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US exposure in airline accidents

Hamish Cotton

Insurers regularly consider the portfolio of business that they write in order to keep their exposure to damages and their reinsurance costs down. For this reason, many insurers either do not write or limit the amount of business that they write for US airlines. There is no doubt that exposure to the type of damages that can arise if any claim for personal injury or death is brought within the US, is exponentially larger than jurisdictions elsewhere.

It is, however, becoming increasingly difficult to avoid the US as a venue for litigation and it is not unusual to see plaintiffs attempt to bring an action in the US despite an airline accident involving a non-US carrier, no (or few) US passengers and the accident occurring in a non-US location. While this is sometimes achieved through the action being brought against product manufacturers of various components in the aircraft (and in many cases Boeing provides this link), financiers of the aircraft often provide the necessary link. The only US connection in that instance is under the negligent entrustment doctrine. *Continued on page 3.*

IN THIS ISSUE

Editors: HodgkinsonJohnston Aviation & Aerospace Lawyers

ALAANZ Secretariat:
Mecca Concepts Pty Ltd
meccaconcepts@bigpond.com

Table of Contents

US exposure in airline accidents (from p1)

However, questions need to be asked as to whether these procedural changes, as they currently stand, are practical and effective and whether the aviation industry ought be doing more to address the crux of the issue: pilot mental health.

Negligent entrustment

Negligent entrustment is a doctrine that has found favour in the US and has its origin in motor vehicle accidents. The theory was that if you gave the keys of your motor vehicle to an inexperienced, incompetent or drunk person and allowed them to operate your motor vehicle - and that subsequently lead to the death or injury of a third party - that third party could bring an action against you. Under this theory, you had negligently entrusted a dangerous article (the motor vehicle) to someone that you knew, or ought to have known, was not in a position to operate it effectively; as such, you could be held liable for any damage caused.

General aviation

Negligent entrustment claims are not only made in respect of motor vehicles and not just in respect of intoxication. Claims have also been made in the general aviation world. In the case of *White v Inbound* Aviation,[1] the defendant, Inbound, hired out aircraft to pilots. It was Inbound's policy to conduct a 'high altitude check' for pilots wishing to fly to a 'high altitude airport' (being an airport above 4000 feet). At high altitude the aircraft's engine will produce less horsepower, its performance may be degraded and the fuel-air mixture must be adjusted.

The pilot had previously flown into and out of high altitude airports but not ones that were surrounded by mountains. Whilst Inbound did do a check flight with the pilot it did not encompass the high altitude airport requirement.

When the pilot attempted to take off from Lake Tahoe airport he crashed due to mismanagement of the aircraft. The passengers in the aircraft, along with the pilot, were killed. The parents of one of the passengers brought a claim against Inbound for negligently entrusting the aircraft to the pilot.

Quoting *Rocca v Steinmetz*[2] as the seminal case on negligent entrustment, the Court restated the test for negligent entrustment to be:

> ***WHETHER THE OWNER WHEN HE PERMITS AN INCOMPETENT OR RECKLESS PERSON, WHOM HE KNOWS TO BE INCOMPETENT OR RECKLESS, TO TAKE AND OPERATE HIS CAR (OR ANY OTHER INSTRUMENTALITY), ACTS AS AN ORDINARILY PRUDENT PERSON WOULD BE EXPECTED TO ACT UNDER THE CIRCUMSTANCES.***

A finding of negligent entrustment was made in this case.

Aircraft financiers

The creative US plaintiff's bar has developed this principle, and we now see lessors of aircraft being sued for negligent entrustment. The argument is that the lessor, as owner of the aircraft, ought not to lease the aircraft to airlines that have questionable maintenance or other operational practices. There is really no other purpose of the suit in negligent entrustment other than to obtain jurisdiction in the US, leading to higher damages as well as higher fees for Plaintiff lawyers - and not only in the US but also correspondent lawyers the world over.

The US contains a federal statute that protects lessors from responsibility unless the aircraft is in actual possession or control of the lessor. Theoretically that should be sufficient to protect purely financial lessors. However, the case arising out of the Air Philippines crash in 2000 stated that the strict provisions of the lease (including the right to ground the aircraft and to repossess it etc) amounted to 'control'.

Insurance coverage for those lessors is usually provided by AVN 67 whereby the lessor is included in the airline's insurance policy as an additional insured, usually for no extra premium.

This leads us back to the question of exposure. An insurer may have written a line on a European airline, conducting flights only within Europe with few US passengers and using European based aircraft. However, if the aircraft is financed by ILFC (the largest aircraft financier in the world), there is a prospect of a negligent entrustment action being brought against ILFC in the US in the event of an accident.

The insurer's shield – forum non-conveniens

When an aviation accident occurs outside the US but proceedings are brought within the US then undoubtedly the insurers will bring a forum non-conveniens motion (known as FNC). The aim of the motion is to convince the US court that the action ought to be tried elsewhere for a variety of reasons including:

- the nationality of the carrier;
- the location of the accident;
- the national body undertaking the investigation; and
- where the evidence may lie.

Insurers have had mixed success with FNC motions. The Federal Court has laid down a 3 step guide to the exercise of its discretion in applying the doctrine:

1. the amount of deference to be accorded to the plaintiff's choice of forum;
2. whether the alternative forum proposed by the defendants is adequate; and
3. whether the balancing of private and public interest factors implicated the choice of forum.

Yemenia

In 2012 the FNC motion was brought in relation to a negligent entrustment claim against ILFC arising out of the Yemenia air crash near Comoros (an Island nation off the east coast of Africa). The aircraft was not built in the US, the flight had no Americans on board, and no part of the flight was conducted through US airspace. Despite these factors the court denied the FNC motion on the basis that it was not clear how, if they won in France where the defendants wished to have the matter heard, the judgment would be enforced against a US company.

In this case however, the plaintiffs may have regretted their decision as in 2014 the US court dismissed the claims due to a requirement in the *Death on the High Seas Act* (a US statute), which had not been complied with, that personal representatives be court appointed.

West Caribbean

The most recent decision on FNC is that of the West Caribbean loss.[3] In that case the US Court dismissed the action based on FNC stating that Martinique (a French possession in the Caribbean) was a suitable and more convenient venue. The plaintiffs then commenced their action in Martinique only to request that the court refuse jurisdiction based on the principle that the plaintiff ought to be given access to the courts of its choice and in particular if that choice concerned one of the five jurisdictions as provided for the Montreal Convention.

The Montreal Convention states that an action can be brought, at the choice of the Plaintiff, in any of the following jurisdictions:

1. the domicile of the carrier;
2. the carrier's principal place of business;
3. where it has a place of business through which the contract of carriage has been made
4. the place of destination; or
5. where at the time of the accident the passenger has his or her principal and permanent residence

The plaintiffs' application went all the way to the Cour de Cassation (the highest Court in France) who sided with the Plaintiffs. That Court concluded that a plaintiff's choice of one of the competent jurisdictions set out in the Montreal Convention has an imperative and exclusive character such that it deprives all other competent jurisdictions of their jurisdiction to hear the plaintiff's claims.

The plaintiffs then re-filed in the US stating that the foreign courts had refused jurisdiction. In a scathing judgment, Justice Ungaro again threw out the proceedings on the basis of FNC and made it clear that a US Court is not required to blindly accept the jurisdictional rulings or laws of a foreign jurisdiction that purport to render its jurisdiction unavailable. The judgment made it clear that if a foreign court chose to turn away its own citizens, it is difficult to understand why

US courts should devote resources to the matter. In discussing the plaintiffs' argument that the decision may leave them with potentially no court to hear the action the judge stated that it was '*more than disingenuous – it was ridiculous'*. Effectively the plaintiffs had been the authors of their own misfortune.

That decision has recently been affirmed by the Court of Appeal in the US.[4]

In sum, whilst each case is, of course, decided on its own facts it appears that the pendulum has swung in favour of defendants, at least in relation to FNC motions. As to negligent entrustment only time will tell.

1. (1999) 69 Cal.App.4th 910.
2. (1923) 61 Cal.App. 102, 214 P. 257.
3. In Re West Caribbean Airways, S.A., et al. (2007) 619 F.Supp.2d 1299.
4. Pierre-Louis v Newvac Corp., 33 Avi 18,186 (11th Cir. 2009).

Case note: *Ekinci v Civil Aviation Safety Authority* [2014] AATA 114

E.J. Maitland and P.W. Lithgow

Issues frequently arise prior to the substantive hearing by the Administrative Appeals Tribunal (**Tribunal**) of proceedings to review administrative decisions whereby the person the subject of an adverse administrative decision seeks a stay of the decision pending the completion of the Tribunal review process.

In the aviation context, stay decisions frequently seek to preserve a business or employment position pending the review of a decision by the Tribunal. Failure to obtain a stay may prevent a person earning their living or may damage or destroy a business before the review process has been completed.

Section 41(2) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) provides that the Tribunal may make such orders as are appropriate, staying the operation of a decision that is subject to review.

> ***IF THE TRIBUNAL IS OF THE OPINION THAT IT IS DESIRABLE TO DO SO AFTER TAKING INTO ACCOUNT THE INTERESTS OF ANY PERSONS WHO MAY BE AFFECTED BY THE REVIEW, MAKE SUCH ORDER OR ORDERS STAYING OR OTHERWISE AFFECTING THE OPERATION OR IMPLEMENTATION OF THE DECISION... FOR THE PURPOSE OF SECURING THE EFFECTIVENESS OF THE HEARING AND DETERMINATION OF THE APPLICATION FOR REVIEW.***

In *CASA v Hotop* (2005) 145 FCR 232 the Federal Court confirmed that the Tribunal has power to make orders under s 41(2) of the AAT Act extending to the making of orders with a positive effect (as opposed to simply preserving the existing situation). For instance, in *CASA v Hotop* the AAT extended an Air Operator's Certificate (**AOC**) beyond its expiry date while the review of

the decision by CASA to cancel the AOC before its expiry date was before the Tribunal. If the expiry date was not extended the AOC would have expired prior to the review.

Certain decisions of CASA are subject to the automatic stay provisions found in s 31A of the Civil Aviation Act 1988. However, there are many situations not subject to the automatic stay where a stay application is necessary to preserve the status quo pending the hearing and determination of the review of the decision under challenge.

Section 31A(1) provides that the 'automatic stay' provisions in this section only apply if, before making the decision, CASA was required by the Act or the regulations to give a show cause notice to the holder of the civil aviation authorisation concerned.

Decisions by CASA regarding an AOC, a pilot licence or an aircraft maintenance engineer licence will generally be subject to the 'automatic stay' provisions under s 31A of the *Civil Aviation Act*.

Regulation 269(1) of the Civil Aviation Regulations 1988 (**CAR**) confers power on CASA to vary, suspend or cancel an approval, authority, certificate or licence if it is satisfied that one or more of the conditions set out in CAR 269(1)(a) exist. CAR 269(3) provides that before taking action under CAR 269(1) to vary, suspend or cancel an authorisation, CASA must issue the holder of the authorisation a 'show cause' notice.

Although CASA may issue a 'show cause' notice prior to taking action under CAR 269(1), whether or not CASA must issue a 'show cause' notice depends upon whether the authorisation concerned falls within the ambit of the definitions in CAR 263.

For instance, neither a chief pilot nor a chief flying instructor (**CFI**) approval fall within the definitions of an 'approval', and 'authority', a 'certificate' or a 'licence' within the definitions in CAR 263. Accordingly, CASA is not obliged to issue a 'show cause' notice to a chief pilot or CFI before taking action under CAR 269(1), and as a result CAR 269(3) will not apply; and there is no 'automatic stay' invoked pursuant to section 31A of the Civil Aviation Act.

In *Ekinci v CASA*, the chief pilot approval and CFI approval held by Mr Ekinci were cancelled. These decisions were not subject to the automatic stay provisions. The effect of these cancellations would have been to immediately close down the business of which Mr Ekinci was an integral part.

Deputy President Tamberlin QC considered in some detail the principles relevant to the granting of a stay prior to the full hearing and determination of the AAT review of the decisions.

The prospects of success

The Tribunal must consider whether there are facts and circumstances which may provide some real basis for success in reviewing the decision, but not to the extent or effect of being a preliminary hearing by the Tribunal of the issues. Ultimately, the Tribunal found in *Ekinci* on the basis of both affidavit material and oral evidence that '... there is evidence of substantive genuine disputes which require resolution, and that they are not without some prospects of success.'

The consequences of a refusal of a stay

Evidence of hardship, including business disruption and adverse personal financial detriment arising from guarantees and financial commitments given by Mr Ekinci to support the business were relevant factors. Further, the disruption to the business which provided a livelihood to Mr Ekinci and his employees was also relevant. Potential damage to the business goodwill may also amount to significant hardship.

The Tribunal considered whether, in the absence of a stay, the AAT process would be rendered nugatory. In the circumstances of this case there was a real risk that the Applicant's business would collapse in the absence of a stay and as a consequence, even if successful on review, the Applicant's business would be substantially damaged if not irrevocably destroyed.

Safety of air navigation

In aviation cases the dominant consideration is the safety of air navigation. This consideration is to be given primary weight.

The appropriate test is whether the stay will create a 'real', as distinct from 'fanciful', risk that the safety of air navigation may be compromised and passengers, employees or the public put at risk. The absence of clear or specific direct evidence that there is a significant danger to the safety of air navigation is one factor to take into account. A further factor may be the lapse of time between matters for concern being known to the regulator (CASA) and administrative action being taken based on those concerns.

Genuine and immediate concerns as to air safety ought be dealt with by applications pursuant to s 30DB of the *Civil Aviation Act*. Absent such action coupled with the effluxion of time may provide support for the granting of a stay.

The existence of any significant risk is an important factor, however conditions on the stay may be imposed where appropriate. The consequences for the decision maker are to be considered.

Other matters

The Tribunal may take into account other matters including any delay in seeking a stay, the length of time it may take to complete the AAT review proceedings and the ongoing ability of CASA to provide regulatory oversight are all examples of relative matters.

It is clear that the terms of s 41(2) of the AAT Act allow directions and conditions to be placed on the terms of any stay.

The decision of the Tribunal in *Ekinci* highlights that there are competing factors relevant in considering whether a stay ought be granted. If a stay is appropriate, the stay may be subject to conditions and directions such that the legitimate concerns of granting an unfettered stay are addressed with appropriate checks and balances. Clearly the terms of a stay can be fashioned to allow the preservation of business and other interests while providing the regulator (CASA)

with a level of comfort that the concerns that gave rise to the initial decision are recognised and addressed pending the final outcome of the Tribunal review process.

(For further references see also *Dekanic v Tax Agents Board of NSW* [1982] AATA 195; *Re Griffiths, Griff-Air Helicopters Pty Ltd & CAA* (1993) 31 ALD 380; *Cape York Airlines Pty Ltd v CASA* [2004] AATA 727; *AMT Helicopters v CASA* [2006] *AATA 314; McKenzie v CASA* [2008] AATA 651 and *Snook v CASA* [2008] AATA 1139.)

Case note: *O'Brien v. Civil Aviation Safety Authority* [2015] AATA 93

James McIntyre

Mr O'Brien applied to the Administrative Appeals Tribunal for review of a decision by the Civil Aviation Safety Authority (**CASA**) imposing conditions on his Class 1 medical certificate arising from his colour vision deficiency (**CVD**). Those conditions were:

1. The certificate was not valid for air transport pilot licence (**ATPL**) operations. (The practical effect of this condition being that he could only fly as a co-pilot or first officer.)
2. The certificate was only valid for operations within Australia.
3. He was not permitted to conduct night time operations other than as or with a qualified co-pilot.
4. He disclosed to his employer and other assigned flight crew members his CVD.
5. He be limited to operating specified aircraft unless otherwise approved in writing by CASA.

Mr O'Brien had logged more than 6,000 flying hours and was endorsed to fly a variety of single engine and multi-engine aircraft.

The Tribunal accepted evidence from Mr O'Brien that, in all of his flying experience, he had never confused lights including precision approach path indicator lights.

The Tribunal noted that the substantive question before it was whether Mr O'Brien's proposed change of status from co-pilot to captain was possible having regard to the associated higher standards and greater responsibility of the captain's role.

In a lengthy decision, the Tribunal considered an extensive amount of medical evidence in relation to Mr O'Brien's CVD as well as research papers relating to CVD in aviation.

The Tribunal noted that Mr O'Brien had an impeccable flying record and had no difficulty identifying airport lights. The Tribunal was satisfied that, having regard to Mr O'Brien's skills as a pilot (including as a simulator trainer), the transition from co-pilot to captain was not likely to endanger the safety of air navigation.

In relation to condition 1, the Tribunal noted that Mr O'Brien had effectively operated as a first officer without apparent difficulty. Consequently, the Tribunal varied the reviewable decision by removing this condition.

In view of Australia's obligations under the Chicago Convention, the Tribunal retained condition 2, which provided that Mr O'Brien's medical certificate was only valid for flights conducted within Australian territory.

The Tribunal also varied the reviewable decision by removing the condition that Mr O'Brien be limited to operating specified aircraft unless otherwise approved in writing by CASA (Condition 5). The Tribunal noted that Mr O'Brien would need to be endorsed on the different aircraft he sought to operate and would need to complete periodic testing and undergo assessment by persons with knowledge of his CVD. In those circumstances, the requirement for a further 'medical' endorsement for particular aircraft was unnecessary.

The Tribunal affirmed the condition requiring Mr O'Brien to disclose his condition to his employer and other assigned flight crew. It noted that this condition was appropriate and could only add to the safety of air navigation by allowing employers to consider whether Mr O'Brien would be sharing a cockpit with other pilots with CVD.

The Tribunal also affirmed the condition that Mr O'Brien not conduct night time operations other than as or with a qualified co-pilot. It noted this was a minor risk associated with the condition and given the fact Mr O'Brien would only ever fly as or with a co-pilot, the condition could hardly be regarded as being onerous or unreasonable.

The Jetstar Hong Kong decision

Matthew Tsai

It's been described as a decision 'more befitting of a scene from Alice in Wonderland' and 'another victory for Hong Kong's cartel style of doing business'. Others have described it as 'the right decision for Hong Kong'. Like it or hate it, the Qantas Group's aspirations of establishing a fourth Jetstar joint venture (after Singapore, Vietnam and Japan) has been dashed after the territory's Air Transport Licensing Authority rejected Jetstar Hong Kong's licence application on 25 June 2015.

In many ways, the Jetstar Hong Kong decision was the climax of a modern, covert battle for market share over the former British colony.

For the Qantas Group, Jetstar Hong Kong was meant to play an important role in the penetration of the Chinese/Asia Pacific market. It was, after all, part of Alan Joyce's grand plan for Asia – the same plan that convinced Leigh Clifford to give him the CEO role ahead of Peter Gregg and John Borghetti in 2008. For China Eastern Airlines, its equity stake was designed to challenge Air China's presence in the territory through its close relationship with Cathay Pacific. For Shun Tak Holdings, Jetstar Hong Kong was the final step in acquiring the Pearl River Delta's most extensive air-sea-land network.

For Cathay Pacific, Dragonair, Hong Kong Airlines and Hong Kong Express Airways (Hong Kong's home-grown carriers), their futures were at stake. The approval of Jetstar Hong Kong would have opened the floodgates for other airlines to call Hong Kong home- a future Tiger Airways/Scoot Hong Kong perhaps, or even worse, a future Emirates or Singapore Airlines affiliate in Hong Kong.

This article analyses the Air Transport Licensing Authority's decision to reject Jetstar Hong Kong's application and explore the challenges that the Qantas Group, China Eastern and Shun Tak Holdings will face if they appeal.

The issues

From the outset, Jetstar Hong Kong's application on 10 July 2013 was bureaucratic and time-consuming for all parties involved. For instance, the Air Transport Licensing Authority could not proceed after the 14-day submission period because it needed the territory's Chief Executive to designate which parties had 'an interest' in the application. This was, in effect, a screening process that restricted the types of submissions the Air Transport Licensing Authority could consider.

A further hurdle involved jurisdiction. Jetstar initially argued that the Hong Kong Government, through its Transport and Housing Bureau, had the authority to determine that issue. The other carriers, namely Cathay Pacific, Dragonair, Hong Kong Airlines and Hong Kong Express objected and argued that the Air Transport Licensing Authority (an independent statutory body) had authority. In the end, Jetstar conceded and agreed that the Air Transport Licensing Authority, in exercising its power to grant a licence, could determine whether the airline's principal place of business was Hong Kong.

With the preliminary matters resolved, the primary issues were:

1. What was the true meaning and scope of the 'principal place of business' requirement under Article 134 of the Basic Law?

2. Was Jetstar Hong Kong's principal place of business in Hong Kong?

What was the true meaning and scope of 'principal place of business'?

With the tone of a post-apocalyptic thriller, Cathay Pacific described the possible approval of Jetstar Hong Kong as a 'dangerous precedent' that would 'violate both the letter and spirit of the Basic Law'. This was in reference to Article 134(2) of The Basic Law of Hong Kong (**The Basic Law**) which provided that:

> *THE CENTRAL PEOPLE'S GOVERNMENT SHALL GIVE THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION THE **AUTHORITY TO ISSUE LICENCES TO AIRLINES** INCORPORATED IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND **HAVING THEIR PRINCIPAL PLACE OF BUSINESS IN HONG KONG.** (EMPHASIS ADDED)*

The key phrase is 'principal place of business.' As The Basic Law did not elaborate on the meaning of 'principal place of business,' the Air Transport Licensing Authority referred to case law from international jurisdictions to formulate a proper test. On this basis, the Authority gave significant weight to the English Court of Appeal case of Palmer v Caledonian Railway Co which described a 'principal office' as where the general superintendence and management of the business was carried out. It also agreed with the court's views in The Rewia, which found that the day-to-day management was a relevant, but not determinative, factor.

Importantly, the Authority was heavily persuaded by *Ministry of Defence and Support of the Armed Forces for the Islamic Republic of Iran v Faz Aviation Ltd and anor,* which considered all three cases aforementioned and noted that:

> ***THE PLACE WHERE THE DAY-TO-DAY ACTIVITIES OF THE COMPANY ARE CARRIED OUT MAY NOT BE THE PRINCIPAL PLACE OF BUSINESS IF THOSE ACTIVITIES ARE SUBJECT TO THE CONTROL OF SENIOR MANAGEMENT LOCATED ELSEWHERE.***

It also acknowledged the view of the United States Supreme Court in *Hertz Corp v Friend et al,* which observed that a principal place of business involved looking at its 'nerve centre'.

In light of these considerations, the Authority identified numerous requirements for a 'principal place of business' (summarised below):

1. The day-to-day operations of an airline are not determinative of its principal place of business. Its activities must not be subject to the control of senior management, shareholders or related parties located elsewhere.

2. The airline has to have independent control and management in Hong Kong.

3. The nerve centre of the airline has to be in Hong Kong. This involves looking at where and by whom the decisions regarding the key operations of an airline are made. In effect, Hong Kong must be the centre of the airline's corporate activities.

4. Decisions involving the airline's core business (for example, choice of routes and pricing) must be independently controlled and managed in Hong Kong.

As the Authority noted at page 124 of its decision, 'the root of the question goes to how the airline's business is independently controlled and managed in Hong Kong'.

ICAO's views on liberalisation discarded

Surprisingly, the Air Transport Licensing Authority gave little weight to the International Civil Aviation Organisation's (ICAO) views on liberalising market access. At the 2003 ICAO Worldwide Air Transport Conference (ATConf/5), ICAO's 'Consolidated Conclusions, Model Clauses, Recommendations and Declaration' made reference to the phrase 'principal place of business' in their Integral Notes, which provided that:

> *EVIDENCE OF PRINCIPAL PLACE OF BUSINESS IS PREDICATED UPON:* ***THE AIRLINE IS ESTABLISHED AND INCORPORATED IN THE TERRITORY*** *OF THE DESIGNATING PARTY IN ACCORDANCE WITH RELEVANT NATIONAL LAWS AND REGULATIONS,* ***HAS A SUBSTANTIAL AMOUNT OF ITS OPERATIONS AND CAPITAL INVESTMENT IN PHYSICAL FACILITIES IN THE TERRITORY*** *OF THE DESIGNATING PARTY, PAYS INCOME TAX,* ***REGISTERS AND BASES ITS AIRCRAFT THERE****, AND* ***EMPLOYS A SIGNIFICANT NUMBER OF NATIONALS IN MANAGERIAL, TECHNICAL AND OPERATIONAL POSITIONS.*** *(EMPHASIS ADDED)*

The Air Transport Licensing Authority commented that this was only 'an encouragement … Hong Kong has not yet progressed to'. Ironically, this decision could have been the first step towards progress given the successful liberalisation of aviation markets in Japan and Singapore (Hong Kong's key competitors).

Was Jetstar Hong Kong's principal place of business in Hong Kong?

The Air Transport Licensing Authority came to the view that the independent management and control of the airline did not rest in Hong Kong.

The profitable operation of any airline lies in its network planning, specifically its routes and capacities. With Jetstar Hong Kong, all of its management network decisions required approval by a 'Flying Committee'. This committee consisted of two members from China Eastern, one from the Jetstar Group (part of the Qantas Group) and another from Jetstar Hong Kong. On this basis, the Authority observed that Hong Kong could not have been the nerve centre for the airline when two foreign shareholders effectively controlled its network planning arrangements. This alone was enough to reject Jetstar Hong Kong's application.

Although a majority of the Jetstar Hong Kong Board would have been Directors appointed by Shun Tak, the real power was in the airline's Executive Committee, which had the mandate to acquire, lease, purchase, hire purchase, sell, transfer or otherwise dispose of any of the airline's assets. It also had the mandate to control the airline's finances and take out insurance. Since this committee consisted of three members (one from China Eastern, one from the Jetstar Group, and one from Shun Tak), the Authority concluded that any decision by the Executive Committee would have required agreement by members of the two foreign shareholders. This would have also been the case with any shareholder approval.

Another significant concern expressed by the Authority was the possible lack of independence of the CEO. As the Jetstar Group had the right to appoint the CEO, there was a dual reporting line of the CEO to both the Jetstar Group and Jetstar Hong Kong. The Authority cast doubt on whether the CEO could act independently and only in the interests of the airline.

Finally, the Authority questioned the entire business model of the airline. As Jetstar Hong Kong's Business Service Agreement surrendered its right to determine its own network, fare structure and other flight-related matters to the Jetstar Group, Jetstar Hong Kong could not have independently controlled and managed its own decisions. Jetstar Hong Kong argued that it was merely contracting out certain services to the Jetstar Group, but the Authority found that this was not the case. The decision to contract out services can only be done by the owner of the business. Here, Jetstar Hong Kong could not be classified as an 'owner'.

Jetstar Hong Kong's options

For now, Jetstar Hong Kong's future appears bleak. The airline's only avenue of appeal would be by judicial review to the Court of First Instance of the High Court as the Air Transport Licensing Authority is an independent statutory body. However, judicial review only involves a review of the decision-making process rather than the merits of the case. In this light, the court will not examine the validity of the reasoning provided by the Air Transport Licensing Authority, but rather whether any errors were made during the decision-making process. The airline would also need to establish standing by satisfying the 'arguability test'. This would require Jetstar Hong Kong proving that the decision affected the public interest and was made unreasonably or made improperly/incorrectly.

The public interest test would be easily satisfied given the economic benefits brought by a new airline and its contribution to maintaining Hong Kong as an international aviation hub.

The airline, however, would have difficulty establishing unreasonableness or some improper consideration when the Air Transport Licensing Authority made its decision. Satisfying this limb, while difficult, would not be impossible. For instance, one could argue that the Air Transport Licensing Authority's failure to properly take into account Cathay Pacific's own qualification of principal place of business would be a relevant consideration, especially when 48.83% of its capital and 60.91% of its voting rights belong to the London-based Swire Group (including Swire Pacific Ltd and John Swire & Sons Ltd UK and HK).

Nevertheless, Qantas, China Eastern and Shun Tak Holdings need to radically change the airline's corporate and management structure if they wish to continue with this venture. Whether Qantas and China Eastern always wanted a local shareholder on board right from the beginning is disputed, but the fact that Shun Tak Holdings was only introduced in June 2013 (after the airline's incorporation in September 2012) gave the Hong Kong carriers significant ammunition in portraying the inclusion of a local shareholder as an afterthought.

Given its current predicament, the best approach for Jetstar Hong Kong in the author's view would be to operate on a similar model to Comair, an independent South African carrier that uses the software and branding of British Airways under licence. The relationship between Jetstar Hong Kong and the Jetstar Group currently go beyond this. Shun Tak would need to take full control of the airline and enter into a simple licence agreement with the Jetstar Group to use the Jetstar brand and software only before re-applying for a licence. This could potentially weaken Cathay Pacific's views that Jetstar Hong Kong has paid lip service to local laws with the appearance of local control, providing better prospects of regulatory approval. If Jetstar Hong Kong altered its structure to meet the requirements imposed by the Air Transport Licensing Authority, a future application would almost certainly succeed.

Grounded for good?

The reaction of Alan Joyce (Qantas Group CEO) to the decision was not surprising:

> ***AT A TIME WHEN AVIATION MARKETS ACROSS ASIA ARE OPENING UP, HONG KONG IS GOING IN THE OPPOSITE DIRECTION. GIVEN THE IMPORTANCE OF AVIATION TO GLOBAL COMMERCE, SHUTTING THE DOOR TO NEW COMPETITION CAN ONLY SERVE THE VESTED INTERESTS ALREADY INSTALLED IN THAT MARKET.***

Ironically, in September 2013, Cathay Pacific described itself as not being against competition. In fact, it was said,'Cathay Pacific Airways supports increased choice for consumers in Hong Kong, including the setup of LCCs (low cost carriers) with their principal place of business in Hong Kong'. A case of an airline saying one thing and meaning another perhaps, but what is clear is that the 'historic opportunity to continue the successful expansion of the Jetstar brand in this region' so passionately conveyed by Alan Joyce has been thwarted- for the moment at least.

Footnotes can be supplied on request.

Editorial comment: Search for missing aircraft - cost-sharing principles

David Hodgkinson and Rebecca Johnston

The search for Malaysia Airlines (MH) flight 370 - which disappeared in March 2014 while flying from Kuala Lumpur to Beijing - has been a collaborative effort.

However, notwithstanding an agreement with Malaysia and China to share costs, Australia has borne most of the weight, with Australia's 2014-1015 costs budgeted at $79.6 million, as against reported costs of $40 million incurred by the Malaysian government.

Australia has borne these search costs because it is the only state proximate to the area in which MH370 - it appears now - very likely ditched, and was practically the state best equipped to take the lead and conduct the search. Although 153 people of the 227 passengers and 12 crew on board were Chinese, China did not contribute resources or equipment to the underwater search.

This situation has come about despite a raft of treaties signed by almost all the world's nations in other areas such as liability for passenger death or injury, as well as for delay and loss of or damage to baggage and cargo (the 1929 Warsaw Convention and the 1999 Montreal Convention) and the 1944 Chicago Convention on international civil aviation.

Sharing the search costs more fairly

How, then, to arrive at a collaborative solution for future aviation search cooperation for recovery operations in non-territorial ocean waters? It seems to us that there are two possible solutions: one a multilateral approach, and the other a government-to-government approach.

In terms of a multilateral solution, Australia has taken the lead, in part because of bearing the search costs associated with MH370. Earlier this year, Australia suggested to ICAO at its Planning for Global Aviation Safety Improvement conference that an international approach be taken "to ensure that states allocate appropriate resources and prioritize [search] ... activities similarly".

An ICAO working paper from that conference states that

> ***THERE IS A HIGH LIKELIHOOD OF PROBLEMS ARISING IN THE CONTINUITY OF A SEARCH THAT EXTENDS BEYOND THE RESCUE PHASE. THE POTENTIAL FOR DIFFICULTIES TO ARISE IS LIKELY TO EXIST IN CIRCUMSTANCES WHERE THE AIRCRAFT IS BELIEVED TO HAVE GONE MISSING IN A SEARCH AND RESCUE ZONE THAT IS NOT THE RESPONSIBILITY OF THE STATE WITH THE ONUS TO CONDUCT THE INVESTIGATION ... IN THE CASE OF MH370 THE AIRCRAFT WAS BELIEVED TO HAVE GONE MISSING IN AUSTRALIA'S SEARCH AND RESCUE ZONE BUT MALAYSIA HAD RESPONSIBILITY FOR THE ACCIDENT INVESTIGATION UNDER ANNEX 13.***

The paper concluded that 'in the event that a similar tragedy happens in the future, the states involved may be assisted by some additional [standards and recommended practices] that provide a framework for cooperation.'

A state-to-state agreement

In the absence of any ICAO multilateral approach, we argue that there may be some worth in concluding a state-to-state agreement between relevant states in the event of an accident. Such an agreement could incorporate the following six principles:

1. The state most proximate to the area in which an aircraft is lost would control the search and rescue operation and would fund that operation.

2. The state of registration/owners of the aircraft would be granted special status and consulted regarding the particulars of the search and rescue operation.

3. States with nationals on board the aircraft would be apprised of the parameters of the search on an ongoing basis, and would be invited to monitor that search (through physical representation or otherwise).

4. Reimbursement of costs incurred by the state controlling the search and rescue operation would be made at periodic intervals during the search (if lengthy) or at its conclusion, with (a) half of the costs borne equally by the state controlling the search and rescue operation and the state of registration/ aircraft owners, and (b) the remaining costs borne by states in proportion to the passengers on board.

5. If a state cannot afford its apportioned costs, those costs would be assumed by other states on the above basis.

6. The state most proximate to the area in which an aircraft is lost (in formal consultation with the state of registration/ aircraft owners), would determine when the search concludes.

It seems to us that, no matter whether a multilateral or state-to-state approach is taken, either approach may well afford a measure of certainty (and perhaps comfort) to relatives and friends of passengers.

That should be the objective of both ICAO and the airlines.

Footnotes can be supplied on request.

Editors

David Hodgkinson, Partner
HodgkinsonJohnston
david@hodgkinsonjohnston.com

Rebecca Johnston, Partner
HodgkinsonJohnston
rebecca@hodgkinsonjohnston.com

David Hodgkinson and Rebecca Johnston are partners of a dedicated international aviation and aerospace law firm, HodgkinsonJohnston, in Western Australia.

Contributors

Hamish Cotton , Special Counsel, Holman Webb
David Hodgkinson, Partner, HodgkinsonJohnston
Rebecca Johnston, Partner, HodgkinsonJohnston
E.J. Maitland, Solicitor, Maitland Lawyers
James McIntyre, Special Counsel, HBM Lawyers
P.W. Lithgow, Barrister, Victorian Bar
Matthew Tsai, Cooper Grace Ward & University of Queensland

Questions

Please direct any questions, feedback or contributions to the Editors.