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Aviation News

Issue 1 | Summer 2020

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EDITORIAL by John Kimbell QC

Welcome to the first edition of Aviation News!

These are challenging and uncertain times for the aviation world. Covid-19 has temporarily grounded large numbers of commercial aircraft and rumours of airline insolvency abound as pictures of empty airports regularly appear in the press. Against this background, Thomas Macey-Dare QC considers the impact of airline insolvency on slot allocation and Mark Stiggelbout and Emily McWilliams discuss the potential impact of force majeure and frustration arguments based on the pandemic.

One thing, however, that has remain unchanged by Covid-19 is that London is still the jurisdiction of choice for resolving aviation disputes. In this edition, Matthew Reeve comments on a recent decision of the Commercial Court concerning a lease of an Airbus A320 - ***Nas Air Co v Genesis Aviation Trading 3 Ltd*** [2020] EWHC 507 (Comm) which shows the Commercial Court's willingness to deal with lease issues on an expedited summary basis and to enforce 'entire agreement' clauses. Robert-Jan Temmink QC discusses the jurisdictional aspects of Air Berlin's insolvency.

Continuing the jurisdiction theme, Tim Marland describes another recent decision of the Commercial Court, this time dealing with an ultimately unsuccessful attempt to secure London jurisdiction – ***Senior Taxi Aereo v Agusta Westland S.p.A. and Others*** [2020] EWHC 1348 (Comm). The Panamanian, American and Brazilian claimants were seeking to advance a claim in London against the manufacturers of an allegedly defective Agusta AW139 twin turbine helicopter which crashed into the sea off the coast of Brazil in 2011. The Claimants could have brought proceedings in Italy but instead chose London. The Commercial Court had to decide what threshold test ought to be applied when a claimant seeks to rely on the involvement of one English 'anchor' defendant in a multi-party multi-jurisdiction claim.

Stephanie Barrett examines the recent High Court decision in ***Cathay Pacific Airways Ltd v Lufthansa Technik AG*** [2020] EWHC 1789 (Ch). This was a dispute about Cathay's exercise of an option under a long-term engine maintenance agreement. Cathay had exercised the option by withdrawing engines from part of the contract just before the contract ended, and thereby triggered a large credit in its favour. The Court therefore had to decide whether the option was subject to an implied good faith qualification which Cathay had breached.

Mark Stiggelbout also reports on how the Business and Property Courts have switched to operating remotely rather than adjourning claims. Finally in this first edition, we provide an update on the Inquest into the loss of a Piper PA-46 Malibu in the channel on 21 January 2019. The privately chartered aircraft was carrying the footballer, Emiliano Sala, from Nantes to Cardiff when it crashed. The AAIB has now published its final report and the Inquest will now proceed. Members of Quadrant Chambers are involved in both the Inquest and in the Fifa arbitration arising out of the crash.

Quadrant Chambers to welcome two new members

We are delighted to announce that we will be welcoming Celine Honey and Benjamin Joseph as new tenants at Quadrant Chambers upon successful completion of pupillage. Celine and Ben have accepted our offer of tenancy and will join as Members from 1 October 2020.

Celine and Ben will be developing their practices in line with our core areas of work.

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Aircraft Leasing: Latest News

Nas Air Co v Genesis Aviation Trading 3 Ltd

Author: Matthew Reeve

On 27 February, the Commercial Court's Judgment in ***Nas Air Co v Genesis Aviation Trading 3 Ltd*** was handed down. It is notable for two features. First, there are very helpful summaries, in the commercial aircraft leasing context, of the current law as to principles of contractual construction, the significance of the commercial "context" known to the parties at the time of contracting and the implication of terms. Second, the Court considered the question of whether an "entire agreements" clause operates to exclude pleas of estoppel.

The contract in question was an agreed extension of a long lease of an Airbus A320 214 with CFM56-5B4/P engines, operated by Flynas, Saudi Arabia's budget airline. As was known at the time of the extension agreement, the engines were scheduled for major overhauls, by way of "performance restorations" during the extension period, costing $12m. This is a familiar problem when extensions of long leases are contemplated. The airline could have avoided the cost of the performance restorations by declining the extension and handing back the aircraft.

The core dispute is about the meaning of a bespoke provision in the extension agreement providing an option for the provision of substitute engines, with enough life to see out the extension period, so as to avoid the performance restorations of the original engines. The airline says that the relevant term, allowing it to "offer to provide" alternative engines, entitled it to lease in and fit such engines and avoid the cost of the performance restoration. The lessor says that the provision gave it an absolute discretion to refuse substitute engines and to insist that the engines go into the shop for the restorations.

The Court was faced with a reverse partial summary judgment application by the lessor seeking the dismissal of the Claimant's claims. HHJ Pelling QC rejected the application so far as it related to the issue of "offer" above, accepting the airline's submission that it was "realistically arguable" that the lessor's construction "makes no commercial sense". He did however hold that the "entire agreements" clause did preclude the Claimant from running an alternative case on estoppel based on the lessor's pre-contract expressions of its consent to substitute engines provided by the airline.

There is now an appeal on a separate point. The Judge identified and answered, in his Judgment, another point of construction of the relevant clause, a point which had not been raised by either of the parties. The appeal therefore raises interesting issues of principle as to what steps a judge must take to ensure procedural fairness when a new point of construction occurs to him, and what weight he ought to give to concessions by the parties, especially where (as here) the parties have a special knowledge of the aircraft leasing context.

Matthew acted for the Airline, instructed by Robin Springthorpe and Emma Humphries at Norton Rose Fulbright

Matthew Reeve is a highly experienced barrister with a wide-ranging commercial practice. His international aviation and travel practice is acknowledged in both Chambers UK and The Legal 500. It spans all aspects of airline liability, passenger/air accident claims, carriage of cargo, aircraft manufacturer and maintainer liability, air accident investigation and inquests, airline regulation, tour operators, aircraft and engine financing, conflicts of laws and aviation insurance/reinsurance disputes. It regularly involves the management of multiparty and disaster litigation. Matthew was elected a Fellow of the Royal Aeronautical Society in 2012.

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Good Faith and Maintenance Agreements

Cathay Pacific Airways Limited v Lufthansa Technik AG [2020] EWHC 1789

Author: Stephanie Barrett

In ***Cathay Pacific Airways Limited v Lufthansa Technik AG*** [2020] EWHC 1789 (Ch) John Kimbell QC, sitting as a Deputy High Court Judge in the Chancery Division, decided a dispute under a long-term contract for the maintenance, repair and overhaul of aircraft engines ("the Contract"). The ten-year term of the Contract expired in May 2018, and Lufthansa sought payment of US$35.8m due in End of Term Charges thereunder. Cathay agreed that this sum was due but sought to set off sums including US$42.9m as a reconciliation under Schedule 13 to the Contract.

Entitlement to the Schedule 13 reconciliation depended on the valid exercise of an express option in the Contract to remove engines from the "Flight Hours Service Program" ("FHSP") prior to expiry of the Contract Term ("the Option"). Under the terms of the Contract, and due to factors such as the anticipated timings of shop visits, if the engines were removed from the FHSP before the Contract ended this would trigger a financial reconciliation in respect of each engine under Schedule 13 and result in a significant credit to Cathay. Cathay exercised the Option in respect of all of the engines covered by the Contract before the Contract term expired. The Option was therefore exercised for commercial reasons, and the engines were still used in Cathay's fleet.

Lufthansa argued that the Option was not validly exercised, primarily because:

(i) on true construction, or by necessary implication, the Option only applied if Cathay were to remove engines from their fleet for operational reasons;

(ii) the Option was subject to a limitation that it may not be exercised in an arbitrary, capricious and/or unreasonable manner (see ***Braganza v BP Shipping [2015] UKSC 17*** and ***Socimer International Bank v Standard Bank London*** [2008] 1 Lloyd's Rep. 558);

(iii) the Contract was a relational contract and therefore subject to a general good faith limitation, so that the Option could only be exercised in a way that would be regarded as commercially acceptable by reasonable and honest people.

Operational Purpose

The exercise of the Option was not restricted to removal of engines from the fleet for operational reasons. The language used was unambiguous and granted a unilateral option, albeit potentially a price would be paid for its exercise under Schedule 13. The Option operated as a partial termination because the engine(s) would be withdrawn from the FHSP only. The Contract would otherwise continue and would govern e.g. other work requested by Cathay and End of Term Charges.

Socimer/Braganza Implied Term

There was no implied term to the effect that the Option could not be exercised in an arbitrary, capricious or unreasonable way. A *Socimer/Braganza* limitation was more likely to be implied in the case of a contractual discretion to choose between a range of options, taking into account the interests of both parties, rather than in respect of a simple decision whether or not to exercise an absolute contractual right. The Option was far closer to the latter because it operated as a partial termination clause and did not involve the assessment by one party of whether a particular state of affairs existed. In any event, Cathay had not acted arbitrarily, capriciously or unreasonably. Its decision was a commercially sensible one.

Relational Contract

Although the Contract envisaged a great deal of communication and co-operation between the parties over a long period, it was not a "relational contract" and there was no implied term that the Option could only be exercised in good faith.

A term of good faith may be implied in a relational contract as a matter of law subject to any contrary express term. This applies where the parties have not only entered into a long-term collaborative relationship involving trust and confidence, but have also not specified (or have been unable to specify) in detail the terms governing their relationship. By contrast, the Contract was not a joint venture and the terms of the parties' relationship were set out with precision.

A term requiring mutual good faith could also be implied as a matter of fact, but the usual tests for implied terms must be met i.e. whether, at the time the contract was made, a reasonable reader of it would consider the term to be so obvious as to go without saying, or the term is necessary for business efficacy. However, the overall character of the contract is an important consideration, including whether it would be characterised as relational.

In the present case, a reasonable reader of the Contract would infer that the parties had given careful consideration to its terms, and a mutual obligation of good faith was not obviously intended. Nor was any such obligation necessary to give business efficacy to the Contract. The Contract was not a relational contract and was not dependent on the parties' good faith of the parties. Cathay's main obligation was to pay sums due under the Contract, and the key thing was that maintenance work was carried out to the required standards. There was no trust and confidence going beyond matters agreed in the Contract.

Even a good faith obligation was to be implied, it would not apply to Cathay's exercise of the Option. The Option was intended to be for Cathay's benefit and in deciding whether and when to exercise it Cathay was entitled to focus on its own commercial interests. In any event, at all times Cathay acted in good faith. They believed that they had the benefit of a unilateral option to remove engines from the FHSP for commercial reasons.

Result

The outcome of the case was that Cathay's claim succeeded in the sum of US$9.7 million.

Commentary

The decision provides useful guidance on the exercise of contractual options in commercial contracts. Much turned on the particular terms in issue, but of broader interest is the finding that the Contract was not a "relational contract". As the Judge correctly pointed out, an engine maintenance contract is a standard commercial contract and is not an obvious candidate for the implication of a good faith obligation, even though in this sector it is usual for suppliers and airlines to work closely together.

As the Judge held, the financial consequences of Cathay's exercise of the Option followed from the agreed terms of the Contract, including the pre-agreed figures and formulae set out in Schedule 13 for any number of flight hours. The process of contractual interpretation could not be used to rectify Lufthansa's failure to think through the financial consequences of the Option. The Contract was between sophisticated commercial parties and drafted with the assistance of experienced law firms on both sides. In those circumstances, it is inevitably more difficult to argue that, effectively, something has been "left out" or that a "linguistic mistake" has been made. If the Option was intended to be restricted, it would have been easy to insert e.g. a maximum number of engines to which it could be applied. Therefore, if it is sought to constrain the exercise of contractual options, this should be negotiated upfront.

Stephanienie Barrett has significant experience of both aviation and travel work, having undertaken advisory and drafting work as well as advocacy on behalf of a number of major airlines, tour operators and airports. Her experience relates to a broad range of issues, from personal injury, baggage and delay claims under the Montreal Convention, the denied boarding (EC Reg 261/2004) and reduced mobility (EC Reg 1107/2006) regulations, personal injury claims against airports and tour operators, the Package Travel Regulations, and general contractual issues, such as disputes under ground handling agreements and agreements between airlines and airports. Stephanie has appeared as sole counsel for airlines, tour operators or airports in a number of County Court fast and multi-track personal injury trials and in High Court disputes.

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Airlines, Insolvencies and Slots - If a Tree Falls in the Forest … Shouldn't the Saplings in the Clearing Benefit?

Author: Thomas Macey-Dare QC

Airlines have been particularly hard hit by Covid-19. UK regional carrier FlyBe collapsed into administration in March 2020, and other airlines operating in and out of the UK may follow suit in the coming months. If they do, company administrators will seek to realise the value of the airline's UK take-off and landing slots, which may be among its most valuable assets, for the benefit of unsecured creditors. They can do so by exchanging the slots for other, less valuable, UK slots held by other airlines, plus a cash payment.

This limited secondary market in slots is, controversially, permitted by the EU Slots Regulation: Council Regulation (EEC) No. 95/98 on Common Rules for the Allocation of Slots at Community Airports, as amended, which governs the allocation of slots in the EU. Timing is key, as slots are allocated twice yearly, in March (for the following winter season) and in October (for the following summer season).

It is essential that the airline remains an 'air carrier' within the meaning of Article 2(f)(i) of the Slots Regulation when the allocation occurs. If it does, then it will generally be entitled to the same allocation of slots as the previous year, under the 'grandfather' provisions in the Regulation (normally those provisions require the carrier to have utilised its existing slots sufficiently (80%+) in the previous season, but that rule has been relaxed for summer 2020 in light of the current pandemic).

The question is: what is an 'air carrier'? In particular, can an airline which has collapsed into insolvency before the slots are allocated still call itself an air carrier, and insist on its allocation of slots which it will never be able use, simply in order to exchange them for some other slots which it will also never use?

In ***Monarch Airlines Ltd (in administration) v Airport Coordination Limited*** [2017] EWCA Civ 1892 the Court of Appeal held that it could. In that case, Monarch entered administration shortly before the allocation of slots for the summer 2018 season. The body responsible for coordinating slot allocations in the UK, ACL, declined to allocate it any slots while the body which licenses airlines in the UK, the Civil Aviation Authority, decided whether to revoke or suspend Monarch's Operating License under the domestic Operation of Air Services in the Community Regs, SI 2009/41.

Monarch's administrators sought judicial review of ACL's refusal, arguing that the EU Slots Regulation defined an air carrier as 'an air transport undertaking holding a valid operating license or equivalent at the latest on 31 January for the following summer season', which Monarch still did. ACL argued that that was unrealistic and that Monarch was no longer in any real sense an air carrier.

At first instance the Divisional Court agreed with ACL. The Court of Appeal unanimously reversed that decision, holding that it was beyond the ACL's remit to resolve such matters or to conduct the investigations which that would entail, and that these were matters for the CAA as the licensing body. Monarch was duly allocated its slots, which it exchanged with IAG and Wiz Air for substantial cash payments.

This decision seems to run counter to the stated objectives of the EU Slots Regulation, of promoting competition and removing barriers to entry, by ensuring that the richest players can hoover up the best slots of failed carriers.

The EU has long discussed curtailing the current slot trading system (which it originally introduced at the insistence of the UK), and Brexit may open the way to reform. But for now, get ready for plenty of slot-swapping in October.

Thomas Macey-Dare QC is a leading commercial barrister specialising in shipping, shipbuilding, energy, international trade, insurance and international arbitration. He is recognised as a leading practitioner by the Legal 500 in International Arbitration, Commodities and Shipping, and by Chambers & Partners in Shipping & Commodities.

"Excellent on his feet and is a compelling and persuasive advocate." (Legal 500, 2020)

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WELCOME BACK

We are pleased to welcome Stephanie Barrett and Emily McWilliams back to Chambers. Stephanie returned in March following a sabbatical and parental leave. Emily returned in February following parental leave.

Stephanie and Emily are both ranked as leading juniors for aviation.

Stephanie is described as an "*…excellent advocate, who is extremely hard working and easy to work with."* and Emily is described as a "*real aviation specialist; her knowledge in this area is invaluable."*

Aviation Training Talks

The Quadrant aviation team have a number of topical in-house training talks available. All talks are around 45 minutes and can be delivered online.

Topics include:

- Redelivery and Repossession
- Jurisdiction and Anti-suit Injunctions
- Cancellation and Penalties
- Ground Handling Disputes
- Detention of Aircraft as Security including liens, arrest, freezing injunctions
- Hot topics in finance including repudiatory breach and relief from forfeiture
- Air worthiness and aircraft constructive total loss
- Frustration and force majeure

To arrange any of these talks, please contact : marketing@quadrantchambers.com

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Escape Routes from Aviation Contracts – COVID-19, Frustration and Force Majeure

Authors: Mark Stiggelbout and Emily McWilliams

As the COVID-19 pandemic continues to wreak unprecedented havoc in the aviation industry, affected commercial parties will increasingly be looking for escape routes from onerous contractual obligations. Two obvious contenders are the common law doctrine of frustration and any express force majeure provisions. Within these, two specific issues seem ripe for argument in the coming months.

Frustration – Wait and See?

Under the common law of England and Wales, a contract is frustrated – and the parties are discharged from further performance thereunder – if a post-contractual event renders its fulfilment physically or commercially impossible or makes the obligation to perform radically different from that originally undertaken: ***Davis Contractors v. Fareham*** [1956] A.C. 696. That test is well established, albeit that its application to specific factual circumstances is often far from straightforward.

But one area that remains underdeveloped is the extent to which there is a principle of 'wait and see', and how long a party must wait before it can rely on frustration. A delay in being able to perform may be within the commercial risk undertaken by a party, or it may be so long as to frustrate the commercial purpose of the contract. This is potentially very important in the aviation context right now. For example, in circumstances where it is unknown for how long airlines and airports may be out of action, how long must a party wait before concluding that a contract dependent on them has been frustrated?

In ***The Nema*** [1982] A.C. 724, at 752, Lord Roskill proclaimed that "business men must not be required to await events too long" and proposed a test "based upon all the evidence of what has occurred and what is likely thereafter to occur". This rather vague test opens the door to litigation arising out of operating leases and aircraft charter agreements, ground handling agreements, maintenance contracts and operating agreements. All of these will be affected by the pandemic and susceptible to frustration arguments. In 1982, Lord Roskill recognised that opinions could legitimately differ as to when the point of frustration had been reached in 'wait and see' cases. One may expect bountiful litigation now that many parties to such contracts face financial ruin if held to their original obligations.

Force Majeure – Seriousness of the Event

Some of the aviation contracts identified above – particularly operating leases and aircraft charter agreements – may well contain specific force majeure clauses covering matters brought about by the pandemic. The effects of such events on the contract will then turn upon the specific wording used in the clause. However, in general, a force majeure clause will not bring the contract to an end in the way that frustration will. Thus, a further area of contention is likely to be whether the presence of such a clause ousts reliance on the doctrine of frustration, or whether the seriousness of the event keeps the prospect of frustration alive.

The usual rule is that, if the relevant event is covered by a force majeure clause, frustration cannot apply at all (because the parties have provided for what should happen). However, certain cases open the door to an argument that, even where there is a force majeure clause and the event appears to be within it, the seriousness of the event (or its consequences) means that it actually falls outside the clause and frustrates the contract: see ***Bank Line v. Arthur Capel*** [1919] A.C. 435 and ***The Sea Angel*** [2007] 2 All E.R. (Comm) 634. This is potentially of significant importance in the aviation context right now. For example, even if a government regulation causing the loss of individual flights is covered by a force majeure clause, the seriousness of the impact may be so great as to justify an argument that the clause no longer applies. Again, given the extraordinary difficulties presently facing many actors in the aviation context, this rather underdeveloped legal issue may well find renewed expression as the pandemic continues to unfold.

Mark Stiggelbout has a broad international commercial practice, with particular emphasis in shipping, commodities, insurance, international arbitration, aviation, and energy disputes. He is recommended as a leading practitioner in Chambers UK and the Legal 500. Mark acts for many of the world's major airlines and package tour operators. He has extensive experience of claims brought under the Montreal Convention (often concerning personal injury and damaged/delayed baggage) and under EC Regulation 261/2004 (concerning flight delays, cancellations and instances of denied boarding). He has extensive experience of litigating the Regulation 261 "extraordinary circumstances" after *Jet2.com Ltd v. Huzar* [2014] 4 All E.R. 581, including successfully establishing the defence in cases concerning manufacturing defects, air traffic control decisions, bird strikes, crew sickness, and adverse weather conditions.

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Emily McWilliams Emily has a broad commercial practice with a particular emphasis on shipping and aviation related disputes. She is recommended as a leading junior in the fields of Shipping, Aviation and Travel Law by The Legal 500. *"She is a real aviation specialist; her knowledge in this area is invaluable."* (Legal 500, 2020)

Emily regularly appears as sole and junior counsel in both court and arbitration. She is experienced in shipping disputes of all kinds, and has acted in a wide range of aviation matters, including commercial disputes and claims under the Carriage by Air Conventions. Emily's cases frequently involve important issues of principle, such as the meaning and effect of industry standard contractual terms.

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Weighing Anchors Again: Commercial Court confirms applicability of Merits Test to claims against "anchor defendants" under Article 8(1) of Brussels Recast

Author: Tim Marland

In ***Senior Taxi Aereo & Others v Agusta Westland S.p.A & Others*** [2020] EWHC 1348 (Comm) the Commercial Court has confirmed what had previously only been addressed in *obiter* judgments, namely that the Court should apply a 'Merits Test' in evaluating a claim against an anchor defendant before exercising its ancillary jurisdiction over defendants domiciled in other EU Member States pursuant to Article 8(1) of Regulation EU 1215/2012 ('the Regulation').

The Rules

The rules, formerly found in Article 6(1) of the original Brussels I Regulation (44/2001) and which are now found in identical terms in Article 8(1) of the Regulation provide that:

> *"A person domiciled in a Member State may also be sued:*
>
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"

Within the Brussels jurisdiction regime this rule serves a similar function to the common law's "necessary or proper party" joinder rule that is now found in CPR 6.37 and PD6B para. 3.1(3), but the Regulation's rule is much narrower than the common law. One defendant has to be domiciled in England and Wales (the so-called "anchor defendant") and the exercise of ancillary jurisdiction under the Regulation is subject to the proviso that the claims brought against that anchor defendant and the other EU domiciled defendants are "... so closely connected" that it is "expedient" to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

In ***Sabbagh v Khoury*** [2017] EWCA Civ 1120, the Court of Appeal considered whether a merits test should be applied to the claim against the anchor defendant. However, having found that in the ***Sabbagh*** case the claim against the anchor defendant did have merit, the Court's pronouncements on the issue were obiter. Moreover, ***Sabbagh*** resulted in a split decision, with the majority (Patten and Beatson LLJ) finding that a merits test did apply, but Gloster LJ, in a fully and closely reasoned dissent, finding that it did not. The ***Sabbagh*** decision, and the 'grab bag' of CJEU case law on the relevant provision which preceded ***Sabbagh***, are discussed in Michael McParland QC's previous 'Weighing Anchors' article, which can be found on Lexology here.

In ***Sabbagh*** the Court had been agreed that Article 8(1) was subject to a 'sole object' test, namely that it would be an abuse of Article 8(1), and therefore prohibited, if the 'sole object' of invoking the Article was to oust the jurisdiction of domicile of foreign co-defendants. The merits test was relevant, said the majority, because if the claim against the anchor defendant was hopeless, it could be inferred that the sole purpose of bringing the claim against the anchor was indeed to oust such jurisdiction. Gloster LJ, whilst agreeing that the sole object test was relevant, thought that fraudulent abuse of Article 8(1) would need to be shown, rather than a simple evaluation of the merits.

Subsequent to ***Sabbagh***, in ***PJSC Privatbank v Kolomoisky*** [2019] EWCA Civ 1708, in the context of Article 6(1) of the Lugano Convention (in terms identical to Article 8(1) of the Regulation), the Court of Appeal (Flaux, David Richards and Newey LLJ) held in a majority decision (Newey LJ dissenting) that there was no 'sole object' test. In doing so, however, the Court repeatedly referred to a 'sustainable' claim against the anchor defendant – at first instance it had been found that there was a triable issue against the anchor but nonetheless, because the claim had been brought with the sole object of ousting the jurisdiction of domicile of the foreign co-defendants, it was impermissible. The Court found that ousting the jurisdiction of domicile in the ***Kolomoisky*** case was an object, but not the sole object, of the bank bringing proceedings against the anchor defendant, so again the judgments on the applicability of the sole object test are strictly speaking obiter, but this left open the question of whether a merits test was of relevance – was there a difference between a claimant bringing a *sustainable* claim (albeit motivated solely by ousting the jurisdiction of domicile) and a claimant bringing a hopeless claim?

Senior v Agusta – the relevant facts

The claim arose out of a fatal helicopter crash off the coast of Brazil in 2011 after the catastrophic in-flight failure of a tail rotor

blade. The Claimant owners and operators of the helicopter were Panamanian, US and Brazilian companies. The Defendants were all companies within the Leonardo Group and were accused collectively of being the designers, manufacturers, suppliers etc. of the allegedly defective helicopter and/or rotor blade. The anchor defendant, AgustaWestland Limited ('AWL'), was the sole English entity. Jurisdiction against the non-English entities was claimed solely on the basis of Article 8(1).

In response to the claim, AWL applied to strike out the claim against it as incoherent, alternatively for summary judgment under CPR Part 24, on the basis that it was not and never had been involved in any of the relevant roles in relation to the accident helicopter or the accident helicopter type. There were ancillary challenges to the claim based on limitation and lack of legal basis. The foreign co-defendants challenged jurisdiction on the basis that the claim against the anchor was baseless and therefore Article 8(1) was not properly engaged. The two applications were heard together, it being conceded by the foreign co-defendants that, if it was found that there was a sustainable claim against AWL, the jurisdiction challenge would fall away.

The Judgment

Waksman J did not consider that the claim against AWL was suitable for strike out (although had it proceeded he would have required it to be further particularised), nor did he find that the bringing of the claim against the anchor defendant was deliberately abusive as opposed to "perhaps...unwise". He did, however, find that there was no factual basis for asserting that AWL had any relevant role in relation to the accident helicopter or its design, dismissing the totality of the Claimants' evidence in that regard as 'speculative'. He additionally found that in any event the Claimants' statutory claim (under the Consumer Protection Act 1987) failed because *inter alia* it was excluded by s.5(3) of the Act, and that the claim in negligence was time barred.

After a chronological review of the CJEU and English authorities on Article 8(1) and its predecessor, he carefully considered the competing judgments in ***Sabbagh*** and in Kolomoisky and concluded based on those, and other prior authorities, that a merits test should indeed be applied to the claim against the anchor defendant. He considered that there was a limitation on the operation of Article 8(1) which was "at the very least" what he termed the "Artificial Fulfilment Prohibition" ie that if the claim against the anchor defendant amounts to an artificial fulfilment of the criteria of Article 8(1) (eg by suing a fictitious anchor defendant) then it should not be countenanced by the Court.

He regarded the use of the expression "sustainable claim" by the Court of Appeal in ***Kolomoisky*** as indicating that the Court in that case was proceeding "on the assumption that apart from anything else, the claimant does need a sustainable claim against the anchor defendant before being able to invoke [the article]" Essentially he concluded that if there is no arguable claim against the anchor defendant "there is, in truth, no "close" connection because there is no connection" (para.[67]). He differed from Gloster LJ about the reality of the risk of irreconcilable judgments (a major driver of her dissent) where the claim against the anchor was hopeless, finding it to be "low or non-existent" (para.[69]).

Importantly, he found that the merits test was not subject to a further gloss requiring a finding of abuse, bad faith or anything of that nature (echoing a sentiment expressed by the majority in ***Sabbagh*** at [71]), and further found that the merits test was something separate from the Artificial Fulfilment Test or the Sole Object Test (para.[78]).

Undoubtedly this result will chime with common law lawyers who are used to the express requirement of a "real issue...which it is reasonable for the Court to try" under the non-Regulation jurisdictional gateway enshrined in CPR6.37 and 6BPD para.3.1 and confirms the preponderance of obiter decisions on the issue.

Tim Marland, instructed by Nick Hughes and Lorraine Wilson at HFW, acted for the Agusta Defendants. Matthew Reeve, instructed by Tim Brymer and Simon Amos at Knights plc, acted for the Claimants.

Tim Marland is ranked as 'Star Individual' for Aviation in Chambers & Partners 2019 and is consistently recommended as a leading junior by Chambers & Partners and the Legal 500 legal directories where he is praised as: "*Our go-to barrister for high profile cases. I can't think of any other barristers ahead of him; he's very client-focused and knows the insurance market well.*" "*Active, prominent and very good; he's very established in this field and is an excellent barrister.*" "*He's good at giving strong, commercial, practical and down-to-earth advice.*" and "*is able to guide a court through complex case law in a very simplistic way and convey technical points that would otherwise take days at trial*". Tim is one of only seven members of the Bar listed in Who's Who Legal Global Guide 2019 under Aviation – Contentious and is currently the only member of the Bar with the top ranking Global Elite Thought Leader in that category.

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Remote Hearings - Quadrant's Barristers Clock up 145 to Date

Author: Mark Stiggelbout

There is a clear public interest in the continuation of the administration of justice during the COVID-19 pandemic. Both the Commercial Court and Quadrant Chambers have promptly risen to this challenge through a rapid expansion in the use of remote hearings.

As from the beginning of June 2020, the Commercial Court has arrangements for there to be 4 types of hearing available. First, there are fully remote hearings with the Judge and all parties participating via an internet connection from home. Secondly, there are remote hearings with the Judge (but no-one else) present in the Rolls Building. Thirdly, there are hybrid hearings with the Judge and some participants present in Court, and others participating remotely. Fourthly, there are normal physical hearings in which all participants attend in person. Within the first 3 categories, both video and telephone options are available, although telephone will generally be appropriate only for short interlocutory hearings.

From the beginning of lockdown until 9 July 2020, barristers at Quadrant have been involved in almost 150 remote hearings. These comprised 101 remote court hearings, 41 remote arbitration hearings and 3 remote mediations. The longest fully remote trial so far has been a five week Chancery Division trial case heard by John Kimbell QC of Quadrant Chambers sitting a s Deputy High Court Judge. These number of fully or partially remote trials are expected to increase significantly in the weeks and months ahead. In a recent speech, the Head of the Business and Property Courts referred to remote trials as being the 'new normal' even after the Covid pandemic has subsided. What is clear is that Quadrant Chambers continues to trailblaze the 'new normal'.

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Trouble in the Middle East, or Europe, or England & Wales?

Author: Robert-Jan Temmink QC

At a time when the world's busiest airport by international passenger traffic, Dubai International is operating fewer than two dozen flights a day (as opposed to its usual complement of more than a thousand), and 80% of Emirates' full wide-body fleet are parked and wrapped at DXB or DWC, things have not been easy for Etihad in the neighbouring emirate of Abu Dhabi either.

In April 2017 Etihad entered into various finance agreements with Air Berlin. The finance documents included a Facility Agreement which contained an asymmetric jurisdiction clause (i.e. a clause containing different provisions regarding jurisdiction depending on which party had initiated proceedings), and a letter of comfort which set out Etihad's intention 'to continue to provide the necessary support to Air Berlin to enable it to meet its financial obligations as they fall due for payment for the foreseeable future and in any event for 18 months from the date of this letter'. The Comfort Letter had no jurisdiction clause.

Despite Etihad's financing, Air Berlin entered into insolvency and an Administrator was appointed. The Administrator commenced proceedings against Etihad in Germany alleging a breach of the comfort letter, alternatively a pre-contractual claim in culpa in contrahendo on the basis that Etihad used its negotiating power during the negotiations between the parties to avoid providing a clearly binding statement whilst, at the same time, inspiring the trust of Air Berlin that it would adhere to the commitment in the Comfort Letter.

Etihad sought declarations in England that the Berlin claims were subject to the English court's exclusive jurisdiction within Regulation 1215/2012 (Brussels Recast) article 25; that it was not liable for breach of the Comfort Letter because it did not create a binding promise to provide financial support; and that it was not liable on in *culpa in contrahendo* because the facts relied on in the German proceedings did not give rise to a cause of action known to English law.

In a judgment by Mr Justice Jacobs [2019] EWHC 3107 (Comm) the Court followed earlier cases, including ***Commerzbank Aktengesellschaft v Liquimar Tankers Management*** [2017] EWHC 161 (Comm), but found that even in the absence of prior authority it would have had no difficulty in finding:

a. since the jurisdiction clause was in the Facility Agreement which was expressly governed by English law, the question of whether the clause extended to the Comfort Letter and the other claims in the German proceedings was to be determined by English law. The letter was essentially part of an overall agreement package and it would be odd to think that the parties had intended different jurisdictional arrangements to apply to different elements of the package in the absence of express language;

b. the dispute concerning the letter originated from the parties' borrower/lender relationship and although the facility agreement between Etihad and Air Berlin provided a basis for the legal doctrines advanced in Germany, there was a good arguable case that the Comfort Letter was not a binding contractual commitment but a statement of intention ancillary to the actual lending agreement;

c. that the jurisdiction clause contained within it an agreement not to sue in other jurisdictions. The jurisdiction clause was an agreement for exclusive jurisdiction in England and within the meaning of article 31(2) of Brussels Recast. In asymmetric clauses each obligation could be considered on its own. In this case the clause included a provision by Air Berlin not to sue in jurisdictions other than England and that promise was capable of being protected by article 31(2), notwithstanding that the English court was the second seised. It was irrelevant that the obligations under the clause were different for the different parties: that was their contractual bargain. That decision was also consisted with the decision in ***Nikolaus Meeth v Glacetal Sarl*** [1979] 1 CMLR 520.

Whilst our civil law colleagues often appear to be disparaging of anything other than complete symmetry in contractual obligations the decision in the Air Berlin case followed well-established authority. The rationale behind article 31(2) is to enhance party autonomy and avoid tactical jurisdictional litigation. Bearing in mind that rationale, there is no logical justification or juridical basis for treating symmetrical and asymmetrical clauses differently: the correct approach is to focus on the term which has been breached by issuing in a court or jurisdiction other than the one set out in the parties' agreement.

Robert-Jan Temmink QC has a wide-ranging and international practice in commercial and chancery law. He is known for being a talented and intellectually-agile advocate equally at home in fraud and financial services cases as in aviation and shipping matters. He has a strong practice in construction, energy and infrastructure disputes and is often asked to advise and act in complex insolvency and cross-border actions.

Robert is called to the bar in the Eastern Caribbean and has acted in cases in the BVI, Cayman and the Turks & Caicos islands. He is a registered advocate in the Abu Dhabi Global Market Court and was one of the first UK advocates registered to practice in the Dubai International Financial Centre Courts. He is also called to the bar in Northern Ireland and as a Foreign Legal Consultant in the State of New York.

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The Emiliano Sala case – an update – the PIR on 16 March and the breadth of the inquiry

Author: Matthew Reeve

There seems to be no shortage of conspiracists willing to exploit this deeply saddening accident to promote their pathalogical ideas; the latest crackpot theory, emerging in January, is that the pilot jumped out of the aircraft, in flight, before the crash into the sea 22 miles north of Guernsey on 21 January 2019, and seems to be based solely on the fact that he had training as a skydiver!

As recent developments in the Inquest reflect, the real explanations for the accident are likely to be complex and systemic, regulatory and organisational, not simply a result of wrongdoing by a lone individual. Aviation and Football have questions to answer, not least to the Family, but also to their communities and the public. It has now been confirmed by the AAIB that the flight was itself an illegal operation. The accident itself was different in many respects from that of the Nimrod loss, but it may represent a similar opportunity to learn new lessons (and revisit old ones) in the context of commercial aircraft operations. It was, on any measured view, entirely avoidable.

The focus now is on the Inquest. At a Pre-Inquest Review (PIR) on 16 March 2020, the Chief Coroner for Dorset, Mrs Rachel Griffin, considered the scope of the inquest causational inquiry and the range of Interested Persons (IPs). She accepted submissions (on behalf of the Sala Family) that the manufacturer (Piper Aircraft Inc) and the aircraft maintainers ought to be invited to participate as IPs, and she will also approach the owner of the aircraft, the operator and its delegate, and the arranger of the flight, to be IPs. They will join the Sala and Ibbotson Families, the CAA, the AAIB and the aircraft insurers, the existing IPs. There may be as many as 12 participants recognised at the final hearing.

Cardiff City Football Club was also recognised as an IP, on its own application. It is important to note that Cardiff continues to deny that it was Emiliano's employer at the time of the accident and claims that his previous employer, Nantes FC, is responsible for his death.

The Coroner also determined that the initial scope of the inquiry ought to include a considerable range of potential causative factors such as the arrangement of the (illegal) flight, the aircraft operation, the pilot's qualifications, the condition and manufacture of the aircraft, including design and maintenance issues, and the precautions against carbon monoxide poisoning. Many of these factors, and the evidence of their roles, have been debated at length in press articles and other media.

The Coroner set a provisional date for the final hearing of 8 March 2021, with a jury. She rejected a suggested time estimate of 3 weeks, increasing it to 4/5 weeks. She also laid down dates for a further four PIR hearings, in part to manage the disclosure of documents.

The result of the Coroner's decisions, as to the range of interested parties and the boundaries of the causational inquiry, is an inquest of breadth and intensity which has a real chance of exposing the deeper organisational and systemic failings in Aviation and Football which contributed to this tragic accident. And it is hoped that, in so doing, it will identify lessons which will protect the public in the future.

Matthew Reeve instructed by Hickman & Rose, is representing the Sala Family.

Quadrant Chambers is widely recognised as a market-leading set in the fields of aviation and travel, both nationally and internationally especially in commercial disputes involving entities in the supply chain including financiers/lessors, airlines, maintainers, airports, operators, ground handlers, tour operators and aviation insurers .

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- Maintenance disputes and operating agreements
- General intra-industry commercial litigation
- Product liability, aircraft type design and fleet grounding claims
- General aviation and maintenance disputes, including fatal accidents and serious personal injury
- Air accident investigation
- Tour operator liability and supplier claims
- Insurance and reinsurance coverage issues
- Private international law issues
- Regulatory issues and judicial review

Members have also edited and contributed to textbooks such as Halsbury's Laws of England, Shawcross and Beaumont: Air Law, and Margo on Aviation Insurance (4th edition).

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