were subject to litigation privilege — that is, the privilege that attaches to certain documents which result from work undertaken in the course of litigation. In the Province of Ontario, in order for a document to be protected by litigation privilege, the document must have been pro-duced when litigation was in contemplation and the "dominant purpose" for preparing the document must relate to the obtaining of legal advice.

In the course of the examinations for discovery, counsel for Global Aerospace requested production of the allegedly privileged emails from Mr. Robinson. Jetport rejected the request on the grounds that the documents were common-interest litigation privileged. Jetport also objected to questions relating to the spring meeting on the same basis.

Global brought a motion challenging the refusals before Master Graham. The Master ordered that the documents be produced and that the questions relating to the spring meeting be answered.

The key section of Master Graham's endorsement was as follows:

> *"In order to successfully assert this privilege, which was first claimed in 2011, Jetport must first put evidence before the court … that the dominant purpose for which the documents were created was the litigation. Although the documents post-date the retainer by Jetport of outside counsel … and the first reservation of right letter … there is no specific evidence that they were prepared primarily for the purpose of contemplated litigation. The response … [by Mr. Robinson] as to what transpired at a meeting … was that —we are simply strategizing about getting facts in order so we could figure out how to get the claim paid.‖ This would suggest that the focus at that point was still advancing the claim rather than commencing litigation.*
>
> *I conclude that Jetport has not met the evidentiary onus to substantiate its claim of litigation privilege and these documents must be produced."*

Jetport appealed this ruling.

The appellate court had to consider two issues:

- first, did Master Graham err in deter-mining that Jetport failed to establish and evidentiary basis for its assertion of the privilege; and
- second, even if he did err, should the appeal be dismissed because litigation privilege has been dissolved.

On the first issue, in order for Jetport to succeed, it would have to establish that: (a) at the time the emails were sent, there was a reasonable contemplation of litigation; and (b) the emails were created for the *dominant* purpose of litigation.

The appellate court found that there was enough evidence available to the Master to find that at the time the emails were prepared, litigation was in contemplation by the parties. However, the appellate court was also not persuaded that the Master had misapprehend-ed the evidence when he decided that the "dominant purpose" of preparing the emails was not litigation. The Court found that the chronology of events does not necessarily lead to the conclusion that the emails were prepared for this purpose. The Court noted, for example, that the mere retainer of litigation counsel in December 2007 does not automatically mean that all discussions con-ducted from then on were for the dominant purpose of litigation. He also noted that Mr. Robinson's evidence was that the spring 2008 meeting was geared towards —get[ting] the claim paid‖, which does not necessarily mean that this would be accomplished through litigation.

Justice Goldstein wrote:

> *"Most of the evidence that Jetport relies on to advance its claim of litigation privilege goes to the issue of the date upon which there was a reasonable contemplation of litigation rather than the purpose of the communications. …*
>
> *If the law in Ontario were that it merely be sufficient that litigation be a —substantial‖ purpose for the creation of a document, I might be persuaded that litigation cloaks the six documents and the spring 2008 meeting."*

He upheld the Master in finding that Jetport had failed to demonstrate that the emails were protected by privilege.

> *"… the retention of counsel is some evidence as to the purpose of the discussions. That said, the Master, in evaluating the evidence, was entitled to conclude that it was not enough in the circumstances."*

Finally, the Court considered whether litigation privilege would have been dissolved in any event, given that Jetport and Jones Brown were adverse to each other. In order to make this determination, Justice Goldstein referenced Justice Blair's

dicta in *General Accident Assurance Co. v. Chruz*,[13] where he held that:

> *"… litigation privilege is a protection only against an adversary … but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect."*

Given that all of the actions were consolidated, and also given that Jetport and Jones Brown had commenced legal proceedings against each other in the claims being decided, the Court had no difficulty in finding that the common interest privilege had been lost, if it ever existed. Justice Goldstein ruled that:

> "*I acknowledge that Jetport and Jones Brown may still have some interests in common — for example, if Jetport were to be successful against Global, it would no longer have an interest in recovering against Jones Brown. I find, however, that in the circumstances of this case if there was litigation privilege attaching to the emails and the spring 2008 meeting, it has been dissolved by reason of Jetport's action against Jones Brown.*"

The appeal was dismissed. The documents were ordered to be produced.

Carlos P. Martins, Partner, Bersenas Jacobsen Chouest Thomson Blackburn LLP

This article has been reproduced with the kind permission of the author and first appeared in Bersenas Jacobsen Chouest Thomson Blackburn LLP's Transport Notes, Volume 9, Issue 2, February 2013. For further information refer to www.lexcanada.com.

Porter Airlines' International Tariff Challenged

Lukács v. Porter Airlines Inc., Canadian Transportation Agency, Decision No. 16-C-A-2013

Gabor Lukács gives rise to yet another successful challenge of an air carrier's tariff before the Canadian Transportation Agency. This time, the carrier is Porter Airlines, a regional airline operating out of Toronto City Centre Airport with flights largely serving eastern Canada and the northeastern United States.

The nub of Mr. Lukács complaint is twofold:

First, that certain provisions of Porter's international tariff are unreasonable and therefore contrary to section 111 of the *Air Transportation Regulations*, SOR/88-58 (the "*ATR*s") because they are inconsistent with various articles of the *Montreal Convention*, including Article 19 which provides that:

> "*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage and cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid damage or that it was impossible for it or them to take such measures*."

Second, that portions of the Porter tariff are drafted in an unclear manner, contrary to section 122(c) of the *ATR*s, which re-quire tariffs to contain:

> *"...the terms and conditions of carriage,* ***clearly stating*** *the air carrier"s policy in respect of at least the following matters, namely,*
> *(v) failure to operate the service or failure to operate on schedule, ...*
> *(x) limits of liability respecting passengers and goods,*
> *(xi) exclusions from liability respect ing passengers and goods, and*
> *(xii) procedures to be followed, and time limitations respecting claims."*
>
> [***emphasis added***]

Regarding the conformity with the *Montreal Convention*, in the preamble to the decision the Agency made reference to section 111(1) of the *ATR*s which requires tariff provisions to be "*just and reasonable*". The Agency also noted "*in keeping with past Agency decisions, where the Agency has determined that a tariff provision that is contrary to the [Montreal] Convention is unreasonable, the Agency will consider the submissions of the parties and the issue of conformity with the [Montreal] Convention*."

Also in the preamble, with respect to the "*clarity*" aspect of this complaint, the Agency referred to its decision in *Lukács v. WestJet*,[14] where it held that "*an air carrier*

[13] [1999] O.J. No. 3291.

[14] Decision No. 249-C-A-2012

meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning."

In response to certain aspects of the complaint, Porter proposed alternative tariff wordings to address the issues raised by Mr. Lukács. In its decision, the Agency addressed both the original wording, as well as Porter's proposed amendments.

The first issue addressed by the Agency in its decision was whether Porter's tariff on flight delays violates section 111 of the *ATR*s. More particularly, this relates to Rules 18(a) and (c), which mirror the old IATA standard form Condition 9.

Rules 18(a) and (c) provide as follows:

> *"18(a) Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract. ...*
>
> *18(c) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change in the schedule of any flight. The Carrier is not liable for any special, incidental or consequential damages arising from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred."*

Mr. Lukács argued that this language has been explicitly disallowed by Courts in the United Kingdom as well as the Quebec Small Claims Court in *Assaf v. Air Transat A.T. Inc.,*[15] and in *Zikovsky v. Air France*.[16]

The argument advanced by Mr. Lukács was that the effect of Condition 9-like language in air carrier tariffs is to pre-empt the remedies available to delayed passengers under Article 19 of the *Montreal Convention* by "*rendering the notion of 'delay' meaningless*."

In response, Porter argued that the tariff provisions in question do not, in fact, have the effect described by Mr. Lukács. Instead, argued Porter, these provisions "*simply provide passengers with notice of the possibility that scheduled operations may change, that schedules are not guaranteed and that nothing in [these] Rules exempts Porter from liability for delays*." Moreover, Porter argued that the *Montreal Convention* does not require precise departure and arrival times to form part of the contract of carriage.

The Agency, for the most part, accepted Porter's arguments on this issue and held that Mr. Lukács did not adequately explain how the *Montreal Convention* could be read to compel air carriers to assume the onerous obligation of guaranteeing precise departure and arrival times as part of the contract of carriage.

Accordingly, Rule 18(a) and the first part of 18(c) were found to be reasonable and in compliance with section 111 of the *ATR*s. The Agency made an explicit (and helpful) finding that "*carriers should have the latitude required to amend flight schedules based on commercial and operational obligations, including the management of the air carrier's fleet so as to achieve optimal results, which may benefit both the carrier and the passengers, in order to conduct business in a dynamic environment*."

The Agency parted ways with Porter's argument in one respect, however. It found that the final sentence of Rule 18(c), where Porter disclaims liability for failure to make connections, operate flights according to schedule or changing the schedule of any flight was unreasonable on the basis that it conflicts with Article 19 of the *Montreal Convention*.

As a remedial measure, Porter agreed to make changes to Rules 18(a) and (c) to read as follows:

> *"18(a) The carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed. Schedules are subject to change without notice.*
>
> *18(c) Notwithstanding the foregoing, passengers will be entitled to compensation or other remedies for*

[15] [2002] J.Q. No. 8391
[16] 2006 QCCQ 948

> *delays, including delays in the delivery of baggage, in certain circumstances as set out below."*

Mr. Lukács took issue with the revised wording. First, he argued that the new language creates ambiguity as to what constitutes a "schedule change" (which does not trigger liability) and a "delay" (which may do so). This argument was rejected by the Agency, which reiterated the statement from earlier in the decision, cited above, dealing with the need to allow carriers the flexibility to amend schedules.

Mr. Lukács also argued that because the Porter tariff ties check-in times to published departure times, in order for Rule 18(a) to be "reasonable", the tariff would have to be amended in such a manner as to require Porter to make reasonable efforts to provide passengers with timely information about delays and schedule changes and the reasons for them. In considering this argument, the Agency noted that other Canadian airlines have such provisions in their tariffs and ordered Porter to do likewise. It held that "the absence of similar provisions in Porter's Existing Tariff Rules would render the [Proposed Amended Tariff] Rule 18(a) unreasonable.

Mr. Lukács also took issue with the manner in which the amended Rule 18(c) was drafted. He argued that by referring to "other remedies", passengers may get the false impression that their compensation for a flight delay would be something other than a monetary payment — which would conflict with Article 19 of the *Montreal Convention*.

Further, he argued that the term "in certain circumstances" is misleading in that it suggests that compensation would only be applicable in narrowly defined circumstances.

The Agency accepted Mr. Lukács' submissions on both points, ruling that the proposed wording "*seems to broaden the conditions, beyond the condition set out in Article 19* [all reasonable measures], *under which a carrier can relieve itself of liability.*"

The issue then turned to the interpretation of Rule 18(d), which provides that:

> *"18(d) Without limiting the generality of the foregoing, the Carrier cannot guarantee that the passenger"s baggage will be carried on the flight if sufficient space is not available as determined by the Carrier."*

With respect to this provision, Mr. Lukács argued that it is well established that air carriers are required to carry passengers' bags on the same flight on which they are travelling. In support of this argument, he quoted *Cohen v. Varig Airlines*,[17] where the Civil Court of New York court held that:

> *"… The rights of the travelling public includes (sic) the right to stop and receive their baggage at any regular station or stop-ping place for the (vehicle) on which they may be traveling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable and illegal …"*

The Agency did not accept this argument, noting that the same argument was rejected in *Lukács v. WestJet*,[18] in the context of a WestJet tariff. In that decision, the Agency held that:

> *"[The analogous WestJet tariff rule] recog-nizes that situations may arise where, be-cause of insufficient space on the aircraft, WestJet is unable to carry a passenger"s baggage on the flight on which the passenger is being transported. The Agency does not agree with Mr. Lukács" submission that the Rule represents an exemption from liability. The Agency finds that, in accord-ance with the principles of the Convention, WestJet would remain liable for any damag-es incurred by a passenger to whom this may apply."*

The Agency held that Porter"s Rule 18(d) was reasonable, noting that Mr. Lukács had *"not introduced any submissions … that would persuade the Agency to reach a differ-ent finding ...*"

The attention then turned to Rule 18(e) which provides as follows:

> "*18(e) Subject to the Warsaw Convention, or the Montreal Convention, as the case may be, the carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights."*

[17] 380 N.Y.S.2d 450 (aff'd 405 N.Y.S.2d 44)
[18] Decision No. 252-C-A-2012.

Mr. Lukács argued that this wording was contrary to section 122 of the *ATR*s because it is not clearly drafted — leaving the impression that Porter is not liable for delay/cancellation expenses when, in reality, it is pursuant to the provisions of the referenced conventions. He cited a ruling made in *Lukács v. Air Canada*[19], where the Agency held:

> *"...The substantive wording of [analogous Air Canada tariff rule], on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e., "Subject to the Convention"). In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed [analogous Air Canada tariff rule] is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada's limit of liability. Accordingly, the Agency finds [the analogous Air Canada tariff rule] in itself is unclear and that the phrase "Subject to the Convention, where applicable" renders the application of [analogous Air Canada tariff rule] unclear."*

The Agency upheld Mr. Lukács complaint with respect to Rule 18(e) and found that it contravened section 122 of the *ATR*s because it was "likely to confuse passengers, rather than clearly inform them of the applicability of Porter's limit of liability."

The Agency also disallowed Rule 18(e) on the basis that it conflicts with Article 19 of the *Montreal Convention* as the provision, as worded, is alleged to "create a blanket exclusion of liability that relieves Porter from any and all liability for damages to its passengers occasioned by delay and or cancellation of flights" when, in reality, the *Montreal Convention* only allows a carrier to limit its liability for delay in very specific circumstances. In making this determination, the Agency cited *Lukács v. Air Canada*.[20]

This ruling can be viewed with some skepticism. In our view, the tariff wording explicitly states that the limitation of liability is subject to the relevant conventions. It appears, on the face of the decision, that the Agency has conflated this argument with the section 111 ("clarity") argument discussed above.

Given the fact that some of the tariff provisions were found inadequate by the Agency, Mr. Lukács requested that the Agency consider the validity of Rule 18(b), even though he did not specifically complain about it. Rule 18(b) provides as follows:

> "*18(b) The agreed stopping places are those places shown in the Carrier"s timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alter-native carriers or aircraft and, if necessary, may omit stopping places shown in the timetable.*"

In support of this submission, he cited *Lukács v. Air Canada*,[21] where the Agency held that:

> *"When portions of a section of a contract are determined to be null and void, consideration has to be given as to whether the defective portions can be severed from the section and leave meaning to the remaining wording in the section*."

The Agency did undertake such an analysis, but found that Rule 18(b) retains its meaning, despite the disallowance of the Porter tariff provisions set out above.

Given the proposed changes to Rule 18(c), as discussed above, Porter drafted two addition-al Rules to add to its tariff: Rule 18.1 (dealing with passenger expenses resulting from delays) and Rule 18.2 (dealing with baggage delays). Predictably, Mr. Lukács also challenged aspects of both of these pro-posed additions to the Porter tariff.

First, he took issue with Porter"s undertaking to reimburse reasonable expenses to delayed passengers (or passengers with delayed bag-gage), except where its "employees and agents" took all necessary measures to avoid the loss. Mr.

[19] Decision No. LET-C-A-2011.
[20] Decision No. 291-C-A-2011.
[21] Decision No. 208-C-A-2009.

Lukács argued that the term "servants and agents" would be more fitting as this is the language used in the *Conventions* and as such, the term has a well-established meaning in the case law.

The Agency did not see the merit in requiring a change in terminology, as it held that "*the issue of who is a servant or agent of the air carrier can only be determined on a case-by-case basis after an examination as to whether such servant or agent was used to fulfill the carrier"s obligations [arising] out of a con-tract for carriage*."

The next contentious issue was the provision in s. 18.1(ii) of the proposed Porter tariff which requires passengers seeking reimbursement of expenses from flight delays to provide notice of the claim, as well as particulars of the expenses together with receipts within 72 hours. Mr. Lukács argued that the only applicable limitation period in the *Montreal Convention* is two years, as set out in Article 35 and, therefore, the proposed provision conflicts with that article.

The Agency accepted this argument and determined that this provision would be found to be unreasonable, if filed.

Also with respect to Rules 18.1 and 18.2, Mr. Lukács argued that, in several places, the tariff uses the words "as determined by the Carrier", when referring to instances where compensation may be payable. He further argued that such language tends to relieve Porter from liability, and therefore should be disallowed, as they contradict Article 19.

The Agency disagreed. It held that, when presented with a claim, it is the carrier that has to determine whether it is legitimate. This disposition is then subject to review by the Agency, which would then determine whether the carrier acted in accordance with its tariff. The Agency ruled that the term "*as determined by the Carrier*" would be found reasonable in these circumstances, if filed.

Next, Mr. Lukács challenged the language in Rules 18.1 and 18.2, where Porter purports to compensate aggrieved passengers by providing reimbursement for "expenses". He went on to submit that this scope of what is compensable under the Article 19 of the *Montreal Convention* goes well beyond out-of-pocket expenses, giving examples such as lost in-come, loss of a portion of a cruise trip or inconvenience.

The Agency ruled that it would find the term "*expenses*" reasonable if used in this context and that it would allow the filing. It noted that "*ultimately, it is left to the Agency or the courts to determine whether an air carrier has compensated passengers who are affected by a delay in a flight or in the delivery of bag-gage that is in a manner that is consistent with Article 19*."

The penultimate issue raised by Mr. Lukács deals with two procedural requirements that passengers must comply with in order to pursue a claim for delayed baggage, failing which the claim would be extinguished.

The first of these was proposed Rule 18.2(b)(iii), which requires a passenger to report the delayed baggage within four hours of the completion of the flight. Mr. Lukács argued that this conflicts with Article 31(2) of the *Montreal Convention*, which allows 21 days.

The second complaint was with respect to proposed Rule 18.2(b)(iv) which provides that the passenger must submit a complaint in a form prescribed by Porter. He argued that this leaves much room for ambiguity — and that the *Montreal Convention* does not "*bestow upon a carrier the right to determine in which form the complaint may be made, failing which the complaint must be rejected*." He also noted that Article 31(3) requires only that the complaint be in writing.

Finally, Mr. Lukács objected to Porter"s proposed Rule 18.2(c)(i) which placed a temporal monetary limit on delayed baggage claims. The proposed language provided maximum compensation limits as follows:

After the initial 24 hours following completion of the flight, authorize incidental expenses up to CAD$25 per day for up to a maximum of 5 days, to be reimbursed by the Carrier subject to the passenger's submission of receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred and arose from the delay.

Mr. Lukács argued that "*there is a very good reason for the decision of the drafters not to include such a 'per day' provision in the Convention as passengers often incur the greatest expenses in the first 24 to 48 hours of a delay in the delivery of baggage*."

The Agency agreed with Mr. Lukács' position on all three counts and held that the pro-posed provisions would be found unreasonable, if filed.

In the end, there are two notable observations arising from this decision. First, that the Agency is reiterating a point often made before — namely that, if a complaint is made, it will require air carriers to revise their tariffs in a manner that conforms to the requirements of the *Montreal Convention*.

Secondly, and perhaps more notably, is the extent to which Mr. Lukács has been able to build a record of precedents before the Agency, which are now being used by him in numerous contexts. We trust that, in reading this article in isolation, it is clear that this latest decision is the culmination of the various and sundry battles Mr. Lukács has had against other carriers in the previous few years.

Carlos P. Martins, Partner, Bersenas Jacobsen Chouest Thomson Blackburn LLP

This article has been reproduced with the kind permission of the author and first appeared in Bersenas Jacobsen Chouest Thomson Blackburn LLP's Transport Notes, Volume 9, Issue 1 January 2013. For further information refer to www.lexcanada.com.

UPDATE FROM FRANCE

Concorde crash: appeal judgment now issued

Introduction

On July 25 2000 Concorde crashed shortly after take-off from Roissy Charles de Gaulle Airport in Paris, killing 113 people. On February 2 2010 the long-awaited trial – and the battle of experts – began before the Pontoise Criminal Court. Judgment was rendered on December 6 2010; however, almost all of the parties involved in this action lodged appeals against the judgment.

On November 29 2012 the Versailles Court of Appeal rendered its much-anticipated judgment.

The accused in the criminal action were:

- the director of Aérospatiale's Concorde programme from 1978 to 1994;
- a former chief engineer of Aérospatiale's supersonic team;
- an ex-director of the French Civil Aviation Authority (DGAC);
- Continental Airlines; and
- two of Continental's employees.

The principal offence with which the accused were charged was manslaughter, which carries a maximum penalty of five years' imprisonment and a fine of €75,000 for individuals and €375,000 for companies. Damages were also claimed by a number of parties (including Air France, which claimed €15 million) that had constituted themselves as civil claimants.

Possible causes

The first instance and appeal courts were presented with at least three possible causes for the crash. The prosecution's case, supported by the French Accident Investigation Bureau's 2002 report, was that Concorde had run over a titanium strip which had been lost by a Continental Airlines DC10 aircraft, causing one of Concorde's tyres to burst and rubber shards to puncture one of its fuel tanks. This titanium strip had been installed by a Continental Airlines engineer at Houston Airport on July 9 2000, in order to replace a worn part in one of the DC10's engines; the prosecution alleged that this strip had been improperly secured and, in any event, should not have been made of titanium.

Continental's case was that the evidence established that Concorde's engine was already on fire before it ran over the titanium strip, and that the fire had resulted from a failure by Air France technicians to reinstall a metal section linked to Concorde's wheels, causing a water deflector to be torn away, puncturing its fuel tanks. It was also alleged that Concorde had been overloaded.

The third hypothesis related to the potential overfilling of the fuel tank following a fuel transfer to redistribute weight.

Decisions

At first instance the Pontoise Criminal Court acquitted the three French accused and one of Continental's employees. However, Continental Airlines and its welder - who had participated in the installation of the titanium strip onto the DC10 – were found guilty of manslaughter and unintentionally causing injury. Continental's welder received a 15-month suspended jail sentence, while Continental Airlines was fined €200,000. Civil damages of €1 million were awarded to Air France; other civil claimants were awarded more modest sums.

In contrast, the French accused were acquitted of criminal charges. Nevertheless (as a matter of civil law), EADS (which had taken over Aérospatiale) was found vicariously liable for its employees' negligence and ordered to contribute 30% of the civil damages to the victims of the crash.

The first instance court had also conceded that Air France had committed an "error" in allowing Concorde to take off with an "excess load"; however, the court held that this had not caused the accident.

On appeal, the Versailles Court of Appeal, while accepting the sequence of events propounded by the prosecutor, overturned the judgment at first instance in relation to the criminal part of the action. The appeal court thus acquitted all of the accused of

the criminal charges, but found a number of them to be civilly liable for damages. These two aspects must be distinguished in order to understand the decision.

Criminal

In the absence of intentional wrongdoing, negligent acts or omissions carry criminal penalties only where these cross a threshold determined by the Criminal Code. The relevant criteria are:

- the seriousness of the negligence;
- awareness of the likely consequences; and
- a direct and certain chain of causation between the two.

Continental's welder, who had been found guilty of criminal negligence at first instance, was acquitted of this charge on appeal. The court found that while he had been negligent, the welder could not have anticipated that the potential fall of a titanium strip onto the tarmac could lead to this bursting another aircraft's tyre and causing a fatal accident. The court also found that the chain of causation between the welder's negligence and the crash was neither certain nor uninterrupted.

The second Continental employee, acting in a supervisory capacity, had been acquitted at first instance. This was upheld by the appeal court.

Continental, which had been convicted of manslaughter by the Pontoise Criminal Court, was acquitted on appeal, essentially on the grounds that neither the welder nor his supervisor could be considered, under criminal law, to be representatives of the company. This is consistent with a relatively recent shift by the Supreme Court, which showed a greater reluctance to attribute criminal wrongdoing to the corporate employer.

The court also considered the charges against a senior employee of the DGAC. He was found to have known of the risks inherent in renewing Concorde's airworthiness certificate notwithstanding a number of incidents between 1979 and 1994 involving its tyres in particular, and that this amounted to serious negligence on his part. However, the court found that there was insufficient evidence of a chain of causation leading to the Concorde crash, since it was not proven that if the employee had sought to withdraw Concorde's airworthiness certificate, such decision would have been accepted by the French and UK authorities.

Civil

The appeal court upheld the award of damages granted at first instance. Continental has thus been ordered to pay Air France €500,000 as "moral" damages for the loss of life, and €500,000 for the loss of reputation resulting from the crash.

No damages were awarded against the DGAC employee, since only the administrative courts can rule on such a claim.

Comment

The Versailles Court of Appeal judgment has provoked similarly mixed reactions to those which greeted the Pontoise Criminal Court's judgment. Many parties remain dissatisfied.

The decision reflects what appears to be a salutary trend to avoid criminalising every negligent act or omission leading to an accident. However, the matter is not completely over. EADS is still being pursued in separate negligence proceedings for failing to investigate further the incidents which Concorde was known to have suffered involving its fuel tanks.

Olivier Purcell, Partner, Holman Fenwick Willan LLP, Paris

This article has been reproduced with the kind permission of the author and first appeared in the International Law Office Newsletter on 20 February 2013. For further information refer to www.hfwcom.

GEOFF MANSEL AVIATION LAW PRIZE 2013

ALAANZ is pleased to announce that the winner of the Geoff Mansel Aviation Law Prize 2013 is Mr. Uroš Alexander Košenina for his research paper "*Aviation Product Liability: Could Air Carriers face their "Life and Limb" being placed in Peril for the Exclusivity of the Montreal Convention?*"

Uroš is a currently undertaking an Advanced Master in Air and Space Law at University of Leiden's Institute of Air and Space Law.

The winner paper is reproduced as follows below.

Aviation Product Liability: Could Air Carriers face their 'Life and Limb' being placed in Peril for the Exclusivity of the Montreal Convention?

A Comparative Analysis of Aviation Product Liability Developments in the United States and in Europe vis-à-vis the Exclusivity Principle of the Montreal Convention

By - Uroš Alexander KOŠENINA*

Over the past five decades, product liability law in the U.S. and EU has evolved into a sustainable system of recoveries for injured claimants, mainly for its incorporated strict liability concept, providing for the consumer benefits. This article discusses product liability regimes in the U.S. and EU, where the two main aircraft manufacturers are based.

In light of the development of product liability law in aviation, the author analyses the relation between the two sets of law i.e. the product liability regimes of the jurisdictions mentioned and the Montreal Convention, as the exclusivity principle laid down in this convention sheds a different light on this relationship. In examining the above subject, one can see that aviation product liability regimes may also concern the position of air carriers under the Montreal Convention, 1999. Damages which are recoverable from airlines under the Montreal Convention may be different from, and may be legally differentiated from those which are available under product liability regimes. Hence this paper signals a tendency in EU States, including but not limited to civil law jurisdictions, pursuant to which claimants try to rely on the latter regime notwithstanding the exclusivity principle laid down in the Montreal Convention.

Introduction

> "*If you are looking for perfect safety,*
> *you will do well to sit on a fence and watch the birds;*
> *but if you really wish to learn, you must mount a machine*
> *and become acquainted with its tricks by actual trial.*"
>
> — Wilbur Wright, 1901

Safety has always been a primary concern in aviation - from its infancy until the era of modern air transport, and it has been rapidly evolving ever since.[22] EASA has currently declared air transport to be the safest mode of transportation.[23] Moreover, according to ICAO, international civil aviation strives to remain the safest means of transportation. This can be seen from the recent ICAO studies which show the evolution of the accident rate since 2005, where the accident rate for 2010 dropped to only 4.0 accidents per million departures.[24] A further drop in figures is expected:

> "*As the books closed on 2011, the accident rate for Western-built jet aircraft was the best in history. For every 2.7 million flights that took off, there was just one accident that resulted in irreparable damage to the aircraft. At that rate, a person could fly safely every day for about 7,000 years. Of course, any accident is one too many.*"[25]

As much as it is highly desirable within the aviation community to achieve a zero rate

* The author has worked for law firms in Slovenia, the Slovenian Civil Aviation Authority and Emirates Airlines in the UAE. Currently, he follows the Advanced Master's Programme in International Air and Space Law at Leiden University with the support from Raymond and Beverly Sackler Scholarship.

[22] http://www.flyingmag.com, last visited (30-10-2012).

[23] https://www.easa.europa.eu, last visited (31-10-2012).

[24] ICAO Publication, State of Global Aviation Safety, 2011. http://www.icao.int, last visited (31-10-2012).

[25] T. Tyler, Moving Forward, Airlines International, April-May 2012. See: http://www.iata.org, last visited (31-10-2012).

in air accidents,[26] sitting on a fence and observing the birds would somehow still seem to be the only way to reach this goal, or at least until a crash-proof aircraft is built. Thus, air accidents still occur and when the following words were said by David Robert, co-pilot of the Air France Flight 447[27]: "*Damn it, we're going to crash… This can't be happening!*",[28] it was certain that this accident[29] was again *"one too many.*"

According to the final report[30] on the AF 447 accident, pilot error and malfunctioning speed sensors (Pilots) were responsible for the disaster. Therefore, from a legal point of view the case is interesting as it encompasses both the question of the applicability of product liability law on the one hand, providing claimants damage awards which may be different than those under the Montreal Convention, 1999, the liability of air carriers[31] and the applicability of that Convention on the other hand, which can be beneficial for claimants as well although it includes the exclusivity principle.

Development of the Product Liability in the United States

The development of the product liability system in the U.S. created three distinctive theories: negligence liability, warranty and strict liability in tort; the latter demanded the most attention in U.S. case law. If I paraphrase and quote C.N. Shawcross and K.C. Beaumont, the development of the field of liability in tort law in regard to product liability is "*one of the most important common law developments this century, both in England and in the United States*."[32] Notably, there is one seminal case in the development of product liability law in the U.S. which deserves attention, namely, the case of McPherson v. Buick of 1916, which established the fundamental rules of liability based on the concept of negligence.[33] Until that time, a manufacturer in the U.S. could not be held liable for a product that had caused damage to a third party. However, in the case of Buick, the court decided to find the manufacturer of a product, which was "*reasonably certain to place life and limb in peril*" liable, although there was an absence of privity of contract between the injured person and the manufacturer. By this decision, the court paved the way for a third party to receive compensation.[34] The Buick case therefore serves as a milestone in the philosophy of privity of the contract.[35]

Over the past fifty years, the U.S. has diverted from the concept of negligence to the more consumer oriented concept of strict liability. The reason for the introduction of the new concept was the growing awareness of fair treatment for consumers who had de facto insignificant legal protection against the manufacturers under the adopted concept of negligence, which was mainly due to the onerous burden on their side to prove negligent conduct by the manufacturer. Moreover, until 1963 it was extremely difficult to gather evidence, as the state of aviation accident investigation from a technological point of view was at that time not at the same level as nowadays. Thus, this resulted in preventing the 'victims' of accidents from entering litigation proceedings against manufacturers, *as ei incumbit probatio, qui dicit, non qui negat*,[36] and without evidence the case will not stand up in court.

The situation changed in 1963, when the concept of strict liability was applied for the very first time in the case of *Greenman v.*

[26] As this is the case also for the Nigeria: "Aviation Minister, Princess Stella Adaeze Oduah has restated government's determination to achieve a zero rate of air accidents in the country." See: http://www.aviation.gov.ng, last visited (30-10-2012).
[27] Hereinafter referred to as AF 447.
[28] http://www.telegraph.co.uk, last visited (30-10-2012).
[29] The AF 447 flight from Galeão International Airport in Rio de Janeiro, Brazil to Charles de Gaulle International Airport in Paris, France, crashed into the mid-Atlantic on 1 June 2012 and became one of the world's worst aviation disasters, causing fatal injuries to 216 passengers and 12 crew members on board Airbus A330-200.
[30] Final report on the accident on 1st June 2009 to the Airbus A330-203, registered F-GZCP, operated by Air France, flight AF 447 Rio de Janeiro, (July 2012). See: http://www.bea.aero, last visited (04-11-2012).
[31] Convention for the Unification of Certain Rules for International Carriage by Air (1999), which is successor to the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention of 1929); henceforth referred to as the Montreal Convention, or the Convention.
[32] C.N. Shawcross and K.C. Beaumont, 99 Air Law 405 (2004), Chapter 12.
[33] *McPherson v Buick Motor Co.*, 217 NY 382, 111 NE 1050 (1916). The plaintiff, Donald C. MacPherson, was injured when one of the wooden wheels of his 1909 "Buick Runabout" collapsed. The defendant, Buick Motor Company, had manufactured the vehicle, but not the wheel, which had been manufactured by another party but installed by defendant. It was conceded that the defective wheel could have been discovered upon inspection. The defendant denied liability because the plaintiff had purchased the automobile from a dealer, not directly from the defendant.
[34] Id.
[35] Privity is a legal concept which in its effect allowed litigation only between parties of the contract, respectively between those who purchased a product and those who sold it directly to them. Third parties thus could not be compensated for injuries arising from the use of such a product.
[36] *Lat.: the burden of proof lies with who declares, not who denies.*

Yuba Power Products.[37] From this case it is evident that the court shifted from the traditional concepts of contractual law, such as privity of contract, warranty and disclaimer.[38] After the decision made in the Greenman case, the concept of strict liability was widely adopted in U.S. tort law.[39] Furthermore, the decision includes legal and social elements, which had a significant impact on the further development of product liability law in the U.S.[40]

From a legal perspective, the new approach of strict liability was a breakthrough in comparison to the effects arising from the privity of contract doctrine. While the latter prevented third parties from recovering damages and the manufacturers could not be sued when the user misused or abused the product and caused injury to himself, the strict liability concept enabled consumers much more manoeuvring space for their legal actions. Moreover, the burden of proof of negligence was now transferred to the manufacturer. Thus, under the system of strict liability, even without negligence, a manufacturer can be held liable for selling a product which is either defective or not, but which could cause an injury.[41]

In my opinion, the social or equity element of the decision may be interpreted in the way that the users of products lack any means of protection against defective products while thus enhancing equity treatment on the user's side; hence it is only fair to impose strict liability, with restricted defences given to the manufacturer.[42] From a social point of view, consumers who are not able to protect themselves against defective products should be protected from bearing the costs resulting from such a defective product as they ought to be borne by the manufactures rather than by the 'harmed' users. Indeed, the manufacturer is able to protect himself by means of insurance and to further redistribute such costs by modest price increases in the products.[43]

To conclude this brief historical overview of the development of product liability law in the U.S., the above case of Buick had established fundamental rules of liability based on negligence for aviation claims in the U.S. courts. Further case law has shown, however, that an onerous burden of proof was still placed on the individual, who, in respect of aviation cases, was the least likely to be able to discharge the burden.[44] To create a more balanced consumer to business relationship, strict liability in tort has been widely adopted in courts and incorporated in U.S. state law.

Furthermore, the concept of strict liability has been recently adopted in almost all jurisdictions, as the emergence of a strict liability theory is far-reaching.[45] In addition Europe, being one of such jurisdictions, has for example influenced the Japanese product liability regime.[46] Moreover, the new tort law in China[47] also imposes a strict liability concept as an increased liability,[48] whereas Tanzania on the other hand is one of the relatively few countries that has not yet adopted the principle of strict liability for product liability claims.[49]

Notwithstanding the 'contagious' evolvement of the strict liability concept almost worldwide, I believe that the product liability law of each jurisdiction should be examined in somewhat more detail before making a solid conclusion that strict liability is being applied per se and not just latently. But can strict liability be imposed on

[37] See *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963). In the case the court has ruled that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." The court further stated that for establishing liability, a plaintiff needs only to prove that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.

[38] Id. at 901.

[39] See W.L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minnesota Law Review 791, 793-94 (1966).

[40] C. Berenson, The product liability revolution: Let the manufacturer and seller be sued, 15 Business Horizons 76 (1972).

[41] See P.A. Herbig & J.E. Golden, Innovation and Product Liability, 11 American Business Review 13-20 (1993).

[42] See supra note 19, at 76.

[43] See I.H.Ph. Diederiks-Verschoor and Mendes de Leon, An Introduction to Air Law 287 (2012).

[44] See e.g. *Manos v. Transworld Airlines Inc., 324 F Supp. 470, 11 Avi Cas. 17,966; Vrooman v. Beech Aircraft Corp., 183 F 2d 479, 3 CCH Avi. 17,248; Northwest Airlines Inc. v Glenn L Martin Co., 224 F 2d (6th Cir, 1955), 4 Aviation Cases 17, 682; Randy Knitwear v. American Cyanamid Company, 181 N.E. 2d 402 N.Y. (1962); Connolly v. Hagi, 188 Atl. 2d 884 (1963); Farr v. Butters Bros & Co 2 KB 606. CA (1932); Henningsen v. Bloomfield Motors, Inc., 161 A. 2d (1960).*

[45] K. Ross, Product Liability Goes Global, Risk Management Magazine; See: http://www.rmmag.org, last visited (01-11-2011).

[46] See A. Marcuse, Why Japan's New Products Liability Law isn't, 5 Pacific Rim Law & Policy Journal 382 (1996).

[47] The new tort law came into force on 1 July 2011.

[48] P. Coles, Aerospace Bulletin September 2012 - Product liability litigation in China: impact on foreign manufacturers, leaflet (2012).

[49] http://www.dlapiperproductliability.com, last visited (17-10-2012).

manufacturers? For example, not all jurisdictions of civil law follow the legal maxim *lex specialis derogat legi generali*[50] and thus a Civil Code based system may prevail, with reference to the negligence concept.[51] This question will be briefly addressed in the next section.

Product Liability Law in the United States and Europe

- *The United States*

Generally, there are two separate legal systems in the U.S., the federal and the state system, where both federal courts and state courts make law by deciding cases. Moreover, as there is no uniform federal product liability codification in the U.S. and it is thus well possible to be subject to different sets of laws, cases can be adjudicated differently in different states.[52] Despite many attempts[53] made by the manufacturers to convince the U.S. Congress to pass uniform legislation, these efforts have not been successful. So up till now no revolutionary changes have been adopted in U.S. product liability law.[54]

In the U.S., the current legal system of product liability is based on four legal theory categories by which, under state law, a plaintiff may bring a product liability action: breach of express or implied warranty, negligence, strict tort liability and intentional misrepresentation or fraud.[55] In addition, in cases where damage occurs due to a defective product, an individual usually decides either on an action in tort or an action for breach of warranty,[56] whereas the system of negligence would normally apply to the claiming of punitive damages.[57] An action in tort nevertheless offers a desirable advantage to third parties by enabling them to be compensated despite having no contractual nexus with the manufacturer. On the other hand, an action for breach of warranty is normally only available for the purchaser of the product, based on the contractual relation between the purchaser and the manufacturer.[58]

One of the important recent developments in the field of product liability law - in relation to the strict tort liability legal theory - is the adoption of the Restatement[59] (Third) of Torts: Product Liability, which deals with the liability of commercial product sellers and distributors for harm caused by their products.[60] Compared to the Restatement (Second), the new Restatement provides for clearer answers to the question of whether a product is defective by making a distinction between manufacturing defects,[61] design defects[62] and inadequate instructions or warnings defects.[63]

What about product liability for aviation products? A significant development in this regard in the U.S. was the enactment of The General Aviation Revitalization Act (GARA). After the Greenman case,[64] the strict liability concept was widely incorporated in U.S. tort law; moreover, persistent product liability litigation against the manufacturers of small i.e. general

[50] The doctrine states that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).
[51] Such as in the case of Japanese Product Liability Act. See supra note 61.
[52] T.A. Packer, Product Liability Law in the United States: Considerations for Foreign Companies, presented at the 1995 Annual Conference of Multinational Association of Independent Law Firms (MULTILAW), Manila, Philippines. See: http://www.gordonrees.com, last visited (01-11-2012).
[53] Such as an attempt with the Model Uniform Product Liability Act in 1979, followed in 1986 by a bill produced by the Senate Commerce Committee; see C.N. Shawcross and K.C. Beaumont, Air Law, discussion on US Legislative reform para. 209.
[54] As Stolker further argues: *"This is mainly because the various pressure groups are quite well balanced politically. Manufacturers have tried for a long time to introduce liability limits or caps, the restriction or the abolition of the possibility of punitive damages and the restriction of strict liability. Other interest groups have tried to maintain as much strict liability as possible."* See C.J.J.M. Stolker, Aviation Products Liability for Manufacturing and Design Defects: Two Recent Developments, The World Bulletin 93-94 (1998).
[55] http://www.hg.org, last visited (04-11-2012). See also I. H. Ph. Diederiks-Verschoor and P.M.J. Mendes de Leon, supra note 23, at 282.
[56] See e.g. Helicopter Sales (Australia) Pty. Ltd. v. Rotor-works Pty. Ltd., High Court of Australia; I Air Law 189-190 (1976).
[57] See e.g. Grimshaw v. Ford Motor Co., 119 Cal. app. 3d. 757, 174 Cal. Rptr 348 (1981).
[58] See Diederiks-Verschoor and Mendes de Leon, supra note 22, at 282.
[59] Restatements in the U.S. are a type of private, advisory codes, which are generally not binding. However, a court or legislature has the possibility to follow them. The most known has been the Restatement (Second) of Torts, which made a significant impact on American tort law and was in place for 30 years.
[60] Restatement (Third) of Torts: Products Liability (March 13, 1995), accepted in part by the members of American Law Institute. The new restatement revised and updated the Restatement (Second), completely superseding its Section 402A, which was revolutionary promulgated in 1964. See: http://www.ali.org, last visited (04-11-2012).
[61] When the product departs from its intended design, even if all possible care was exercised.
[62] When the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design, and failure to use the alternative design renders the product not reasonably safe.
[63] When the foreseeable risks of harm posed by the product could have been reduced or avoided by reasonable instructions or warnings, and their omission renders the product not reasonably safe.
[64] See *Greenman v. Yuba Power Products Inc.*, supra note 16.

aviation aircraft and new aircraft component parts caused their existence to be placed in danger.

As a response to the situation of a declining aviation industry,[65] the U.S. Congress passed GARA in 1994. Its main objective is to provide immunity to general aviation aircraft manufacturers from long-term liability by creating an 18-year statute of repose.[66] GARA is the aviation industry's tort reform and its vitality is slowly eroding with each new case published interpreting GARA's extents. Therefore the legal aviation community should shape it into a 'good law.'[67] A noteworthy example of such a 'good law' is the recent case of United States Aviation Underwriters, Inc. v. Nabtesco Corp., dealing with the effect of the GARA period of repose on product liability claims for refurbished components, which in practice could be rather ambiguously interpreted under GARA.[68]

To sum up, one can see that there is no uniform federal product liability regime in the U.S. and thus, the law of each state determines the liability of manufacturers on a case-by-case basis. Although product liability cases in U.S. courts are generally subject to the strict liability regime, it is, however, possible that in the same case the court in one state would adjudicate it for the benefit of the claimant and the decision of another state's court would be more favourable towards the manufacturer.[69] Even though the Restatement of Torts and GARA play an important role in product liability litigation, a legislative reform at a federal level is needed to avoid such discrepancies between state court rulings. The easiest way to achieve that would be by changing the voluntary nature of the Model Uniform Product Liability Act of 1979 and make it mandatory to be used by all states, as the Act for its substantial provisions comes very close to a well-established uniform codification.[70]

- *Europe*

On 25 July 1985, the Council of Ministers of the European Economic Community adopted the EC Directive 85/374/EEC "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products."[71] Among its 22 provisions, the Directive gives detailed definitions of the producer, damage, defect and product. Yet the core of the Directive is the first article, which incorporates the concept of strict liability.[72] The injured person however has to prove the damage, the defect and the causal relation between damage and defect. On the other hand, the Directive offers six possible defences to the producer, under which he can escape liability.

Remarkably, one of the defences set out in Article 7(b) draws special attention.[73] From a close review of the provision one can see that the burden of proof lies on the producer. The reason for this can be found in the Explanatory Memorandum to the Draft proposal of the Directive, explaining that the liability, irrespective of fault, shall not burden the producer to an unjustified extent.[74] Going further into the practical application of the provision, the question is how to prove negative facts and how strict the manufacturer's proof should be as the Directive does not provide any guidance in this respect.[75] Moreover, the provision refers to the term "putting the product into

[65] N.J. Rice, The General Aviation Revitalization Act of 1994: A Ten-Year Retrospective, 2004 Wis. L. Rev. 945, 946 (2004).
[66] Section 2 of *GARA* stipulates that no civil claim for death, personal injury or damage to property against the manufacturer is allowed in case an aircraft or component part is more than 18 years old.
[67] O.M. Brady, The General Aviation Revitalization Act of 1994 - an update, 71 The Journal of Air Law & Commerce 422 (2006).
[68] United States Aviation Underwriters, Inc. v. Nabtesco Corp, No. C10-821Z W.D. Wash. Ct. App. (2011). The opinion will indeed be very welcomed by component manufacturers, as the court held that the eighteen-year statute of repose set forth in *GARA* runs from the date that the component part, along with the aircraft in which it was installed originally, was delivered to its first purchaser. This opinion should provide sufficient protection for aircraft and component manufacturers, as on the growing market for used parts there is an ongoing tendency to remove, refurbish, and resale used parts for years after the original delivery. See: http://www.salawus.com, last visited (22-10-2012).
[69] Also Stolker, see supra note 33, at 94.
[70] Model Uniform Product Liability Act, Department of Commerce, Federal Register, 31 October 1979, FR Doc. 79-33253.
[71] EC Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products, 85/374/EEC, henceforth also referred to as the EC Directive.
[72] Article 1 stipulates that *"the producer shall be (strictly) liable for the damage caused by a defect in his product."*
[73] Article7(b) determines that the manufacturer shall not be liable if he proves *"that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards."*
[74] Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Bulletin of the European Communities Supplement 11/76, Explanatory memorandum, 13 (1976).
[75] See Stolker, supra note 33, at 97.

circulation," but does not define this.[76] For this reason, I believe we can expect complex legal discussions with emerging new cases in courts.

Another question that might raise practical issues is whether 'Acts of God' or vis major can be used as a defence by the producer in a possible product liability litigation case. The EC Directive does not specifically deal with this legal term as a possible means of defence. However, considering the history of the EC Directive, it can be concluded that strict liability should not be applied to damages resulting from 'Acts of God.'[77] Moreover, if we compare the EU product liability with the EU environmental liability law, it is even clearer that commonly accepted defences given to the defendant, such as force majeure, should be allowed.[78]

Furthermore, can the liability provisions of the EC Directive affect airlines, if we consider that they are not even mentioned in it? The answer is affirmative, as strict liability can be extended to the importer of a product based on Article 3(2). Therefore, in a case where an airline would for example import an aircraft from a non-EU state for immediate further resale, hire or lease and not for its own use, such an airline would be treated as a producer under Article 3(2) and hence be held liable. On the other hand, if an airline initially used the aircraft for its own operations and made it the object of a hire or lease agreement at a later stage, then such an airline would not be deemed to be a producer under the Directive.

What about the legal position of an airline regarded as a producer under Article 3(2) of the EC Directive and which enters into a wet lease agreement? This situation could be legally challenging. Such a lease arrangement could mean a high risk of liability exposure for the lessor airline as it could be held liable both on the basis of product liability as the producer and under the Montreal Convention as the air carrier. In such a case, whereby one airline provides an aircraft, complete with crew, maintenance, and insurance (ACMI) to another airline for the provision of the carriage, the lessor airline is deemed to be a contracting carrier under Article 39 of the Montreal Convention and hence subject to liability under the Convention.[79] Thus, one can bring actions for damages against the contracting carrier or the actual carrier (in this case the lessee airline), or both. A contrario, this 'double-liability' risk does not apply to a dry lease situation as in such a case liability under the Convention lies solely with the lessee airline.[80]

The U.S. Regime as compared with the European Regime on Product Liability

A comparison with the U.S. shows that Europe is not a strong 'competitor' when discussing the quantity of (aviation) product liability cases before courts.[81] Nevertheless, the EC Directive and its solutions often serve as a model in other countries. Thus, the significance of the Directive is to be found in its far-reaching effects outside the boundaries of the EU and thereby influencing non-EU countries in revising their product liability law through the lens of the Directive's provisions.[82]

[76] If we consider the argumentation of the Commission laid down in the Explanatory Memorandum to the Draft Directive, 'normally' a product is put into circulation when it has been started off on the chain of distribution. See also: J.L. Fagnart, 'La Directive du 25 Juillet 1985 sur la Responsibilite du fait des Produits' (1987), 23/01 Cahiers de Droit Europeen 3-68, at 45. In case an aircraft would crash on its test flight for example and damage would occur to third parties due to a manufacturing defect, the manufacturer could not escape liability because a test flight would be considered as the moment when the aircraft has been put into circulation. However, this can vary from case to case and not always can one determine the exact time of 'putting the product into circulation.'

[77] See J.M. Fobe, Aviation Products Liability and Insurance in the EU, Legal Aspects and Insurance of the Liability of civil aerospace products manufacturers in the EU, for damage to third parties, Kluwer Law and Taxation Publishers 53 (1994).

[78] See EC White Paper on environmental liability, COM(2000) 66 final 9 February 2000.

[79] In *Best v. BWIA West Indies Airways,* the court held that Article 39 of the Montreal Convention is designed to regulate liability in the context of code share agreements, and agreements under which a carrier enters into a 'wet' lease constructions. *Case No. 06-CV-4589, 2008 Westlaw 4458867 (E.D.N.Y. 29 September 2008)*

[80] See W. Mueller-Rostin, Aviation product Liability in Europe - The EC Directive and Brussels Convention 1968, Paper presented at the 1987 ESC Aviation Law and Claims Conference in London 24 & 25 November 1987, at 5.

[81] Only a few cases can be found on aviation product liability in the European courts, when compared to the United States, and mostly in the field of general aviation in countries such as France, Belgium, United Kingdom, Germany and Netherlands. See Fobe, supra note 56, at 92-110. See also Stolker, supra note 33, at 94. Stolker sees the explanation for that in out-of-the-court settlements rather than bringing the cases before courts.

[82] See Article 2-5 of the *Japanese Product Liability Act* (Act No. 85/1994), which is based on the EC Directive's provisions on the definitions, especially with respect to the term 'producer' and 'products liability,' time limitations and the manufacturer's or producer's defences; see: http://www.consumer.go.jp, last visited (01-11-2012).
Nevertheless, although the strict liability concept was incorporated into the Japanese Products Liability Act, the previous Civil Code-based system with severely limited scope and equally limited remedies prevents the strict liability system to function as intended; thus strict liability will in practice in Japan not be imposed on manufacturers. Remarkably, a fundamental provision of the Japanese Products Liability Act is also Article 6, which stipulates that not only the Products Liability Act, but also the Civil Code articles

When drawing a further comparison between the U.S. and Europe, one can conclude that at a first glance both product liability legal regimes are based on the concept of strict liability. However, when we drift away from the theory, is this actually the case in practice?

Product liability law in Europe is the only one which is explicitly based on strict liability.[83] However, this does not preclude victims from pursuing claims on the basis of other forms of liability – such as those based on tort, contractual liability or statute, applying in such cases the national law of a Member State.[84]

Such a strict system is also one of the reasons why only a few cases have been brought before European courts as the manufacturers rather opt for an out of court settlement. Nevertheless, in my opinion it may be uncertain whether in the EU strict liability will apply as a uniform principle in all Member States as the legal nature of the EC Directive allows different variations when implementing the Directive into national law. In addition, even if implemented uniformly, each national court may interpret the national law differently.

On the other hand, in U.S. courts, product liability cases are generally subject to the strict liability regime. However, as there is not yet uniform codification of the product liability law in the U.S. at a federal level, the court will apply the concept of strict liability differently.[85] Moreover, in the U.S., even though it sounds strict, product liability is not always strict liability per se, especially when dealing with liability for design defects.[86] Both the U.S. law and the EU law on product liability distinguish between manufacturing defects, design defects and cases of inadequate warnings or instructions. However, under the new Restatement (Third),[87] manufacturing defects remain subject to strict liability, and a contrario, design defects are governed by a new liability standard which is certainly not strict liability, though it is more than 'just' a negligence system.[88]

Furthermore, when comparing the GARA 18-year repose period with the 10-year statute of limitation as set out in Article 11 of the EC Directive, one can see that the U.S. regime is less strict. Additionally, GARA applies only to general aviation, whereas for commercial aviation there is no Federal Statute of limitations.

In summary, while the basic concepts are similar, product liability regimes are implemented and explained differently in Europe and the U.S. However, irrespective of the jurisdiction in which a claimant intends to enforce his rights for compensation, whether in the U.S. or in Europe, to have legal grounds for a successful product liability claim, the damage must be the result of either defective design,[89] defective construction, or inadequate instructions for handling the product put on the market.[90] In the end, of course, the courts will be the one to call all the shots. Thus what is really important, both in the U.S. and in Europe, is how the judge will and should handle the burden of proof, as it is still possible that he shifts it from the shoulders of the manufacturer to the shoulders of the claimant.[91]

When referring to GARA and design defects as one of the most common causes of aviation accidents and especially to non-unified federal codification, it is hard to avoid the impression that the U.S. system of product liability is somehow retracting from the strict liability concept. With that development in mind, would passengers not be better flying with European

apply to the liability of a 'producer or the like' for damage caused by a defective product.

[83] See Article 1 and 3 of the EC Directive.

[84] See Article 13 of the EC Directive.

[85] See also P.P.C. Haanappel, Product Liability in Space Law, 2 Houston Journal of International Law 60-61 (1979).

[86] D.G. Owen, Defectiveness Restated: Exploding the "Strict" Products Liability Myth 1996 U. Illinois L.Rev. 743,786 (1996).

[87] Restatements in the U.S. are a type of private, advisory codes, which are generally not binding. However, a court or legislature has the possibility to follow them. The most known has been the Restatement (Second) of Torts, which made a significant impact on American tort law and was in place for 30 years.

[88] See P.H. Corboy, The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability, 61:4 Tenn.L Ref.,1043 (1995).

[89] For example, navigational equipment may be regarded as a defectively designed product as well. In Re Korean Disaster of 1 September 1983, whereas the court considered the Jeppesen chart as a product. See I. Awford, Civil Liability Concerning Unlawful Interference with Civil Aviation, in: P.M.J. Mendes de Leon/T.L Zwaan (Eds.), Aviation Security, Proceedings of a conference held in January 1987, 49 (1987).

[90] See Diederiks-Verschoor and Mendes de Leon, supra note 22, at 281-282. See also respective case law: *Northwest Airlines Inc. v Glenn L Martin Co., 224 F 2d (6th Cir, 1955), 4 Aviation Cases 17, 682; Brinson v. Raytheon Aircraft Company, 571 F.3d 1348 (11th Cir. 2009); Kay v. Cessna Aircraft, US Court of Appeals (9th Cir. 1977), U.S. Aviation Reports 375; United Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd. 2009 U.S. App. Lexis 25488 (10th Cir. 2009).*

[91] See Stolker, supra note 33, at 101.

manufactured aircraft for the sake of being subject to a strict liability regime in their relations with manufacturers in a potential litigation case? A detailed analysis of the most common causes of aviation accidents[92] and their correlation with the quantity of the legal actions against manufacturers is needed before the question can be raised whether EU air carriers should replace their fleets with only European manufactured aircraft? Without going into further details concerning business and other considerations, I would argue that favorable product liability provisions form one but certainly not the determining factor for the choice of a manufacturer.

***

The Issue of the Exclusivity of the Montreal Convention - Status Quo Ante for Air Carriers?

> "*It is obvious that if these Plaintiffs are going to have a meaningful recovery they're going to have to go after the products defendants*."[93]

Nowadays, this remark, although made at the time of the Warsaw Convention, reflects the idea that manufacturers have become a preferential source for a potentially greater recovery of damages for claimants, as air carriers are protected under the Montreal Convention regarding the jurisdictional and other limitations on the amount of damages that may be claimed.

In that respect, the chart at Schedule 1 compares regimes under the Montreal Convention and the EC Directive in the event of personal damage caused to a passenger.

Moreover, manufacturers who are supposed to be financially stronger are, in comparison with the majority of air carriers, more attractive litigation targets for claimants. This facet was shown in the case of the AF 447 litigation proceedings, where the claimants brought claims against product manufacturers in the U.S. However, in that case the common law forum non conveniens doctrine[94] was used and the court dismissed the actions on this procedural rule.[95] This decision also makes clear [96] how complex the relation between the product liability law and the Montreal Convention can be.[97]

The multifaceted relation between the two sets of law, i.e. the product liability law and the Montreal Convention brings us to the question of whether a claimant is limited in choosing the legal basis for his claims for the damage he suffered in an aviation accident. By decisions made in the two seminal cases, Sidhu v. British Airways[98] and El Al Israel Airlines v. Tseng,[99] the question whether a cause of action independent from any contractual or tortious situation can be regarded 'exclusive' across the whole field of the liability of the carrier in international carriage by air, was settled, at least in the U.S. and in the U.K.[100]

Especially in the Tseng case, the court explicitly ruled that the Convention has a preemptive effect[101] as it " ...precludes a passenger from maintaining an action for personal injury damages under local law when her claims does not satisfy the conditions for liability under the Convention."[102]

---

[92] http://www.jacobymeyers.com, last visited (05-11-2012).

[93] A remark made by Judge Bertelsman in the litigation against Air Canada, accident of DC9-32 aircraft at Cincinnati on 2 June 1983. See Fobe, supra note 56, at 81.

[94] Under the Montreal Convention a passenger can sue in a variety of countries as a result of air accidents: (1) the carrier's domicile, (2) the carrier's principal place of business, (3) where the ticket was purchased, (4) the flight's destination, and (5) the passenger's 'principal and permanent residence', which is defined as 'the one fixed permanent abode of the passenger at the time of the accident'.

[95] See A.I. Mendelsohn, 'Foreign Plaintiffs, Forum Non Conveniens, and the 1999 Montreal Convention,' 36 Air and Space Law 300-303 (2011).

[96] See also: *Cf. United States District Court for the Northern District of California MDL No. 10-2144-CRB, Slip op. (N.D. Cal. Oct. 4, 2010).* By the words of the Judge Breyer: *"If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with the [Montreal Convention] in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the Montreal Convention ... Second, Air France's presence as a third party Defendant would undercut the MC's jurisdictional restrictions, because Air France will end up indirectly litigating the passengers' claims outside of the five forums expressly provided for in the Montreal Convention."*

[97] See also: G.N. Tompkins, Jr., Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States 63-64 (2010).

[98] *House of Lords, Abnett v. British Airways PLC* and *Sidhu and Others v. British Airways PLC* (1997).

[99] *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (1999).

[100] See C.N. Shawcross and K.C. Beaumont, 99 Air Law 405 (2004).

[101] *"... where the Convention is applicable to the transportation, and if liability does not arise under the Convention, there is no liability whatsoever, and resort to local law for the assertion of the claim is barred by the exclusive and preemptive nature of Article 25 of the Convention."* See Tompkins, supra note 76, at 49.

[102] See supra note 78. However, even before the *Tseng* case, there are myriad cases in the U.S., in which the courts held that the Convention is the exclusive basis for all claims and preemptive for state law based claims. See e.g. In re *Air Disaster at Lockerbie*, Scotland on December 21, 1988, 928 F.2d 1267 (2. Cir.); *Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991); *Pflug v. Egyptair Corp.*, 961 F.2D 26, 28-30 (2d Cir. 1992); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881 (5th Cir. 1996); *Ajibola v. Sabena Belgium*

On the other hand, the question of the exclusivity of the Montreal Convention[103] vis-à-vis the legal actions against the manufacturers has not yet been raised before courts, except in France.[104] If manufacturers were to use this defence in litigation, would the court extend the reasoning from the Tseng case and hence push the air carriers into the situation of being the sole litigation target even when manufacturers were solely responsible for the aviation accident?

If one only looks at the strict wording of the exclusivity provision of the Convention as set out in Article 29,[105] it can be easily argued that legal actions against the manufacturer, based on product liability for example, would conflict with the exclusivity principle so that the first question above can be answered affirmatively. However, it seems that a wider interpretation of the provision is required before making such a conclusion. Therefore, it is crucial that the systematic, historical and teleological interpretation of the provision is also considered.[106] In addition, "...Article 29 falls within the chapter: 'The Liability of the Carrier' ... suggesting perhaps that it only concerns the carrier."[107] Furthermore Article 30 of the Montreal Convention specifically gives protection to the servants and the agents from being a litigation target, but the same is not mentioned for the manufactures who are neither servants nor agents.

In addition, it is also important to look at the object and purpose of the Montreal Convention and look back to see in what period and for what reason the exclusivity provision was introduced. One can see that no channeling or exclusivity of carriers or the exclusion of manufacturers is mentioned, nor was the Convention designed to protect manufacturers.[108]

The view presented above, however, also needs to be reflected from the standpoint of opponents, who find their arguments in the Tseng case. The alternative view argues that claims must be brought exclusively against the airline.[109]

Nevertheless, it is to be highlighted that the Montreal Convention does not explicitly stipulate that no other person shall be liable, nor that the claim for compensation can be raised against the carrier only. This view is articulated in the decisions of the French courts[110] and therefore in France, which provide that the exclusivity of the Montreal Convention does not conflict with legal actions against the manufacturer. Moreover, claimants are free to choose to bring either a claim against the manufacturer or the air carrier, however in the former case the claim would be limited by the conditions and limitations of the Montreal Convention.[111]

Going beyond the scope of the Montreal Convention, it is questionable whether this Convention would not infringe the constitution of the ratifying State by presenting this exclusivity provision. For example, according to the Slovenian Constitution, laws and regulations must comply with generally accepted principles of International Law and with Treaties that are binding on Slovenia.[112] Thus the Constitution recognizes supremacy of (ratified and published) treaties over the laws and regulations but not over the Constitution itself, which is the supreme law of the Slovenian legal system. It is therefore difficult to accept that the Montreal Convention could prevent claimants from

Airline, 1995 WL 552737 (S.D.N.Y. 1995); *Donkor v. British Airways*, 62 F. Supp. 2d 963, 968 (E.D.N.Y. 1999).

[103] Henceforth also referred as the Convention.

[104] See: *Decision of the French Republic on Behalf of the French People Arising out of the Accident of Gulf Air Flight, Cour de Cassation, Civil Division 1, Public hearing on 12 November 2009, Appeal No.: 08-15269;* and *Decision of the French Republic on Behalf of the French People Arising out of the Accident of Kenya Airways Flight, Cour de Cassation, Civil Division 1, Public hearing on 11 July 2004 Appeal No.: 04-18644.* From the decisions in both cases one can see that passengers are not precluded to raise claims against the manufacturer despite the exclusivity of the Convention.

[105] *"In the carriage of passengers ... 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 ..."*

[106] See also Article 30(1) Vienna Convention on the Law of Treaties. Article 30 stipulates that treaties must be interpreted *"in good faith in accordance with the ordinary meaning given to the terms of treaty in their context and in light of the object and purpose."* See also *Air France v. Saks*, 470 US 392, 397 (1985).

[107] See P. Neenan, The effectiveness of the Montreal convention as a Channelling Tool Against Carriers, The Aviation & Space Journal 24 (2012).

[108] Id., at 18-31.

[109] See Mendelsohn, supra note 74. Medelsohn proposed that *"US courts in future cases should extend the Tseng doctrine one step further: not only must the victim of an air crash disaster in international air transportation bring his/her claim exclusively under the provisions of the 1999 Montreal Convention, but also, more importantly, that claim must be brought exclusively and only against the airline on which the death or injury occurred."*

[110] See supra note 83.

[111] See supra note 86, at 18-31.

[112] Constitution of the Republic of Slovenia, Official Gazette RS, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06.

bringing claims other than under the Convention itself, whereas it is crucial to consider that such legal actions constitute the constitutional right of an individual to judicial protection under national law. As this could appear as an issue within the European legal systems, in the U.S. the Constitution declares that the Constitution, the Laws of the U.S. and all Treaties made under the Authority of the U.S. are, together, the supreme Law of the Land, equal in stature.[113] Therefore, Montreal Convention as a treaty validly consummated under the Constitution of the U.S. is equal in stature with the Constitution and an Act of Congress.

However, it seems that the implications of the exclusivity principle laid down in the Montreal Convention for aviation manufacturers and their product liability adds new dimensions to the issue each time it is brought up for discussion. An interesting illustration of this can be given in the situation where an airline, which has entered into a wet lease agreement for example, is deemed to be an importer and thus possibly liable both as a producer, pursuant to Article 3(2) of the EC Directive 85/374/EEC, and as the air carrier under the Montreal Convention.[114] If we follow the alternative view on the exclusivity issue, would such a narrow interpretation of the exclusivity principle then not result in making the EC Directive unenforceable with regard to the claims made by the passenger against the manufacturer? Thus, I expect that this specific provision of the EC Directive (Article 3(2)) shall be employed as an additional argument for the conclusion that the exclusivity principle applies to air carriers only so that claims can also be raised against the manufacturer on a different legal basis than the Montreal Convention.

***

Conclusion

In conclusion, pursuant to this short analysis and while bearing in mind that argumenta *non sunt numeranda, sed ponderanda*,[115] one can see that an injured passenger having suffered damage during international carriage by air may therefore bring an action against the manufacturer on the basis of product liability law and against the air carrier under international law - this should be done only pursuant to the provisions and principles of the Convention. Since the manufacturer is not considered to be the agent of the carrier, any claim against the manufacturer is not and cannot be barred by the exclusivity of the Convention. The exclusivity rule applies only to other claims against the carrier, based on tort or national law. Thus, the manufacturer can be sued under product liability law in addition to the carrier, particularly if the carrier is able to rely on the defence of "*liability of a third party*" and is thus able to limit its liability. In such a case the airline should plea the exclusivity provision of the Convention in order to prevent the manufacturing defendants from obtaining jurisdiction against the carrier for a contribution outside the limits of the Convention.

However, will the next aircraft accident wake up manufacturers to raise the issue of exclusivity and rely on it as a defence? In my opinion the Tseng case only pertains to the legal position of air carriers which cannot affect that of manufacturers. However, here again the courts will have the final word and the French case law can be good jurisprudence to refer to, especially for civil law jurisdictions. In addition, the risk of a potential 'exclusivity' defence raised by manufacturers and unknown decisions by the courts rests with the airlines. Thus, the airlines should establish and define contractual relations with manufacturers with care, especially when negotiating liability clauses, making sure they are balanced and mitigating the worst-case scenario.

> *"In flying I have learned that carelessness and overconfidence*
> *are usually far more dangerous than deliberately accepted risks."*
>
> *— Wilbur Wright*

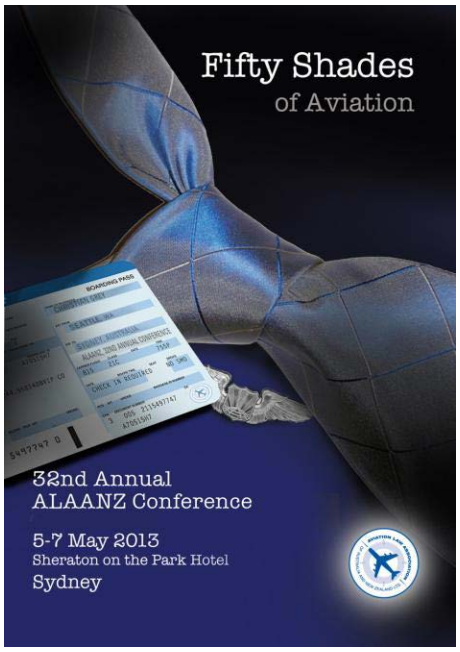
[113] Article VI, Clause 2 of the United States Constitution.
[114] See Section III. above.
[115] *Lat.: Arguments should be defined not by quantity, but by their value.*

Schedule 1

Principles	MC 99	EC Dir 85/374	Comments
Compulsory elements for a claim	(1) accident (2) damage: death or bodily injury (3) accident takes place on board aircraft / embarkation, disembarkation	(1) product (2) damage: death or personal injury	
Damages	bodily injury and death	death and personal injury	
Burden of proof	causality between accident and damage	causality between damage and defect of the product	
Liable parties	air carrier	producer*	Defined as: producer of finished products, raw materials, component parts, and any person who by putting his name, trademark or other distinguishing feature on the product presents himself as its producer.
Statute of limitations	2 years	subjective 3 years / objective 10 years*	3 years from the moment when the claimant became aware of the damage, the defect and identity of the producer, however the right of the claimant extinguishes after 10 years from the date when the product was put into circulation (unless proceedings against the producer instituted in the meantime).
Jurisdiction	(1) the court of the domicile of the carrier; or (2) of its principal place of business, or (3) where it has a place of business through which the contract has been made; or (4) before the court at the place of destination; or (5) or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence	subject to national and private in't law rules	
Basis of liability and amount of damages	(1) strict liability up to 113.100 SDR (2) unlimited liability subject to reliance on exoneration by the carrier (see Art. 21(2) of the Montreal Convention)	strict and unlimited liability*	* Each member state may limit liability to 70 million EUR or more for damage resulting from a death or personal injury and caused by identical items with the same defect (Article 16).

OTHER NEWS FROM ALAANZ

32nd Annual ALAANZ Conference



- Click here for the ALAANZ 2013 Annual Conference Program
- Click here for the ALAANZ 2013 Annual Conference Registration

The 32nd Annual ALAANZ Conference is being held in Sydney, 5-7 May 2013. In the great tradition of ALAANZ conferences, we are pleased to present this fantastic forum for delegates to get up to date with the issues currently facing lawyers, insurers, brokers and the broader Aviation Industry. We have put together an informative and relevant program to be delivered by experienced local and international presenters covering the latest industry developments in aviation law, both from an Australian and International perspective.

The Honourable TF Bathurst, Chief Justice of NSW, will open the Conference and provide the Keynote Address

The conference dinner will be held at one of Sydney's iconic venues – the Opera House. The preliminary program, and registration information, will be distributed early in the New Year.

Don't miss this opportunity to be involved with your colleagues from Australia, New Zealand and abroad.

Cologne Compendium on Air Law in Europe

On 5 April 2013, a commemorative event at the Koln/Bonn International Airport was held for the launch of the *Cologne Compendium on Air Law in Europe*. The Compendium, written by more than 80 contributors, combines the elements of a treatise and a commentary and outlines the legal basis for the regulation of aviation in various European countries. The book is the product of a collaboration among WilmerHale, Deutsche Lufthansa AG and the Institute of Air and Space Law of the University of Cologne. The Compendium's three co-editors are: David Heffernan, chair of WilmerHale's Aviation Practice Group; Nicolai von Ruckteschell, senior vice president, general counsel, chief compliance and corporate officer of Deutsche Lufthansa AG; and Prof. Dr. Stephan Hobe, director of the Institute of Air and Space Law for the University of Cologne.

The Compendium provides a comprehensive overview on the legal situation of the most topical problems of air law throughout the world and especially in Europe. It is based on the three-volume *Kolner Kompendium des Luftrechts*, which was published on a cooperative basis by the Institute of Air and Space Law of the University of Cologne and Deutsche Lufthansa AG in 2008, 2009 and 2010. The compendium will serve as a guide for students and legal practitioners in the various sub-specialties of air law.

The book can be purchased through amazon.com.