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Editors	**Contributions and Feedback to**	**ALAANZ Secretariat:**
Nick Humphrey	Nick Humphrey	Mecca Concepts Pty Ltd
Dr Vernon Nase	nick.humphrey@emirates.com	*meccaconcepts@bigpond.com*
	Associate Professor Dr Vernon Nase	*Tel: +61 409 336 804*
	vernon.nase@curtin.edu.au	

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RECENT CASES

Australian Competition and Consumer Commission v Flight Centre Limited (No 2) [2013] FCA 1313 (6 December 2013)

On 6 December 2013 the Federal Court of Australia held that Flight Centre Pty Ltd ("**Flight Centre**") contravened Australian competition law on six occasions in its dealing with three international airlines by engaging in conduct which constituted an attempt to induce the airlines to enter into contracts, arrangements or understandings which have the purpose or likely effect of substantially lessening competition.

The Facts

Between August 2005 and March 2009 Flight Centre managers sent a series of emails to employees of Singapore Airlines Limited, Malaysia Airline System Berhad and Emirates requesting that the airlines provide Flight Centre with access to fares sold directly on the airlines websites. The ACCC alleged in each case that Flight Centre had attempted to induce the airlines to make a contract or arrangement or arrive at an understanding that any fare offered by the airline directly to its customers would:

- be made available to be purchased through Flight Centre; and
- would be sold by the airline at a total price, including any charge for its booking services, of no less than the net fare plus the commission that Flight Centre would be entitled to be paid for its services if Flight Centre had sold that fare to a customer.

Determination that Flight Centre is a Competitor of the Airlines

Australian competition law prohibits entering into contracts, arrangements or understandings between competitors which have the purpose or effect of substantially lessening competition.

The Federal Court held that the emails sent by Flight Centre managers sought to induce the airlines to enter into a contract, arrangement or understanding to fix, control or maintain Flight Centre's distribution margins. The relevant question for the Court was accordingly whether airlines compete in the same market as travel agents, which for the purpose of the Australian competition law involves a consideration of whether the services supplied are substitutable for or competitive with one another.

Applying this definition, the Court held that there exists a single market in which travel agents and airlines compete for the supply of both the service of booking the flights and the 'distribution service' which involves promoting air travel, dealing with the public in relation to the booking of the air travel and receiving payments for the air travel.

Flight Centre's Claim that it was only an Agent Rejected

Flight Centre's contention that the relevant market was for 'air travel' and that the only service supplied was a bundle of rights conferred in return for the payment of the fare, which Flight Centre supplied as agent for the airlines, was rejected.

In these circumstances, the Court found that Flight Centre had breached the Australian competition law. The Court will determine the penalty payable by Flight Centre in a separate hearing.

Competition Law Implications for Airlines and Travel Agents

Unless the Federal Court's decision is overturned on appeal, the decision stands as authority for the proposition that airlines are competing in a market which includes travel agents and may include other suppliers of travel services.

Accordingly, airlines need to remain conscious of the competition issues which may arise when dealing with travel agents. Agreements which involve offering particular fares, conditions or other inducements to particular travel agents should be carefully examined to ensure the agreements comply with the requirements of the Australian competition law.
Flight Centre has foreshadowed an appeal to the Full Court of the Federal Court.

Ben Martin, Partner, Mark Mackrell, Partner & Keira Nelson, Senior Associate, Norton White Lawyers, Sydney

Campbell v Hay [2013] NSWDC 11 (19 February 2013)

In this case, the New South Wales District Court considered a defence, based on civil liability legislation, that the plaintiff's injury sustained in an aircraft accident, resulted from the materialisation of an obvious risk of the dangerous recreational activity in which the plaintiff was engaged. In most Australian states, there is legislation which provides that a person is not liable in negligence for harm suffered by another person in the case of an obvious risk of a dangerous recreational activity.[1]

In this case the plaintiff was undertaking flying instruction by the defendant in a light recreational aircraft which suffered an engine failure. The defendant instructor took over control of the aircraft which made an emergency landing during which the plaintiff was injured. The trial judge held that the defendant failed to exercise reasonable care for the safety of the plaintiff in not diverting to an appropriate landing strip immediately after engine vibrations which had occurred prior to the engine failure. However, the trial judge also held that flying training in a light recreational aircraft was a dangerous recreational activity and that the plaintiff's injuries were the materialisation of an obvious risk of that dangerous recreational activity and dismissed the plaintiff's claim.

Mark Mackrell, Partner, Norton White Lawyers, Sydney

Cousins v Nimvale Pty Ltd [2013] WADC 175 (19 November 2013)

This proceeding before the District Court of Western Australia arose from the death of two young women in a helicopter crash at Purnululu National Park in Western Australia on 14 September 2008. The plaintiffs were the parents of the deceased who claimed under the *Civil Aviation (Carrier's Liability) Act 1961* (WA) (CACLA) which gives effect in this State to the *Civil Aviation (Carrier's Liability) Act 1959* (Cth) ("**Commonwealth Act**").

District Court Judge John Staude considered issues relating to the inclusiveness of the statement of claim, in particular, the applicability of the *Fatal Accidents Act* (1959) WA, the availability of a claim for negligently inflicted psychiatric injury to non-passengers, the applicable time limit for making of the claim and the proper ambit of the CACLA.

A major focus of His Honour's analysis was the correct reading of the CACLA. The CACLA is essentially uniform legislation, mirrored in each State jurisdiction, as a consequence of the importing and codification of the Warsaw Convention system into Australian domestic law through the Commonwealth Act.

His Honour turned to the non-binding Federal Court case of *South Pacific Air Motive Pty Ltd v Magnus*[2] ("**Air Motive**"), for guidance. Hill J in Air Motive had noted that "*the conventions were intended to be a complete code with respect to contractual passengers, but not with respect to non-passengers.*" Sackville J in Air Motive noted the doctrine of the exclusivity of the convention, precluding turning to another remedy once the convention applied to the carriage, and citing cases such as *Sidhu v British Airways*,[3] and *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd.*[4] His Honour also noted that these cases supported the proposition that psychiatric injury to a passenger, absent physical injury, was not compensable (the "bodily injury" issue).

In exploring the contentious issue of whether the Act excluded a claim for purely psychiatric injury by a non-passenger Sackville J observed that the words 'in respect of' (used in s 35(2) of the Commonwealth Act, but not in the Warsaw Convention itself) had been considered by the High Court in *Workers Compensation Board of Queensland v Technical Products Pty Ltd.*[5] In this case the High Court held that the employer was not required to insure against a claim for damages for psychiatric injury to a person other than an employee.

Staude DCJ noted that Sackville J identified a number of factors which supported the

[1] In this case the provision was section 5N of the *Civil Liability Act 2002* (NSW).

[2] [1998] FCA 1107

[3] [1996] UKHL 5, [1997] 1 All ER 193.

[4] [2002] 2 All ER 565

[5] (1988) 165 CLR 642

conclusion that pt IV of the Commonwealth Act was not intended to cover psychiatric injury claims by non-passengers (at [50]). This conclusion was thought to be compatible with the policy of the legislation. Staude DCJ also noted that in his opinion "*the Commonwealth Act applies, as far as non-passengers are concerned, only to liability for damage due to death of a passenger.*"

On the authority of *Air Motive*, His Honour held that s 35(1) of the Commonwealth Act, properly construed, does not apply to prevent an action in tort for injury to a non-passenger. His Honour went on to conclude that "*pt IV is not a code that applies so as to limit the rights of non-passengers to claim in respect of injury to them caused by an aircraft accident.*"

Ultimately, Staude DCJ concluded in this instance that "[a]s the psychiatric injury claim was pleaded more than three years after the event giving rise to the cause of action, namely, the crash, it [was] barred by the effluxion of time." His Honour, relying on Air Motive, further endorsed the proposition that "[a]*s a matter of law damages for psychiatric injury suffered by a non-passenger* [were] *not compensable under the CACLA*."

Editor's note:

A consequence of His Honour's position entertaining the possibility of claims in negligence for non-passengers would be the application of Section 5S of the Civil Liability Act 2002 (WA) (the "**CLA**") to the particular claim. Section 5S(1) of the CLA provides that "*a person (the* ***defendant****) does not owe a duty of care to another person (the* ***plaintiff****) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.*" While the old "*control mechanisms*" for negligence are shrunk into Section 5S(2) and essentially go to the 'reasonable foreseeability' criterion, the bar is still reasonably high for relatives, without a direct perception of the event, claiming in this manner.

Editors.

Edwards v Endeavour Energy [2013] NSWSC 1899 (19 December 2013)

In this proceeding before the Supreme Court of New South Wales, the question arose whether an observer on a helicopter used for inspecting power lines was a passenger or a member of the crew. The helicopter was chartered by a power line company to inspect power lines in rural areas and the observer was an employee of the power line company on board to observe the condition of the power lines. The carriage of a passenger in commercial transport operations is subject to a domestic regime based on the Warsaw Convention,[6] which created a right of action for passengers but imposed a limit of liability.

In the United Kingdom, the House of Lords held in *Herd v Clyde Helicopters Ltd*[7] that a police observer in an aircraft chartered by the police authority was a passenger subject to a similar domestic regime based on the Warsaw Convention. However in *Edwards v Endeavour Energy*, the trial judge sought to distinguish the House of Lords decision because the observer in this case, in addition to checking the power lines for his employer, was also required to assist the pilot by directing him to the power lines that were to be inspected and by looking out for, and warning of, hazards which, so the trial judge held, meant that the observer was a member of the crew and therefore not a passenger. The decision is questionable.

Mark Mackrell, Partner, Norton White Lawyers, Sydney

Lustig v Qantas Airways Ltd (Civil Claims) [2013] VCAT 1012 (20 June 2013)

In an interesting decision arising from a dispute aboard a Qantas flight when a passenger was refused permission to hang a suit in a business class suit locker, VCAT determined that it had jurisdiction for the claim and that the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) did not apply to

[6] As the carriage was intrastate carriage, the applicable legislation was the *Civil Aviation (Carriers' Liability) Act 1967 (NSW).*

[7] [1997] AC 534.

exclude the Tribunal's jurisdiction or limit the claimants' entitlements.

Passenger refused permission to hang suit in business class suit locker

In this case, the applicants, Mr Peter Lustig and Mr Giuseppe De Simone, claimed that they were travelling together and had boarded a Qantas flight at Sydney airport to return to Melbourne in April 2006.

Before the flight departed, an incident took place during which the customer service manager on the flight refused to allow Mr De Simone to hang a suit in the business class suit locker. It is alleged that the customer service manager subsequently assaulted Mr De Simone during the dispute, in which both passengers participated. Both passengers were then asked to leave the aircraft, which they did.

It is alleged they were told that if they left the aircraft Qantas would not press charges.

Airline informs passengers of decision not to carry them in future

Mr Lustig was subsequently charged with interfering with a crew member of the aircraft and, although he was convicted in the District Court of New South Wales, that conviction was subsequently quashed and a new trial was ordered but has never been pursued.

Both passengers were informed after the incident that Qantas had decided that it would not carry them again in the future.

Passengers seek apology from airline and damages for expenses incurred

Mr Lustig and Mr De Simone each made an application against Qantas in VCAT seeking a range of orders.

Mr Lustig sought:

- damages of $4.50 for a bus ticket to change terminals at Mascot Airport, the cost of a Virgin flight back to Melbourne and further damages up to $9,000;
- a written apology;
- retraction of the "never use our services again" letter;
- reinstatement of Frequent Flyer and Qantas Club statements together with 10 million Frequent Flyer points;
- exemplary and/or punitive damages; and
- such other orders as the Tribunal deems appropriate.

Mr De Simone sought:

- damages of $300 for the cost of the flight from Sydney to Melbourne and the cost of a replacement Virgin flight;
- Frequent Flyer points to the value of $9,699;
- a public apology from Qantas;
- reinstatement of Qantas Frequent Flyer status; and
- an order preventing Qantas from prohibiting him from flying again with Qantas.

Airline submits that VCAT not vested with federal jurisdiction and cannot hear application

Qantas submitted that the Victorian Civil and Administrative Tribunal had no jurisdiction to hear and determine the applications on two bases:

- Qantas relied on a defence of immunity under federal law, submitting that the provisions of Part IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) applied and the Tribunal does not have jurisdiction to hear and determine claims made under this Act because it is a federal law and the Tribunal is not vested with federal jurisdiction under the *Judiciary Act* 1903 (Cth).
- The provisions of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) apply to the claims, so that any claim under the *Fair Trading Act* (Vic) becomes a claim under Commonwealth law and the Tribunal is unable to hear and determine the claims because it is not vested with federal jurisdiction.

Application of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth)

Qantas maintained that Part IV of the Act applied, because except for the claims in relation to the cost of replacement flights and the bus ticket, the claims were for

damages for personal injury sustained in an "accident" which took place on board an aircraft travelling between two states.

It further submitted that the claim was statute barred, as proceedings were not brought within two years after the date of arrival of the aircraft at the destination and that the provisions of Part IV of the Act extinguish any other causes of action.

Member Grainger, who determined the dispute, noted that the question for the Tribunal was whether the claims are claims for damage "sustained by reason of any bodily injury suffered by (a) passenger resulting from an accident which took place onboard the aircraft or in the course of any of the operations of embarking or disembarking".

Claims found not to be claims for personal injury

Member Grainger found in relation to Mr Lustig's claims that his claim for damages for a bus ticket and for a return flight back to Melbourne are not claims for damages arising out of a personal injury. He was also satisfied that the claim relating to the retraction of the "never use our services again" letter and written apology were not claims for damages arising out of personal injury.

While the claim for damages was limited to $9,000 and for the award of Frequent Flyer points and the claim for exemplary and/or punitive damages was more questionable, he was satisfied that these claims were not claims for personal injury as long as the exemplary damages relate only to the alleged breach of contract, misrepresentations and the unconscionable conduct of Qantas. He also found that the exemplary damages sought by Mr De Simone were not compensation for an alleged assault.

Claims found to arise from contractual relationship between passengers and airline

Member Grainger further rejected the argument that federal jurisdiction was being exercised in this instance.

While he accepted that there were cases which suggest that the Montreal Convention extinguishes all claims for damages arising out of international travel other than those for personal injury and damage to baggage, there is nothing in the wording of Part IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) to support the submission in respect of that Part that all other claims are also extinguished.

Submission was made that the events which gave rise to the claims occurred at Sydney Airport, being a Commonwealth place, and that as such, any claim under the *Fair Trading Act* would involve a purported exercise of federal jurisdiction, because that Act cannot apply of its own force to events which occurred at Sydney Airport.

Member Grainger accepted that the incident on 6 April took place on a Qantas aircraft which was located in a Commonwealth place, but he said that the claims made by Mr Lustig and Mr De Simone could not be described as a cause of action arising out of a defined event at a Commonwealth place. Rather, they arose out of a generalised contractual relationship between each of them with Qantas.

The applications by Qantas were dismissed and an order was made for the proceeding to be set down for hearing.

Matter yet to be resolved seven years later

It has now been more than seven years since the incident which gave rise to the claims. It is hoped that this matter will soon be finally determined. For the present however, the decision of Member Grainger provides an interesting analysis of the application of the federal jurisdiction and the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) and the *Commonwealth Places (Application of Laws) Act* to claims of this type.

Andrew Tulloch, Partner, CBP Lawyers, Melbourne

Nguyen v Qantas Airways Limited [2013] QSC 286

This case, in which the plaintiff claimed damages for personal injuries allegedly sustained on an international flight between Australia and the United States of America on 9 December 2008, was heard before

Justice David Boddice in the Supreme Court of Queensland. The claim involved an application of Article 17 of Montreal No 4 Convention, which was incorporated into Australian law by Part IIIC of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) (as amended) ("the **Act**").

The Facts

The plaintiff, who occupied Seat 55G on the flight, found that his seat would not fully recline. The passengers seated in the row immediately in front of the plaintiff kept their seats reclined the entire flight. Additionally, an audio-visual box occupied some of the plaintiff's leg room space. The plaintiff argued that as a consequence he became cramped for leg room. Seven hours into the flight he began to experience pain in his lower back in addition to nausea and general unwellness. The plaintiff alleged that his right leg began jerking uncontrollably and that he became distressed and asked for a seat change which was denied by cabin staff. The plaintiff alleged that he then made several requests for assistance which were ignored.

Legal Argument Advanced

The plaintiff's legal counsel argued that these events constituted an unusual and unexpected event that was external to the passenger, in short, an Article 17 accident. Article 17(1) of the Montreal Convention (1999) provides that "the carrier is 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." The judicial definition of "accident" as "an unusual and unexpected event that is external to the passenger" is provided by Justice Sandra Day O'Connor in the US Supreme Court case of *Saks v Air France*.

Subsequently, in further and better particulars, on 12 May 2011, the plaintiff alleged that the seat did not recline at all. However, by letter dated 8 July 2013, the plaintiff amended this to assert that the seat "did not recline more than about half of the recline available on the adjoining seat in that row".

In response the defendant disputed that the plaintiff was seated in seat 55G because the plaintiff was allocated seat 55H pursuant to the boarding pass issued in his name. The defendant also disputed the plaintiff's contentions that his seat did not recline and did not recline fully. The defendant further disputed that the plaintiff felt back pain, nausea or general unwellness and that his leg began jerking uncontrollably. In respect of other particulars of the claim, among other things the defendant disputed that (i) the reclining of the seat in front or (ii) the placement of the A-V box constituted unusual or unexpected occurrences.

The Court's analysis

Boddice J turned initially to the High Court's decision in *Povey v Qantas Airways Limited*[8] and, in particular the judgment of Kirby J who noted that the Saks' test to establish an accident involved satisfying three elements:

> "*First, there must be a cause separate from the "injury" itself. Second, there must be an "event or happening" that is unexpected or unusual. Third, there must be an event that is external to the passenger.*"

After an extensive analysis of the evidence, His Honour turned to the issue of the credibility of the witnesses. His Honour observed that:

> *"The Plaintiff impressed me as being highly emotional as to the events on the flight in question. He did not impress me as being a reliable historian, of those events.*"

Conclusion

In summary, Boddice J did not accept the plaintiff's evidence as to seat 55G having a lack of recline. His Honour concluded that the seat 55G was operating normally. As a consequence, in His Honour's words:

> *"In those circumstances, it cannot be said the injuries sustained by the plaintiff constituted an unusual and/or unexpected event that was external to the plaintiff. It also cannot be said it constituted an accident within the meaning of Article 17 of the Montreal No 4 Convention."*

Editors.

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[8] [2005] HCA 33.

REGULATORY AND INDUSTRY UPDATE

Cancellation of Pilot Licences - Courts Reluctant to Overturn Decisions of Civil Aviation Safety Authority

In brief - Maintaining safety of air navigation is paramount

Two decisions in the Federal Court of Australia in 2013 have further clarified the principles governing the cancellation of pilot licences. Safety of air navigation remains the most important consideration for the Civil Aviation Safety Authority (CASA) and courts are reluctant to interfere in its decisions.

CASA cancels pilot licence following complaint

In *Anderson v Civil Aviation Safety Authority*,[9] Justice Jagot was asked to resolve three questions of law:

- Whether the Administrative Appeals Tribunal ("the **Tribunal**") was empowered to affirm a decision of CASA made under regulation 269(1)(a) of the *Civil Aviation Regulations* (1988) ("**CARs**") and whether CASA was empowered to make a decision under that regulation to cancel the aircrew licences held by the appellant John Anderson in circumstances where he had not been convicted by a court of a breach of either the *Civil Aviation Act* (1988) ("**CAA**") or CARs.
- Whether the Tribunal erred in law in taking into account an irrelevant consideration, i.e. that the appellant had provided untruthful information to the Department of Veterans' Affairs.
- Whether the Tribunal erred in law in failing to take into account a relevant consideration, namely the hardship that the appellant would endure in the event of cancellation of his pilot licence.

[9] [2013] FCA 1367.

Pilot charged with various offences and CASA cancels pilot licence

CASA's decision arose from a complaint made about a flight piloted by Mr Anderson on 30 March 2007 whilst ferrying a party of scuba divers between the Abrolhos Islands and Geraldton, Western Australia in a 40 year old Sikorsky helicopter.

Mr Anderson was charged and various offences were found proved, but convictions were not recorded and instead Mr Anderson was subject to good behaviour bonds.

CASA's authority under the legislation to cancel pilot licences

Regulation 269(1) provided:

> *"Subject to this regulation, CASA may... vary, suspend or cancel the authorisation if CASA is satisfied that one or more of the following grounds exists, namely:*
> *(a) that the holder of the authorisation has contravened, a provision of the Act or these Regulations...*
> *(b) that the holder of the authorisation fails to satisfy, or continue to satisfy, any requirement prescribed by, or specified under, these Regulations in relation to the obtaining or holding of such an authorisation;*
> *(c) that the holder of the authorisation has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;*
> *(d) that the holder of an authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such an authorisation;*
> *(e) that the holder of the authorisation has contravened a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in CAOs."*

Regulation 269(1A) further provides:

> *"CASA must not cancel an authorisation under subregulation (1) because of a contravention mentioned in paragraph (1)(a) unless:*
> *(a) the holder of the authorisation has been convicted by a court of an offence against a provision of the Act or these Regulations... in respect of the contravention; or*
> *(b) the person was charged before a court with an offence against a provision of the Act or these Regulations... in*

respect of the contravention and was found by the court to have committed the offence, but the court did not proceed to convict the person of the offence."

Court finds that Tribunal was empowered to cancel licence

Although Mr Anderson had been charged with breaching Section 20A of the CAA, reckless operation of an aircraft, he was acquitted of that charge.

In his decision Justice Jagot noted that the grounds and regulation 269(1) are not mutually exclusive and overlap to a significant extent. Merely because Anderson was acquitted of a breach in criminal proceedings did not preclude the Tribunal from considering whether Anderson was a fit and proper person within the meaning of Regulation 269(1)(d). He concluded that the Tribunal was empowered to do what it did.

Tribunal entitled to take supply of untruthful information into account

As to the issue of the supply of untruthful information provided to the Department of Veterans' Affairs, Anderson had apparently advised the Department that he ceased full time employment in December 2005 and was then being paid nothing, whereas in fact he was working in New Guinea and being paid for work. The Tribunal inferred he provided false information to the department for his personal gain.

Justice Jagot considered this to be information which the Tribunal was entitled to take into account in considering his fitness to hold a licence, it being considered that there was a reason for a lack of confidence that Anderson would disclose all relevant information, especially where he perceived it might be contrary to his interests.

Hardship to licence holder not a relevant consideration

Finally Justice Jagot concluded that hardship to the licence holder was an irrelevant consideration which the Tribunal was precluded from taking into account in circumstances where CASA was bound to regard the safety of air navigation as the most important consideration.

For these reasons the applicant's appeal was dismissed with costs.

Tribunal affirms CASA's decision to cancel pilot licence after helicopter crash

The second Federal Court decision, in the case *Sullivan v Civil Aviation Safety Authority*,[10] involved an appeal against an Administrative Appeals Tribunal decision affirming a decision to cancel the licence of Mark Sullivan, following an investigation into a crash on 30 March 2010 of a helicopter of which Mr Sullivan was the pilot, carrying two passengers from Katherine to a remote community in the Northern Territory, Numbulwar.

Two cargo pods had been attached to the skids on the helicopter and the aircraft had a takeoff weight in excess of the manufacturer's maximum takeoff weight. The helicopter lost lift following a strong gust of wind, clipped a fence post and turned over. The pilot Mr Sullivan was charged with three criminal offences and received fines and a suspended jail sentence.

Appeal against findings of Administrative Appeals Tribunal

It was contended for Mr Sullivan that the Tribunal had made a series of adverse findings against him in respect of serious matters and failed to apply the requirements specified in *Briginshaw v Briginshaw,*[11] which stated:

> *"Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matter "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences".*

[10] (2013) FCA 1362.
[11] (1938) 60 CLR 336 at 361-362

Justice Jagot stated:

> *"Provided the material findings of fact and the ultimate decision are reasonably open and based on some logically probative material, the process of reasoning cannot properly be impugned on the basis that the decision maker did not apply, or say in some way that it applied, Briginshaw."*

Federal Court rejects applicant's arguments and upholds Tribunal's decision

Mr Sullivan's case was that the Tribunal's decision may be impugned not because the conclusion was not reasonably open, nor that there were not material factual findings based on some logically probative material, but as a result of the Tribunal not having reasoned by reference to Briginshaw. Justice Jagot did not consider that was required.

He also rejected a contention that the Tribunal was bound to take into account the 12 month period of exclusion and guilty pleas in determining whether Mr Sullivan was a fit and proper person. He considered it was more likely and should be inferred that the Tribunal was well aware of these facts when it weighed the material before it and came to the conclusion not to attribute weight to that material.

Finally, there was criticism of the Tribunal by the applicant in failing to question the evidence of one witness as to whether her recollection of events was faulty. The judge found that there was no denial of procedural fairness by the way in which the Tribunal dealt with this witness' evidence. The Tribunal gave adequate reasons for rejection of that evidence.

Courts reluctant to interfere in decision making powers of CASA

These two decisions are further examples of the reluctance of the courts to overturn or interfere in the decision making powers of CASA in relation to cancellation of pilot licences in circumstances where maintaining the safety of air navigation is paramount.

Andrew Tulloch, Partner, CBP Lawyers, Melbourne

Overview of the ICAO Safety Information Protection Taskforce

At its 38th meeting, the ICAO Assembly adopted resolutions A38-3 'Protection of Certain Accident and Incident Records' and A38-4 'Protecting information from safety data collection and processing systems in order to maintain and improve aviation safety'. Updating corresponding Resolutions adopted at the 37th Session of the ICAO Assembly (A37-2 and A37-3), the Resolutions address the recently completed work of the Safety Information Protection Taskforce ("**SIPTF"**). The Resolutions instruct ICAO's Council to initiate steps to amend Standards and Recommended Practices and Guidance material, taking into account the findings and recommendations of the SIPTF relating to the disclosure and use of safety information (including information from occurrence notifications, accident investigations and safety management systems).

The purpose of this article is to provide a brief overview the work of the SIPTF and the path that ICAO has determined to deal with its findings. Aviation lawyers are likely to take an interest, given the profession is affected by the legislature's approach to placing limitations on the disclosure and use of safety information in order to ensure the aviation industry is forthcoming with it for safety purposes in the future. Understandably, the views of the profession will be varied on how extensive these limitations should be, particularly where a client's interests are affected by the availability of the information in the public domain or in judicial and administrative proceedings.

The SIPTF and its findings

The SIPTF was formed in 2011 to review the framework of protections for safety information in the ICAO Annexes to the Convention on International Civil Aviation (Chicago Convention). The review included consideration of the avenues through which the reasons for protecting safety information can be advocated.[12]

[12] An ICAO High-level Safety Conference recommended the formation of the SIPTF in 2010 (Doc 9935 – Report of the High-level Safety Conference 2010, recommendation 2/4). The ICAO Council endorsed the recommendation (C-DEC

Principles for the Protection of Information

One of the SIPTF's recommendations was to make some of the principles for the protection of information found in Attachments to ICAO Annexes mandatory by upgrading them to Appendices.[13] These principles cover:

- the advice that the sole purpose of protecting safety information from inappropriate use shall be to ensure its continued availability so that proper and timely preventive, corrective or remedial actions can be implemented and aviation safety improved or maintained;
- the protection shall be based upon the nature of the safety information;
- safety information shall not be used in a way different from the purposes for which it was collected;
- the use of safety information in disciplinary, civil, administrative and criminal proceedings shall be carried out only under suitably authoritative safeguards (authoritative safeguards are suggested to include legal limitations or restrictions such as protective orders, closed proceedings, in-camera review, and de-identification of data).[14]

The premise of these principles is not new. However, they have been reworded from existing versions to more clearly articulate the objective of protecting safety information. Further, with their elevation to mandatory status, the expectation is that States would incorporate them into their national laws. This process would be assisted by the development of guidance material that the SIPTF recommended as well as arrangements to work with lawyers and the judiciary to assist them to develop an informed position on the disclosure and use of safety information.[15]

Administration of Justice

Reliance on the principles would occur in different ways depending on the nature of the information at issue and the circumstances in which it is proposed to be disclosed and used. The area often most focused on is the administration of justice. The task force developed the principles of protection with aviation industry concerns in mind about what is argued to be the 'criminalisation of accidents', (i.e. the prosecutions following the Concorde crash in France in 2000). The task force was also cognisant of judicial decisions in cases involving actions for damages, where sensitive safety information was disclosed, creating uncertainty about the extent to which guarantees of confidentiality can be given.[16]

The SIPTF intends that the principles of protection will help States develop legislation with greater certainty about the outcomes where information collected for safety purposes is sought for the administration of justice. Judicial bodies will most likely still apply an existing balancing test to weight the interests of the administration of justice against the likely adverse effects on the future availability of

190/6) and the Air Navigation Commission provided the SIPTF with its terms of reference (SIPTF – Fourth Meeting Report SIPTF/4 WP/24, p.i-1).

[13] In accordance with Article 37 of the Chicago Convention, ICAO is charged with adopting international standards, recommended practices and procedures related to the safety, efficiency and regularity of air navigation. Contracting States are bound to comply with the standards unless they lodge a difference with the standard as provided for by Article 38 of the Convention. State audits are conducted to pursue compliance.

[14] These principles were drafted as proposed amendments to Attachment B to the new Annex 19 (Safety Management). Annex 19 is a compilation of standards and recommended practices taken from other Annexes regarding State Safety Programs and Safety Management Systems, as well as related elements including the collection and use of safety data and State safety oversight activities. Attachment B is titled 'Legal Guidance for the Protection of Safety Information from Safety Data Collection and Processing Systems.' Its current content replicates Attachment E to Annex 13 (Aircraft Accident and Incident Investigation).

[15] Examples of this approach include a 'listening session' that was held by some members of the SIPTF taskforce in the United States and involved members of the legal profession and other stakeholders. Some civil law countries such as France, Spain and Brazil have begun holding information sessions with the judiciary on the reasons for protecting accident investigation information (SIPTF, Working Group 3 Final Report, 11 January 2013).

[16] Examples include the Canadian Court decision to allow the disclosure of Cockpit Voice Recorder information in *Société Air France v NAV Canada*, 2010 ONCA 598. In the absence of statutory protection, United States courts have not been persuaded to limit the disclosure of voluntarily submitted reports about safety concerns (see: *In re Air Crash at Lexington, KY, August 27, 2006* 545 F.Supp.2d 618 (2008)). In Spain, the decision in *Judgment 780, the Spanish Court Provincial Court in Madrid (21 November 2011)* was considered to be a step forward in that country with the court declining to require that full declarations of those involved in the safety investigation be disclosed to the court in criminal proceedings.

safety information that disclosure may have.[17] However, there will be better guidance material to assist with establishing criteria in legislation for the administration of the balancing test.

Safety Information for Safety Purposes

Although matters concerning the administration of justice are often the predominant focus when the protection of safety information is discussed, the SIPTF ensured other situations in which there was uncertainty about the disclosure and use of safety information were addressed. The SIPTF's work included a review of the circumstances in which in which information should be disclosed between safety agencies for different safety-related purposes. Indicating that this is an area that needs attention, the new Annex 19 (Safety Management) to the Chicago Convention recommends that State authorities responsible for the State Safety Program should have access to appropriate information from incident reporting systems.[18]

The SIPTF has sought to further clarify that sharing safety information between state safety authorities is necessary in the interests of safety. The task force did this by proposing an important qualification to the definition of 'inappropriate use' which currently appears in Annex 13 (Aircraft Accident Investigation) and Annex 19. 'Inappropriate use' is currently defined as:

> *"the use of safety information for purposes different from which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public".*[19]

The SIPTF suggestion for a revised definition adds the following sentence:

> *"the use of such information for demonstrably safety-related purposes by the safety regulator in administrative actions and related proceedings, the use of information in accident and incident investigations, or in safety studies, are not considered inappropriate use."*[20]

The addition of the sentence is intended to show that the use of safety information for these safety purposes is not 'inappropriate'. The use of safety information from different sources by the regulator and accident investigator can be characterised as legitimate (and appropriate), provided it is demonstrably in the interests of safety. This does not mean the information can be disclosed and used without safeguards. However, the view of the SIPTF was that if some action is necessary in the interests of safety, and in order to take that action certain information is required, then prima facie, the disclosure of the information should not be regarded as inappropriate. Members of the task force have begun to propose workable safeguards to help ensure these processes do not invite abuse, including a requirement that the information only be sought from a protected source that maintain confidentialities (such as the accident investigator) if there is no practicable alternative.

A number of countries are trying to implement safety information sharing frameworks that allow the use of information for appropriate safety purposes while ensuring suitable safeguards. Europe is progressing a new regulation through the European Parliament on occurrence reporting that involves sharing information between agencies, including to enable corrective or preventative action while limiting the use of the information to punish a person (except in the case of gross negligence).[21]

Similarly, in Australia, the Australian Transport Safety Bureau (ATSB) and the Civil Aviation Safety Authority (CASA) have worked to develop a policy on sharing occurrence information. The policy is published on the websites' of the respective agencies.[22] It advises that the occurrence information referred from the ATSB to

[17] See for example the balancing test contained in standard 5.12 of Annex 13. A similar balancing test is proposed in recommended practice 5.3.2 of Annex 19.

[18] Annex 19 to the Chicago Convention, recommended practice 5.1.3

[19] Annex 13 to the Chicago Convention, Attachment E. Legal Guidance for the Protection of Information from Safety Data Collection and Processing Systems, paragraph 1.5(c).

[20] SIPTF – Fourth Meeting Report SIPTF/4 WP/24, 4A-4

[21] 'Proposal for a regulation of the European Parliament and of the Council on occurrence reporting in civil aviation (2012/0361(COD))' See: http://www.europarl.europa.eu/

[22] ATSB: http://www.atsb.gov.au/aviation/safety-information-policy-statement.aspx.
CASA: http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_101466.

CASA will remove overt identifying information. CASA also makes the following commitment:

> *"CASA will not rely on the report in taking action unless it is necessary to do so in the demonstrable interests of safety and where there is no alternative source of the information practicably available to CASA.*
>
> *CASA will not normally recommend the institution of criminal proceedings in matters which come to its attention only because they have been reported under ATSB's mandatory reporting scheme. The exceptions will be in cases of conduct that should not be tolerated, such as where a person has acted intentionally, knowingly, recklessly or with gross negligence.*
>
> *In taking any action, CASA will afford affected individuals and organisations natural justice."*

Next Steps

Australia and other countries will benefit from the work of the SIPTF, and from ICAO's ongoing work with the SIPTF's recommendations, as envisaged by the ICAO Assembly Resolutions (A38-3, A38-4). It is important to acknowledge in that respect that the SIPTF is not a determinative body. The ICAO Secretariat submitted a paper to the 38th Assembly advising that the recommendations will be considered by ICAO's Safety Management Panel[23] and other relevant groups of experts through the normal process for the development and amendment of Standards and Recommended Practices and other supportive guidance material.[24] The recommendations are expected to be considered and implementing material developed to go before a High Level Safety Conference in 2015.[25]

In the interim, work will continue in Australia to enhance the existing frameworks for the protection of safety information. In so far as they may bear on these issues, the findings of the Australian Government's recently announced Aviation Safety Regulatory Review[26] will need to be taken into account. The terms of reference for the review broadly cover the roles and relationships of Australia's aviation safety agencies as well the regulatory reform process for aviation safety. The review will report to the Minister in May 2014.

Patrick Hornby, Manager Legal Services, Australian Transport Safety Bureau & Jonathan Aleck, Associate Director of Aviation Safety, Civil Aviation Safety Authority

David Forsyth AM to Chair Panel for Wide-Ranging Review of CASA

David Forsyth AM, a highly regarded figure in Australian aviation, will chair an independent review panel into the operations of the Civil Aviation Safety Authority (CASA) and aviation safety regulation in Australia announced by the Federal Government on 14 November.

Mr Forsyth is the chair of Safeskies Australia, former chair of Airservices Australia and has over 30 years of experience in safety management and aviation business.

He will be joined on the review panel by two other highly experienced industry figures in Don Spruston, former Director General of Civil Aviation at Transport Canada and former Director General of the International Business Aviation Council, and Roger Whitefield, former Head of Safety at British Airways, former safety adviser to Qantas and former United Kingdom Civil Aviation Authority board member.

The Government has stated that the review will be strategic in nature and will benchmark Australia's safety regulation against other leading countries.

[23] The Safety Management Panel was established to provide recommendations on the development of the new Annex 19. Consideration of the SIPTF's findings and conclusions was given by the 4th meeting of the Safety Management Panel in November 2013, where the Panel fully endorsed the principles reflected in the SIPTF's recommendations.

[24] Secretariat, 'Balance the Use and Protection and Use of Safety Information (A38-WP/80)', 38th Assembly, para 4.1

[25] The last High Level Safety Conference was held in 2010. It is a meeting between the Directors General of Aviation from all the contracting States to the Chicago Convention. The purpose of the meeting is to build consensus and obtain commitments and formulate recommendations deemed necessary for the effective and efficient progress of key safety activities by ICAO.

[26] The Review was announced by the Minister for Infrastructure and Regional Development on 14 November 2013. A copy of the Minister's media release is at: http://www.minister.infrastructure.gov.au/wt/releases/2013/november/wt028_2013.aspx

Under the review's Terms of Reference, the Government has stated that the principal objectives are to investigate:

- the structures, effectiveness and processes of all agencies involved in aviation safety;
- the relationship and interaction of those agencies with each other, as well as with the Department of Infrastructure and Regional Development (Infrastructure);
- the outcomes and direction of the regulatory reform process being undertaken by CASA;
- the suitability of Australia's aviation safety related regulations when benchmarked against comparable overseas jurisdictions; and
- any other safety related matters.

The review report will:

- examine and make recommendations as required on the aviation safety roles of CASA and the Australian Transport Safety Bureau (ATSB) and other agencies as appropriate;
- outline and identify any areas for improvement in the current interaction and relationships between CASA and the ATSB, as well as other agencies and Infrastructure;
- examine and make recommendations as required on the appointment process and criteria applied for key aviation safety roles within CASA and the ATSB;
- examine the current processes by which CASA develops, consults on and finalises changes to aviation safety regulations and other legislative instruments (such as civil aviation orders) and make any proposals for improving these processes such that new regulations are best practice in safe operations for each relevant sector of the aviation industry;
- review the implementation of the current aviation safety regulatory reform programme and assess the effectiveness of the planning and implementation of regulatory changes, including cost impacts on industry;
- examine and make recommendations on options for improving future aviation safety regulatory reform having regard to international experience and stakeholder views, and the Government's objective of reducing the cost of regulation to business;
- provide advice to Government on priorities for future regulatory development and implementation strategies; and
- provide advice to Government on options for improving oversight and enforcement of aviation regulations, including rights of review.

The review panel will provide its report to the Deputy Prime Minister in May 2014.

Ben Martin, Partner, Mark Mackrell, Partner, Keira Nelson, Senior Associate, Norton White Lawyers

AIRCRAFT FINANCE UPDATE FROM IRELAND

Ireland's Dedicated Exchange for Aviation Finance (announced in January 2014)

On 20 January 2014, the Irish Stock Exchange (**"ISE"**) announced plans to create a dedicated exchange for aviation related debt and other instruments. ISE Chief Executive Deirdre Somers said:

> *"Ireland is a world leader in aviation finance and the Irish Stock Exchange is a world leader in debt listings, we want to combine these skills to make Ireland even more attractive for aviation issuers and investors."*

In a Press Release[27], the ISE states that it will offer a highly efficient, low cost platform delivering better visibility, greater investor reach and improved market intelligence for the aviation industry. The ISE worked with Enterprise Ireland's Aviation Forum and many other industry participants to advance plans for the dedicated exchange, and the initiative has been welcomed by the global aviation industry.

Financing of aircraft deliveries is sourced from commercial banks, debt and equity (including private equity) investors. It has been internationally recognised that the capital markets are a growing source of funding for aircrafts and accounted for $15bn or 15% of the total requirement in 2013.[28]

Current listings on the ISE include (*non-exhaustive list*):

- $927M EETC from International Airlines Group (the parent of BA and Iberia);
- $636M ABS from Avolon (a global leasing company);
- Debt instruments with a total value of $12.7bn; and
- Equity listing for Aer Lingus and Ryanair.

[27] Press Release ISE 20 January 2014
[28] As above

The new dedicated platform aims to be an international hub for aviation finance assets creating a market in Ireland and the first of its kind worldwide that will be supported and enhanced by specialist knowledge of the industry in Irish based leasing, broking, corporate finance, legal and tax professional firms.

Mason Hayes & Curran, Dublin

PNC Equipment Finance LLC v Aviareto Limited and Link Aviation LCC (unreported, High Court, December 19, 2012*)*

This case involved a lease agreement between two US corporations relating to an aircraft registered with the FAA in the USA. Another party registered a non-consensual right or interest in the International Registry. Under Article 40 of the Cape Town Convention (the **"Convention"**), certain categories of non-consensual rights must first be submitted by the contracting states through "declarations" to Unidroit as the designated depository of the protocol to the Convention. Once declarations are approved, parties in those contracting States can submit non-consensual rights for registration with the categories stipulated. The USA has not made any declaration under the Convention and in these circumstances, the non-consensual registered rights did not constitute a valid registration and an order was made by a Minnesota court in the USA directing Link Aviation LLC to discharge the registrations.

The Minnesota court order was not complied with and an application was made to the Irish Courts to direct the Registrar to remove the registration.

The Commercial Court accepted the Minnesota Court Order as *prima facie evidence* that the disputed registration should not have been made and ordered that the party discharge the registration. If, however, the party fails to carry out the discharge, the Irish Court ordered that the Registrar should do so instead.

TransFin-M, Ltd v Stream Aero Investments S.A. and Aviareto Limited (unreported, High Court (Commercial Division) April 18, 2013)

Transfin owned an aircraft and signed a letter of intent to sell the aircraft to Stream Aero Investments. Stream Aero was in simultaneous negotiations to sell on the aircraft to Star Jet. When the negotiations between Transfin and Stream Aero fell through, Transfin entered into direct negotiations with Star Jet. Stream Aero claimed an entitlement in the Oklahoma courts to an agency fee or commission for the sale transaction and registered a non-consensual right over the aircraft with the international registry. There was no order from the Oklahoma courts regarding the registration.

In this case, the relevant Contracting States of the parties involved were Panama and Russia who had not at that time ratified the type of consensual rights which Stream Aero sought to rely upon, as in the PNC case above.

In this case, no court order was in existence directing Stream Aero to discharge the registrations. The Irish Courts ultimately determined that the proceedings fell within Order 11 Rule 1F and/or Rule 1G of the Rules of the Superior Courts which state that:

> *"(1F) the action is founded or a tort committed within the jurisdiction; or*
>
> *(1G) any injunction is sought as to anything to be done within the jurisdiction or any nuisance within the jurisdiction ought to be prevented or removed whether damages are or are not also sought in respect thereof."*

Essentially the Commercial Court determined that the registration, which could not have been a valid registration amounted to a tort committed and/or a nuisance and/or something which necessitated action to be taken within Ireland given that the Registry is based in Ireland. The Commercial Court determined therefore that it had jurisdiction over Stream Aero to make an *in-personam order* directing it to discharge the non-consensual right or interest. The Commercial Court deemed the registration to be invalid and without any basis and ordered that the registration be discharged.

Donal Gallagher, Registry Official at Aviareto Limited[29] has commented that:

> *"The Transfin case is of particular importance due to the willingness of the Irish courts to accept jurisdiction in matters involving the Registrar and registrations on the International Registry. This is certainly so in cases involving registrations which should not have been made."*

He further commented that the Transfin case "*illustrates the possibility of initiating proceedings in Ireland immediately, rather than first seeking a local order and then subsequently taking further proceedings in Ireland seeking an order against the Registrar to have that order enforced*".

It remains to be seen whether the Irish Courts will be willing to assert jurisdiction in less clear-cut cases, where the registration type is valid and it is necessary to substantively consider and determine the merits of the registration itself.

Mason Hayes & Curran, Dublin

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[29] Article "Procuring the discharge of problem or improper registrations on the International Registry – expediting the process"

Alpstream AG & Ors v PK Airfinance Sarl & Anor [2013] EWHC 2370 (Comm) (31 July 2013)

While not a decision of the Irish Courts, one of the more notable judicial decisions in the aviation sector in 2013 is the recent decision of the English Commercial Court in the *Alpsteam Case*. This case highlighted the duties of financiers in the context of aircraft repossessions; the powers and remedies available to financiers following breach and default, and the duties accountability of financiers in the event of a distressed sale and remarketing.

Justice Bruton's decision in *Alpstream* has attracted significant attention from international media and legal press due to the identity of the parties, which included Russian media mogul and billionaire Alexander Lebedev, who controlled the claimants.

The duties of a financier considered in the judgment include a mortgagee's duty to a mortgagor to:

- take reasonable steps to obtain the best value for the aircraft, burden of proof – sale and remarketing process;
- act in good faith and for proper purpose and consideration of concept of "wilful misconduct"; and
- assessment of loss.

Justice Bruton held that the Defendants were liable to *Alpstream* for breach of duty (PK), procurement of breach of duty (GECAS) and conspiracy (PK and GECAS) and made an award in favour of the claimants of $10.75Million.

English judicial decisions are not binding on the Irish Courts in its determinations but are regarded as having persuasive effect. We understand that the decision in *Alpstream* is likely to be appealed.

Mason Hayes & Curran, Dublin

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We gratefully thank Christine O'Donovan, Partner, Mason Hayes & Curran, for her permission to reproduce these articles.

UPDATE FROM EUROPE

EU ETS Update: the Compliance Conundrum

The EU's Emissions Trading Scheme (ETS) continues to be one of the most controversial topics on the regulatory agenda, particularly so as the April 2014 deadline for surrendering allowances looms large amid persistent uncertainty over how the scheme operates at present and what further amendments are expected in the near future. This Briefing gives an overview of recent developments at ICAO, the Commission's proposal to further amend the ETS (including international reaction to it) and then considers what carriers should be doing now in order to comply with their regulatory obligations.

"Stopping the clock"

By way of background, on 12 November 2012, the Commission announced that it was recommending the EU "stops the clock" on certain important aspects of the ETS. This decision was made following sustained pressure from airlines, industry bodies and governments and passed into European law on 24 April 2013. In practical terms, the "stop the clock" decision meant that an aircraft operator would not be sanctioned if it failed to comply with the ETS Directive's annual reporting and compliance obligations before 1 January 2014 in respect of flights to or from aerodromes outside of the EU. For non-EU airlines with no intra-EU operations, this effectively disapplied EU ETS – a development welcomed by the wider industry, though not by the European low-cost sector in particular which still finds itself caught by the full force of EU ETS for the majority of operations.

The stated purpose of the "stop the clock" decision was to allow breathing space for ICAO to devise its own global agreement at the ICAO Assembly meeting in October 2013. The Commission warned at the time that failure by ICAO to deliver would result in the ETS being fully reinstated as of 1 January 2014.

Developments at ICAO

On 4 October 2013, after two weeks of reportedly fractious discussions, the ICAO Assembly adopted a Resolution to develop a global scheme to limit CO^2 emissions from international aviation.

The Resolution calls for appropriate measures to be finalised and voted on at the next ICAO Assembly in 2016, and for an agreed global scheme to be implemented by 2020. ICAO also underlined that when designing new schemes and implementing existing ones, States should:

- Engage in constructive bilateral or multilateral consultations and negotiations with other States to reach an agreement.
- Grant defined exemptions to developing States.

Although the EU proposed a paragraph in the Resolution that would have permitted its ETS to continue to apply to flights within European airspace pending the implementation of a global scheme, this was rejected by the ICAO Assembly. The EU and 14 Member States of ECAC were limited to filing a written statement of reservation insisting that the Resolution did not diminish their rights to apply EU laws to aircraft of all States on a non-discriminatory basis.

Whilst some progress was undoubtedly made at ICAO, the final text of the Resolution is largely aspirational in nature and devoid of detail – arguably not the level of progress expected by the Commission when it stopped the clock.

Commission's proposal to further amend the ETS

The EU's response to the ICAO Resolution was surprising given the furore which had preceded "stop the clock". On 16 October 2013 the Commission published a proposal to amend the ETS Directive, the key features of which can be summarised as follows:

- Emissions from flights operated in 2013 between aerodromes in the European Economic Area (EEA) and countries outside the EEA remain fully

exempt from the ETS (essentially this is a one year continuation of the "stop the clock" derogation).

- Flights between aerodromes in the EU are not exempted, although obligations to report 2013 emissions and surrender allowances are postponed for one year.
- For the period 2014 to 2020, all emissions for flights between aerodromes in the EU would continue to be covered in full by the ETS Directive.
- For the period 2014 to 2020, flights between aerodromes in the EEA and non-EEA countries benefit from a general exemption for those emissions that take place outside EU airspace. Thus, flights between the EU and third countries are generally covered only in proportion to the distance travelled by those flights within EU airspace.
- Emissions from flights to and from countries which are "developing"[30] and emit less than 1% of international civil aviation emissions should be completely exempt.

The EU's latest proposal is not yet binding and must be formally approved by the Council and the European Parliament. At the time of writing, negotiations to agree an amended Directive are ongoing, although it now appears likely that "stop the clock" will be extended for at least a further 12 months. According to press reports, negotiators from the European Parliament, the Commission, the EU Executive and the EU Presidency (representing Member States) reached an outline agreement on 4 March 2014 to "exempt" flights between EU and non-EU countries from the ETS until 2016, although the ETS continues to fully apply to intra-EU flights. Full details of the agreement (which still needs to be approved by the European Parliament) are awaited but at present it has no legislative effect.

In terms of approving the agreement and amending the existing law, time is clearly of the essence in view of the forthcoming deadline under the original ETS Directive to report and surrender allowances (being 31 March and 30 April 2014 respectively).

Reaction to the Commission's proposal

The Commission's Proposal was almost universally criticised at State and industry level. Presaging the outline agreement referred to above, the UK, French and German governments all expressed concern and called for the "stop the clock" decision to extend to at least 2016 when the ICAO Assembly next meets. Unsurprisingly, the US and Chinese governments (among others) remain vehemently opposed to any suggestion that even a watered down ETS be reintroduced, however far that may be in the future.

Elsewhere, IATA's Director General gave the EU credit for forcing the issue of tackling aviation emissions onto the international agenda but urged it to withdraw the proposed amended Directive on the basis that it undermines the work done to date through ICAO. A number of industry bodies including the Association of Asia Pacific Airlines and Airlines for America have expressed their opposition to the proposal whilst the Arab Air Carriers' Organisation has warned of possible future trade wars if the amended Directive is adopted.

The general consensus among industry commentators seems to be that the Commission misread the international mood by proposing amended legislation that is inconsistent with the accord reached at the ICAO Assembly and, in doing so, stirred up further hostilities with third country governments, leading ultimately to the retreat apparently signalled by the outline agreement now under discussion.

What should carriers do now?

Arguably, the scope of compliance obligations for carriers has never been more uncertain – clearly this is unsatisfactory in circumstances where the significant costs of compliance continue to

[30] The Commission's proposal defines developing countries as "*those which benefit at the time of adoption of this proposal from preferential access to the Union market in accordance with Regulation (EU) No. 978/2012 of the European Parliament and of the Council, that is those which are not classified in 2013 by the World Bank as high income or upper-middle income countries*".

accrue. For present purposes, we can offer the following guidance.

In theory, and pending formal approval of the outline agreement purportedly reached on 4 March 2014, the "stop the clock" decision expired on 31 December 2013 and is no longer in force. Therefore, as of 1 January 2014 and until the adoption of amended legislation, the ETS Directive fully applies to all flights departing from or arriving in the EU. It follows that carriers are legally obliged to:

- Report their 2013 emissions by 31 March 2014; and
- Surrender the corresponding 2013 allowances by 30 April 2014.

Whether or not failure to comply with these obligations will attract enforcement action is, to say the least, a grey area. Earlier this year, a number of competent authorities issued advice to aircraft operators under their control urging full compliance. The UK Environment Agency, for example, has previously stressed that penalties apply for failure to submit reports and surrender allowances and that, unless and until the law changes, the full scope of the Directive applies.

In contrast, the French authorities have said that carriers can report emissions if they wish but will not be penalised for failing to meet the March 2014 deadline. Similarly, the authorities in Belgium have agreed not to impose penalties on carriers that fail to report their 2013 emissions.

Meanwhile, a number of competent authorities, including UK, Netherlands and Germany, face mounting criticism for failing thus far to impose penalties on carriers that failed to comply with their obligations to report emissions for their intra-EU flights in 2012 in breach of the terms of the "stop the clock" decision; a failure which contrasts with similar enforcement action taken by their counterparts in other States, including Belgium and France.

Against this uncertain background and in the absence of clear guidance to the contrary from their competent authority, carriers should prepare to finalise and submit their verified emissions reports by 31 March 2014, in line with the legal requirements of the ETS Directive. Thereafter, the onus is firmly on the EU legislative bodies to agree an amended Directive or, at the very least, issue comprehensive guidance to all competent authorities (and in turn all carriers) well before the deadline for surrendering allowances on 30 April 2014.

These latest developments again call into question the long term viability and practicality of regional schemes such as the EU ETS. Whilst there is now a consensus among States, carriers and industry bodies that global emissions from aviation should be regulated, the proper forum for developing these regulations is surely ICAO, despite the length of time this process involves. How the EU responds in the meantime remains to be seen.

Sue Barham, Partner and Charles Cockrell, Associate, Holman Fenwick Willan LLP

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Times are Changing for Tour Operators – but not Passengers

In a recent press release the Federal Court of Justice announced its December 10 2013 decision (X ZR 24/13) in which it deemed two clauses in the general terms and conditions of a tour operator regarding flight time changes to be invalid.

Decision

The claimant was the umbrella association of German consumer centres. The defendant tour operator used general terms and conditions which stipulated, among other things, that the definitive determination of flight times rested with the tour operator issuing the travel documents. Information about flight times given by travel agents was thus not binding. The claimant claimed that the clauses were invalid.

The court agreed with the claimant and deemed the clauses invalid, as they led to an unfair disadvantage of passengers against the principle of good faith.

In the court's view, the first clause modified the principal contractual performance promise contained in the travel contract, not

only when definitive flight times were agreed, but also when the contract contained only preliminary flight times. According to the court, pursuant to the general principles of contractual interpretation, preliminary flight times are not to be met by all means. However, the court also held that a passenger can legitimately expect that flight times will not be changed without a material reason and that the time frame implied by preliminary flight times will not be disregarded completely. Yet the clause in question allowed the tour operator to change flight times at will, irrespective of whether a material reason had occurred. The court therefore took the stance that this was unreasonable towards passengers, who rightly expected certainty regarding flight times, even taking into account the legitimate interest of the tour operator to adapt the intended flight times to changed circumstances or circumstances which were unforeseeable at the time of signing the travel contract.

In addition, the court held that the second clause led to an unfair disadvantage of passengers, as it allowed the tour operator to elude a contractual obligation which arose from information given by a travel agency acting for the tour operator.

Comment

It will be interesting to see the detailed reasoning of the court once the full judgment is available. What is clear already is that this decision will necessitate the amendment of tour operators' general terms and conditions. It will also impact on the contractual relationship of tour operators with airlines and travel agencies, as tour operators will want to shift liability for passenger claims relating to changed flight times or for reduction of travel price arising from the travel contract.

Ulrich Steppler, Partner and Katherina Sarah Bressler, Associate, Arnecke Siebold Rechtsanwälte

This article first appeared in the International Law office Newsletter on 29 January 2014 and and has been reproduced with the kind permission of the authors.

UPDATE FROM THE UNITED STATES

New Rules Issued By the U.S. Department of Transportation Pursuant to the Air Carrier Access Act Take Effect

Two new rules issued by the U.S. Department of Transportation are now in effect and promote accessibility of aviation-related services by individuals with disabilities.

The first rule went into effect on December 12, 2013 and relates to accessibility of airline websites and automated airport kiosks for passengers with disabilities. Within two years carriers must make accessible to persons with disabilities those portions of their websites that provide core travel information and services, such as booking or changing a flight and associated amenities, accessing flight status, or checking in for a flight. These webpages must meet the Web Content Accessibility Guidelines 2.0 Level AA standard, an internationally-recognized website-accessibility standard. Carriers must test their websites to ensure accessibility and usability.

If a passenger with a disability contacts a carrier by means other than its website, such as by telephone or in person at a ticket counter, and states that he or she is unable to use the website due to a disability, the carrier must: 1) provide web-based services to the passenger, such as fee waivers for purchasing a ticket online; and 2) disclose web-based discount fares if the passenger's itinerary qualifies for such a fare.

Carriers also must publish on their website forms that passengers may submit to request services and accommodations relating to disabilities, such as wheelchair assistance.

Finally, within the next nine years at least 25% of all automated kiosks that a carrier individually or jointly owns, leases, or controls in each location at a U.S. airport must meet standards for technical accessibility with respect to their physical design and performance as set forth in 14 CFR 382.57(c).

The second rule, which went into effect on January 13, 2014, addresses transportation of wheelchairs and other assistive devices in aircraft cabins. The existing regulations required new aircraft with at least 100 passenger seats to accommodate at least one passenger's wheelchair in a priority stowage space within the aircraft cabin, and the regulations prohibited the use of "seat-strapping," in which wheelchairs are strapped to a row of seats using a strap kit.

The new rule permits the practice of seat strapping as an alternative to stowing wheelchairs in a closet or similar space. If a carrier uses the seat strapping method, the carrier must stow two wheelchairs in the cabin, but only if stowing a second wheelchair in the cabin would not displace additional passengers.

When publishing the final rule, the DOT expressed concern that permitting carriers to use the seat-strapping method could cast unwanted attention on passengers with disabilities and lead to stigmatization or unwanted attention for such individuals. Accordingly, the revised regulations require that carriers permit a passenger who will be stowing a wheelchair in the cabin to pre-board, and carriers are prohibited from suggesting that a passenger decline to stow his or her wheelchair in the cabin for any non-safety reason.

The rule applies to aircraft of foreign carriers ordered after May 13, 2009 or delivered after May 13, 2010, and applies to aircraft of U.S. carriers with respect to aircraft ordered after April 5, 1990 or delivered after April 5, 1992.

Bartholomew J. Banino, Partner and Marissa N. Lefland, Associate, Condon & Forsyth LLP

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Court Rules that the ADA Impliedly Preempts Claims for EU 261 Compensation from Being Adjudicated in U.S. Courts

On February 12, 2014, Judge Thomas M. Durkin became the third district court judge to hold that U.S. courts cannot enforce so-called "direct claims" brought under European Union Regulation EU 261,[31] seeking standardized compensation from airlines for cancelled or delayed flights to or from the European Union.[32] Judge Durkin rendered his decision in the EU 261 class action filed in the U.S. District Court for the Northern District of Illinois against EU-based carrier Iberia[33] by U.S. residents who alleged that Iberia violated EU 261.[34] Judge Durkin's decision followed the decisions issued by Judge John A. Nordberg and Judge Edmond E. Chang dismissing the EU 261 class action filed against Continental Airlines[35] and Delta Airlines,[36] respectively. In his decision, Judge Durkin granted Iberia's motion to dismiss the plaintiffs' cause of action for violation of EU 261, agreeing with Judge Nordberg and Judge Chang that the text and legislative history of the Regulation establish that no private right of action under EU 261 exists in United States courts. However, unlike Judges Nordberg and Chang, Judge Durkin ruled that a second ground also supports dismissal of a direct claim brought under EU 261: implied preemption under the Airline Deregulation Act ("**ADA**").[37]

In each class action filed against Continental, Delta and Iberia, the defendant airline moved to dismiss on the grounds that EU 261 does not provide a private right of action enforceable in U.S. courts and that the ADA expressly preempts a claim for violation of EU 261. The airlines' ADA argument is based on the Supreme Court's broad interpretation of the ADA's preemption provision, which states that "[a] *State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier*."[38] In *Lozano v. Continental*, Judge Nordberg did not rule on the issue of express ADA preemption, basing his decision entirely on the ground that the European Union never intended to confer a private right of action under EU 261 that could be enforced by a U.S. court. In *Volodarskiy v. Delta*, Judge Chang agreed that the absence of a private right of action under EU 261 was a dispositive basis for granting Delta's motion to dismiss. With respect to Delta's ADA preemption argument, he held that the ADA does not expressly preempt a direct EU 261 claim because the ADA's definition of the word "State" does not include foreign countries. In *Giannopoulos v. Iberia*, Judge Durkin agreed with Judge Chang that the ADA does not expressly preempt a cause of action for violation of EU 261. However, Judge Durkin went on to consider whether the ADA preempted such a claim under the doctrine of implied preemption, finding that the ADA does impliedly preempt a direct cause of action brought under EU 261.

In *Giannopoulos*, Judge Durkin found that the ADA impliedly preempted the domestic adjudication or enforcement of EU 261 because, by enacting the ADA, Congress intended to occupy the entire legislative field of services provided by air carriers. In so holding, he concluded that the "compensation scheme EU 261 creates fits squarely in th[e] subject matter area" of services provided by air carriers and that the enforcement of the EU 261 compensation scheme in the United States would "overlap[] in both substance and territorial application" with the ADA's governance of airline services. He also stated that the enforcement of EU 261 in the United States would "*create*[] *a regulatory environment analogous to the*

[31] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004.

[32] Condon & Forsyth's previous Client Bulletins and Newsletters on the topic of EU 261 are available at: http://www.condonlaw.com/publications.htm.

[33] *Giannopoulos v. Iberia, Líneas Aéreas de España, S.A.*, No. 11 C 775, Opinion and Order [Dkt No. 254] (N.D. Ill. filed on Feb. 12, 2014).

[34] The plaintiffs also alleged a breach of contract claim against Iberia. In a separate opinion, Judge Durkin granted Iberia's motion for summary judgment dismissing the plaintiffs' breach of contract claim.

[35] *Lozano v. Continental Airlines, Inc.*, No. 11 C 8258, 2013 WL 5408652 (N.D. Ill. Sept. 26, 2013) (Nordberg, S.J.). A final judgment has not been entered in this case, however, as the plaintiffs moved for reconsideration. The motion for reconsideration is still pending.

[36] *Volodarskiy v. Delta Air Lines, Inc.*, No. 11 C 782, 2013 WL 5645776 (N.D. Ill. Oct. 16, 2013), (Chang, J.).

[37] 49 U.S.C. § 41701 *et seq.*

[38] 49 U.S.C. § 41713(b)(1).

patchwork regulation that [the] *preemption doctrine is intended to avoid.*"

Accordingly, as it stands, airlines have two possible defenses against direct EU 261 claims brought in a U.S. court: (1) no private right of action; and (2) implied preemption under the ADA. Nevertheless, despite the growing number of cases finding that EU 261 claims cannot be brought in U.S. courts, the issue is far from settled.

This same issue of whether direct EU 261 claims can be brought in a U.S. court still is under consideration in two other EU 261 class action cases pending in the United States Court in the Northern District of Illinois against Lufthansa and United Airlines.[39] Moreover, the plaintiffs in the *Volodarskiy* case are appealing Judge Chang's decision to the Court of Appeals for the Seventh Circuit. Accordingly, although there is no conflict between the decisions rendered in the *Continental*, *Delta* and *Iberia* class actions, the domestic and foreign carriers should stay tuned as these novel legal issues continue to unfold.

Christopher R. Christensen, Partner, Anthony U. Battista, Partner and Mary Dow, Associate, Condon & Forsyth LLP

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[39] *Polinovsky v. Deutsche Lufthansa AG*, No. 11 C 780 (N.D. Ill. filed on Feb. 3, 2011) (Coleman, J.); *Bergman v. United Airlines, Inc.*, No. 12 C 7040 (N.D. Ill. filed on Sept. 4, 2012) (Tharp, J.).

Ninth Circuit Strictly Construes Two-Year Limitations Period of Montreal Convention

In *Narayanan v. British Airways*, No. 11-55870 (9th Cir. Mar. 19, 2014), the Ninth Circuit Court of Appeals held that, under the plain language of Article 35(1) of the Montreal Convention, the Convention's two-year limitations period applies even to claims which have not yet accrued at the time that the limitations period is triggered. In other words, the Court held that even if a cause of action is yet to accrue under local law, the Montreal Convention's limitation period will foreclose any actions that are not brought within a period of two years.

Article 35(1) of the Montreal Convention provides that "[t]*he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.*"

Narayanan involved a wrongful death action brought by the widow and adult children of Papanasam Narayanan. Mr. Narayanan, who suffered from an advanced-stage lung disease, requested supplemental oxygen during a flight from Los Angeles to London. Plaintiffs alleged that he was denied supplemental oxygen during flight and died six months later as a result of that deprivation. Plaintiffs brought their wrongful death suit within two years of Mr. Narayanan's death, but more than two years after his flight had arrived at its destination. The district court dismissed plaintiffs' complaint for failure to state a cause of action because the complaint was filed beyond the two-year limitation period of the Montreal Convention.

In upholding the district court's dismissal, the Ninth Circuit said that a plain reading of the Convention made it clear that the complaint was untimely. The Court noted, however, that a "*factual wrinkle*" existed, in that the limitations period for plaintiffs' claim began running six months before the claim actually accrued. In determining whether Article 35(1) applied irrespective of when a claim accrues, the Court pointed out that it was deciding an issue of first impression in the Ninth Circuit and that the only decision presenting similar facts was a brief 1962 Illinois district court

decision which had summarily held that a wrongful death claim was time-barred.[40]

Plaintiffs argued that Article 35(1) should not apply to preclude their action because the wrongful death claim did not begin to accrue under California law until the date that Mr. Narayanan died, which was six months after the aircraft arrived at its destination. Plaintiffs asserted that the drafters' use of articles "the" and "an" in Article 35(1), rather than referring to "any" claim for damages, must indicate a cause of action that was already in existence at the time the aircraft arrived at its destination, and their claim was not yet in existence at that time.

The Ninth Circuit rejected this argument, noting that Article 35(1) in conjunction with Article 29, which provides that "any" action for damages must be brought subject to the conditions of the Convention, makes clear that any action seeking damages, regardless of when the claim may accrue, is subject to the two-year limitations period of Article 35(1). In a footnote, the Court noted that plaintiffs' argument appeared to be in reliance on its previous decision in *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.,* where the Court distinguished between "an" action and "all" actions in finding that third party claims for indemnity and contribution were beyond the reach of Article 35(1).[41] The Court stated that because plaintiffs had brought a claim for damages, and not for indemnity or contribution, their reliance on the *Chubb* decision was misplaced.

Although the Court held that the text of the Convention was unambiguous and it need not proceed any further, it also noted that the drafting history of the Convention supported its conclusion. The Court stated that plaintiffs' argument that California law governed the timeliness of their wrongful death claim was at odds with the "Convention's cardinal purpose of achieving uniformity of rules governing claims arising from international air transportation." It went on to state that the drafting history of the Convention indicated that the drafters intended the two-year limitations period to act as a statute of repose, which would function as a jurisdictional prerequisite that extinguishes causes of action not brought within the fixed period of time. In further support of its holding, the Court cited to numerous other courts that had similarly held that the limitations period of Article 35(1) operates as a condition precedent to suit and is not subject to any equitable tolling which may be available under local law.

The Ninth Circuit's decision in *Narayanan* reinforces the strict application of the limitations period which was contemplated by the drafters of the Montreal Convention, and recognizes the uniform application of the two-year limitations period to all claims for damages, regardless of when those claims may accrue under a jurisdiction's local law.

Scott D. Cunningham, Partner, Anthony U. Battista, Partner and Natasha N. Mikha, Associate, Condon & Forsyth LLP

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[40] *Bapes v. Trans World Airlines, Inc.*, 209 F. Supp. 380, 381 (N.D. Ill. 1962).
[41] *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1027 (9th Cir. 2011).