3 HARE COURT

Travel & Aviation Bulletin

Summer 2024

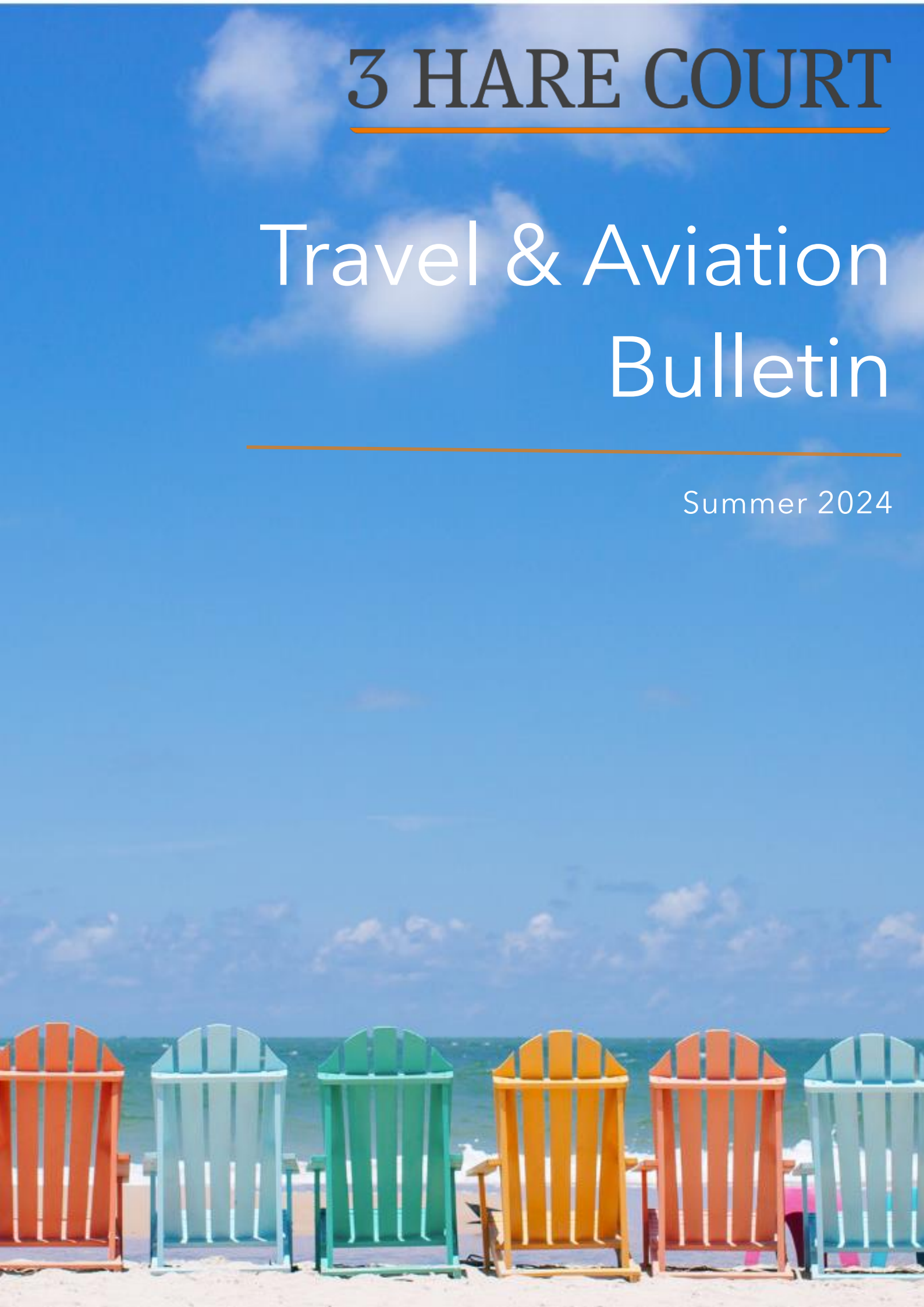


Table of Contents

Introduction

Welcome to the latest issue of our Travel & Aviation Bulletin.

Whether you're mourning the end of your summary holidays, or longing for the start of them, we hope this latest issue will provide some welcomed insights relevant to travel and aviation practitioners alike.

From the termination of package holidays, to the jurisdictional challenge in the proceedings concerning aircraft detained in Russia, to relief from sanctions and expert evidence, to the contributory negligence and the limits on damages under Montreal Convention, we hope there is something in here for everyone. Happy summer reading!

Lastly, many of you may have seen the recent judgment for *Nicholls & Anor v Mapfre Espana Compania De Seguros Y Reaseguros SA [2024] EWCA Civ 718*. Following this bulletin, we will circulate a special edition of the Travel & Aviation Bulletin dedicated to this verdict.

In this Summer edition:

- **Richard Campbell** examines the CJEU ruling in Tez Tours (C-299/22) which sought to answer that question.
- **Adam Riley and Tabitha Hutchison** consider the points concerning jurisdiction that practitioners can take-away from this decision in *Re Russian Aircraft Operator Claims [2024] EWHC 734*.
- **Daniel Goldblatt** and **Katharine Bailey** explore the practical implications of the Court of Appeal's decision in *Yesss (A) Electrical Ltd v Warren [2024] EWCA Civ 14; [2024] 1 WLUK 217*, with a particular focus on late applications for expert evidence which may jeopardise a trial date.
- **Christopher Loxton** analyses the recent judgment of HHJ Saunders *in Wuchner v British Airways (July 2024).*

Christopher Loxton

Editor

Tez Tours (C-299/22) – terminating contracts in "unavoidable and extraordinary circumstances"

When COVID-19 struck, the world was forced indoors and the impact on the travel industry was manifest as planes were grounded and airports closed. Would-be holidaymakers came to appreciate that the only escape was to the lavish and gossipy world of Netflix's Bridgerton. With many holidaymakers wanting to terminate their package holidays, Europeans turned to their rights under the Package Travel Directive (Directive (EU) 2015/2302).

Article 12[1] in summary provides:

- A traveller may terminate the package holiday contract at any time before the start of the package.
- Where the traveller terminates the package travel contract under the article, they may be required to pay an appropriate and justifiable termination fee to the organiser.
- The package travel contract may specify reasonable standard termination fees based on:

1. The time of the termination of the contract before the start of the package; and
2. The expected cost savings and income from alternative deployment of the travel services.

- In the absence of standardised termination fees, the amount of the termination fee must correspond to the price of the package minus the cost savings and the income from alternative deployment of travel services. The organiser must provide a justification for the amount of the termination fee if the traveller so requests.

However, the Article goes onto state that, notwithstanding the above provisions, in the event of "unavoidable and extraordinary circumstances" occurring at the place of the

destination or its immediate vicinity and which significantly affect the performance of the package or the carriage of the passengers to the destination, the traveller may terminate the package travel contract before the start of the package without paying any termination fee (and is entitled to a full refund of any payments made for the package but is not entitled to additional compensation.)

The Article also allows the organiser to terminate the package travel contract when they are prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package (and similarly on termination the organiser shall provide the traveller with a full refund of any payments made for the package, but is not liable for additional compensation).

How does COVID-19 and the lockdown landscape fit into these rights for both holiday makers and organisers alike?

The Court of Justice of the European Union (CJEU) sought to answer this question in a judgment issued on 29 February 2024 in *Tez Tours* (C-299/22), following a request for a preliminary ruling from the Supreme Court of Lithuania concerning the interpretation of Article 12(2) of the Directive. As stated in the CJEU's judgment, the request was made *'in proceedings between M.D and 'Tez Tour' UAB concerning the right invoked by M.D to terminate, without charge, the package travel contract he had entered into with the latter on the grounds of the health risk associated with the spread of COVID-19'*. [2]

M.D had entered into a package travel contract on 10 February 2020 with Tez Tours for a family holiday to the United Arab Emirates from 1 to 8 March 2020, with return flights between Vilnius, Lithuania and Dubai, UAE and a seven-night stay in a hotel.

However, on 27 February 2024 M.D told Tez Tours that he wanted to terminate the package travel contract and then use the sums that he had paid on a trip on a future date *'when the health risk associated with the spread of COVID-19 would have decreased.'*

M.D submitted he was entitled to full reimbursement as his termination of the holiday contract was a result of the *'occurrence, at the place of destination of the package tour or in the immediate vicinity thereof, of unavoidable and extraordinary circumstances which were likely to make it impossible to carry out the tour safely or to transport the passengers to the destination, in particular without exposing them to inconvenience or health risks'*. He felt this was evidenced by information about the COVID-19 spread (that was being published in the press and by the relevant authorities) and also the increased number of global infections, flight restrictions and 'social distancing' recommendations.

Tez Tours disagreed and submitted that the spread of COVID-19 could not, on the termination of the package contract, be regarded as a circumstance making it impossible to perform the package concerned.

On appeal from M.D, the Lithuanian Supreme Court relied on the CJEU for guidance on the interplay between the pandemic and the conditions in which the existence of "unavoidable and extraordinary circumstances", within the meaning of Article 12(2), could be relied on by a traveller.

The CJEU was asked to answer the following questions:

1. Is it necessary for there to be an official warning from the appropriate authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the destination (and potentially departure) country as belonging to a risk area?
2. When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity (i) should account be only taken of objective circumstances (i.e. where there performance becomes both physically and legally impossible) or does it cover cases where performance is not impossible but becomes complicated and/or economically inefficient (in terms of traveller safety) and (ii) are subjective factors relevant (such as the traveller belonging to a higher risk group)?
3. Does the fact that the circumstances on which the traveller relies had already arisen or were at least already presupposed/likely when the trip was booked affect in some way the right to terminate the contract without paying a termination fee?
4. When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity at the time of termination of a package travel contract and whether they significantly affect the performance of the package, does the concept of "the place of destination or its immediate vicinity" cover only the [country of the place of destination] or, taking into account the nature of the unavoidable and extraordinary circumstance, that is to say, a contagious viral infection, also the [country of the place of departure], as well as points related to going on and returning from the trip (transfer points, certain means of transport, and so forth)?

Taking each question in turn the CJEU reached the following conclusions:

Question one

The CJEU took a step back and noted firstly that the definition of "unavoidable and extraordinary circumstances" could be found at point 12 of Article 3 (namely *'a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken'*). Furthermore, Recital 31 clarified the scope of the concept (namely '*it may cover for example warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods…which make it impossible to travel safely to the destination as agreed in the package travel contract*').

The Court considered that it could not be inferred from the relevant provisions and recitals that *'in order to be able to establish the occurrence of 'unavoidable and extraordinary circumstances', within the meaning of that provision, it is necessary for the competent authorities to have issued an official recommendation advising travellers against travelling to the area concerned or an official decision classifying that area as a "risk area"'*. [32]

Further, the CJEU reminded itself that the Directive aims to harmonise the rights and obligations arising from package travel contracts, and that the conditions for official traveller recommendations to be given from competent local authorities amongst member states are not uniform and therefore to find that Article 12(2) would be subject to adoption of those recommendations *'is likely to compromise the objective harmonisation pursued by the directive*'. [35]

The Court acknowledged that such recommendations may have considerable

evidential value (as to circumstances and consequences for performance of the package), and how the evidence is admitted and evaluated is down to the national court, but '*such recommendations and decisions cannot, however, be given evidential value to the extent that their non-existence would be sufficient to prevent the occurrence of those circumstances from being established*'. [37]

Question two

The CJEU reminded itself of the wording of Article 12(2) – which includes *'significantly affect the performance of the package or carriage…'* – and concluded that the termination right was not subject to the condition that circumstances have arisen which make performance/transfer '*objectively impossible*.' On the contrary, '*in accordance with their usual meaning in everyday language, those terms clearly have a broader scope, covering not only the consequences that exclude the very possibility of executing the package, but also those that significantly affect the conditions under which the package is performed.'* [48] The Court felt this was reflected in the aforementioned Recital 31 where, say, risks of terrorism may fall within the scope of Article 12(2), and whilst they might objectively pose a risk to traveller safety, it would not make it "objectively impossible" to perform the package.

As such, the Court considered that a crisis such as the pandemic could be regarded as having '*significant effects*' on the performance of a package, whilst not necessarily making performance objectively impossible.

Turning to the issue of the relevance of personal factors relating to the individual traveller (e.g. travelling with young children), the Court emphasised that *'those consequences must be established objectively, in the same way as the circumstances which caused them…[and] there is nothing in the wording of Art 12(2) to suggest that personal factors…should be disregarded in the context of that assessment, in so far as they are objective in nature*'. [54/55]

When considering whether Article 12(2) was satisfied at the date of termination, it is not sufficient for the holidaymaker to '*rely on purely subjective assessments or fears'* [69], nor should the holidaymaker '*be expected to rely solely on the organiser's assessment of the feasibility of the performance of the trip in question*.' [70] As such, *'in order to assess the likelihood and significance of the effects, within the meaning of that provision, it is necessary to take the perspective of an average traveller who is reasonably well-informed and reasonably observant and circumspect'*. [71]

In summary, '*Article 12(2) of Directive 2015/2302 must be interpreted as meaning that the concept of 'unavoidable and extraordinary circumstances … significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination' of the trip in question, covers not only circumstances which make it impossible to perform that package but also circumstances which, without preventing such performance, mean that the package cannot be performed without exposing the travellers concerned to risks to their health and safety, taking into account, where appropriate, personal factors relating to the individual situation of those travellers. The assessment of such effects must be made from the perspective of an average traveller who is reasonably well-informed and reasonably observant and circumspect on the date of termination of the package travel contract in question'*. [72]

Questions three

The CJEU conceded that Article12(2) (and point 12 of Article 3), in relation to '*unavoidable and extraordinary circumstances'*, did not state the situation had to be unforeseeable or non-existent at the time of the package travel contract was entered into, however, the terms seemed to point to situations that at that time did not exist and were unforeseeable.

The Court held that *'a situation which, on the date of conclusion of the package travel contract, was already known to the traveller concerned or was foreseeable for him or her'* could not be relied on by that traveller as "unavoidable and extraordinary circumstances", however, this was "***without prejudice***" to *'the possibility, given the evolving nature of the situation, that that situation may have undergone significant changes after the conclusion of the contract such as to give rise to a new situation, capable of meeting as such the definition of the concept of 'unavoidable and extraordinary circumstances', within the meaning of that provision*'. [83]

Question four

Before embarking on an answer to the question, the Court acknowledged that it was accepted that at the time of M.D's termination COVID-19 had reached the UAE (the place of destination of the trip). Bearing in mind the answers to questions 1 and 3 above (that the COVID-19 spread constituted an unavoidable and extraordinary circumstance for Art 12(2)) it was common ground it occurred 'at the place of destination' and that if the courts accept this, then the spread of a serious disease on a global scale must also fall under the scope of the concept of 'unavoidable and extraordinary circumstances' as *'the effects of the latter will also be felt at the relevant travel destination'*. [86]

The Court therefore considered the fourth question to be as follows*: 'the referring court seeks to ascertain, in essence, whether Article 12(2) of Directive 2015/2302 must be interpreted as meaning that, in order to determine whether unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity 'significantly [affect] the performance of the package, or … significantly affect the carriage of passengers to the destination', effects occurring at the place of departure and at the various places connected with the start and return of the trip in question may also be taken into account'*. [89]

The Court was careful to point out that although the effects to be considered under Article 12(2) will likely to be seen at the destination or its immediate surroundings, *'the fact remains that that provision contains no geographical limitation as regards the place where those effects, caused by such circumstances, must occur in order for them to be capable of being taken into consideration'*. [91]

This consideration also had to be read in conjunction with the reality that often package travel contracts included the carriage of passengers and therefore the relevant package travel contract had to, in accordance with Article 5(1)(a)(ii) of the Directive, specify the means, characteristics and categories of transport, the points, dates and times of departure and return, and the duration and places of intermediate stops and transport connections.

The CJEU concluded that it logically followed *'that, where the effects caused by unavoidable and extraordinary circumstances extend beyond the place of destination to reach, in particular, the place of departure or return or the places of intermediate stops and transport connections, they are likely to affect the performance of the*

package concerned and must as such be able to be taken into account for the purposes of applying Article 12(2) of Directive 2015/2302'. [93]

Conclusion

Given that litigation arising from terminations of package holidays prior to the package as a result of the COVID-19 is likely to come to the fore as we attempt to move on from the pandemic, the CJEU should be commended for providing such clear guidance and addressing uncertainties around Article 12.

Having said that, practitioners here do not need to be reminded that, as clear and useful a judgment like this may be, it is not binding on the UK courts following Brexit. However, the interpretations provided by the CJEU of an Article that is identical to the wording in the Package Travel and Linked Travel Arrangements Regulations 2018 will, at the very least, provide a good steer to any of the domestic courts attempting to grapple with a Regulation 12 claim.

---

[1] Implemented in the UK through the Package Travel and Linked Travel Arrangements Regulations 2018, specifically Regulations 12 and 13.

Richard Campbell

richardcampbell@3harecourt.com

Russian aircraft operator policy claims (jurisdiction applications): key points for practice in jurisdictional challenges

Introduction

This article distils key points on jurisdiction for practitioners from the lengthy decision in *Re Russian Aircraft Operator Claims* [2024] EWHC 734 (Comm). In this case Henshaw J rejected challenges to the English court's jurisdiction over the case advanced by the Defendant reinsurers on the basis of Russian exclusive jurisdiction clauses.

Adam Riley and Tabitha Hutchison consider the points concerning jurisdiction that practitioners can take-away from this decision.

Christopher Loxton was instructed by Fieldfisher LLP for the Deep Sky Leasing claimants.

The Court summarised its conclusions at paragraph 557:

"[…] I consider that the Claimants have shown strong reasons why the court should decline to stay these proceedings. I consider that in all the circumstances – including having regard to comity, to the importance of giving effect to exclusive jurisdiction clauses in general, and to the extent to which such problems might be said to have been foreseeable – the court should decline to stay the proceedings. The main reason is that the Claimants are very unlikely to obtain a fair trial in Russia, which in itself is a strong reason to decline a stay. In addition, the inevitability of increased multiplicity of proceedings and far greater risk of inconsistent findings on fundamental issues were these claims to proceed in Russia, as well as an element of risk of personal attacks on individuals who in the ordinary course would attend trial, add further support to the view that strong reasons exist to refuse a stay."

The judgment is essential reading for practitioners who regularly undertake or defend jurisdictional challenges, especially in the context of exclusive jurisdiction clauses. It considers in-depth (inter alia):

- principles relevant to the "strong reasons" test for granting a stay of proceedings commenced in England;
- the assessment and weight of un-/foreseeable factors relevant to matters of convenience and substantive justice;
- the degree of likelihood or risk of an unfair trial (and the standard required to be met in establishing the unfairness of a trial in a foreign jurisdiction); and
- the proper approach to evidence in such jurisdictional challenges.

Basic background

The Claimants in the case are owners and lessors of aircraft and aircraft engines, which were leased to Russian airlines under leases governed by English, Californian or New York law. Following the February 2022 invasion of Ukraine, the Claimants issued default and termination notices under the leases. The Russian airlines failed to return the aircraft to the Claimants, which still remain in Russia. These facts precipitated the instant litigation, relating, as at the date of the decision, to 208 aircraft and 31 engines. The sums claimed were in the region of US$9.7 billion, following settlement of some of the claims. The Claimants accepted that the underlying insurance policies and reinsurance policies in relation to which they had brought their claims contained Russian law and jurisdiction agreements, which were valid at Russian law and, further, that the Claimants' claims fell within the scope of those Russian law and jurisdiction clauses.

It was common ground that the Russian jurisdiction agreements were required to be enforced, unless the Claimants could satisfy that there were strong reasons not to do so. The Claimants argued there were strong reasons not to enforce the exclusive jurisdiction clauses because:

- they would not receive / there was a real risk they would not receive a fair hearing of their claims in Russia;
- requiring the Claimants to pursue their claims in Russia would be contrary to public policy, because it would undermine the sanctions imposed on Russia following the invasion of Ukraine; and
- requiring the pursuit of the claims in Russia would give rise to an undesirable multiplicity of proceedings and the risk of inconsistent judgments.

Key practitioner points

As to the principles relevant to the grant of a stay, the Court confirmed the following:

- The court is not bound to grant a stay but has discretion to do so;
- There can be no absolute or inflexible rule governing the exercise of the discretion;
- An English court will ordinarily exercise its discretion by granting a stay of proceedings unless the claimant can show strong reasons for suing in England;
- What constitutes a strong reason will depend on all the facts and circumstances of the particular case;
- The burden of showing strong reasons is on the claimant; and
- Strong reasons are not shown merely by establishing factors that would make England the appropriate forum on a *forum non conveniens*

As to the foreseeability or otherwise of certain factors, and how these impinge on the analysis to be undertaken by the Court:

- Foreseeable factors of (mere) convenience should not be regarded as strong reasons to decline a stay;
- Regard can properly be had to whether the claimant would be prejudiced by having to sue in the foreign court because they would, for political, racial, religious or other reasons, be unlikely to get a fair trial;
- There are some judicial statements which suggest that a matter pertaining to the interests of justice might not amount to a "strong reason" if it was foreseeable and could be regarded as encompassed within the parties' bargain in agreeing to the exclusive jurisdiction clause;
- A situation where a party would be unlikely to receive a fair trial due to state interference or lack of judicial independence/impartiality would be an "exceptional circumstance" involving the interests of justice;
- Whether or not an exclusive jurisdiction clause ("EJC") was specifically or individually negotiated has no freestanding significance, provided it was freely adopted in the sense that a party had a choice whether or not to contract on terms which included such a clause; and
- What is relevant, when considering whether it was foreseeable that the agreed forum would provide an unfair trial, is to have regard to the fact (if a fact) that a claimant did not have actual knowledge that the relevant contract would contain an Exclusive Jurisdiction Clause in favour of the jurisdiction in question.

The Court additionally commented on the applicable standard to be met where there is an EJC, so far as the proposition that a trial in the relevant forum would be unfair:

- A more stringent test than "real risk" is appropriate when relied on as a ground to give effect to a contractual agreement as to forum, in order to respect party autonomy and give proper weight to the principle of English law that parties should be held to their bargains;
- In the specific context of jurisdiction agreements, a higher standard than "real risk" is appropriate in order to reflect the "strong reasons" criterion, and the courts' acceptance that an EJC is the most stringent form of jurisdiction clause;
- The enquiry is fundamentally different from the balancing exercise called for by the second stage of the *Spiliada* test, where no question of contractual entitlement arises;
- An EJC involves the same policy considerations as lie behind the mandatory stay imposed by section 9 of the Arbitration Act 1996 and the very high bar in Article 6(c) of the Hague Convention 2005 on Choice of Court Agreements;
- The courts use a higher standard than "real risk" when assessing, in other interlocutory contexts involving departure from a party's prima facie entitlements, whether a future event will occur (e.g. in security for costs applications; an order restraining freedom of expression; an application for an anti-suit injunction);
- It will generally be unlikely, given the factors outlined above, to be sufficient for the counterparty merely to show a "real risk" of an unfair trial, if real risk is taken to connote a plausible or arguable case;
- It will generally be necessary to show that the preponderance of the evidence indicates that it is likely that the agreed forum will not provide a fair trial; and
- Proof on balance of probabilities is not the necessary or appropriate standard, because such a finding implies findings of fact (which is unlikely to be possible on the materials

available in applications challenging jurisdiction); the decision to be taken is instead concerned with the strength of the relative arguments in play.

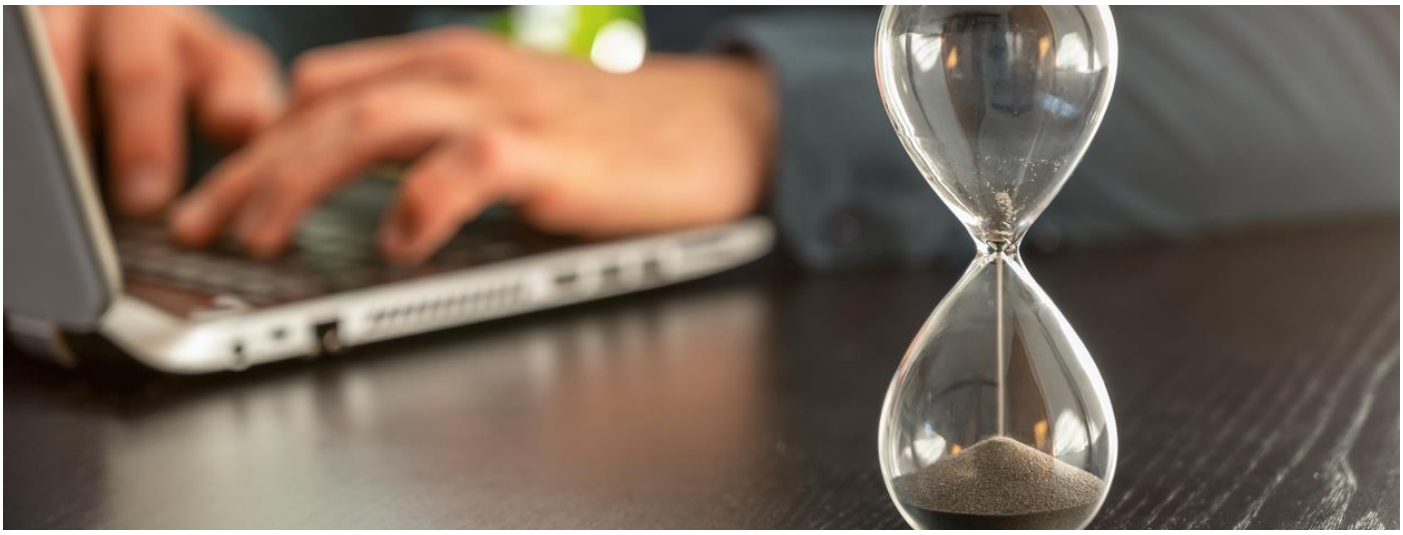
In outline, the Court took the following view of the correct approach to evidence:

- To establish a real risk of injustice, the claimant must adduce positive and cogent evidence; broad and conclusory allegations concerning the judicial system in the contractual forum will not suffice;
- The court should resort to the burden of proof only if it finds itself unable properly to form a view on the evidence before it; and
- The court is concerned with the relative plausibility of the rival contentions and evidence.

The conclusion set out at the outset of this article was reached following the application of the above principles to the voluminous expert evidence in the case. Although the Court reached the conclusion that a fair trial was unlikely to be obtained in Russia, Henshaw J ruled that this did not amount to a decision "that the Russian courts will *necessarily* decide the issue in a particular way, contrary to English public policy" (emphasis added). As such, he noted the Court would "have been hesitant about refusing the Defendants' stay applications on public policy grounds". In addition, Henshaw J considered that the prospect of a multiplicity of proceedings, and the resulting risks of inconsistent findings on key issues, were factors that could also be taken into account. However, these latter factors were not themselves decisive.

Adam Riley & Tabitha Hutchison

adamriley@3harecourt.com
tabithahutchison@3harecourt.com



Opine and no punishment: relief from sanctions and expert evidence

Does a late application for expert evidence in a discipline not addressed by existing directions require relief from sanctions, and with it, the formal application of the *Denton* test? In this article, Daniel Goldblatt and Katharine Bailey explore the practical implications of the Court of Appeal's decision in Yesss, with a particular focus on late applications for expert evidence which may jeopardise a trial date.

The Court of Appeal recently held (in *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14; [2024] 1 WLUK 217) that it does not, and that courts should approach such applications primarily with the Overriding Objective in mind. While that may take some of the burden off of applicants, successful applications will almost certainly depend on whether trial dates can be kept.

Background facts

The claimant (the respondent before the Court of Appeal), Mr Martin Warren, was employed by the defendant (**the applicant**), Yesss (A) Electrical Limited ('**the Employer**'). Mr Warren alleged that he was injured at work on 29 September 2016. Proceedings were issued in October 2019 and the value of the claim was said to be £140,000. Liability was denied and it was contended by the Employer that Mr Warren was fundamentally dishonest in respect of his claim for care costs.

The claim was allocated to the multi-track, and at the CCMC, directions were given for both parties to rely upon expert evidence from orthopaedic surgeons. A timetable for questions under CPR Part 35, and a date for the joint experts' report, was set down.

At the conclusion of Mr Warren's orthopaedic expert's report, it was said that the opinion of a pain management expert should be sought, however no point was made about this at the CCMC.

The parties exchanged factual evidence and submitted pre-trial checklists in the usual way. In December 2021, a notice of trial date was issued, listing the hearing for 4 April 2022. As it

happened, that hearing was vacated due to the unavailability of witnesses.

By an application notice dated 22 February 2022, Mr Warren applied for permission to rely upon reports from pain management and psychological experts.

On 25 February 2022, a notice of trial date was issued listing the trial for 20 and 21 September 2022. Those dates Mr Warren could not do – the court had overlooked his 'dates to avoid' in re-listing the trial – so he also applied to vacate.

DJ Stewart heard the applications. He made an order which vacated the trial date, granted permission for Mr Warren to rely upon pain management expert evidence, but refused permission for a psychologist. In the judge's view, the application for expert evidence fell to be decided according to the Overriding Objective (not pursuant to the *Denton*[1] principles), and it was relevant that no trial date would be jeopardised (which, the judge accepted, was good fortune for Mr Warren since the hearing had to be vacated and re-listed).

On appeal, HHJ Glen agreed with the district judge's analysis that there was no support in the authorities for the principle that applications for expert evidence in a discipline not already ordered by the court was one for relief from sanctions under CPR r.3.9. Further, HHJ Glen felt that such an application if made 'late' (and he accepted Mr Warren's point that by virtue of the adjournment this application was 'late', but not 'very late'), is not one for relief. The judge noted that although there was some conflict in the authorities, it would be wrong in principle to equate a late application to rely upon expert evidence with a scenario where a party is late to file a witness statement, since CPR r.32.10 expressly operates as a sanction for failure to serve a witness statement in time.

Lewinson LJ gave permission to appeal on both grounds, namely the applicability of r.3.9, and the relevance of lateness.

Arguments before the Court of Appeal

On appeal, the Employer said Mr Warren's application was in breach of a number of provisions in the directions, rules and practice directions. In summary, it was argued that these provisions were designed to regulate when in proceedings case management directions are applied and made, and to make the CCMC the single occasion at which case management is undertaken. As for sanction, the Employer argued that by its terms CPR r.35.4(1) envisaged a sanction ("*No party may call an expert or put in evidence an expert's report without the court's permission*"). On lateness, the Employer said the delay between the CCMC and the application was significant, and had resulted in grossly inefficient and disproportionate case management.

Mr Warren maintained that the judges below had reached the right decisions and, to the extent necessary, had exercised their respective discretion reasonably. He further argued that CPR r.35.4(1) contained no express or implied sanction so did not affect this analysis.

Decision

Birss LJ gave the unanimous judgment of the Court of Appeal. The judgment contains the following helpful conclusions:

- Although the cases of *Mitchell* and *Denton* characterise a "tougher approach", the courts are no less tolerant of delay today than they were before. Where there is no identified breach of a rule, PD or order, then whilst the "ethos" of *Mitchell /Denton* may legitimately be applied by the courts in reaching

decisions, r.3.9 will not necessarily apply. The overriding objective under r.1.1 will instead "play an important part" (see [25]).

- In relation to implied sanction, not every "must" in the CPR imports a sanction for failure (see [29]) and "the hurdle for identifying an unexpressed but implicit sanction must be a high one" (see [31]).
- As a general rule, when working out whether a case is covered by r.3.9 one must identify the rule, PD or order said to have been breached; if there is none, then (outside the narrow categories of implied sanction) it does not apply (see [33]).
- Just because a rule, PD or order provides that a party needs "permission" to take a step, does not mean that the need for permission has been imposed as a sanction for breach of something (c.f. r.32.10 with permission to amend statements of case) (see [34]).
- In this case, there was no "built in sanction" for non-compliance and, whilst lateness may lead to negative consequences, that will be due to the application of the Overriding Objective, not r.3.9 (see [46]).
- On the lateness ground, and relatedly, where there is no sanction, the court will simply apply the Overriding Objective, and this is a case management decision which is a matter for the judge's discretion (see [49]).

Analysis

Very late applications for expert evidence, i.e. those where a trial date would be lost as a result of a successful application, very rarely succeed. Unusually (and fortunately for Mr Warren), the trial date in the present case was not impacted by permission being given for additional expert evidence. However, many if not most applications for expert evidence that are made after directions have been set will probably result in a trial date being impacted.

The CPR and case law is clear that the loss of a trial date, once set, will be a decision of last resort (see, for example PD 28.5.4 for Fast Track and Immediate Track cases as well as PD 29.7.4 for Multi Track cases).

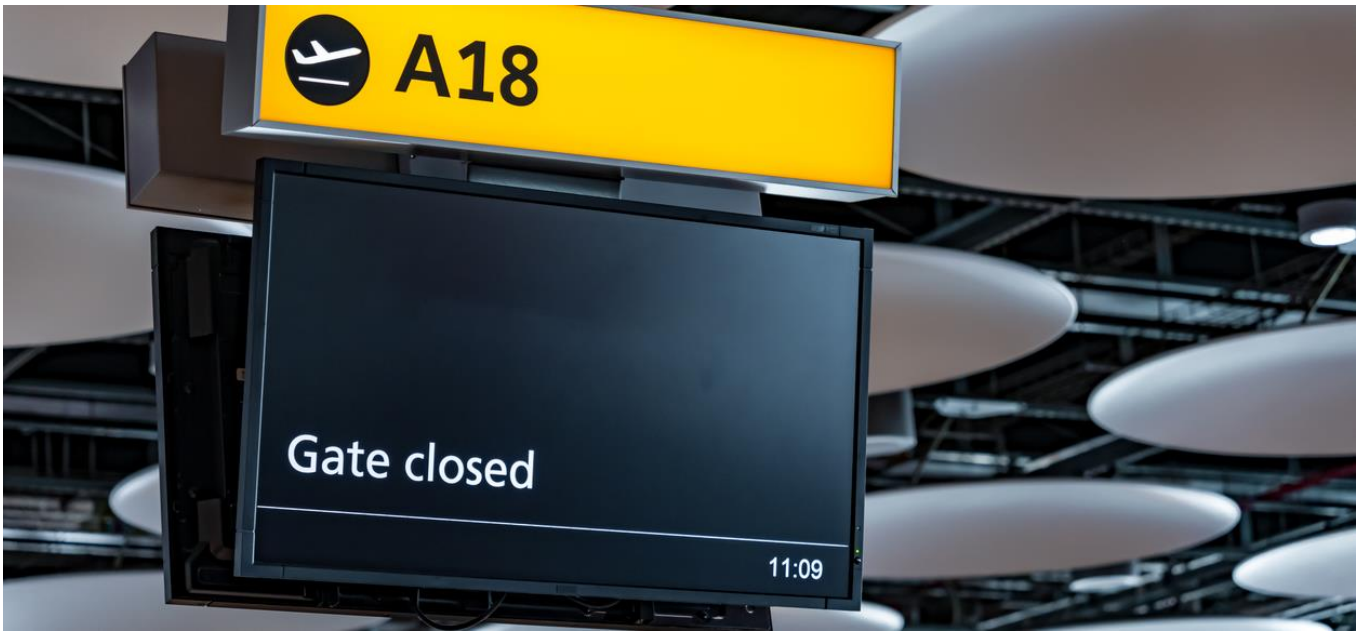
The authors note that *Bhaloo v Fiat Chrysler Automobiles UK Ltd* [2019] EWHC 3398 (QB) was such a rare case. This was an application by a defendant to a mesothelioma claim for further expert evidence to deal with medical causation. The parties were agreed that the trial date would be lost if the defendant's application was successful. HHJ Richardson, in refusing the application, appeared to pre-empt Briss LJ's decision and focused on the Overriding Objective and the modern attitude to compliance with the CPR and directions of the Court.

It will be important for any application to emphasise any potential prejudice and injustice it may face if permission is not given. This will usually be easier to show when expert evidence goes to liability, rather than, say, to quantum.

[1] *Denton and Others v T H White Limited* [2014] [2014] 1 WLR 392.

Daniel Goldblatt & Katharine Bailey


danielgoldblatt@3harecourt.com
katharinebailey@3harecourt.com



The Montreal Convention – contributory negligence and limits on damages

In this article Christopher Loxton analyses the recent judgment of HHJ Saunders in *Wuchner v British Airways* (July 2024). A case that an examined the interplay between Article 20 (contributory negligence) and Article 21(2) (limits on damages) of the Montreal Convention.

Wuchner v British Airways PLC, Central London County Court, Claim no. F22YY049, 3 July 2024 (HHJ Saunders)

In a recent case concerning a fall at a boarding gate, His Honour Judge Saunders gave useful guidance as to the operation of Articles 20 and 21 of the Montreal Convention concerning contributory negligence and the damages cap on liability.

The claim arose out of a slipping accident which occurred on 11 November 2017, when the Claimant slipped on a spillage of Baileys liqueur in a boarding gate area at London Heathrow Airport. He alleged he sustained serious injuries, although the extent of those injuries is to be the subject of a future quantum trial.

BA admitted that the Claimant had slipped over, and that an accident had occurred within the meaning of article 17(1) of the Montreal Convention, but contended that the fall was solely or partially due to the Claimant's own carelessness relying on Article 20. BA also invoked the limitation of damages limit/cap set out in Article 21(2).

The Articles in question

Article 20 provides:

'If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or

wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.'

Article 21(2) reads:

'The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 113,100[1] Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.'

Facts

Having heard evidence from the Claimant, and two of BA's staff who had manned the boarding gate in question, HHJ Saunders made the following findings:

- The Claimant had slipped and fell, whilst carrying four coffees in a tray under his left thumb, whilst carrying a carry-on bag in his left hand. In his right hand, he was carrying a mobile phone and another carry-on bag.
- BA's boarding gate staff had been aware of the spillage prior to the Claimant's fall and, in accordance with BA's protocols, had telephoned the airport operator to arrange the attendance of a cleaner but had been unable to obtain an answer.
- The Claimant had placed himself under considerable pressure in being late for the plane, and that this was a contributory factor in the mechanics of the accident. He had placed himself in a '*vulnerable position*' and was conscious that he had to catch the plane and that his colleague was waiting for him at the boarding gate.
- The Claimant therefore contributed significantly to his own downfall by leaving himself almost no time to catch the flight, which could have been avoided, and placed himself in a position whereby he could not give sufficient attention to his actions, coupled with the fact that he appeared to have been substantially overloaded. That meant he was not able to adapt to the situation and contributed to the accident accordingly.
- The Claimant failed to look where he was going or to notice the spillage when moving towards the boarding gate.
- The Claimant moved too quickly towards the boarding gate because he was rushing to avoid missing the flight; and/or the Claimant failed to pay attention to or respond to one of the BA's staff members warning to him of the spillage.
- By reason of the above facts, the Claimant was 20% contributory negligent to the circumstances of the accident and therefore BA was partially exonerated from liability to the Claimant pursuant to Article 20 of the Montreal Convention.
- BA were 80% responsible of the accident at it have should expected (and would be familiar) with the concept that passengers are frequently late for their flights – this is a '*normal everyday occurrence which BA and other airlines experience*' – and whatever the delay between the spillage being identified and the accident occurring, it was incumbent on BA's staff to '*protect the area*' around the

spillage, or to re-route any passengers as soon as it was discovered. It was not enough to simply call cleaners employed by Heathrow Airport for them to attend and clear the spillage (who had not arrived in time before the accident).

Whilst HHJ Saunders was clearly at liberty to arrive at conclusion (8), it was arguably obiter dictum because whether BA was negligent / at fault for the accident has no relevance to whether an accident occurred (within the meaning of Article 17(1)), and only tangential relevance to whether the Claimant was at fault. In other words, had BA's staff not noticed the spillage prior to the Claimant's fall, an accident would likely still have occurred (because the fall would have been '*an unexpected or unusual event or happening that is external to the passenger*'[2]). The only question would then have been how responsible the Claimant was for the accident.

Findings of fact as to a carrier's responsibility for an accident are highly relevant, however, where Article 21(2)(b) of the Convention is relied upon, namely where the carrier seeks to prove that the damage complained of '*was solely due to the negligence or other wrongful act or omission of a third party*'. In this case, it was not BA's case that the accident was solely due to the actions of a third party (e.g. the airport operator).

The legal issues

Having made the above findings of fact, HHJ Saunders was required to resolve the following legal issues:

- Whether BA's liability for damages was limited to no more than 113,100 Special Drawing Rights ("SDRs")[3] pursuant to Article 21(2).
- If the answer to (1) was 'Yes', whether any deduction for contributory negligence falls to be applied to (a) the value of the claim as limited under Article 21(2), or (b) the total notional value of the claim (i.e. without regard to any such limit).

As the Judge himself commented[4], given the purported value of the claim (in excess of £5 million), whether the claim was limited and how a deduction should be applied to the limited claim, or without consideration of the limit, was '*highly important*'.

The Judge was also originally to have decided what the applicable date was for the conversion of SDRs into pound sterling for the purposes of entering any judgment on the claim. However, by the time of the trial the parties had agreed that the conversion date would be the date at which quantum was determined (whether by judgment or settlement), since the Claimant's losses crystallised on that date.

In relation to the first issue, the Judge commented that there was no definition of in the Convention of the phrase '*negligence or other wrong act or omission*' found in Article 21(2). He therefore held that it was for national courts to interpret these terms under their respective choice-of-law rules, in this case English law principles.[5]

The Judge noted the distinction in Article 21(2) between '*the carrier or its servants or agents*' on the one hand, and '*a third party*' on the other. Relying on *Mather v easyJet Airline Co Ltd* [2023] CSIH 8, a decision of the Scottish Court of Session (First Division, Inner House), the Judge found, unsurprisingly, that BA's employees fell within the definition of '*the carrier or its servants or agents*'.

It is unclear why it was felt necessary to decide the above point, particularly when the Judge made no findings (and appears not to have been asked) as to whether Heathrow Airport's cleaners would have constituted agents of BA. This was, perhaps, to be expected though given the absence of any findings that London Heathrow's acts/omissions caused or contributed to the accident.

As the Judge found that BA was 80% responsible for the accident, and the Claimant was only 20% responsible, he held that the damages cap in Article 21(2) did not apply[6].

Although the Judge was not required to answer the second issue in light of his conclusions on the first issue, he went on to consider it, namely whether the 20% deduction for contributory negligence should be made to the total of recoverable damages (as the Claimant argued), or upon the total damages available under the damages cap (as BA argued).

On the Claimant's argument, quantum would have been calculated as follows:

- £5 million less 20% contributory negligence, limited to 131,100 SDRs (approximately £140,000[7]) = £140,000

On BA's argument, quantum would have been calculated thus:

- £5 million, limited to £140,000 less 20% contributory negligence = £112,000

Referring to the limited academic commentary[8] on the issue (and in the absence of any authority), HHJ Saunderson favoured the Claimant's argument and held[9] that the deduction for contributory negligence should be made from the total, not the total subject to the damages cap. He explained that this view would '*be consistent with the combination of my reading of the effect of the totality of Articles 17, 20 and 21(2)*'[10].

Comment

Whilst the case provides helpful guidance on the application of Article 20, and the Montreal Convention generally, it is highly questionable whether the (obiter) conclusion on when Article 21(2) applies is correct.

The effect of the conclusion is that even where a claimant is, for example, found 50% responsible for an accident, provided the quantum of their claim proved up to the damages limit/cap, they can recover damages up to that limit in full. That cannot be right or fair as it means the claimant's culpability has no impact on the amount s/he recovers.

The decision is also contrary to the text of Article 20, which ends with the sentence: '*This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21*'. The drafters therefore explicitly intended that findings of contributory negligence be applied to quantum *after* the application of Article 21.

In the author's view, the correct position is that a finding of contributory negligence is simply applied *after* a determination as to the value of the claim. In other words, if a claimant is only found to be entitled to damages up to the SDR limit/cap – because the carrier has proved that the damage was not due to its negligence or wrongful act/omission and/or the same was solely due to the negligence or wrongful act/omission of a third party – then the percentage finding of contributory negligence is then applied to that SDR limit/cap. On the other hand, if a claimant is found to be entitled to damages in excess of the SDR limit/cap – because the carrier has not proved the Article 21(2) defence – then the percentage finding of contributory negligence is applied to whatever damages are found to have been proved (above the limit).

In other words, had the Claimant in this case proved his entitlement to £5 million, and the SDR limit did not apply, he would be entitled to £4 million. However, if it had been found that the damages cap under Article 21(2) applied then he would be entitled to £112,000 (140,000 less 20% contributory negligence). Either way, the finding of contributory negligence "bites".

Put another way, if:

- Claimant A is found to be entitled to damages that amount to being 1 SDR (or the currency equivalent) under the 131,100 SDR-limit (and therefore Article 21(2) does not apply), but is found to be 50% contributory negligence; and in another case
- Claimant B is found to be entitled to 1 SDR over the amount of 131,100 SDRs, but is also found to be 50% contributory negligence;

those same findings of contributory negligence cannot be applied differently to each claimant, otherwise it would produce absurd and unfair results: Claimant A would only be entitled to 65,549 SDRs and Claimant B would be entitled to 131,100 SDRs, and yet the quantum of their claims were only found to differ by 1 SDR. The more logical and fairer outcome would be that Claimant A would be entitled to 65,549 SDRs and Clamant A would be entitled to 65,555.50 SDRs.

Whilst the judgment is one from a highly respected circuit judge, with substantial experience of aviation and travel claims, its impact on this second issue is likely to be limited given it was obiter and would not constitute a binding legal precedent in any event.

We watch this space for any future English judgment that provides guidance on the meaning of "agent" versus "third party" in Article 21(2), so as clarify if and what acts / omissions of an airport operator (providing cleaning services for example) might provide a defence to carriers under that Article.

---

[1] Now 128,821 SDRs by virtue of The Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2021 but this was not in force at the time of the accident or the issue of the claim.

[2] As defined in *Air France v Saks*, 470 U.S. 392, 405 (U.S. 1985, United States Supreme Court), and followed in *re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495.

[3] SDRs being an artificial currency instrument created by the International Monetary Fund (IMF), the value of which are calculated from a weighted basket of major currencies, including the U.S. dollar, the euro, Japanese yen, Chinese yuan, and the British pound.

[4] At [78].

[5] Relying on the practitioners' text *The Montreal Convention: A Commentary*, 2023, Elgar Commentaries, Ed. Leloudas et al, at paragraph 21.33, and *Silverman v Ryanair DAC* [2021] EWHC 2955 (QB).

[6] At [121].

[7] Applying exchange rates at the time of writing.

[8] Drion "Limitation of Liabilities in International Air Law" (1954); *The Montreal Convention: A Commentary; and Saggerson on Travel Law,* 2022, 7th Ed.,Wildy, Simmonds & Hill, Ed. Chapman KC et al.

[9] At [131].

[10] *Ibid*.

Christopher Loxton

christopherloxton@3harecourt.com

3 Hare Court

We have a strong reputation in personal injury and travel litigation, as well as in civil fraud, commercial litigation, employment, insolvency, international work including arbitration, financial services, professional negligence, property and construction litigation and all manner of public, administrative, and constitutional law practice, incorporating civil liberties and human rights.

Members are ranked as leading specialists in the Legal 500, Chambers & Partners and Who's Who Legal in personal injury, travel, insolvency, civil fraud, administrative and commercial law, amongst others, and we are a top tier set for travel.

We provide specialist advice and representation at all stages of the litigation process, including pre-action, drafting pleadings, skeleton arguments and schedules, undertaking ADR, and providing advocacy at interlocutory hearings, trials and inquests – from fast-track cases to the most substantial and complex claims, from major commercial disputes to catastrophic and fatal accidents.

Claims in which we are involved frequently have a cross-border element; whether arising from an overseas accident or contractual dispute or involving foreign parties. We are uniquely placed to assist with such matters, where there are implications for the duty and standard of care, where jurisdiction and the choice of law are in issue and where direct actions are brought against overseas defendants or insurers. Chambers has established links to the travel industry and we are an ABTA partner. Members of Chambers are admitted as barristers in overseas jurisdictions and are fluent in many languages including Dutch, French, German, Hindi, Italian, Punjabi, Spanish, Swahili and Urdu.

For further information please view our website or contact us at marketing@3harecourt.com or 020 7415 7800 for further information.

Contributors to this issue

Richard Campbell

Richard accepts instructions on a wide range of civil and commercial matters. He regularly appears in court for both trials and interlocutory applications as well as undertaking a range of pleading and advisory work. Richard undertakes a wide variety of personal injury work, including employers, occupiers and public liability cases and advises on matters of liability and quantum. He also regularly instructed to advise and appear in matters pertaining to travel claims.

Christopher Loxton

Christopher undertakes court, drafting and advisory work in a wide variety of matters relating to aviation and travel law, including: Insurance disputes. Hull damage claims, carriage by air disputes involving EU regulations, Warsaw and Montreal Conventions, and associated passenger, cargo, baggage, delay and denied boarding claims. Personal injury, fatality, and discrimination claims. Regulatory and compliance issues. Package Holiday (including holiday sickness) claims, Regulation (EU) 1177/2010 claims. International carriage by road and sea claims, including under Athens Convention and the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Daniel Goldblatt

Daniel Goldblatt has a broad and busy practice ranging from multiparty Commercial Court disputes to constitutional law appeals in the Privy Council. He has particular experience in contract and trust disputes, civil fraud, insolvency, aviation and travel law, and public and constitutional law. He is also developing a practice in international arbitration and mediation. Daniel has experience acting and advising in travel and aviation law disputes. He primarily acts for airlines and tour package holiday providers.

Adam Riley

Adam is instructed in contractual and personal injury matters involving the Package Travel Regulations (both the 1992 and 2018 iterations) as well as in claims pursuant to the Montreal Convention, the Athens Convention and under EC Regulation 261/2004. He regularly appears in trials and drafts advices and pleadings in disputes involving jurisdictional and conflict of laws issues. He also has experience of CEDR adjudication work. Adam acts in a range of cross-border and domestic personal injury matters. He also accepts instructions to advise matters relating to liability, causation, quantum, evidence, costs and appeals.

Katharine Bailey

Katharine is regularly instructed in matters involving the Package Travel Regulations, the Montreal Convention, and the Athens Convention. Katharine's caseload covers trials, interim applications, and costs and case management conferences. Katharine also represents various airlines in passenger claims for compensation under the EU Denied Boarding Regulations (EC Regulation 261/2004). She also maintains a busy paperwork practice in this area, drafting advices (e.g. on jurisdictional and procedural points, local standards/expert evidence, or quantum), pleadings, and schedules of loss.

Tabitha Hutchison - Pupil

Tabitha commenced pupillage in October 2023 and is gaining experience in all of Chambers' core practice areas. Tabitha will commence her full tenancy upon conclusion of their pupillages in October 2024.

3 HARE COURT

Temple
London EC4Y 7BJ

Telephone: +44 (0)20 7415 7800
Email: clerks@3harecourt.com

www.3harecourt.com