Aerospace

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AEROSPACE BULLETIN

Welcome to the July edition of our Aerospace Bulletin

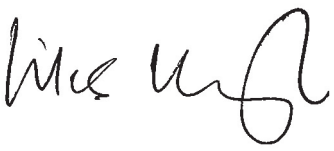
In the UK, the admissibility in civil litigation of accident investigation reports produced by the Air Accidents Investigation Branch of the UK Department for Transport has long been a grey area. In this HFW Aerospace Bulletin, Mark Gammon examines a recent decision of the English High Court which attempts to cast further light on this issue.

Elsewhere in Europe, Olivier Purcell and Jean-Baptiste Charles report on recent French legislation which imposes an obligation on tour operators and airlines to warn passengers of carriage involving airlines which are banned from the European Union.

Looking further East, James Jordan explores the opportunities and challenges which arise in relation to the aviation market in Myanmar, and Kate Seaton reports on HFW's successful defence of a cargo claim in South Korea, in which the claimant sought to rely on the activation of 'shock watches'.

Finally, in South America, Jeremy Shebson and Mariana Somensi look at relevant limitation periods for aviation claims in Brazil, in light of a recent decision of the Brazilian Superior Tribunal of Justice.

For further information about any of the articles in this Bulletin, or for aviation and aerospace issues in general, please contact one of the team, or your usual contact at HFW.



Giles Kavanagh, Partner and Head of Aerospace.

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The broader use of AAIB accident investigation reports

The admissibility of an accident report published by the Air Accidents Investigation Branch of the UK Department for Transport (the AAIB) in civil proceedings in England and Wales has long been a grey area, but until recently there was no reported decision, on any contested issue, giving any direction one way or the other. For those who represent aircraft operators and other organisations in the aviation industry, there has traditionally been an acceptance that accident investigation reports are not admissible in civil proceedings, although, unlike in the United States, there is no legislation or regulation which prohibits this use. Why, therefore, have the courts not been troubled previously with the argument that such a report is inadmissible?

The background lies in the legal framework which grants the AAIB the power to investigate accidents and incidents and the remit of this function. The AAIB's powers are set out in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996, which implement the EU obligations of the UK under Council Directive 94/56/EC to carry out Annex 13 to the Convention on International Civil Aviation (the 'Chicago Convention'). EU Regulation No 1996/2010 contains the provisions for air accident investigations which operate in Member States.

The role of the AAIB is to investigate the cause of aircraft accidents from a safety perspective. Importantly, its role is not to apportion blame or liability. With that remit in mind, it is perhaps unsurprising that the AAIB's investigators must have access to the aircraft, its components and wreckage after a reported accident or incident and, importantly, an ability to take statements from witnesses, without impediment, as part of the gathering of evidence to determine the cause. What use then can subsequently be made of this factual enquiry, by a party seeking to rely on the published accident report in civil proceedings in England and Wales?

> The court considered the AAIB report to be admissible. It is for the trial judge to determine what weight to give to the evidence in the report.

This question arose in a recent application before the High Court of Justice in *Rogers v Hoyle* [2013] EWHC 1409, where the Court considered whether an AAIB report, published in relation to a fatal aircraft accident on 15 May 2011, constituted inadmissible opinion evidence. That opinion evidence was argued to extend to all findings of fact in the AAIB report and, as such, it was argued that the report should be excluded from the proceedings before the court on the substantive dispute between the parties.

In an interesting and, perhaps, controversial decision, the Court concluded that the AAIB report was admissible as evidence in civil proceedings, and that it is for the Court to determine what weight should be given to the contents of the report. It did so having considered the relevance of the evidence contained in the AAIB report and, in particular, the evidence of the pilot and the eye witnesses in relation to the manner in which the aircraft was seen to be flown before it entered a spin, and the evidence of the AAIB's investigators on technical aspects. The Court was persuaded that statements made to experienced AAIB accident investigators during the course of their investigations had the advantage of immediacy and so could be regarded as more reliable than a recollection at trial, which may not take place until several years after the accident.

That is difficult to dispute, but where the AAIB report does not identify the person to whom any factual statement is attributed and, where the report is in a form to draw attention to particular issues and recommendations for safety purposes, it necessarily comprises analysis and discretion from the AAIB's perspective as to what is relevant for the accident report. The view taken by the Court is that evidential interrogation lends itself to the question of weight rather than admissibility, which reflects the position that it is for the Court hearing the evidence at trial to determine whether the evidence is persuasive and should be taken into account. The Court can accept or ignore that evidence, but the concern is that evidence which cannot be tested, for example by cross-examining the witness, will be accepted without further scrutiny.

There is a distinction between expert evidence, where the person giving evidence has specialist skill and knowledge of particular facts on which to give an opinion, and an opinion of a person who is not placed to give such evidence. The general rule is that opinion evidence is not admissible. What then is the status of the evidence in relation to issues of fact contained in the AAIB report, where those facts are derived from interviews of eye witnesses and others?

It was argued that findings of fact in the AAIB report are statements of opinion. However the Court was not persuaded that evidence of fact in the AAIB report should be excluded because it could not be considered reliable or capable of being tested. While the Court accepted that the AAIB report contains conclusions on the basis of inferences drawn from facts made available to the investigators, with such inferences falling into the category of opinion evidence, the AAIB was recognised as having a particular role that any expressions of opinion were informed and based on knowledge and experience. As such, the Court considered the AAIB report to be admissible. It is for the trial judge to determine what weight to give to the evidence in the report.

This is a departure from the way in which the role of the AAIB and the AAIB reports tend to be regarded by the aviation community and their legal advisers, and it is potentially a decision which challenges the landscape hitherto understood and respected (and it may, therefore, be the subject of appeal). One potential consequence of this decision is that the AAIB may now have one eye on their reports having a broader purpose. It would be of no surprise if this decision raises some concern for the AAIB.

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Passengers on blacklisted carriers must be warned before concluding contract

EU Regulation 2111/2005 established a list of air carriers that are subject to an operating ban within the European Community, and imposed an obligation to inform passengers of the identity of the operating air carrier. This provision has already been integrated into the French Civil Aviation Code.

On 24 April 2013, the French Parliament passed a new law (2013-343) which takes the obligation to inform passengers one step further: any party (whether an individual or a corporation) offering contracts of carriage which include, for any leg of the journey, carriage by an 'actual carrier' (as defined by Article 39 of the 1999 Montreal Convention), which is subject to an operating ban within the European Union, must:

- Inform the passenger or ticket purchaser of this in clear and unambiguous terms, in writing.
- Invite the passenger or ticket purchaser to seek alternative travel options.
- Do so before conclusion of the contract of carriage (or where appropriate, the travel package).

Failure to comply with this obligation, and/or the sale of a package or contract of carriage involving a flight with a blacklisted carrier, will expose the seller to a fine of €7,500 per ticket sold (increased to €15,000 for a repeat offence).

This fine is distinct from the criminal proceedings which may also be pursued against the air carriage contractor (i.e., the carrier, tour operator or other seller) for deliberately endangering human life or criminal negligence (under Article 121-3 of the Criminal Code).

The law was first presented in draft form to the National Assembly in December 2009. It is slightly odd that even though the draft law was unanimously adopted before the National Assembly and the Senate, it still took more than three years to be passed into law.

The new law does not go so far as to prohibit the sale of tickets involving a carrier which is subject to an operating ban within the European Union; although this was initially envisaged, such a provision was considered to be ineffective or inappropriate, since in certain parts of the world alternative carriers are unavailable.

The law will enter into force on 24 April 2014 or on such earlier date as may be set down by decree.

A practical question arises as to who is affected by this new law. Clearly, any ticket seller or air carriage contractor (as defined by EU Regulation 2111/2005) operating within France will be affected. However, there is an issue of whether such sellers or contractors operating outside France can be affected by the law. The manner in which the authorities seek to apply the law will need to be monitored.

Nevertheless, it is clear that many tour operators and airlines offering contracts of carriage involving blacklisted air carriers within France will need to adapt their practices in order to ensure that potential passengers are warned of the situation and invited to seek alternative travel arrangements prior to the conclusion of the contract.

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Country Focus – Myanmar

Myanmar is set to become Asia's next big aviation market since Aung San Suu Kyi's National League for Democracy won landmark by-elections, which have led to easing of economic sanctions by the West. The economy is rapidly transforming, and investment across a number of industries has been significant. Myanmar is experiencing significant changes and law-makers have set about reforming the country's dated legislation to create a better environment for inbound investment. As the number of existing international carriers looking to enter the market increases, and with the emergence of new domestic carriers, this article considers what the future holds for Myanmar's up and coming civil aviation sector and the challenges investors and stakeholders may face.

Market conditions

Statistics from January 2013 suggest that Myanmar's international passenger market consists of about 81,000 seats a week. In April 2012, the international passenger market consisted of only about 49,000 weekly seats. Most commentators agree that Myanmar is the most under-served market in the Association of South East Asian Nations (ASEAN). For example, Myanmar has a population of 48 million, whilst fellow ASEAN state Malaysia has a population of 28 million, yet figures from April 2012 suggest that in passenger numbers Malaysia's aviation market is nearly 20 times larger (in April 2012 Malaysia had 830,825 seats per week).

Myanmar has 49 airports, 3 international and 46 domestic. The two largest international airports are at Yangon and Mandalay. A third international airport has been built in the new capital, Naypyitaw, and whilst it has started to handle international traffic it is not yet fully operational. A further international airport is also planned for Hanthawaddy (about 80 kilometres from Yangon). Domestic airports do, however, lack basic infrastructure and most are unable to accommodate jet aircraft. In light of this, the Myanmar government has appealed to the private sector for assistance and is in the process of awarding contracts to privatise some of the country's airports.

Opportunities

Opportunities exist for all types of carriers – local and foreign, domestic and international, low cost and full-service. Tourism to Myanmar has seen significant growth in light of the increased political stability and as the levels of wealth across Asia continue to increase, tourists will likely be the driving factor behind the predicted 20% per annum growth in passenger numbers. Business travel will also become increasingly important as foreign investment in the country continues. The Myanmar government has also recently extended the granting of visa-on-arrival at Mandalay International Airport for visitors from 22 more countries, which will make it easier for tourist and business travellers alike to visit the country.

Air cargo will also likely see significant growth as both Myanmar's import and export industries continue to boom. The European Union is also set to reintroduce duty and quota free access to the European market in line with its Generalized System for Preferences for least-developed countries. The duty and quota free access should have been available to Myanmar, but has been suspended since 1997 due to allegations of forced labour. The proposal to reinstate preferences follows reports that this has largely ceased. The European Commission estimates the restoration could help increase Myanmar's exports by 30%.

Legal developments

The legal framework behind investment in Myanmar is also undergoing significant change and is needed to allow international investments. In January 2013, the Directorate of Investment and Company Administration of the Ministry of National Planning and Economic Development published the Foreign Investment Rules and the classification of Types of Economic Activities Notification pursuant to Myanmar's new Foreign Investment Law. The aim of the new laws and rules is to provide investors with security of tenure, protection against State expropriation and also a means to enforce the terms of agreements with local partners. These areas have all been significant areas of concern for international investors in the past.

A further recent demonstration of the country's commitment to attracting foreign businesses was the 6 March 2013 decision by the Myanmar parliament to sign the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Foreign companies

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negotiating contracts with Myanmar counterparties can now proceed on the basis that arbitration agreements referring disputes to international arbitration outside Myanmar and foreign awards should soon be enforceable.

In terms of aviation law, Myanmar still needs to take steps to modernise. The main legislation is the Myanmar Aircraft Act 1934 and the Union of Myanmar Carriage by Air Act 1934. Both require significant revisions to reflect the changes that have occurred in aviation since the 1930s. Myanmar is yet to sign and ratify the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), although there have been suggestions that this is being considered.

Challenges

Airport infrastructure is potentially the biggest barrier to continued growth. This was highlighted by the December 2012 crash of a Fokker 100 operated by a domestic carrier, which led to two fatalities and at least 11 injuries. The aircraft crashed on approach to Heho airport during poor weather. The airport only has a non-directional beacon approach rather than the more modern instrument landing system, even though it is the country's largest domestic airport; this was considered to be a major factor which contributed to the crash. Improvements are clearly required at all airports and whilst the current government seems committed to the project, this could change in a country where the political situation is still far from stable.

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The future

Whilst there will almost certainly be significant challenges for the emerging aviation industry in Myanmar, there are significant opportunities. As international carriers continue to add flights and domestic carriers increase in size, this should lead to increased investment opportunities throughout the aviation sector as MROs, FBOs and other airport and ground handling services will all be needed.

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Victory for carrier in Korean shock watch case

Those involved in the air freight industry will be familiar with shock watches. According to the manufacturers of these devices, shock watches are designed to protect products from impact and tilting. They may also provide evidence to support a damage claim by the cargo owner/shipper. In practice, however, their use may be of more limited value. Following a recent judgment handed down by the Seoul Central District Court, if the only proof of damage is the activation of a shock watch, this alone may not be sufficient to guarantee a successful claim against the carrier.

The case in question involved the carriage by air from San Francisco to Incheon, South Korea, of five crates of medical equipment. Upon arrival into Incheon, and during segregation of the cargo, a shock watch stacked on one crate was found discoloured and a shock watch which had been stacked on a second crate was found to be missing. A survey report procured by the Claimants concluded that the cause of the damage was due to a 'hidden impact' during the carrier's custody. Photographs of the consignment in question showed no obvious signs of physical damage to the outer packaging of the crates, yet upon testing, the machinery within was found damaged and no longer functioning. A claim was brought against the carrier by the subrogated Insurers for the House Air Waybill consignees seeking to recover their outlay for the damaged consignment.

Based on carriage USA to South Korea, the carrier's liability was governed by the provisions of the Montreal Convention 1999 (the Montreal Convention). Article 18(1) of the Montreal Convention provides that *"the carrier is liable for damage sustained in the event of...damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air".* In its defence, the carrier argued defective packaging (available under Article 18 (a) and (b)) since the cargo was found to have no shock absorbers or support. The carrier also argued that the mere fact

that one shock watch was missing and one had been activated was not sufficient evidence that the damage had been caused during carriage by air. There was also no proof that the alleged missing shock watch was actually attached to the cargo on uplift at San Francisco. Informal tests carried out on the shock watches by the carrier (the results of which were presented to the Court) indicated that the shock watch used in respect of the consignment in question was also overly sensitive.

In the written decision, the Judge accepted that the claim should be adjudicated in accordance with the provisions of the Montreal Convention. He also held:

- That the burden of proof was on the Claimant to establish that the cargo in question had sustained damage during the course of carriage by air and that the Claimants had not discharged that burden of proof.
- The shock watch used was not appropriate for the weight/volume of the subject cargo.
- No prior notice had been given to the carrier that shock watches had been attached to the cargo (or that the cargo was sensitive to shock or tilting), and nor had any additional charge been paid for handling the cargo on the basis it was sensitive to impact.

In short, the Judge concluded that the mere fact that the shock watch had discoloured was not sufficient evidence of an external impact causing damage to the cargo during the carriage by air.

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The Judge's analysis is positive news for carriers defending similar claims, as it underlines the fact that the simple activation of a shock watch may not, on its own, be sufficient to mount a successful case against the carrier. Although, for commercial reasons, most claims of this nature will never reach the courts (particularly if the Montreal Convention applies, as liability limits are unbreakable), carriers may be more willing to consider mounting a defence to such claims, particularly if the claim value warrants it and the carrier/its Insurers have the appetite to defend.

HFW represented the carrier in these proceedings, brought by the cargo interests' subrogated insurers. The decision was handed down in June of this year.

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Limitation periods for aviation claims in Brazil

The Brazilian Superior Tribunal of Justice has decided that the Brazilian Consumer Code of 1990 5-year limitation period potentially applies to surface damage claims arising out of aviation accidents.

In October 1996, a TAM Fokker 100, performing flight 402 from São Paulo (Congonhas) airport to Rio de Janeiro (Santos Dumont) airport, crashed in a heavily populated area soon after taking off, killing a total of 99 people (all those on board plus three people on the ground).

In May 2003 (nearly 7 years after the event), a person who lived close to the accident site started proceedings in a São Paulo State Court seeking moral damages from TAM.

The claimant alleged that she had been psychologically affected due to the accident and was unable to undertake ordinary domestic activities after seeing several badly burnt and charred bodies and witnessing the general destruction in her neighbourhood.

The First Instance court held that the claim was time-barred and applied the 2-year limitation period contained in the Brazilian Aeronautical Code of 1986.

A Second Instance ruling held that the claim was not yet time-barred because the 20-year limitation period contained in the Brazilian Civil Code of 1916 was applicable. TAM appealed this decision to the Superior Tribunal of Justice (the Superior Tribunal).

The Superior Tribunal found that the claimant, as a bystander, should be treated as if she was a consumer, because she had been affected by the execution of TAM's services. In accordance with Article 17 of the Consumer Code, the Superior Tribunal held that the victims of an event, such as the ground victims or affected bystanders of an aviation accident, can be treated as consumers and that therefore a 5-year limitation period applies.

Pursuant to previous Superior Tribunal decisions, when there is a conflict between the Civil Code and the Consumer Code, the latter should be applied due to its more specialist content. The Second Instance decision was therefore reversed and the Superior Tribunal found that the claim was time barred.

The Superior Tribunal then considered the conflict between the Consumer Code and the Aeronautical Code, both specialist pieces of legislation which address the issue of air carriers' liability. While the Aeronautical Code is specialist because of the type of service it governs (carriage by air), the Consumer Code is specialist because of the special contractual relationships it seeks to govern (consumer relationships).

In order to decide which regime should prevail, the Superior Tribunal was guided by the Brazilian Constitution of 1988, which came into force after the Aeronautical Code.

The Superior Tribunal ruled that the Consumer Code, by protecting the weaker party (i.e. the consumer), is more in line with the Constitution, which has, as one of its main principles, the protection of "human dignity".

The Superior Tribunal also commented that the Consumer Code has been rightly and consistently applied to lost baggage or flight delay claims.

Therefore, it appears that the Consumer Code's 5-year limitation period applies to aviation claims filed by passengers or bystanders, which arise out of domestic or international flights. This decision serves to reinforce the consumer focus in carriage by air claims in Brazil, notwithstanding the existence of specific aviation legislation designed to govern such matters.

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