

RIMS Forum IATA

GLOBAL LEGAL PANEL - BRAZIL

Crisis Response

Dispute System Design

JULIO COSTA, PARTNER

CAR IN COOPERATION WITH HFW



May 2025



LAST 20 YEARS



MID-AIR COLLISION
GOL - GLO1907 - B737-800
EXCEL AIRE - LEGACY 600
AMAZON REGION (2006)

TAM - JJ3054 - A320
CONGONHAS (2007)



AIR FRANCE - AF447 - A330
ATLANTIC OCEAN (2009)

LAST 20 YEARS



**ART TAXI AÉREO – GRAN CARAVAN
RIO BRANCO, ACRE (2023)**

**MANAUS AEROTAXI – EMB110
BARCELOS, AMAZON REGION (2023)**



**VOEPASS 2283 – ATR72 500
VINHEDO, SÃO PAULO (2024)**

Aviation Accidents in Brazil New Challenges in **Crisis Response**



Family Assistance – Obsolete regulation; doing the right thing in a complex environment



Intense Regulatory Scrutiny – Multiple parallel investigations



The Double-Edged Sword of Instant Comms – WhatsApp, social media & the “crisis echo chamber”



Data Processing and Protection – Security, purpose, and consent



Compensation – A universe in expansion (death, collective and social damages)

Economic	Material damages	Effective Losses	Medical, funeral expenses, destroyed property, etc
		Loss of profits	Lost business opportunities or income reasonably expected
Non-economic	Moral damages	Offence or violation of 'moral' rights of a person (freedom, honour, mental or physical health, image/reputation, etc.)	
	Aesthetic damages	Permanent and negative alteration to a person's visual appearance, such as scars, etc.	
	Death damages	Compensation claimed by the Estate for the pain, suffering, and other losses that a person experiences between the time of injury and their eventual death.	
	Social/Collective	Often arise from actions that harm public goods, such as the environment, public health or consumer rights; and impact the rights/interests of a group of people or the community.	

Aviation Accidents in Brazil
New Challenges in
Crisis Response



Valuing Emerging Professions and Informal Employment Structures – Challenges in income assessment (influencers, freelancers etc)



Expanding Legal Recognition of Social Ties – From frozen embryos to socio-affective parenthood



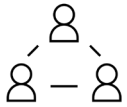
Environment – A growing concern

DISPUTE SYSTEM DESIGN IN MAJOR AVIATION LOSSES - **A POSITIVE EXPERIENCE**



Isonomy, Equity, Transparency, Confidentiality and Celerity

Principles



Victims' families, airlines, insurers, and government entities (e.g., prosecutors, public defenders, and consumer protection agencies).

Stakeholders



Objective

Provide the victims' families with an alternative (i.e., a controlled environment) to explore settlement possibilities without prejudice to their rights.

DISPUTE SYSTEM DESIGN IN MAJOR AVIATION LOSSES - **A POSITIVE EXPERIENCE**

Pre-agreed settlement parameters

Court precedents

Similar experiences: TAM JJ3054 (2007),
AF447 (2009), Samarco - Vale/BHP (2015),
Brumadinho Vale (2019)

Documents

Internal Regulation (official rules)

'Quick Reference Guide - QRG' (for the families)

Enrolment *et al* - Forms

Non-Disclosure Agreement

Full and Final Release



DISPUTE SYSTEM DESIGN IN MAJOR AVIATION LOSSES - **A POSITIVE EXPERIENCE**

Physical structure

Working stations
Meeting rooms
Laptops / website
Telephones

Personnel

Neutral '*Observers*' – trained by authorities
'*Consultative Committee*' - formed by public authorities to decide on controversial issues (decisions not binding)
Lawyers representing all parties involved
Secretaries

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JULIO COSTA



Personal Jurisdiction in U.S. Courts

Trend has been that U.S. courts have been dismissing cases that belong in other jurisdictions

Susan Hardy v. Scandinavian Airlines System

- Passenger was injured when she fell while disembarking the aircraft in Oslo
 - Claimed that the jetbridge was not at the correct level in relation to the door of the aircraft
- Trial court dismissed the case on jurisdictional grounds because:
 - SAS is not a resident of Louisiana, where the action was filed
 - The injury was not caused by conduct in the U.S.
- Fifth Circuit Court of Appeals reversed the decision
 - Court focused on all of SAS's contacts with the U.S., not just Louisiana, and allowed the case to proceed
- U.S. Supreme Court declined to hear the case (only accepts 1% of appeals)

Is this decision an outlier, or a new trend?

Recovery For Contracting Covid-19 After Flight

Sowunmi v. American Airlines

- Passenger claimed:
 - She tested negative several times, wore her mask, and social distanced prior to her flight from Jamaica to Philadelphia
 - Other passengers around her removed their masks during the flight while coughing or sneezing
 - She knew of at least three other passengers that had contracted Covid-19 before the flight
- After the flight, the passenger came down with severe Covid-19 symptoms and tested positive
- Passenger sued the air carrier for damages for her severe symptoms
- Air carrier filed a motion to dismiss the case at the outset because the claims were too speculative
- Court refused to dismiss the case finding that the allegations of cause were specific enough to allow further litigation

Plaintiffs may not win these cases, but it may cause an increase in litigation over this issue

Cargo – Declared Value for Carriage (Limitation of Liability)

Brink's v. Air Canada

- Shipment of gold bars (US\$15 million) and bank notes (US\$2 million) from Switzerland was stolen in Toronto
- Montreal Convention generally limits liability of carrier to the weight of the shipment
- One exception to the liability limitation is a “Special Declaration of Interest” and payment of a “Supplementary Sum” with that declaration

Brink's v. Air Canada (Cont.)

- Air Canada argued traditional view that declared value needed to be stated on the air waybill (contract of carriage), or some other clear declaration of declared value
- Brink's argued there is no requirement to state the value on the airwaybill, any communication to the airline that the shipment was valuable is sufficient
- Brink's also argued that purchase of more secure shipping option was payment of "supplementary sum"
- Court agreed with Air Canada that there needed to be a clear and specific monetary value declared for carriage
- Court also found that the payment for Air Canada's Secure Service was a standard fee charged for shipment of all valuable cargo, and was not a special negotiated rate based on the declared value
- Thus, Court upheld the Montreal Convention's limitation of liability (US\$13,000)

This is an argument gaining traction in other jurisdictions

Trump Administration – What's Next for Air Carriers?

- Business-Friendly Regulatory Environment
- Less Regulation and Fewer Pro-Consumer and Environmental Rules
- Decreased Enforcement Actions
- Reduced Opposition to Merger/Acquisition/Code Share Activity
- Spending on Infrastructure

CLYDE&CO
Successful risk navigation



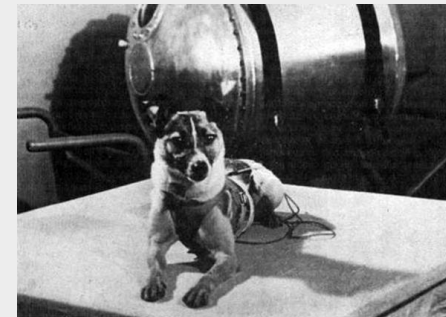
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Charles Röbin, Partner



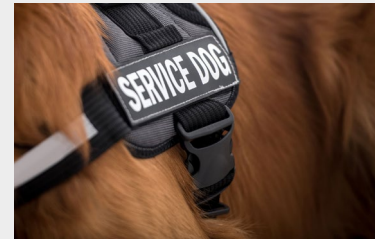
Carriage of Live Animals by Air

- Animal air travel
 - 1909 – Pigs might fly
 - 1957 – Space Dog
 - 2016 – Pooch Pilots Plane
- IATA Live Animals Regulation
- Council Regulation (EC) Nos 1/2005 and No 576/2013 – animal welfare during transportation
- Montreal Convention 1999 – compensation for animals in transport
- Treaty on the Functioning of the EU (TFEU) – 1957
 - Article 13 – “sentient beings” rather than things



Carriage of Live Animals by Air contd

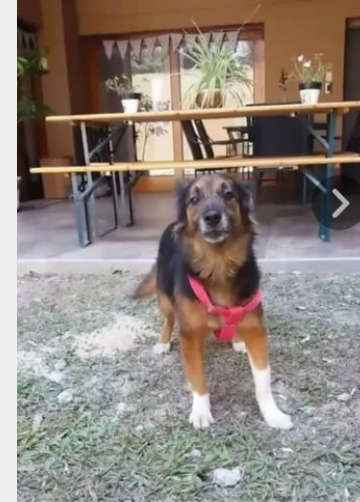
- **Cabin**
 - Unchecked Baggage
 - Emotional Support Animals (ESA)
 - Service/Assistance Animals
- **Baggage**
 - Checked Baggage
 - Limits of Liability – SDRs 1,519
 - Intent or Recklessness with Knowledge
 - Special Declaration + Supplementary Sum
- **Cargo**
 - MAWB/HAWBs
 - Defences – Article 18(2) + Contributory Negligence
 - Limits of Liability – SDRs 26 per kg
 - Special Declaration + Supplementary Sum



“Mona”

Ms Ortiz v Iberia Líneas Aéreas de España, S.A.

- **Commercial Court - Madrid**
 - 22 October 2019
 - Buenos Aires / Madrid / Barcelona
 - Checked Baggage – size and weight
 - No Special Declaration
- **Claim**
 - EUR5,000 for non pecuniary damages
 - Regulation No 2027/97
 - Ratification of MC99 into Spanish law
 - Concession of liability – limited to applicable baggage limits



BUSCAMOS A MONA!!!
Ayúdanos a difundir

02325-686889
15-4175-5257 (solo WhatsApp)

Commercial Court No. 04 Madrid – 846/2021

- **Claimant's Arguments**
 - Passenger compensation applicability – Article 21
 - Contrary to objectives of EC law
- **Defendant's Arguments**
 - Applicability of MC99 – Article 29
 - Checked baggage Article 22(2) limits of liability
 - No evidence of intent or recklessness with knowledge – Article 22(4)
 - No special declaration of interest – Article 22(2)



CJEU Referral

- **Questions Referred**

- Is checked baggage interpreted as excluding pets and companion animals?
- Does the compensation limit for checked baggage apply to pets/companion animals?

- **Backdrop to Decision to refer**

- No MC99 definition of baggage
- Definition of luggage
- Differentiation between “things” and “sentient beings”
- CJEU Referrals: 2010 and 2020 – “bundle of items”
- Article 333 of the Spanish Civil Code – living beings in living environment
- SPI - Actual value v Material value



CJEU Discussion

- Conflation of animal welfare and compensation for loss of checked baggage
- Special Declaration of Interest and supplementary sum paid mechanism and coverage
- Comparison with rail passengers' rights for loss / damage of animals
- Passenger being synonymous with “person”
- Difficulties in uniform application between baggage and cargo
- Convention objectives



Thank you. Any questions?

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Introduction

- The Montreal Convention is a stable but evolving framework via Court interpretation.
- The ECJ plays a key role in ensuring the Convention remains adapted to modern challenges via interpretation.
- Recent ECJ rulings reveal subtle shift in the interpretation of key terms and the scope of liability.
- Even limited evolutions in case law can have a significant impact on insurers' exposure.
- The analysis of three recent decisions illustrates this dynamic.

BT v Laudamotion (C-111/21, 2022)

- **Facts:** Passenger undertook (unnecessary) emergency evacuation, following a contained engine failure during take off, subsequently diagnosed with PTSD.
- **Legal issue:** Whether PTSD without physical injury qualifies as 'bodily injury' under Article 17(1).
- **Ruling:** Yes, if the passenger demonstrates *'the existence of an adverse effect on his or her psychological integrity of such gravity or intensity that it affects his or her general state of health and that it cannot be resolved without medical treatment'*.
- **Significance:** Expands liability scope to include certain psychological harms. Shift from prior conservative views.

DB v Austrian Airlines (C-510/21, 2023)

- **Facts:** Coffee spill during flight caused burns; alleged that inadequate medical care given by the air crew aggravated the injury. Action brought past the two-year limitation period.
- **Legal issue:** Whether post-incident mishandling by air crew falls under the scope of the 'accident' or constitutes a harmful event distinct from that accident.
- **Ruling:** Yes, both events constitute a single accident so that the action is time-barred in the present matter.
- **Significance:** Expands definition of accident to include subsequent carrier behaviour. A double-edged sword: broadens exposure but also allows to enforce the 2-year time limitation period.

JR v Austrian Airlines (C-589/20, 2022)

- **Facts:** Passenger fell while disembarking, possibly due to not using the handrail.
- **Legal issues:** Does such a fall qualify as an 'accident' under Article 17(1)? May contributory negligence of the claimant be invoked in this context?
- **Ruling:** Yes, disembarkation accident confirmed, but carrier may be exonerated due to passenger negligence if properly demonstrated.
- **Significance:** Provides a broad 'accident' definition; introduces nuance via contributory negligence.

Key takeaways

- The ECJ maintains a cautious approach, but recent rulings show that it can be willing to stretch legal definitions (such as ‘bodily injury’ in the *BT v Laudamotion* case) in response to evolving expectations.
- Societal pressure may continue to drive a gradual broadening of liability under the Montreal Convention.
- The Convention’s application can sometimes benefit carriers, particularly due to its strict two-year limitation period (*DB v Austrian Airlines*).
- The number of ECJ decisions interpreting the Montreal Convention remains limited (typically 1–3 per year), but their cumulative impact on insurer exposure is significant. Close monitoring is essential.

UK cases

Arthern -v- Ryanair (2023)



Passenger slipped on a puddle of melted water/de-icing fluid on the floor near the toilet.

The court at first instance found that the presence of de-icer on the floor of the galley was not unusual or unexpected.

On appeal, the judge referred to the CJEU decision in JR: *“In so far as the judgment forms part of international law about the Montreal Convention, I have considered it. However, I do not regard it as having high persuasive value because the reasoning is brief. The judgment does not demonstrate the same degree or quality of reasoning as (in particular) the domestic appellate courts in the cases that I have cited above.”*

// *The judgment does not demonstrate the same degree or quality of reasoning as (in particular) the domestic appellate courts in the cases that I have cited above....*

I do not regard it as having....value..”

UK cases

Lambert -v- Aer Lingus (2025)

Passenger claimed that his travel in business class did not meet his expectations as neither wheelchair assistance nor vegan food was provided, and he was, initially downgraded to economy, although ultimately travelled in business.

UK Consumer Rights Act provides for a right to a “price reduction” in addition to any remedy in “damages”.

Argued, and decided in the context of some ADR decisions that, as this remedy is distinct to “damages” it is not pre-empted by Montreal exclusivity.

In *Lambert*, the court determined that “..the Convention [provides] an exclusive code...If the Convention affords no remedy...then no remedy is available...in a contract of carriage case.”

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MANAGING AIRLINE SUPPLY SIDE EQUIPMENT DURABILITY ISSUES – THE IMPLIED TERMS

Matthew Reeve KC

22 May 2025



Introduction

Context – High asset values:

A320 - \$110m

A380 - \$450m

Two CFM LEAP engines - \$28m



Exclusion of liabilities in aircraft sales contracts

Section 14 SOGA

“(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

*(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, **taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.***

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- a) fitness for all the purposes for which goods of the kind in question are commonly supplied,*
- b) appearance and finish,*
- c) freedom from minor defects,*
- d) **safety,** and*
- e) **durability.**”*

Typical scheme for management of liability for quality in aircraft sales:

1. The buyer is afforded an opportunity to inspect, accept or reject the aircraft before delivery.
2. The manufacturer provides a limited warranty for defects for a specified period. 3 years and 3000 hours is common. There may be different warranty periods for specific components. The structure and wings and the avionics may be subject to longer period.
3. The remedy under the express limited warranty is usually confined to repair or replacement of the defective component.
4. There is wording which says that the express limited warranty is the buyer's only remedy for defects and which seeks to exclude any implied terms.

Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm)

The clause:

4.1 THE WARRANTY, OBLIGATIONS AND LIABILITIES OF SELLER AND THE RIGHTS AND REMEDIES OF BUYER SET FORTH IN THE AGREEMENT ARE EXCLUSIVE AND ARE IN LIEU OF AND BUYER HEREBY WAIVES AND RELEASES ALL OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS OR LIABILITIES, EXPRESS OR IMPLIED, ARISING BY LAW, IN CONTRACT, CIVIL LIABILITY OR IN TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, AND B) ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF SELLER TO ANYONE OF ANY NATURE WHATSOEVER BY REASON OF THE DESIGN, MANUFACTURE, SALE, REPAIR, LEASE OR USE OF THE AIRCRAFT OR RELATED PRODUCTS AND SERVICES DELIVERED OR RENDERED HEREUNDER OR OTHERWISE.



Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm)

Cooke J:

“It is to my mind clear that the first two lines of Article 4.1 can only be read as saying that the defendant seller’s obligations are to be found exclusively in the APA and its Appendix... The parties’ language is in my judgment fairly susceptible of only one meaning (to employ the expression used by Lord Diplock in *Photo Production* and Lord Justice Rix in *The Mercini Lady*). There is no express reference to the word ‘condition’ but the language must necessarily be taken to refer to the implied conditions of the Sale of Goods Act, because they are obligations and liabilities ‘implied, arising by law’.”

Wilmington Trust v Spicejet [2021]

The clause:

“... LESSOR HEREBY SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED (EXCEPT AS HERIN BELOW PROVIDED IN THIS SECTION 5(a)), AS TO ARIWORTHINESS, CONDITION, DESIGN, OPERATION, MERCHANTABILITY, FREEDOM FROM CLAIMS OF INFRINGEMENT OR THE LIKE, OR FITNESS FOR USE FOR A PARTICULAR PURPOSE OF THE AIRCRAFT, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE AIRCRAFT, THE ABSENCE THEREFROM OF LATENT OR OTHER DEFECTS...”

Ineffective to exclude the implied condition as to quality.



“AS IS, WHERE IS”

The Union Power [2013] 1 Lloyd's Rep. 509, Flaux J

(1) the words are not sufficient to exclude the implied term of satisfactory quality and fitness for purpose but

(2) they are effective to exclude the right of rejection of the vessel for breach of that term. Second level

Wilmington Trust Case



Conclusions

1. The modern view is that exclusion clauses are to be interpreted by reference to the ordinary rules of contractual construction, with the calibration of the clarity of language required informed by the importance of the rights to be excluded.
2. In sales and supplies of aircraft and engines, appropriately clear language is needed to exclude the statutory implied terms as to quality. That is normally done either by clearly referring to them as “conditions” or by language which clearly excludes remedies other than those expressly contracted for.
3. The phrase “as is, where is” cannot be treated as a reliable mechanism for excluding the implied terms.

EXCLUSION OF SATISFACTORY QUALITY IMPLIED TERM

QUESTIONS



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