
THE AVIATION LAW REVIEW

SECOND EDITION

EDITOR
SEAN GATES

LAW BUSINESS RESEARCH

THE AVIATION LAW REVIEW

The Aviation Law Review

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THE AVIATION LAW REVIEW

Second Edition

Editor
SEAN GATES

LAW BUSINESS RESEARCH LTD

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EDITOR'S PREFACE

The first edition of *The Aviation Law Review* has been enthusiastically received around the world. Not only is aviation law global in its reach, but it is also in many respects unique, even in the field of transport, as this edition demonstrates. The second edition of *The Aviation Law Review* includes chapters from contributors to the first edition alongside a number of chapters from lawyers in additional jurisdictions, making this an even more vital tool for students, practitioners and in-house counsel.

Clients continue to demand a 'one-stop shop' approach from their lawyers in this field given the issues they face and the special nature of the subject. All the customary disciplines of a commercial practice come into play, but all must then be overlaid with an aviation perspective. This further emphasises the essential nature of specialisation in the industry and maintains the exclusivity of the practice of aviation law.

This year again, regulatory matters have been to the fore with more and more countries seeking to feather-bed consumers with protection from the vicissitudes of life, and at the expense of the industry. The global tendency towards the nanny state piles costs on operators, which can only be recovered from ticket prices, and therefore consumers, but since the link between regulation and cost is indirect, regulators can boast of their concern for consumers without having to deal with the backlash of increasing cost, or finding a budget for their extravagance. Among others the US consumer protection laws represent a further imposition, though perhaps EC carriers will find comfort in the company of their peers!

Unmanned aerial vehicles are coming into the regulatory focus as aspirational operators look to adopt the technology for cost saving and additional services. BP has won the first licence from the FAA for use of UAVs to monitor the Alaskan pipeline. Amazon's intentions in this area have been widely published and the plans of Jeff Bezos should not be dismissed lightly. Many jurisdictions are consulting on the shape of the regulatory framework, on whether UAV operators will fall to be regulated similarly to commercial operators and what airspace they will be permitted to occupy.

Last year I railed against the failure of the EC to institute a truly first-class accident investigation body within Europe. This year practitioners' eyes should be

focused on a recent decision of the UK Court of Appeal in *Rogers v. Hoyle*, which has permitted the use of accident reports in civil liability trials contrary to the prohibition on this practice recommended by the draftsmen of the Chicago Convention 1944 in the accident investigation annex and by the draftsmen of the EU Regulation on accident investigations. The prospects for the EC revisiting the topic are remote, but perhaps the right approach in any event would be for a truly global accident investigation board to be established; the potential for cost saving would be significant, while providing the opportunity to eliminate those unable to attain a sufficiently high standard. Sadly the prospects of movement in the International Civil Aviation Organization (ICAO) within the next two decades seem remote, though in the past the Air Navigation Commission has acted as an investigatory appellate body!

Before closing, one must welcome the Montreal Protocol to the Tokyo Convention following the Diplomatic Conference at the ICAO in Montreal this year. This has been focused on the activities of disruptive passengers and the regulation of in-flight security officers. The Protocol, by extending jurisdiction to the state of next landing in relation to criminal offences committed on board aircraft make it much more probable that those offences will be prosecuted and that disruptive passengers will be brought to book. Sadly, states declined to take the short step of extending immunity to the commander of the aircraft beyond that extant in the original Convention. The actions of the commander and flight and cabin crew remain susceptible to examination by courts, which can review their actions with the full benefit of hindsight and a test of reasonableness the interpretation of which will vary widely from one country to another. Industry recommended that deference be given to the actions of the flight crew in situations where the safety of the aircraft could be jeopardised, but this was not taken up by the delegates. Nevertheless the Protocol is to be commended for what it does achieve more than criticised for that which delegates passed on, and hopefully it will be ratified without too much delay.

I would like to extend my thanks to the contributors to this volume, both those who contributed before and those who have joined the group. Their efforts are highly appreciated and represent a substantial contribution to the global aviation law library.

Sean Gates

Gates Aviation Ltd

London

July 2014

Chapter 9

FRANCE

*Vonnick le Guillou, Julie Catala-Marty, Marie Bresson, Jonathan Rubinstein,
Loïc Poullain and Guilhem Argueyrolles¹*

I INTRODUCTION

The main regulators for civil aviation in France are the European Aviation Safety Agency (EASA) and the French Directorate General for Civil Aviation (DGAC).

The EASA is the centrepiece of a new regulatory system that provides for a single European system in the aviation sector. Its responsibilities are as follows: implementing and monitoring safety rules, including inspections in EU Member States; type certification of aircraft and components, as well as the approval of organisations involved in the design, manufacture and maintenance of aeronautical products; and authorisation of third-country (non-EU) operators.

The DGAC is a national administration, under the Ministry of Ecology, Sustainable Development and Energy, which includes all government departments responsible for regulating and supervising aviation safety, air transport and civil aviation activities in general. It is specifically responsible for various tasks related to civil aviation, such as air traffic control, supporting research and development in the field of aircraft construction, and qualification of aircraft (issuing of airworthiness certificates).

i Access to the market

Airports and airfields

The French state is competent for the creation, accommodation and operation of national and international-interest airfields, or those required for state missions. The operation of airfields open to public traffic may be undertaken by public bodies or granted to private entities through public contracts. The French state may control technically or

¹ Vonnick le Guillou and Julie Catala-Marty are partners, Marie Bresson is a senior associate and Jonathan Rubinstein, Loïc Poullain and Guilhem Argueyrolles are associates at Bird & Bird.

administratively any airfield on its territory. It should be noted, however, that Paris and Bâle-Mulhouse Airports are subject to special status and that airfield operation is currently undergoing deep modifications, as the French state intends to transfer most of its assets, responsibilities and prerogatives to local administrations.

Airlines

While Air France used to be a state-owned company, it is no longer such, and there are no longer any requirements for airlines regarding state control or ownership.

Most of the rules on the operation of air services are harmonised across the European Union (Regulations Nos. 2407/92, 2408/92, 2409/92 and 1008/2008), and provide a principle of free access to the market for any airline fulfilling moral, financial and technical reliability requirements, and which are granted to that extent an air operator's certificate by the DGAC and an operating licence by either the minister in charge of civil aviation or the regional state representative.

ii Regulation of slots

Council Regulation (EEC) No. 95/93 of 18 January 1993 aims to ensure that, where airport capacity in a Member State is scarce, the available landing and take-off slots are allocated in an equitable, non-discriminatory and transparent way.

For this purpose, each Member State responsible for a 'coordinated airport' should ensure the appointment of a neutral coordinator. In 1995, the Association for the Coordination of Schedules was appointed by the French authorities to allocate slots in the busiest French airports.

The principle for slot allocation is that an air carrier having operated its allocated slots for at least 80 per cent of the scheduled period is entitled to the same slots in the equivalent scheduling period of the following year, whereas slots that are not sufficiently used by air carriers are reallocated.

iii Treaty-based commitments regarding transit and traffic rights

The operation of scheduled and non-scheduled air services to or from France is regulated. The applicable regulations in France are Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, and bilateral conventions where they apply, and the Civil Aviation Code, especially Book III.

Any air transport taking off, landing or flying within the French territory requires an authorisation from the competent authority. As a result of the European harmonisation (in particular Regulation No. 2408/92), no authorisation is required for airlines located in Member States of the European Union to perform transport within the EU, whereas authorisation is needed for transport from or to non-EU countries, or performed by airlines based outside the EU.

iv Interests in aircraft equipment

There is no specific regulation applicable to interests in aircraft equipment. Although France did sign the Cape Town Convention on International Interests in Mobile Equipment and the specific Protocol to the Convention regarding aircraft equipment on 16 November 2001, they have not yet been ratified.

v Labour and employment issues

Labour in aviation is mostly ruled by the French Labour Code and dedicated collective agreements.

As a result of Article R330-2-1 of the French Civil Aviation Code, which refers to Article L1262-3 of the French Labour Code, some foreign low-cost airlines that used to apply foreign and advantageous labour law to employment contracts for foreign employees working on their French operating bases were forced to modify said contracts, as French law prevailed.²

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

As far as international carriage is concerned, death or injury to passengers and loss or damage to baggage or cargo are subject to the provisions of the Montreal Convention, which has been ratified by European Commission on behalf of the Member States and came into force in France on 28 June 2004.

Article L6421-3 of the Transport Code states that Regulation (EC) No. 889/2002 amending Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents is applicable to European Union air carriers operating with a licence granted pursuant to Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community.

ii Internal and other non-convention carriage

The provisions of the Montreal Convention also apply to domestic carriage as a result of Regulation (EC) No. 889/2002 of 13 May 2002 amending Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents is directly applicable in France, whose Article 1 extends the application of the Montreal Convention to carriage by air within a single Member State.

Concerning carriage that is not governed by the Montreal Convention (such as gratuitous carriage), Article L6422-2 of the Transport Code states that the air carrier liability is subject to the provisions of the Warsaw Convention and subsequent conventions that supplement it, even if the carriage is not international.

iii General aviation regulation

General aviation regulation can be found in the Civil Aviation Code and in the Transport Code. The Civil Code is also applicable since the Transport Code sometimes refers to the rules set out in it (e.g., Article L6131-1).

² Council of State (French administrative supreme court), 2nd and 7th subsections, 11 July 2007, No. 299787 and No. 300114, *EasyJet Airlines Company Ltd et al.*

iv Passenger rights

Regulation (EC) No. 261/2004 is applicable in France and deals with compensation and assistance to passengers in cases of denied boarding, cancellation or long delay of flights (more than three hours).³ Airlines have to compensate passengers when flights are cancelled within two weeks of departure or arrive more than three hours late, but only if the issue was within their control. On 22 July 2013, the European Commission published guidelines⁴ to clarify when a delay or cancellation should generally be considered not to be an airline's fault ('extraordinary circumstances').

As far as the carriage of disabled passengers is concerned, the rules are set out in Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. On 23 December 2010, France acceded to the UN Convention on the Rights of Persons with Disabilities.

Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community provides rules on passenger rights regarding airfares and in particular, regarding pricing and the possibility for passengers to effectively compare prices for air services of different airlines.

Regulation No. 2111/2005 obliges carriers and any companies selling flight tickets to advise passengers of the identity of the carrier actually operating the flight and allows the European Commission to establish a list (blacklist) of airlines banned from operating in the EU. Article L6421-2-1 of the French Transport Code French has been implemented by Law No. 2013-343 to introduce a new duty of information going beyond Regulation (EC) No. 2111/2005 since it provides that any person or entity selling a ticket on a flight of an operating air carrier on the EU blacklist should clearly and unambiguously inform passengers of this situation and invite them to seek alternatives. This obligation is subject to an administrative penalty of €7,500 per ticket (or of €15,000 in the event of renewed breaches), and may also be subject to criminal penalties pursuant to Article 121-3 of the French Criminal Code.⁵

v Other legislation

The rules set out in the Council Directive 90/314/EEC on package travel, package holidays and package tours have been transposed into the Tourism Code.

According to Article L211-16 of the Tourism Code, the legislation on tour packages applies to any individual or legal entity that performs or participates in, regardless of how that person is compensated, operations consisting of:

- a* the organisation or the selling of individual or group travel or holidays;

3 CJEU judgment in Case C-11/11 *Air France SA v. Heinz-Gerke Folkerts and Luz-Tereza Folkerts* confirming its judgment in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others*: passengers must be compensated when their flight arrives at the final destination at least three hours late.

4 Non-exhaustive and non-binding list of extraordinary circumstances for the application of Regulation (EC) No. 261/2004.

5 To our knowledge, no airline has been fined pursuant to this article.

- b* services during travel or holidays, in particular the issuing of transport documents, booking of accommodation in hotels or accommodation industry and the issuing of vouchers for food services or accommodation; or
- c* touristic services, in particular the organisation of visits of museums or registered historic monuments.

These persons are subject to strict liability towards the purchaser for the full performance of their contractual obligations, regardless of whether the contracts have been entered into online or not and whether the services are to be performed in person or by another service provider, without prejudice to their right of recourse against such a provider and within the limits set out in international conventions.

III LICENSING OF OPERATIONS

i Licensed activities

French law distinguishes between public air transport, chartering (lease of an aircraft with the crew) and wet lease (Articles L6400-1 to 3 of the Transport Code).

The first two categories are subject to the granting of three authorisations:

- a* a transport certificate (Article L6412-2 of the French Transport Code implementing EU Regulation No. 1008/2008), which is granted when the airline demonstrates sufficient technical skills;
- b* an operating licence (L6412-2 of the French Transport Code). To obtain a licence, the operator shall have its principal place of business and its registered office in France; and
- c* an authorisation to operate transport services (Article R330-6 et seq. of the Civil Aviation Code). Operators shall notify scheduled flights to the DGAC one month before their performance. Specific provisions exist for non-scheduled flights.

ii Ownership rules

Pursuant to EU Regulation (EC) No. 1008/2008, for an undertaking to be granted an operating licence by a Member State, Member States or nationals of Member States shall own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings.

The French Transport Code provides specific requirements regarding listed companies, whose purpose is compliance with the 50 per cent control requirement for such companies (Article L6411-2 et seq.).

iii Foreign carriers

European air carriers

According to Article 15 of Regulation (EC) No. 1008/2008, European air carriers that have been granted an operating licence by another Member State are entitled to operate intra-Community services but an authorisation is needed for extra-Community air services.

For intra-Community air services, Community air carriers shall notify the DGAC of the intended flights at least one month in advance for scheduled flights, 10 working

days in advance for a series of non-scheduled flights and two working days in advance for other cases, the approval being tacit (Article R330-8 of the Civil Aviation Code).

On the other hand, for extra-Community air services, an explicit authorisation is required. The request shall be filed at least one month in advance for scheduled flights, 10 working days in advance for a series of non-scheduled flights and two working days in advance for other cases.

Non-European air carriers

Non-European air carriers shall be granted an authorisation from the DGAC both for intra-European and extra-European flights.

IV SAFETY

France is a signatory to the Chicago Convention on International Civil Aviation of 7 December 1944 and is a Member State of the International Civil Aviation Organization (ICAO). As such it must comply with international safety standards defined by the ICAO.

As a Member State of the European Union, France is also widely governed by European harmonised safety rules.

i Occurrence reporting

Occurrence reporting is governed by Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation⁶ as implemented into French law by Article L6223-1 et seq. of the French Transport Code; Article R722-6 and R722-7 of the French Civil Aviation Code;⁷ the Decree of 17 August 2007 on civil aviation occurrences and incidents reporting and the Decree of 17 August 2007 setting out the list of civil aviation events and incidents (which is essentially the same as the list appended to the Directive).

These rules impose a duty of reporting any occurrence to the DGAC. Occurrence is defined as ‘operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has not resulted in an accident or serious incident’. A wide-ranging and detailed list of such reportable occurrences is included in these rules.

The reporting duty is imposed on all professionals in the civil aviation sector who become aware of a reportable occurrence in the exercise of their functions, in particular commercial air carriers and pilots of commercial aircraft.

ii Accident reporting

Accident reporting is governed by Regulation (EU) No. 966-2010 of the European Parliament and of the Council of 2 October 2010 on the investigation and prevention of

6 As amended by Regulation (EC) No. 596/2009 of the European Parliament and of the Council of 18 June 2009.

7 As amended by Decree No. 2013-565 of 26 June 2013.

accidents and incidents in civil aviation; Articles L6221-1 et seq. of the French Transport Code and Articles R722-2 to R722-5 of the French Civil Aviation Code.

Accidents or serious incidents that occur in France have to be reported to the French investigation board (BEA) (Article 9 of the Regulation and Articles R722-2 of the French Civil Aviation Code). This obligation bears on operators,⁸ air navigation services providers and aircraft, engines and equipment designers, manufacturers and maintenance providers.

Accidents occur when there is fatality or severe bodily injuries, or destruction or structural damage to the aircraft. A serious incident is defined as:

an incident involving circumstances indicating that there was a high probability of an accident and is associated with the operation of an aircraft, which in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked or, in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time it comes to rest at the end of the flight and the primary propulsion system is shut down.

iii Maintenance and continuing airworthiness

Maintenance and continuing airworthiness of aircraft are governed by the Commission Regulation (EC) No. 2042/2003 of 20 October 2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (as subsequently amended) and its annexes relating to:

- a* the ‘measures to be taken to ensure that airworthiness is maintained, including maintenance’ and to the ‘conditions to be met by the persons or organisations involved in such continuing airworthiness management’ (Part M);
- b* the ‘requirements to be met by an organisation to qualify for the issue or continuation of an approval for the maintenance of aircraft and components’ (Part 145);
- c* the ‘aircraft maintenance licence’ and ‘the requirements for application, issue and continuation of its validity’ (Part 66); and
- d* the ‘requirements to be met by organisations seeking approval to conduct training and examination as specified in Part-66’ (Part 147).

iv Training

Flight crew licensing and training is governed by the Commission Regulation (EU) No. 1178/2011 of 3 November 2011 (as subsequently amended) laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No. 216/2008 of the European Parliament and of the Council and its Annex (Part FCL). This Regulation was implemented by a Decree of 5 April 2012 (NOR: DEVA1209952A).

8 Until 2013, it was incumbent mainly on captains.

V INSURANCE

The types and levels of insurance applicable to air carriers and aircraft operators in France are set forth by Regulation (EC) No. 785/2004, which in fact applies to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of an EU Member State. This Regulation requires air carriers and aircraft operators to be insured, in particular in regard to passengers, baggage, cargo and third parties, to cover the risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion).

For liability in respect of passengers, the minimum insurance cover must be 250,000 special drawing rights (SDR) per passenger. However, in respect of non-commercial operations by aircraft with a maximum take-off mass (MTOM) of 2,700 kilograms or less, EU Member States may set a lower level of minimum insurance cover, provided that such cover is at least 100,000 SDR per passenger.

For liability in respect of baggage, the minimum insurance cover must be 1,131 SDR per passenger in commercial operations.

For liability in respect of cargo, the minimum insurance cover must be 19 SDR per kilogram in commercial operations.

The levels of cover set out above do not apply with respect to flights over the territory of the EU Member States carried out by non-EU air carriers and by aircraft operators using aircraft registered outside the EU that do not involve a landing on, or take-off from, such territory.

For liability in respect of third parties, the minimum insurance cover per accident and per aircraft must be:

<i>Category</i>	<i>MTOM (kilograms)</i>	<i>Minimum insurance (million SDR)</i>
1	≤ 500	0.75
2	≤ 1,000	1.5
3	≤ 2,700	3
4	≤ 6,000	7
5	≤ 12,000	18
6	≤ 25,000	80
7	≤ 50,000	150
8	≤ 200,000	300
9	≤ 500,000	500
10	> 500,000	700

Air carriers and, when so required, aircraft operators, must demonstrate compliance with the insurance requirements set out in this Regulation by providing the competent authorities of the EU Member State concerned (in France, the DGAC) with an insurance certificate or other evidence of valid insurance.

With regard to overflights by non-EU air carriers or aircraft registered outside the EU, which do not involve a landing on or take-off from any EU Member States, as

well as in respect of stops in EU countries by such aircraft for non-traffic purposes, the EU Member State concerned may request evidence of compliance with the insurance requirements laid down in the Regulation.

For EU air carriers, the sanctions for infringing this Regulation may include the revoking of the operating licence. With regard to non-EU air carriers and to aircraft operators using aircraft registered outside the EU, the sanctions may include refusal of the right to land on the territory of an EU Member State.

Where EU Member States are not satisfied that the conditions of this Regulation are met, they must prohibit an aircraft from taking off until the air carrier or aircraft operator concerned has produced evidence of adequate insurance cover.

VI COMPETITION

i The relevant competition provisions

There are under French law no specific competition provisions for the aviation sector. The ordinary provisions of the French Commercial Code are thus applicable to this sector. Article L420-1 prohibits all agreements and concerted practices that have as their object or effect the restriction of competition, and Article L420-2 prohibits abuses by undertakings of their dominant position.

The French Competition Authority, the independent administrative authority competent for competition law matters, is also competent to enforce, where applicable, the European antitrust provisions. Article 101 (prohibition of anti-competitive agreements) and 102 (prohibition of abuses of dominance) of the Treaty on the Functioning of the European Union, which are very similar to the French provisions, will apply where the practice at stake may have an appreciable effect on interstate trade.

The issue of the effect on interstate trade was examined in depth in a decision by the Competition Authority regarding the supply of fuel for aircraft in Réunion Island.⁹ The Competition Authority, following a complaint by Air France, found that major oil companies had shared the market and limited supplies to secure their market shares and breached both French and European provisions prohibiting anti-competitive agreements. The oil companies challenged the finding of the Competition Authority that interstate trade was affected in that case. The second ruling of the Court of Cassation in this case is still pending.

ii Procedure before the Competition Authority and fines

The Competition Authority may conduct investigations – either following a complaint or *ex officio*, find a breach of the provisions and impose fines. A decision by the Competition Authority may be appealed before the Court of Appeal.

The amount of the fines imposed by the Competition Authority for anti-competitive practice can reach 10 per cent of the turnover of the undertaking concerned.¹⁰ In practice,

9 Decision No. 08-D-30.

10 Article L464-2 IV of the Commercial Code.

however, the maximum fine is rarely imposed. The method used for the calculation of the fines is exposed in a fining Notice that the Competition Authority published in 2011.¹¹

iii Cooperation agreements under competition law

Cooperation agreements between competitors are not *per se* prohibited by the French or European competition provisions. Some cooperation agreements are sometimes even considered as being pro-competitive. This is generally the case for R&D agreements, for instance.

Cooperation agreements between competitors will in general be assessed under antitrust rules, and in particular the prohibition of anti-competitive agreements.¹² The analysis is usually conducted in such cases in the light of the European Commission's Guidelines on horizontal cooperation, which sets out the Commission's position with regard to this type of agreement.

With regard to cooperation agreements, exchanges of information taking place as part of the cooperation may be problematic and are usually examined with great care by the Competition Authority. According to the case law, any information exchange that would exceed the scope of the cooperation could be considered as an anti-competitive agreement or concerted practice.¹³

iv Criminal liability for breaches of competition law

In addition to the proceedings before the Competition Authority, to which the undertaking is party, the Commercial Code also provides that criminal proceedings may be initiated against individuals who 'fraudulently play an individual and decisive role in the conception, organisation or implementation' of the anti-competitive practices by the provisions cited above (Article L420-6). This provision has, however, very rarely been applied so far: 20 decisions between 1985 and 2006. Although the provision seems to be increasingly applied, most decisions concern bid-rigging practices.¹⁴

VII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

There are no specific fora for claims relating to air travel. A passenger's claim can be brought against the operator and any other liable entity and their respective insurers.

11 Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties, available on the Competition Authority's website.

12 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C11, 14.1.2011, p. 1.

13 Competition Authority, Annual Report for 2009, p. 143.

14 Statistics published by the Minister for Finance and Economy (DGCCRF) cited by Mrs Riffault-Silk, Adviser to the Court of Cassation, RLC 2007/11, No. 809, p. 165.

There is no specific timelines for settlement as it can be achieved at any time. When one of the parties is underage, a court approval of terms and conditions of the settlement is needed before it can be executed.

The time limitation for a passenger to bring a claim against the air carrier is, as provided by the Montreal Convention and Regulation (EC) No. 889/2002 of 13 May 2002, two years, whether the air carriage is international or internal.

A product liability claim (against the manufacturer or any equipment manufacturer) has to be brought within three years after discovery of the defect and within 10 years after the date on which the product was put into circulation.

A compensation claim can be brought against the carriers and other liable parties and their insurers, and if all defendants are found liable, the court could allocate a share of liability to each or some of them or consider them jointly and severally liable.

ii Carriers' liability towards passengers and third parties

Carriers' liability towards passengers

The operator's liability to passengers in the course of international or internal carriage is established in accordance with the Montreal Convention's provisions (applicable to internal carriage with respect to Article 1 of Regulation (EC) No. 889/2002 of 13 May 2002).

In cases of death or injury of passengers, the operator is strictly liable and not able to exclude its liability for damages up to 113,100 SDR¹⁵ per passenger. For damages exceeding 113,100 SDR, the operator can exclude or limit its liability if it proves that:

- a* the damage was not due to its negligence or other wrongful act or omission; or
- b* the damage was solely due to the negligence or other wrongful act or omission of a third party.

In cases of damage caused by delay, or damage or loss to cargo or luggage, the operator's strict liability is limited to:

- a* 4,694 SDR for damage caused by delay;
- b* 1,131 SDR per passenger in cases of destruction, loss, damage or delay of the baggage unless a special declaration of interest was made; and
- c* 19 SDR per kilogram for the carriage of cargo unless a special declaration of interest was made.

ii Carriers' liability towards third parties

Liability for damage to the surface is governed by Article L6131-2 of the Transport Code, which provides a strict liability of the operator. Only the victim's fault can exonerate the operator.

In cases of a collision between two moving aircraft, the liability is governed by the rules of the Civil Code (Article L6131-1 of the Transport Code).

15 Pursuant to ICAO revision of 30 December 2009 (as provided for by Article 24 of the Montreal Convention).

iii Product liability

Product liability action is only possible against the manufacturer of the product (or seller, leasor or supplier if manufacturer cannot be identified or importer if the manufacturer is outside the European Union).

Product liability is governed by Article 1386-1 et seq. of the Civil Code (on 19 May 1998 the statute implemented Directive No. 85/374 EEC of 25 July 1985).

This law introduced the strict liability of the producer, which is likewise applicable in the case of a tort claim or contractual claim.

The victim has to prove the existence of a defect and a causal link between the default and the damage incurred.

iv Compensation

No punitive damages can be obtained before French courts since compensation cannot be used as a penalty under civil law.

In the context of air accidents, when the Warsaw or Montreal Convention is applicable, claimants are not allowed to request damages against the air carrier in the criminal proceedings. Such requests for compensation must be done before civil courts.

In matters involving death or injuries, the main categories of compensatory damages are:

- a* damages for pain and suffering;
- b* material damages (economic loss including loss of support in cases of death); and
- c* funeral expenses (in cases of death).

In matters involving injuries, the assessment of damages for pain and suffering of the claimant is made on a case-by-case basis by the courts by taking into account the circumstances of the accident, the victim's injuries and his or her recovery (post-traumatic stress disorder can sometimes be taken into account if well documented). In death cases, the assessment of pain and suffering of the claimant will mainly depend on his or her family relationship or of a demonstration of close link of affection with the deceased. A child losing one of his or her parents, or parents losing a child, would receive between €30,000 and €50,000 for pain and suffering.

In matters involving death, the court will usually refer to published tables to assess the material damages for loss support in cases of dependency. Such tables take into account, *inter alia*, the deceased's income and age, and the number of dependants and their age.

As far as funeral expenses are concerned, the court will award any reasonable amount based on the invoices disclosed by the claimants.

In the event where a criminal investigation is initiated, it is possible for the claimants to receive interim payments on damages for pain and suffering from the Guarantee Fund for the Victims of Acts of Terrorism and Other Offences, which is then subrogated into the victims' rights against the amount of the interim payment.

Medical expenses (and sometimes death benefits) are paid by state-funded social security, which is then subrogated against potentially liable third parties.

VIII THE YEAR IN REVIEW

i Court of Cassation decisions, 15 January 2014

The French Court of Cassation issued several interesting decisions on 15 January 2014:

Case No. 11-21394

The Court of Cassation quashed a Court of Appeal decision holding an airline liable for damage to a passenger's hearing. The passenger claimed to have suffered pain during the take-off and the landing approach, and was diagnosed with hearing damage by a doctor just after the flight. Court-appointed medical experts confirmed the hearing damage and one even stated that the damage was not due to a pre-existent medical condition but to the conditions of the flight and in particular the air-conditioning system and the repetition of the compression stages. The Court of Cassation quashed the Court of Appeal decision on the grounds of Article 17 of the Montreal Convention by finding that the hearing damage was not linked to any accident that took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Case No. 11-27962

The Court of Cassation, on the grounds of Article 17 of the Warsaw Convention, quashed a Court of Appeal decision holding an airline liable for the damage (broken knee) of a passenger who fell from the trolley transporting him and his luggage to the aircraft for a flight between Algeria and France. The Court of Cassation found that since the only witness to how the passenger fell was his wife, there was no evidence that there had been any accident attributable to the airline, or that he did not pass out for some reason and then fall.

Case No. 11-29038

Further to an aircraft accident on June 2009 (Yemenia) that led to the death of almost all the passengers, one of the passengers' families requested an interim payment in the context of an urgent proceeding (which requires that there is no serious challenge to the claim). The Court of Appeal agreed to allow more than 100,000 SDR by finding that since the investigation was still ongoing the airline was not able to demonstrate that the accident was not due to its negligence or other wrongful act or omission, or that such damage was solely due to the negligence or other wrongful act or omission of a third party. The Court of Cassation quashed the decision on the grounds that, in the context of an urgent proceeding, the ongoing investigation into the causes of the accident is indeed a serious challenge.

ii Court of Cassation decision, 2 April 2014

A decision of the French Court of Cassation of 2 April 2014 (No. 13-16038) confirmed a Court of Appeal decision according to which:

- a* passengers of a delayed flight (two hours) can be awarded compensation under the Montreal Convention for a flight in a single Member State (since Regulation (EC) No. 889/2002 extends the application of the Montreal Convention to carriage by air within a single Member State);

- b* the compensation provided for by Regulation (EC) No. 261/2004 on compensation and assistance to passengers in cases of denied boarding, cancellation or long delay of flights (more than three hours) does not exclude the possibility for the passengers to request, in addition or instead, compensation under Articles 19 and 22 of the Montreal Convention.

IX OUTLOOK

On 17 March 2014 the French parliament passed a new law introducing the possibility of bringing class-action proceedings under the French legal system. This procedure allows associations of consumers to sue professional entities to claim compensation for individual and material damage caused to consumers as a consequence of a sale of a good or a provision of service (bodily injuries and death are excluded from the scope of the French class actions). The entry into force of the law still requires the publication of a decree, which will specify the rules governing the procedure. These new rules are very likely to offer a new procedural framework for passengers' claims in relation to denied boarding and cancellation of flights, or to any other material damage they may suffer as a result of any breach of duty by air carriers.

Appendix 1

ABOUT THE AUTHORS

VONNICK LE GUILLOU

Bird & Bird

Vonnick is a partner in the Paris office of Bird & Bird and the head of the aviation group in France, as well as head of the international dispute resolution group.

She has developed a widely recognised expertise in international litigation matters relating to product liability for aeronautical manufacturers as well as for original equipment manufacturer or maintenance, repair and overhaul companies. For over 15 years she has advised a major European aeronautical manufacturer concerning issues in this area of expertise.

Vonnick specialises in domestic and international litigation relating to complex, cross-border liability cases, air transport and aviation insurance, for French and foreign industrial companies, airlines and insurers. She has acted in numerous aircraft crash cases, such as the Concorde crash in July 2000, the Air France flight 447 accident on 1 June 2009, as well as the Manx2 accident in Cork in February 2011. She has also handled high-profile international liability claims in other industrial sectors, including the insurance sector.

Vonnick has been practising as a lawyer since 1984. She is a member of several associations such as the International Aviation Women's Association, the International Bar Association and the French Society of Air and Space Law.

JULIE CATALA-MARTY

Bird & Bird

Julie is a partner in the competition law team in Paris.

Her expertise and in-depth experience cover all aspects of competition law. She has been involved in complex merger notifications before the European Commission and the French Competition Authority. She also regularly represents clients in cartel and

abuse proceedings before both the French and the EU authorities, as well as during dawn raids launched by the competition authorities.

In addition, Julie has extensive experience in designing and implementing highly customised and interactive competition law compliance programmes. She also has expertise in matters at the interface between competition and IP law.

Julie advises clients across a wide range of industries including telecommunications, media (specifically the TV sector), banking and financial services, retail distribution, e-commerce, cosmetics and luxury goods, heavy industry (such as cement, aggregate and paper) and public works.

Prior to joining Bird & Bird in April 2011, Julie was part of the antitrust teams at Clifford Chance and Howrey.

Julie is an active member of the French Association for Lawyers Practising Competition Law and of several professional organisations. She regularly publishes papers on competition matters.

MARIE BRESSON

Bird & Bird

Marie is a senior associate within the dispute resolution and aviation groups, based in Paris.

She acts in major disputes involving industrial risk and has particular expertise in the aviation sector. She also advises French and international companies on various types of commercial and civil liability disputes in any jurisdiction including arbitration, as well as aviation regulation, ground handling disputes, aircraft repossession, insurance law, product recalls and contracts. Marie has acted in major aircraft crash cases, such as the Concorde crash of July 2000 and the Air France flight 447 accident of June 2009.

Marie joined Bird & Bird in 2005 after having practised in a Franco-Chinese law firm in Hong Kong (Thomas, Mayer & Associés), and within the aviation department at Clyde & Co. She holds a master's degree in business law, as well as a specialisation degree in European law and a postgraduate degree (DESS) in international business law.

JONATHAN RUBINSTEIN

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Jonathan is an associate within the dispute resolution and aviation groups based in Paris.

He specialises in domestic and international litigation relating to complex, cross-border liability cases, air transport and aviation insurance, for French and foreign industrial companies and insurers.

Jonathan acts in major disputes involving industrial risk, and has particular expertise in the aviation and insurance sectors.

Jonathan joined Bird & Bird in 2011 after having practised in a French law firm specialised in insurance litigation (SCP Bouckaert Ormen Passemard Sportes).

He holds a master's degree in business law (Université Paris-XII) as well as an LLB (Sheffield Hallam University) and a postgraduate degree (DEA) in international private law (Université Paris 1 Panthéon-Sorbonne).

Jonathan is a native French speaker and is fluent in English.

LOÏC POUILLAIN

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Loïc is an associate within the dispute resolution and aviation groups, based in Paris.

He acts in major disputes involving industrial risk and has particular expertise in the aviation and insurance sectors. Loïc has acted in numerous aircraft crash cases, such as the Air France flight 447 accident of June 2009. He also assists and advises French and international companies in various types of commercial and civil liability disputes, as well as aviation regulation, insurance law and drafts contracts and general terms and conditions.

Prior to joining Bird & Bird in 2009, Loïc taught economics and this experience has allowed him to develop a full understanding of the economic and financial issues in dispute resolution cases and to build a strong record in the evaluation of damages.

Loïc graduated in economics and management from the Ecole Normale Supérieure and holds a master's degree in law from Université Paris-XIII.

Loïc is a French native speaker and is fluent in English.

GUILHEM ARGUEYROLLES

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Guilhem specialises in domestic and international litigation relating to complex, cross-border liability cases, air transport and aviation insurance, for French and foreign industrial companies and insurers. Guilhem has acted in various aircraft crash cases, such as the Gulf Air crash of August 2000 and the Air France flight 447 accident of June 2009. He also handles high-profile international claims involving product liability, industrial risk, insurance law and commercial law.

Guilhem joined Bird & Bird in 2010 after having completed his training in insurance companies and law firms specialised in business litigation.

He holds a master's degree in litigation (Université Paris 1 Panthéon-Sorbonne) as well as in philosophy (University of Bordeaux), and a postgraduate degree (DEA) in private law (Université Panthéon-Assas – Paris II).

Guilhem is a French native speaker and is fluent in English.

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