Aircraft transactions with Iran following the lifting of sanctions

Decades of sanctions have left Iran with one of the oldest fleets in the world, in desperate need of major fleet renewal. Following the recent easing of sanctions this process should now start, but because the sanctions regime is not yet fully lifted a myriad of issues remain that require careful review when dealing with Iran.

On 16 January 2016 the International Atomic Energy Association (IAEA) issued a report confirming that Iran had completed the necessary preparatory steps (i.e. reduction in stockpiles of low-enriched uranium) to start the implementation of the Joint Comprehensive Plan of Action (JCPOA), which is a plan for the reduction of Iran’s nuclear program agreed by Iran, China, France, Germany, the Russian Federation, the US and the UK reached in Vienna in July 2015. This triggered much awaited sanctions relief from the EU and the US and a major move towards the end of a sanctions regime that commenced in 1979 and has been in place in relation to Iranian aviation since 1995. Iran’s economy of 80 million people, already the second largest in the MENA region even after years of sanctions, stands to benefit hugely, as do many foreign investors looking for growth in an otherwise sluggish international economy.

In January the European Union lifted all sanctions which had targeted, amongst others, Iran’s oil, gas, shipping, petrochemicals, insurance and financial sectors. Over 400 entities that had previously been designated for asset freezes by the EU were de-listed.
The US broadly lifted “nuclear-related secondary sanctions” which had targeted non-US companies/persons dealing with Iran’s energy, shipping, financial, shipbuilding and automotive sectors, Iran’s port operators, providers of related insurance, Iran’s trade in gold and other precious metals, and trade with Iran in graphite and raw or semi-finished metals, such as aluminium, steel and coal. The US also de-listed a number of “specially designated nationals” (SDNs). Further relief was also offered to Iran’s aviation sector which will benefit from a Statement of Licensing Policy establishing a favorable licensing policy regime to request specific authorization from OFAC. This will allow the provision of US civilian aircraft and parts to Iran for the first time in decades and to foreign subsidiaries of US companies, which ought in some circumstances to be able to deal with Iran without exposing their parent company to penalties. A number of Iranian banks will be reconnected to the SWIFT network, facilitating the electronic transfer of funds, and helping to inject cash from Iran’s frozen assets into the country’s economy. About USD 30 billion of Iran’s estimated USD 100 billion of frozen assets are expected to be released.

However, caution must still be exercised. Not all of the EU and US sanctions against Iran are being lifted. There are residual asset freezes in place against individuals and entities linked to Iran’s ballistic missile program and human rights violations, and foreign businesses must carry out proper due diligence on their counterparts before concluding contracts. Furthermore, the US “primary” sanctions will continue to prohibit US persons in general from carrying out business with Iran outside the few exempted areas such as food, medicine and the newly liberalised aviation sector. Banks will still be unable to clear US dollars for Iran-related business and financial institutions generally are likely to tread carefully before re-engaging wholesale with Iran and Iranian related business.

Summary

As a brief summary therefore of the progress which has been made in reconnecting Iran to the global economy:

- The EU’s “nuclear” sanctions and US secondary sanctions have been lifted
- Legal restrictions on doing business in Iran’s oil, gas, petrochemical and shipping sectors have been lifted
- Iran can sell its oil on the open market and repatriate its foreign currency earnings
- Iranian banks are no longer cut off from the world’s banking sector
- The SWIFT financial messaging system has been re-connected to Iran
- Foreign investors can make capital investments in Iran’s estimated USD 250 billion projects market
- IP rights to protect brands can be registered

The new normal is not an unfettered ability to trade with Iran

There are many residual restrictions still in force and businesses need to be aware of these restrictions before entering Iran. Restrictions connected with ballistic missile and human rights violations remain. There are also a number of designations on Iranian entities. For example, both the EU and the US have maintained the designation of the Islamic Revolutionary Guard Corps (“IRGC”) which has interests in many areas of the Iranian economy. Businesses are unable to deal with these entities under these residual sanctions.

Iran remains designated by the United States as a “state sponsor of terrorism”. The Financial Action Task Force reiterated its concerns in February 2016 about Iran’s failure to address anti-money laundering and combatting financing of terrorism deficiencies. The threat this poses to the integrity of the international financial system was highlighted.

Counterparty risks and KYC remain significant issues

The first key step for any international investor in Iran will be to identify not only whether its counterpart is designated in any way, but whether that counterpart is owned or controlled by persons who are designated. That is likely to be a difficult conversation for a foreign investor (particularly a Western investor) to have with an Iranian counterpart. Without a culture or history of “client due diligence” in Iran, requests for information about shareholders and directors of Iranian companies, not to mention passport copies, are likely to be met by strong resistance.

Banking issue remains a key concern

There was no relief for US clearing banks, or for foreign financial institutions who deal in US dollars. The potential for settlements such as those agreed by BNP Paribas and Commerzbank for allegedly engaging in US dollar transactions with Iran has not diminished. Indeed, it has arguably increased as more business is anticipated to be carried out with Iran. This is a major problem for the aviation industry, which is of course a predominantly dollar-dominated industry: current US sanctions ensure
that no transactions in Iran can be dollar-dominated. All dollar payments need to be cleared through a US clearing bank and therefore have an intrinsic US nexus. Banks that can work in euros are likely therefore to be the initial beneficiaries of the sanctions relief, provided they can structure deals to entirely avoid any dollar payments.

Whilst Iranian banks are connected to the SWIFT financial messaging system, few, if any, tier one financial institutions are listening at the other end. There is a reluctance to support business with Iran in any currency because of the risks associated with accidentally handling US dollars. Whether that reluctance translates into a substantial handbrake on the potential for trade with Iran is the great unknown.

**Workarounds exist**

Foreign subsidiaries of US companies are now permitted to engage in business with Iran. This is provided that it does not conflict with the purposes of the JCPOA and that it is not with the Government of Iran. The US parent company will need to be wary of unwittingly “facilitating” trade with Iran by giving any approvals for its subsidiary to carry out such business. General Licence H permits US parent companies to pass the necessary approvals to divest themselves of the decision making authority for the entry of that business, allowing the foreign subsidiaries to take the ultimate decision to engage in that business themselves. Understanding General Licence H is therefore a means by which conglomerates with links to, or even headquarters in, the US could carry on business with Iran, via their subsidiaries.

**Selling and leasing aircraft to Iran**

We turn now to looking at the impact on transactions involving aircraft.

In implementing the Joint Comprehensive Plan of Action, the US has opened the door for sales and leasing of US aircraft and related parts and services to Iran. It is of course well known that following years of isolation the Iranian commercial aircraft fleet requires substantial upgrading: to take but one example, Iran Air owns three of the last four 747-200Ms in existence, aged up to 40 years old. Iran’s fleet of 273 commercial aircraft has an average age of 23.8 years.

The re-exportation of goods to Iran is regulated by the US Department of Treasury through the US Office of Foreign Assets Control (“OFAC”) and by the US Department of Commerce through the Export Administration Regulations.

The Iran Transactions and Sanctions Regulations address transactions with Iran. These Regulations do not define the term “reexport”. However, the EAR provide a definition, which is illustrative as to how OFAC likely would interpret the term. The EAR broadly define “reexport” to include the shipment of an item subject to the EAR from one foreign country to another foreign country.

On 16 January 2016, OFAC issued a “Statement of Licensing Policy for Activities Related to the Export or Reexport to Iran of Commercial Passenger Aircraft and Related Parts and Services” (the “SLP”). The SLP establishes a favorable licensing policy under which US and non-US persons may request specific authorization from OFAC to engage in transactions for the sale of commercial passenger aircraft and related parts and services to Iran, provided such transactions do not involve any person on OFAC’s Specially Designated Nationals and Blocked Persons List (“SDN List”). It should be noted that the SDN List still includes Mahan Air, Iran’s second largest carrier, “for providing financial, material and technological support to the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF)”.

Under the SLP, US companies and, where there is a nexus to US jurisdiction, non-US companies may apply for licenses to engage in transactions for the (i) export, reexport, sale, lease or transfer to Iran of commercial passenger aircraft for exclusively civil aviation end use, (ii) export, reexport, sale, lease or transfer to Iran of spare parts and components for commercial passenger aircraft; and (iii) provision of associated services, including warranty, maintenance and repair services and safety-related inspections, for all the foregoing, provided that licensed items and services are used exclusively for commercial passenger aviation.

Within only 12 days from the SLP, on 28 January, Airbus announced an order by Iran Air for 118 new aircraft (made up of 21 A320ceo family, 24 A320neo family, 27 A330ceo family, 18 A330-900neos, 16 A350-1000s and 12 A380s) in a deal worth USD 25 billion at list prices, signed in the presence of presidents Hassan Rouhani of Iran and François Hollande of France. The first deliveries are said to be scheduled to take place as early as July 2016, with the entire order to be fulfilled by 2022. Iran’s flagship carrier, Iran Air, has said that it will require as many as 580 new aircraft (including the Airbus order) over the next ten years, with 300 of those required in the next five years. It is not publicly available knowledge how these aircraft will be financed, although
Airbus has said that it might provide some temporary finance. It should also be noted that it is uncertain how committed this transaction is, and that because the aircraft have more than 10% US-origin equipment on them, OFAC approval will be required (we discuss this further below).

Despite the deputy head of Iran’s Civil Aviation Organization being quoted as specifying that 80 new aircraft will be purchased each year, to be split between Airbus and Boeing, it is unclear how soon a deal with Boeing would be agreed. Boeing was given clearance in February by the US government to hold talks with Iranian airlines about potential deals, and has conducted talks over the past few months. Aside from Airbus and Boeing, Iran Air agreed on 1 February to purchase 40 ATR-600s turboprops from ATR, the French-Italian manufacturer. This deal, valued at USD 1.1 billion at list prices, included firm orders for 20 aircraft and 20 options.

It is important to note that OFAC has not issued a general license, which would have permitted the above transactions to take place without any further authorization from OFAC. Rather, OFAC will evaluate and provide case-by-case licenses for the export, reexport, sale, lease or transfer to Iran of commercial passenger aircraft, spare parts and components for such aircraft, and associated services, all for exclusively commercial passenger aviation. Specific licenses issued pursuant to the SLP will include appropriate conditions to ensure that licensed activities do not involve, and no licensed aircraft, goods or services are resold or retransferred to, any person on OFAC’s SDN List.

The SLP addresses US-origin commercial passenger aircraft or commercial passenger aircraft that contain 10% or more US-origin content (i.e., where US-origin goods comprise more than 10% of the total value of the foreign-made goods). The affected aircraft include: wide-body, narrow-body, regional and commuter aircraft used for commercial passenger aviation. The types of aircraft not eligible for licensing under the SLP include cargo aircraft, state aircraft, unmanned aerial vehicles, military aircraft and aircraft used for general aviation or aerial work. The 10% US-origin issue is a major consideration when proposing to deal with Iran: prospective sellers and lessor are well aware that most aircraft have at least 10% US-origin equipment on them, and they will need OFAC approval for any sale/lease (including a wet lease). This rule applies to both second-hand and new aircraft – OFAC has yet to approve the Airbus and ATR deals with Iran referred to above.

US persons are authorized to engage in transactions that are “ordinarily incident to a licensed transaction and necessary to give effect thereto”. According to the FAQs issued by OFAC, such services include transportation, legal, insurance, shipping, delivery and financial payment services provided in connection with the licensed export transaction. An example provided by OFAC of a service ordinarily incident to the licensed export transaction service would be where a US person provides insurance to cover the shipment of a licensed component from a US manufacturer to an Iranian customer. In contrast, a US person’s provision of insurance to cover the component over a period of years after it has been exported to Iran would not be ordinarily incident to the licensed export transaction and would require separate authorization from OFAC.

Finally, as previously mentioned, the SDN List and the Department of Commerce’s Denied Persons List and Entity List should be consulted in connection with compliance due diligence procedures.

Transactions authorized by OFAC pursuant to the SLP generally do not need separate authorization from the Department of Commerce, which regulates exports of US-origin and US-content goods pursuant to the US Export Administration Regulations (“EAR”). The Bureau of Industry and Security (BIS) maintains licensing requirements on exports and reexports to Iran under the EAR. The EAR could be implicated irrespective of the percentage of US origin content in the Aircraft. The EAR provides a list of categories of items that cannot be reexported to Iran without a license. To avoid duplication, exporters or reexporters are not required to seek separate authorization from BIS for an export or reexport subject both to the EAR and to OFAC’s Iranian Transactions Regulations. Therefore, if OFAC authorizes an export or reexport, such authorization is considered authorization for purposes of the EAR as well. Transactions that are not subject to OFAC regulatory authority may require BIS authorization.
Conclusion

It is clear from Iran’s recent orders with Airbus and ATR that its appetite for new aircraft is high and, with the recent lifting of sanctions, there is a clear opportunity for suppliers of both aircraft and aircraft parts and providers of related services to do business with Iran. One risk concerning lessors in particular is snap back – the possibility of Iran violating the conditions of the sanctions lifting regime, leading lessors to be forced to repossess aircraft from a jurisdiction where repossession rights are not yet fully defined. For this reason many market participants are saying that for now they are more comfortable with selling rather than leasing. Many market commentators believe that lessors will lease aircraft into Iran but will begin wet leasing them before dry leasing them.

For regular updates on sanctions Clyde & Co has a dedicated website:

http://www.clydeco.com/blog/sanctions

For further information, please contact Mark Bisset
Montreal Convention: to whom is the carrier liable in the event of delay?

It is clear from Article 19 of the Montreal Convention 1999 that the “carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo”, but it is less clear to whom the carrier is liable in the case of passenger delay – only to the passenger or also to other parties who may suffer damage? In a judgment delivered on 17 February 2016, the Court of Justice of the EU confirmed the latter alternative.

The CJEU held, in response to a request for a preliminary ruling from the Supreme Court of Lithuania, in Case C-429/14 Air Baltic v Special Investigation Service of the Lithuanian Republic (SIS), that the Montreal Convention was to be interpreted as meaning that a carrier which has concluded a contract of carriage with an employer of persons carried as passengers is liable to that employer for damage occasioned by delay in the carriage by air of those passengers.

The main proceedings and the questions referred

The reference arose from a claim brought by the SIS against Air Baltic for reimbursement of an amount equivalent to about Euro 338 which SIS had paid to two of its agents in respect of travel expenses and social security contributions, as required by Lithuanian law, in the light of delay which the two agents suffered in travelling on business for the SIS. The SIS had bought tickets for its two agents to travel from Vilnius to Baku via Riga and Moscow, with the first two sectors on Air Baltic and the last on another carrier. The late arrival of the flight at Moscow meant that they missed the connection to Baku, and Air Baltic put them on another flight, which arrived in Baku the following day.

The first instance court held that Air Baltic was liable to pay the SIS for the amount claimed. Air Baltic appealed to the Supreme Court, arguing that under Article 19 of the Montreal Convention the carrier can be held liable only to the passengers themselves and not to other persons, especially when they are not natural persons and hence not consumers.

The Lithuanian Supreme Court decided to refer to the CJEU the question whether Articles 19, 22 and 29 of the Montreal Convention are to be understood as meaning that an air carrier is liable to third parties, inter alia to the passengers’ employer, a legal person with which a transaction for the international carriage of passengers was entered into, for damage occasioned by a flight’s delay, on account of which the employer incurred expenditure. The Court also referred a second question, but as this was only to apply in the case of a negative answer to the first question, it became irrelevant.

The CJEU’s reasoning

The Court started by stating that, as a result of Article 31 of the Vienna Convention, an international treaty must be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

As to the ordinary meaning of the provision in question, the Court found that, as Article 19 refers to “any damage occasioned by delay…”, and does not specify who may have suffered that damage, although it does not explicitly so provide, it lends itself to being interpreted as applying not only to damage suffered by passengers themselves but also to damage suffered by an employer.

The Court then examined whether such an interpretation is supported by the context and objectives, and concluded that it is, for the following reasons:

– The Convention exists in six authentic language versions (French, English, Arabic, Chinese, Spanish and Russian). Although the French language version in Article 22(1) restricts the concept of damage occasioned by delay to damage “for each passenger”, the English, Spanish and Russian versions differ, in that they refer to damage caused by delay, without restricting the damage to that suffered by passengers
– Article 1(1) of the Convention, which defines its scope of application, provides that it “applies to all international carriage of persons, baggage or cargo performed by aircraft...”. While it does not define the persons who retain the services of an air carrier for such purposes, it is to be interpreted in the light of the third recital in the preamble, which mentions "the importance of ensuring protection of the interests of consumers in international carriage by air", and consumers for such purposes are not necessarily the same as passengers and may include persons who are not passengers. Given this objective, Article 1(1) cannot be construed as excluding consumers of international carriage by air, even though they may not be passengers

– Several provisions of the Convention (eg, Article 1(2), which refers to “the agreement between the parties”, Article 3(5), which provides that the carrier’s non-compliance with the ticketing requirements shall not affect the existence or validity of the contract of carriage, Article 25, which provides that the carrier may stipulate that the contract of carriage shall be subject to higher limits of liability, and Article 33(1), which provides that one of the available jurisdictions is the court where the carrier has a place of business through which the contract has been made) establish a link between the carrier’s liability and a contract of carriage, and it is not relevant for such purposes whether or not the other party to such contract is a passenger

Finally, the Court pointed out that, given the provision in Article 22(1) of a monetary limit for the liability of the carrier for each passenger, the amount of the carrier’s liability to a non-passenger in respect of the delay of passengers cannot exceed “the cumulative amount of compensation that could be awarded to all of the passengers if they were to bring proceedings individually”.

Thus, as the Court points out, “the provisions of the Montreal Convention have been an integral part of the European Union legal order from the date on which it entered into force and... consequently, the Court has jurisdiction to give a preliminary ruling concerning its interpretation”. Indeed, the Court has done so on several previous occasions (e.g., in Walz v Clickair in 2009).

Comment

The Court’s approach to the interpretation of the Convention generally, with its regard for the Vienna Convention principles and the different language versions, is to be welcomed (although one is left wondering how the Arabic and Chinese versions of Article 22(1) deal with the concept of damage), and is consistent with the careful approach adopted in previous cases, such as Walz v Clickair. Moreover, although some may not like it, it seems perfectly proper for the Court to interpret the Convention, for the reasons it gives.

One matter that merits some comment is that in its judgment the Court makes no mention whatsoever of any judgments of courts of other jurisdictions on the issue. It may well be that this is because the parties to the case did not raise any in their arguments, and this in turn may be due to the absence of any authoritative rulings on the issue from any courts. Although there do not appear to be have been many, the issue has arisen, and Shawcross & Beaumont reports a judgment of a New York appeal court in 1997 (in Pakistan Arts and Entertainment Corporation v PIA) holding that an employer of passengers which had bought tickets for the passengers was entitled to bring a claim in respect of delay.

Indeed, in none of the several cases in which it has examined provisions of the Montreal Convention has the Court referred to a single judgment of another court on the issue in question. As mentioned above, this may well be because the parties to the case have not cited any in their arguments. However, as the Court itself pointed out in Walz v Clickair, “in the light of the aim of [the Montreal Convention], which is to unify the rules for international carriage by air, [terms in the Convention] must be given a uniform and autonomous interpretation”, and the courts of many of the main states party to the Convention have frequently stressed the desirability of comity in the interests of attaining uniform interpretation. Hence, it is to be hoped

Why is the CJEU involved?

Some may wonder why the CJEU is involved in interpreting provisions of the Montreal Convention. The reason is that the EU (in addition to each of its member states individually) is a party to the Convention, and furthermore the Convention has been approved by the Council on behalf of the EU (by Council Decision 2001/539) and implemented into EU law (by Parliament and Council Regulation 889/2002, amending Council Regulation 2027/97).
that in future references concerning the Convention the parties to the cases will cite in their arguments to the Court judgments relating to the issue from national courts of standing, and that the Court will give due consideration to such jurisprudence.

Another comment that may be made is that, although no mention of this was made by the Court, in common law jurisdictions at any rate the concept of subrogation is well known, and would permit a party other than the passenger, such as a travel insurer, to bring a claim for delay against an airline.

One questionable element of the Court’s judgment is where it says that the compensation awarded to a non-passenger party cannot exceed the cumulative amount of compensation that could be awarded to all of the passengers concerned if they were to bring proceedings individually. As Article 22 of the Convention clearly provides that “In the case of damage caused by delay... in the carriage of persons, the liability of the carrier for each passenger [emphasis added] is limited to 4,694 Special Drawing Rights”, it seems unequivocal that the limit applies per passenger and is not to be calculated cumulatively with regard to all passengers concerned.

Finally, lest this judgment might cause concern about this, the judgment should not open the way for other parties to bring claims against airlines in respect of passenger death and injury. There is little jurisprudence on the question of who is entitled to bring such claims, and Article 24 does leave the issue open, but, as Shawcross and Beaumont notes, provisions in the Convention, such as Article 22(1) concerning special contracts between the carrier and the passenger, suggest that the ability to bring a claim is limited to the passenger and his/her personal representatives unless a third party is clearly given such right by the substantive law of the forum.

For further information, please contact John Balfour or Tom van der Wijngaart.
Modern slavery

For the aviation sector, modern slavery (covering slavery, servitude, forced and compulsory labour and human trafficking) could be a major supply chain issue, particularly in relation to the providers of ancillary services such as catering, cleaning and ground/baggage handling in countries with more challenging labour environments.

Rules implemented in October 2015 require companies with a turnover of GBP 36 million or more to produce a “slavery and human trafficking statement” at the end of each financial year.

The rules apply to businesses with a year end of 31 March 2016 or later and the statement should be published as soon as possible (and in practice within six months) after the year end. The statement must be published on the organisation’s website with a link “in a prominent place” on its homepage.

Which organisations must comply?

Any company which carries on a business in the UK, or part of a business in the UK, supplies goods or services and has an annual turnover of GBP 36 million or more. A company’s turnover is determined by combining the turnover of its subsidiaries with its own. Any UK subsidiary which meets this threshold must also produce its own statement. These parameters will capture almost all airlines operating within the UK as well as many aviation service providers.

What must the statement contain?

In short the organisation must state:

– The steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business (including its foreign subsidiaries)
– That the organisation has taken no such steps

There are no further compulsory requirements regarding the content of the statement. The only penalty is for failure to produce one at all, in which case the organisation can be compelled by Court order to do so.

What might the statement contain?

The new rules give non-compulsory examples of what a statement may contain information on, for example:

– The organisation’s structure, business and supply chains
– Its policies in relation to slavery and human trafficking
– The parts of its business and supply chains where there is risk of modern slavery taking place and what steps have been taken to assess and manage that risk
– The training on modern slavery available to staff

Additionally, the government has released guidance on the preparation of a statement, suggesting, amongst other things, that an organisation disclose information on:


The guidance is not compulsory and there is no legal penalty for non-compliance. However, it is clear that the Government expects consumers, investors and NGOs to engage and/or apply pressure where they believe the business has not taken sufficient steps. The real risk to airlines is therefore in being named and shamed by pressure groups or media organisations for not producing a sufficiently clear statement or, worse, evidence being uncovered inconsistent with the information in the statement. Parallels can be seen in relation to the reputational damage caused to retailers following the exposure of poor working conditions of garment producers in Indonesia.
Similar rules are in place in California where the NGO “KnowTheChain” has already engaged in public shaming exercises. The London and New York-based Business and Human Rights Resource Centre has also been active in approaching non-compliant organisations under the Californian regime and is very likely to turn its attention to businesses who fail to comply with the spirit, or letter of reporting requirements under the new UK rules.

**What companies should do next**

Organisations subject to the reporting requirement will need to ensure their slavery and human trafficking statement is underpinned by appropriate and proportionate action that is defensible in the face of scrutiny and criticism from inside and outside of the organisation.

Procurement policies should address modern slavery, and organisations should ensure that they have contractual protections in supply contracts; clear labour and whistleblowing policies; and consistent messaging throughout the supply chain. However, for those organisations operating in high risk jurisdictions, enhanced due diligence and the implementation of more stringent preventative measures will undoubtedly be required.

For further information, please contact Nick Ewell-Sutton or Nick Dent
Ryanair v Secretary of State for the Home Department: a more reasonable standard in respect of carrier responsibility for identification of passengers?

On 26 May 2015, two passengers aboard a Ryanair flight from Palma de Mallorca arrived at Edinburgh Airport. The two were travelling on Greek passports which had been inspected at least twice, including once by Spanish officials, before boarding the flight with no apparent problems. In Edinburgh, the two were stopped by UK Border Force officers who identified irregularities with the passengers’ documents. The passports were determined to be forgeries and the two passengers identified as Albanian nationals and detained. As a result of its failure to pick up on the false documents, Ryanair was charged GBP 2,000 for each passenger, totalling GBP 4,000, under long-standing UK regulations.

These charges and the policy behind them have been opposed by carriers since their inception, with little promise of repeal or satisfactory recourse. Carriers now consider the majority of individual charges not worth the cost of challenging, and are mostly resigned to living with this hefty cost of doing business (for instance, Ryanair offered evidence that these charges amount to over GBP 400,000 per year for the airline).

Choosing to challenge these particular charges rather than accept them as business as usual, Ryanair appealed the decision of the Home Office to the Court; and with the comprehensive and at times highly critical ruling in Ryanair v Secretary of State for the Home Department, the Central London County Court may have provided an opportunity to shake up the current state of affairs.

History of regulation

Immigration (Carriers’ Liability) Act 1987 (“ICLA”)

The ICLA first imposed financial sanctions on carriers bringing passengers to the UK who lack the necessary entry documents; the underlying policy being to prevent those wishing to enter the UK illegally from doing so. The ICLA imposed fines of GBP 1,000 for each illegal entrant brought to the United Kingdom. This fine was doubled to GBP 2,000 in August 1991 and two years later was extended to cover passengers without transit visas where these were required.

The ICLA provided a defence whereby a carrier is not liable for the falsity of a document if such falsity is not “reasonably apparent”, but the legislation provided no definition or guidance as to under what circumstances irregularities in a travel document may be “reasonably apparent”.

The ICLA was met with strong opposition from the air transport industry, which argued that it was inappropriate for private carriers to assume the public role of immigration officers. The ICLA was implemented in the face of this opposition – and very strictly implemented from the very start. Charges of several million pounds began to be levied and by the mid-1990s reached an average of GBP 12 million per year.

Following implementation of the ICLA, a major complaint arose that carriers were being fined for passengers who did not possess the proper travel documents, but who had been reviewed and had their documents approved for entry by national border and immigration officials, including UK authorities. Further, these passengers included legitimate business travellers and tourists, rather than those individuals targeted by the legislation.

In response, the Approved Gate Check Status (“AGC”) scheme was introduced in which charges are waived in respect of passengers arriving from approved AGC airports with improper documentation. An appeals process was also adopted in which carriers’ could appeal to the enforcement
authorities for the review of individual cases and guidelines were issued allowing the authorities to use discretion in particular circumstances.

Notwithstanding these moderating measures, the fines and responsibilities placed on carriers continued to prove significant.

Immigration and Asylum Act 1999 – Section 40 (“1999 Act”)

Section 40 of the 1999 Act replaced the ICLA (which has now been repealed). However, the liability of carriers for charges incurred in respect of the transport of persons arriving in the UK without proper documentation remains.

The 1999 Act maintains the GBP 2,000 charge per individual. Likewise, the carrier has a defence if it is able to show that the falsity of the document is not “reasonably apparent”; however, the Home Office has produced greater guidance in determining what standard of falsity amounts to “reasonably apparent”. Additionally, the legislation provides a more robust and clear-cut appeals process.

According to the official guidance, the falsity of a document is “reasonably apparent” if it is of a standard which a trained representative of the carrying company, examining it carefully but briefly and without the use of technological aids, could reasonably be expected to detect. Further, “a ‘trained representative’ would be expected to have a level of basic knowledge of how to identify false documents, but not to be expert nor to have the resources for a highly detailed examination”. As will be seen below, this guidance fails to provide much clarity.

Carriers are also afforded a more structured appeals process that includes judicial review. On receiving a Notification of Charge, carriers have 30 days in which to make representations and provide accompanying evidence explaining why the carrier believes it is not liable to the charge. Representations are usually made in writing; however, large carriers with a large number of charges hold regular meetings with officials to present their representations verbally.

Following review of the representations, officials may choose to waive the charge or issue a Charge Notice advising the carrier that it has 30 days to pay the charge. If the carrier continues to believe that a charge should not have been imposed, it may make a written objection to the Home Secretary or appeal directly to the Court.

A written objection must provide reasons for the objection and be delivered within 28 days of the Charge Notice. An appeal must be filed within 28 days of the Charge Notice or, if the carrier has made a written objection, within 28 days of service of the Home Office decision responding to the objection.

Ryanair v Secretary of State for the Home Department

The case concerns two Albanian nationals (a man and woman) traveling on forged Greek passports. It is unclear how the two made it to Spain, but it was not contested that the falsified passports were reviewed by the Spanish police at border control in Palma de Mallorca before reaching Ryanair’s ground control staff and that the Spanish police did not identify them as suspicious.

UK immigration officials determined the passports were forged based upon two specific issues: (i) there was no green to blue colour shift in the ink spelling the word ‘HELLAS’ when holding the passports in light and slightly tipping them; and (ii) the Greek flag concealed in the top left-hand corner of the biodata page was slightly cut off. Ryanair was charged under s.40 of the 1999 Act for both individuals.

Ryanair made a representation to UK Border Force officials that the falsities of the documents in question were not “reasonably apparent”. Upon brief review, the officials disagreed. Ryanair chose to appeal this decision to the Central London County Court. On 21 January 2016, the Court issued its opinion in favour of Ryanair and requiring the Home Office to adopt a clearer, reasonable and objective standard.

In determining the applicable standard to which a carrier should be held, the Court turned to the guidance produced by the Home Office discussed above, and the direction that a falsity is reasonably apparent “if it is of a standard which a trained representative of the carrying company, examining it carefully but briefly and without the use of technological aids, could reasonably be expected to detect”. The Court found this guidance to be confusing and difficult to interpret; and that this lack of clarity results in carriers not being able to fully understand their obligations.

The Court also determined that the official guidance is frequently changed without adequate notification or emphasis on its importance. The result, as the Court stated, is an “inconsistent application of inconsistent standards” and a more reasonable objective standard must be adopted.
The Court’s criticism of the manner in which the charges are currently levied, and the seemingly out-of-hand way they were handled in the matter at issue, went so far as to explicitly instruct the Home Office that it must not regard the charges as a “revenue raising exercise”.

The Court sought to establish what elements may go toward a proper standard. First, “it is clear that the standard expected of a trained representative...must be lower” than the professionals at the UK Border Force. Second, where national immigration authorities and trained carrier representatives with basic knowledge both fail to identify any irregularities, this must be evidence that goes toward determining whether or not such irregularities can be regarded as being reasonably apparent.

The Court stated that there should be no general expectation on the part of the Home Office that trained carrier representatives with basic knowledge be expected to detect irregularities that go undetected by national border control authorities. That said, irregularities that go undetected by national authorities would not automatically exculpate a carrier from identifying reasonably apparent problems in a document. However, if both fail to spot the issue, it seemed to the Court that, without further evidence of negligence or corruption or similar intervening events, this amounts to evidence against any suggestions that such an irregularity was reasonably apparent. The Court stated “it is not the job of the carriers to permit or refuse entry or exit; that duty under UK law lies with the Border Force”, whereas the carrier’s duty is to look for reasonably apparent irregularities and alert the relevant authorities of the same.

The Court concluded that the burden is on the Home Office to establish on a balance of the probabilities that the issues complained of were indeed reasonably apparent based upon a reasonable and objective standard and that each event must be considered on its own circumstances. In this particular instance there was “powerful evidence” against finding the irregularities were reasonably apparent.

Future Issues and potential future regulation
It is difficult to imagine that the charges against carriers in this area will be radically revisited as the result of a single, non-precedential County Court ruling. And while it is unclear whether the Home Office will appeal the ruling, it seems much more likely that the UK authorities will continue to levy the charges when falsities are reasonably apparent depending upon the circumstances - and carriers will continue to pay the charges.

In fact, rather than scaling back current carrier charges, new, additional carrier charges are being proposed. The Immigration Bill 2015/2016 presently being considered by Parliament includes provisions allowing for new civil penalties for carriers who fail to properly direct passengers to immigration control at the UK border.

It will be interesting to see if further challenges are made by carriers to future changes; or if the decision in Ryanair is to be regarded as a one-off happy result while the unhappy status quo continues.

For further information, please contact Dylan Jones
Alternative dispute resolution for aviation consumer claims – UK Update

On 18 June 2013 the general framework for alternative dispute resolution (“ADR”) in the EU was boosted through the enactment of Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (the “ADR Directive”). The ADR Directive entered into force in July 2013, with EU member states having been required to implement its terms by 9 July 2015.

The EU ADR/ODR framework

The ADR Directive aims to facilitate an efficient and low-cost form of dispute resolution for domestic and cross-border complaints by consumers resident in the EU against traders established in the EU. Importantly, the ADR Directive does not make the use of ADR mandatory for such disputes. Rather, it requires the government of each member state to ensure that certified ADR bodies are available to handle disputes where a consumer and trader wish to use them. In that regard the ADR Directive sets out specific operational requirements which certified ADR bodies must meet. Under such criteria ADR must be provided free of charge or at a nominal cost to consumers, disputes must be resolved within 90 days and those overseeing disputes must be independent, impartial and have the necessary expertise.

The ADR Directive is complemented by Regulation (EU) No. 524/2013 on Online Dispute Resolution for Consumer Disputes (the “ODR Regulation”). The ODR Regulation provides for an online platform through which domestic and cross border consumer complaints can be referred to national ADR providers appointed under the ADR Directive. The ODR Regulation applies where a business offers goods or services, or a consumer purchases goods or services, via their website or other electronic means. The ODR Regulation entered into force in July 2013 and automatically took effect as of 9 January 2016, although the online platform (accessible at http://ec.europa.eu/odr) was not launched until 15 February 2016.

The UK Regulations

The ADR Directive and aspects of the EU ODR Regulation requiring transposition into national law were implemented in the UK through the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended) (the “UK Regulations”).

In terms of aviation consumer claims, the UK Civil Aviation Authority (the “CAA”) has been appointed as the competent authority for the vetting and monitoring of ADR providers and overseeing the implementation and enforcement of the UK Regulations. As at 6 June 2016 two ADR providers had been approved by the CAA, namely CEDR Services Limited (“CEDR”) and Consumer Dispute Resolution Ltd (“The Retail Ombudsman”). A third, The Ombudsman Service Ltd, being the first to gain CAA approval, subsequently withdrew its services insofar as the handling of aviation claims is concerned. It is understood that a further three prospective ADR providers are currently being audited by the CAA.

The schemes run by CEDR and The Retail Ombudsman both cover the following classes of claims:-

- Denied boarding, delay or cancellation
- Destruction, damage, loss or delayed transportation of baggage
- Destruction, damage, or loss of items worn or carried by the passenger
- Any more general disputes arising where the consumer alleges that the business is not trading fairly
- Problems faced by disabled passengers or passengers with reduced mobility when using air transport services
Importantly, and in contrast with the position understood to have been adopted in certain other EU member states, the UK Regulations impose no obligation on air carriers to submit claims to ADR (unless they are otherwise required to do so under the rules of a trade association). Nevertheless, a number of carriers have now chosen to submit consumer claims to ADR. As at 6 June 2016 British Airways and Thomson were listed as having subscribed to CEDR’s services, with Turkish Airlines, Egyptair and Ryanair being part of the The Retail Ombudsman’s scheme.

Part 4 of the UK Regulations sets out a number of ‘trader information requirements’, some of which are specific to those traders having elected to submit claims to ADR; these include the requirement to reference the name and website of the relevant ADR provider in their terms and conditions. However, a number of the ‘trader information requirements’ apply regardless of whether a trader agrees to submit claims to ADR. In summary, where a trader (including an air carrier) has exhausted its internal complaint handling procedure pursuant to Regulation 19 of the UK Regulations it must “on a durable medium” (i.e. by letter or email):

- Inform the consumer that it cannot settle the complaint
- Provide the name and website address of an ADR entity or EU listed body competent to deal with the complaint
- Confirm whether it is prepared to submit to an ADR procedure

Separately, in line with obligations flowing from the ODR Directive, Regulation 19A(3) of the UK Regulations requires online traders (which clearly includes air carriers) to provide:

- A link to the ODR platform
- State the online trader’s email address

The CAA has made it clear that the provision of an online enquiry form is insufficient to meet the latter requirement.

CAA compliance project

Regulation 19 ‘trader information requirements’ was originally scheduled to come into force on 9 July 2015, but that deadline was pushed back until 1 October 2015, seemingly due to a degree of inertia in suitable ADR providers being identified and approved. Whilst many carriers have now complied with these requirements, it appears that a number have yet to make relevant amendments to their website and claims handling procedures. As a result, on 10 March 2016 the CAA notified carriers that it was commencing a compliance project with regard to the ‘trader information requirements’.

As part of that project, the CAA required carriers to confirm whether they had contracted with an ADR provider to handle consumer complaints, provide examples of ‘deadlock letters’ sent to passengers in line with Regulation 19 of the UK Regulations and screenshot webpages where details of the ODR platform are provided. As the CAA has reminded carriers in recent correspondence, it has powers under the Enterprise Act 2002 and the Consumer Rights Act 2015 to take enforcement action over infringements of the ADR Regulations and Regulation (EC) 261/2004 (“Regulation 261”). However, to date, such powers do not appear to have been invoked in respect of the UK Regulations.

ADR and the CAA’s PACT service

The CAA’s Passenger Advice and Complaints Team (“PACT”) handles various types of consumer complaints, although in recent years some 80% have related to claims for fixed compensation arising out of denied boarding, cancellation and delay under Regulation 261. The high volume of such complaints and the resulting pressure placed on CAA resources appear to have been a source of significant frustration.

With the above issues in mind and in view of prospective changes that would be brought about through the implementation of the UK Regulations, the CAA conducted an extensive industry consultation which culminated in the April 2015 publication of CAP1286, setting out the CAA’s proposed policy on consumer complaints handling and ADR. As part of that policy the CAA outlined its intention to incentivise voluntary participation of carriers in private ADR arrangements.

As regards PACT, CAP1286 outlined the CAA’s view that the service could be wound down once 50% of passengers departing from or arriving at UK airports are served by carriers who agree to submit consumer complaints for handling by a competent ADR provider. Thereafter, the intention was for the CAA’s involvement in consumer complaints handling to effectively be limited to meeting its obligations as a competent authority under Regulation 261 and Regulation (EC) 1107/2006 (insofar as disability access matters are concerned).
However, as confirmed in the CAA’s 2016/17 statutory charges consultation document (CAP1373) and subsequent correspondence with carriers in March 2016, the CAA’s position on this matter has now changed. The CAA’s revised position (seemingly following further consultation with, inter alia, the European Commission) is that PACT will remain available for use by passengers whose carriers have not voluntarily submitted to ADR. However, where a passenger seeks to make a complaint to PACT, about a carrier who uses ADR, the passenger will be directed to the relevant ADR provider and PACT will not further deal with the matter.

The key change arising out of the above system lies in the costs recovery mechanism adopted by the CAA. PACT has historically been funded through various direct and indirect CAA charges. This led to a situation where a particular carrier’s financial contribution to PACT was not necessarily commensurate with the number of complaints against that carrier handled by PACT. The CAA therefore argued that carriers with lower claims/complaints records could effectively end up subsidising those carriers with a comparably higher volume of claims. As of 1 June 2016, a ‘polluter pays’ system has been implemented, whereby carriers will pay a fee of GBP 150 per complaint accepted for consideration by PACT. The CAA considers that this better balances fairness for carriers with its own statutory obligation to ensure its services remain costs neutral in line with the Civil Aviation Act 1982.

Comment

Whilst there has been some marked inertia in the establishment and industry acceptance of an UK ADR framework for aviation consumer complaints, it is encouraging that a number of carriers have now agreed to submit consumer complaints to ADR through a CAA-approved provider. However, the modest number of carriers having done so is perhaps indicative of some ongoing industry concern regarding the suitability of ADR for the resolution of aviation consumer complaints and claims. Such concerns have included the following issues:

- The decisions of ADR providers are binding on carriers but not on passengers, with the result that passengers can further pursue their complaint (through the courts or otherwise) where they are dissatisfied with the ADR decision. Carriers have questioned whether that is acceptable. However, the CAA’s position (based on the ADR experience in other sectors) is that in practice consumers are more likely than not to respect the decision of the ADR provider.

- The CAA has capped passenger ADR fees at GBP 25 per claim and remains strongly in favour of free access to ADR. There remains legitimate concern that fees at this level do not provide a sufficient disincentive to spurious or poorly prepared complaints, which are costly for carriers to administer. In that regard it is noted that in many cases the County Court issue fees for an equivalent claim through the Small Claims Track would be more than double the ADR fee cap.

- The degree to which the ADR providers and their staff will have the requisite knowledge and experience of aviation matters, including important legal issues such as the exclusivity of the Montreal Convention 1999 (and associated treaties), has been questioned. Schedule 3 to the UK Regulations requires that “an ADR official possesses a general understanding of the law and the necessary knowledge and skills relating to the out-of-court or judicial resolution of consumer disputes...” Whether a “general understanding of the law” is sufficient is questionable to say the least. The CAA has assisted ADR providers through the publication on its website of list of aviation-specific consumer legislation (both UK and EU) which it would like ADR officials to be familiar with. Whether that expectation is met in practice remains to be seen.

In some respects the ADR Directive and UK Regulations also appear to hinder rather than assist consumer rights. For instance, in respect of consumer complaints that have reached “deadlock”, it is strongly arguable that forcing carriers not using ADR to nevertheless provide passengers with details of an ADR provider and the ODR platform is entirely counter-productive. These measures would no doubt lead to confusion on the part of passengers, who would be presented with details of an ADR provider and ODR platform that can in no way assist them in resolving their outstanding complaint or claim.
Changes to PACT and associated adjustments to its funding structure have also attracted a degree of industry criticism. For instance, the CAA has recently confirmed that for those carriers not subscribing to ADR, the fee of GBP 150 would be payable for each complaint handled by PACT, even where PACT sides with the carrier’s position in respect of a particular complaint or claim. The CAA’s justification in that regard is that the fee covers the cost of investigating a case and such costs are incurred regardless of the outcome. Whilst the CAA’s position is understandable, this is of course frustrating for carriers, particularly where they may have already made it abundantly clear to the passenger why they will make no recovery, and in circumstances where PACT’s recommendation could be duly ignored and proceedings could subsequently be issued. The CAA has however indicated that in the longer term it may consider the viability of a PACT charge which varies depending on whether the passenger’s complaint is upheld.

Whilst the above may appear to paint a rather pessimistic picture of the ADR landscape for aviation claims, there are clearly significant advantages for passengers and carriers alike if ADR proves to be a viable means for resolving complaints, not least in terms of reaching expedited resolution of small claims and limiting recourse to often expensive and sometimes unnecessary County Court litigation. Many in the industry are currently hedging their bets, and will no doubt be watching the experience of those first carriers to sign up to ADR with great interest.

For further information please contact Tom van der Wijngaart or Sarah Pearson.
Recovering damages when multiple accumulative factors cause injury

The Privy Council has reaffirmed the doctrine of material contribution that was, to some extent, already law in their recent decision in Williams v The Bermuda Hospitals Board. The Council confirmed that where an injury is caused by two or more factors operating cumulatively, one or more of which was a breach of duty, it is immaterial for the purposes of recovering damages for negligence whether the cumulative factors operated concurrently or successively.

The underlying case arose out of a claim for medical negligence. The claimant, Mr Williams, attended hospital suffering from acute appendicitis. While he had an appendectomy later that day, there were serious complications involving sepsis to his heart and lungs which had developed incrementally over time while he was awaiting treatment in hospital. The original judge found as fact that there had been a culpable delay of at least two hours and 20 minutes prior to the appendectomy, but that the claimant had not proved that the delay was the cause of the complications to his condition. This decision was reversed by the Court of Appeal and that reversal was then endorsed by the Privy Council.

The primary authority for this decision was the House of Lords case Bonnington Castings v Wardlaw. In Bonnington a claimant contracted pneumoconiosis through inhalation of dust containing minute portides of silica during the course of his employment. The dust inhaled by the claimant came from two sources, one of which was the pneumatic hammers in the factory, which involved no negligence on the part of his employers. The second source was the swing grinders in operation at the factory, and the emission of dust was a result of the negligence of the claimant’s employer. The House of Lords concluded that, because the claimant’s condition was caused by the total dust ingested, the important question was whether the dust originating as a result of the employer’s negligence materially contributed to the claimant’s condition.

Given that the conclusion (as a finding of fact) was that the dust from the swing grinders had materially contributed to the claimant’s condition, the employer was held liable for damages arising from the claimant’s entire condition.

The parallels between Bonnington and Williams were obvious. However, it was possible to distinguish Williams from Bonnington because in Bonnington the two causes had occurred concurrently not successively. While the defendant argued that this should be a reason for distinguishing Bonnington, the Privy Council did not agree. They held that it was immaterial whether the factors operating cumulatively were simultaneous or consecutive, even though the two factors in Williams (the appendicitis and the subsequent delay) had occurred consecutively.

It should be noted that while the Bonnington decision was reaffirmed, the Privy Council did not consider the evidential considerations that were important in such cases, although it was held that the sequence of events might be relevant in considering as a matter of fact whether the later event had made a material contribution to the outcome or whether the earlier event had been overtaken by subsequent events. Notwithstanding this position, as a general rule, successive events were capable of making material contributions.

This decision will of course have ramifications for any employer, including those within the aviation sector (for example manufacturing companies or maintenance providers), whose negligent act may have contributed to an employee’s injury. Such employers should be aware that if their employees are capable of demonstrating that a factor, caused by a wrongful act, caused injury and contributed to an overall condition, it does not matter that that condition may have been caused cumulatively by another factor (that may or may not in itself be wrongful). Accordingly, a claimant will succeed in proving causation where he or she can prove, on the balance of probabilities, that a defendant’s negligence has materially contributed to an invisible injury.

For further information, please contact Adam Tozzi.
A US Second Circuit decision questions whether US states can subject foreign corporations to the general jurisdiction of their courts as a condition of registering to do business in the state

When a foreign corporation wishes to “do business” in a US state, it is required to register in that state (by obtaining a “certificate of authority”) and appoint an in-state agent to accept service of process. The registration statutes of some US states expressly require or, as in New York, have been interpreted by the courts to require, that the foreign corporation, as a condition of registration, consent to the general personal jurisdiction of the state’s courts. Being subject to the general jurisdiction of a state’s courts is no small matter because it means that, instead of being subject to suit in the forum state (ie, the state where the action is brought) only for claims arising from the corporation’s forum-related conduct (specific jurisdiction), the corporation can be sued for claims that do not arise from its forum-related conduct (general jurisdiction). General jurisdiction has also been referred to as “all purpose” jurisdiction to convey that it means that one subject to it can be sued in the forum for all purposes, not just transactions or conduct related to the particular state.

Brown v. Lockheed Martin Corporation
In February of this year, a three-judge panel of the US Court of Appeals for the Second Circuit in New York issued a decision in Brown v. Lockheed Martin, 2016 WL 641392 (2d Cir. Feb. 18, 2016), in which the court questioned (but did not decide) the validity of registration statutes that condition registration upon the foreign corporation’s consent to general jurisdiction in light of the US Supreme Court’s oft-discussed 2014 decision in Daimler v. AG Bauman. In Daimler, the Supreme Court clarified that a corporate defendant is subject to general jurisdiction only where the corporation is “fairly regarded at home,” which means (1) its place of incorporation; (2) its principal place of business; or (3) in the extraordinary case, where the corporation’s contacts with the forum state are so “continuous and systematic” that it is essentially “at home” there. It is worth noting that a foreign corporation’s contacts with the forum state rarely would be so “continuous and systematic” that it could be considered “at home” there. The lone example of such a scenario cited by the Daimler court involved a Philippine corporation that had relocated its headquarters during wartime such that the forum became the corporation’s principal, albeit temporary, place of business.

Cindy S. Brown, acting as the personal representative of her late father’s estate, brought the action against the global aerospace company Lockheed Martin Corporation (“Lockheed”) and others in Connecticut federal court to recover for asbestos-exposure injuries that her father, an Air Force airplane mechanic, suffered at locations outside of Connecticut. Lockheed, which is incorporated and has its principal place of business in Maryland, at relevant times leased offices and employed 30 to 70 workers in Connecticut. Lockheed also was registered to do business and had appointed an agent for service of process in Connecticut pursuant to that state’s business registration statute.
Lockheed successfully moved to dismiss on the ground that it was not subject to personal jurisdiction in Connecticut. Specific jurisdiction was not an issue in the case because the incidents of decedent’s asbestos exposure occurred outside of Connecticut and, therefore, the plaintiff’s claims could not have arisen out of Lockheed’s contacts (if any) with Connecticut.

On the plaintiff’s appeal to the Second Circuit, the court concluded that Lockheed’s business contacts with Connecticut were insufficient, in the context of Lockheed’s overall activity, for the company to be considered “at home” in Connecticut.

The court also considered whether Lockheed had consented to general jurisdiction in Connecticut; registering to do business and appointing an agent for service of process in the state. Lockheed argued that it could have consented only to specific jurisdiction – not general jurisdiction – under the registration statute, which did not expressly condition registration upon the corporation’s consent to general jurisdiction. The court, differentiating “Connecticut’s registration statute from others that have been definitively construed to convey a foreign corporation’s consent to general jurisdiction”, concluded that the Connecticut registration statute did not require Lockheed to consent to general jurisdiction as a condition of registration.

Importantly, however, the court observed that, even if the Connecticut registration statute had required the foreign corporation to consent to general jurisdiction as a condition of registration, it is questionable whether such consent could validly confer general jurisdiction, in light of *Daimler*, if the corporation is not “at home” in Connecticut. The court noted that, although a defendant may ordinarily consent to a court’s jurisdiction (for example, in a contract), it pointedly left open the question of “whether consent to general jurisdiction via a registration statute would be similarly effective notwithstanding Daimler’s strong admonition against the expansive exercise of general jurisdiction.”

**Conclusion**

The US Supreme Court’s *Daimler* decision will continue to alter the jurisdictional landscape in US courts. The *Brown* decision is an indication that there may be a compelling argument that a state, such as New York, cannot compel a foreign corporation to consent to general jurisdiction as a condition of registration without violating the Due Process clause of the US Constitution.

For further information, please contact Nicholas Magali in our New York office.
New book on drones

Kluwer has just published a book, The Law of Unmanned Aircraft Systems, which describes the law relating to drones in a number of countries, edited by Benjamyn Scott. Two members of the firm have contributed to it – Nick Medniuk of the London office and Thomas Lawrenson of the Johannesburg office.

Appointments

It has recently been announced that Jeffrey Goh is to become the Chief Executive of Star Alliance with effect from the beginning of 2017. Currently Chief Operating Officer and General Counsel of Star Alliance, Jeffrey had previously been in the legal department of IATA, and before that, some 15 years ago, a solicitor at Beaumont and Son, prior to its merger with Clyde and Co. We congratulate Jeffrey on this prestigious appointment and wish him every success with it.
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