Passenger numbers to double over the next 20 years
Floodgates to open on past claims for delay and cancellation under EC Regulation 261
CJEU rules on “time of arrival” under EC Regulation 261
Progress update on the revision of EC Regulation 261
CJEU rules that airlines are within their rights to charge passengers for checked baggage
Single European Sky (SES II+) initiative remains in gridlock
Political impasse delays implementation of the EU Airports Package of Regulations
State aid update and European legacy airline restructuring
Special focus on Ebola
Where next for Malaysian Airlines?
Passenger numbers to double over the next 20 years

The International Air Transport Association (IATA) released its first ever 20 year global passenger growth forecast in October 2014, which predicts annual passenger numbers will grow from 3.3 billion this year to 7.3 billion in 2034.

The Global Passenger Forecast Report, put together by the new IATA Passenger Forecasting Service, working in association with Tourism Economics, analyses airline passenger flows across 4,000 country pairs for the next 20 years, using three key demand drivers: living standards, projected population and demographics, and price and availability.

The Report forecasts that China will overtake the US as the world’s largest air passenger market by 2030, and that by 2034, the five fastest increasing markets, in terms of additional passengers per year, will be China, the US, India, Indonesia and Brazil. Eight of the ten fastest growing markets in percentage terms will be in Africa, and the highest growth in terms of country pairs is predicted to be in Asia and South America, reflecting economic and demographic growth in those markets.

The Report highlights the fact that meeting the forecast growth in global air passenger numbers, which represents a 4.1% average annual rate of growth, will require government policies that support the economic benefits that such increased levels of air connectivity will make possible.

Tony Tyler, IATA’s Director General and CEO, said the following:

“Airlines can only fly where there is infrastructure to accommodate them. People can only fly as long as ticket taxes don’t price them out of their seats. And air connectivity can only thrive when nations open their skies and their markets. It’s a virtuous circle. Growing connectivity stimulates economies, and healthy economies demand connectivity.”

Tyler points out that at present, aviation helps sustain 58 million jobs and US$2.4 trillion in economic activity, and that in 20 years time, IATA has projected that aviation will support over 105 million jobs and US$6 trillion in GDP.

IATA’s forecasts for the 10 largest air passenger markets (defined by traffic to from and within) for the next 20 years

- The US will remain the largest air passenger market until around 2030, when it will drop to number 2 behind China;
- India will grow from being the 9th largest market to the 3rd, overtaking the UK around 2031, which will fall to 4th place;
- Japan will decline from the 4th largest market to the 6th largest by 2033, reflecting a declining and ageing population;
- Germany and Spain will decline from 5th and 6th positions to be the 8th and 7th largest markets, France will fall from 7th to 10th position and Italy will fall out of the top ten largest markets completely in or around 2019;
- Brazil will rise from the 10th largest market in 2014 to the 5th largest by 2034; and
- Indonesia will enter the top ten around 2020 and will attain 6th place by 2029.

The Report recognises that air travel has an environmental impact, and states that in 2009 the industry agreed three targets so as to ensure that aviation plays its part in ensuring a sustainable future:

- 1.5% annual fuel efficiency improvement by 2020;
- Capping net emissions through carbon-neutral growth from 2020;
- A 50% cut in net emissions by 2050, compared to 2005.

In the same week that the Global Forecast Report was published, IATA released the results of its quarterly Business Confidence Survey of CFOs and heads of cargo, which forecasts growth across the airline industry over the next year. Management of airlines are predicting largely positive profit expectations for 2015, notwithstanding some downside risks associated with the weaknesses in the Eurozone economic recovery, the Russia-Ukraine crisis, and some knock on effects from the Ebola crisis.
Floodgates to open on past claims for delay and cancellation under EC Regulation 261

On 31 October 2014, the English Supreme Court announced its decision to refuse the applications by Jet2.com and Thomson Airways to appeal the Court of Appeal’s decisions that unforeseen technical defects arising out of the operation of an aircraft cannot be relied upon as “extraordinary circumstances” for the purposes of defending EC 261 claims (the Huzar case below), and that EC 261 claims do not have to be brought within a two year time period under the Montreal Convention, but can be brought for a period of up to six years after the date of the delayed or cancelled flight, under the rules of normal limitation periods in English Law (the Thomson case below).

The rejection by the Supreme Court of these two appeals against the Court of Appeal judgments means they stand as final decisions binding on all lower courts in England and Wales, as the Supreme Court is the highest court in England and Wales.

Notwithstanding the intervention of IATA, the UK CAA, and the European Low Fares Airline Association (ELFAA) in the appeals process, who made submissions to the Supreme Court supporting Jet2’s appeal, the Supreme Court made the following order:

"The Court ordered that permission to appeal be refused in Thomson because the application does not raise an arguable point of law; (and) permission to appeal be refused in Jet2.com because the application does not raise a point of law of general public importance and, in relation to the point of European Union law said to be raised by or in respect to the application, it is not necessary to request the Court of Justice (of the European Union) to give any ruling because the Court's existing jurisprudence already provides sufficient answer."

The reference to European law here is a reference to the Wallentin-Hermann judgment of the Court of Justice of the European Union in 2008, as keen followers of EC 261 case law will be aware.

So where does that leave the airlines?

It is worthwhile reiterating a summary of the Court of Appeal’s decisions; a detailed legal analysis of these judgments can be found in our previous bulletins at:

(http://www.shlegal.com/knowledge/publications/06_14_English_Court_clamps_down_on_extraordinary_circumstances_in_passenger_claims) and;

(http://www.shlegal.com/knowledge/publications/06_14_EC_261_Court_confirms_English_passengers_may_claim_within_6_years_of_flight).

The Court of Appeal’s judgment in Huzar v Jet2.com set down the following:

- For a technical problem to constitute an extraordinary circumstance, the circumstance must be out of the ordinary;
- The fact that a particular technical problem may be unforeseeable does not mean that it is unexpected;
- Difficult technical problems arise as a matter of course in the ordinary operation of a carrier’s activity, some may be foreseeable and some not but all are properly described as inherent in the normal exercise of the carrier’s activity;
- Normal technical problems such as component failure or general wear and tear should not be considered as extraordinary circumstances;
- Events which are beyond the control of the carrier because they are caused by the extraneous acts of third parties, such as acts of terrorism, strikes, or air traffic control problems, or because they result from freak weather conditions, cannot be characterised as inherent in the normal activities of the carrier.

The practical effect of the two judgments in Huzar and Dawson on claims for compensation made in England and Wales is as follows:

- Where a case has been concluded in the courts, it cannot be re-opened, unless the case is within the time limits to be appealed to a higher court;
- Cases where a settlement has been accepted by the passenger cannot be re-opened;
- Where an airline has been deferring decisions on claims arising out of technical defects, which it alleges are “extraordinary circumstances”, pending the outcome of the application for leave to appeal to the Supreme Court, it must now apply the extraordinary circumstances test laid down in the Court of Appeal’s judgment;
- Where, prior to the Court of Appeal judgment, and while the application for leave to appeal has been pending, passengers have made claims for compensation to the airline, and had their claims refused, they may now choose to ask the airline to re-assess their claims or take their cases to the county court;
Where a claim has been stayed in the lower courts, pending the application for leave to appeal the Court of Appeal decision, an application to lift the stay can now be made, and the case will be determined on the basis of the Court of Appeal’s judgment;

Any new claims (for flights that fall within the six year limitation period) should be assessed in accordance with the tests laid down in the Court of Appeal judgment.

The Court of Appeal’s judgment in the Dawson v Thomson Airways case simply held that passengers can refer compensation claims to the courts in England and Wales for flights going back for a period of six years, the English law limitation period, as opposed to a two year limitation period under the Montreal Convention 1999.

On 31 October 2014, the UK CAA posted on their website a press release under the section “Passengers” entitled “CAA calls on airlines to comply with the law following Supreme Court decisions on flight delay cases.”

In their press release, the UK CAA said the following:

“This is also important information for anyone who has made a claim for flight delay compensation but is waiting for a decision pending the outcome from the Supreme Court. Following the decisions in these two cases, airlines should not continue to put claims on hold. Where airlines have already put claims on hold, the CAA expects airlines to revisit them and pay compensation for any eligible claims.”

Andrew Haines, Chief Executive of the CAA, said:

“We acknowledge airlines’ concerns about the proportionality of the flight delay regulations and recognise that airfares may increase as a result. However, the court’s decisions in these cases bring legal clarity to this issue and we now expect airlines to abide by them when considering claims.”

The reaction of the airlines to these decisions reported in the media has been fairly muted.

A Thomson Airways spokesman said: “We are surprised and disappointed to note the decision of the Supreme Court as we believe our position is sound in law. We will now review the position based on the Court’s decision.”

The Chief Executive of the British Air Transport Association, Nathan Stower, said:

“Today’s Supreme Court decision is both surprising and disappointing. UK airlines support the principle of passenger protection and always meet their legal obligations. However, the rules should be clear, affordable and proportionate for the sake of passengers and airlines. The current system fails those tests and this decision will further increase costs which ultimately are borne by all passengers. Vital reform of the EU regulation has recently stalled in Brussels due to disagreements between the Spanish and UK governments over Gibraltar. These differences must now be urgently resolved to allow the necessary reforms to proceed.”

A spokesman from easyJet said:

“The potential increase in costs by paying compensation far in excess of the fare price places a huge financial burden on us as an airline and will ultimately lead to higher fares for all, which is not in the long-term consumer interest.”

Several commentators have warned that the effect of the Supreme Court’s ruling to reject the appeals of Jet2 and Thomson has ‘swung the pendulum against airlines’, and ‘could make budget airlines’ pricing models unsustainable.’

Perhaps not surprisingly, the Supreme Court’s rulings on 31 October were picked up across all the English media, and even made front page news in The Daily Mail newspaper. Lawyers acting for claimant passengers are cock-a-hoop about the decision, and are saying that the floodgates for passengers’ claims for delay and cancellation that have been backed up for long periods of time will now be opened; they are predicting a torrent of claims. Law firms specialising in bringing EC 261 claims on behalf of passengers are saying that the Huzar ruling will “open the door to more than two million compensation claims every year in the UK, worth an estimated £876 million”, and that the Dawson ruling confirming that passengers have six years to bring a claim for flight compensation could lead to the activation of historical claims worth over £3.9 billion. They estimate there are over 1,000 cases awaiting the outcome of the ruling, and another 2,000 passenger claimants waiting in the wings to issue proceedings.

Several commentators have warned that the effect of the Supreme Court’s ruling to reject the appeals of Jet2 and Thomson has ‘swung the pendulum against airlines’, and ‘could make budget airlines’ pricing models unsustainable’.
It should be emphasised that the Court of Appeal decisions in Huzar and Dawson are only binding on and applicable to cases that are heard in the courts of England and Wales, but the concern is that these rulings will be referred to by claimants bringing claims for delay or compensation against airlines across the EU, and may be considered by courts in other EU Member States as “of persuasive effect.”

It should also be emphasised that although the airlines have no right of appeal or the ability to challenge the Supreme Court’s decision (they cannot appeal directly to the Court of Justice of the European Union (CJEU) – their case has to be referred to the CJEU by a national court), there is a case pending before the CJEU called Van der Lans v KLM, which was referred up by a Court in Amsterdam on 28 May 2014, which asks 10 questions challenging the breadth and validity of the tests in the Wallentin-Hermann CJEU judgment on when technical defects can constitute “extraordinary circumstances” under EC Regulation 261.

Although airlines would almost certainly receive short shrift from courts in England and Wales should they seek to continue to apply to stay claims on the basis that the Van der Lans v KLM case is pending before the CJEU, a judgment in favour of Air France – KLM given in that case by the CJEU may “trump” the Court of Appeal decisions in Huzar (given that the CJEU is a higher court than the English Court of Appeal), and there is a possibility that if the CJEU rules that the Wallentin test was wrong, or too broad, the effect of the Huzar Court of Appeal judgment may be diluted, or even overruled.

Law firms specialising in bringing EC 261 claims on behalf of passengers are saying that the Huzar ruling will “open the door to more than two million compensation claims every year in the UK, worth an estimated £876 million.”
The CJEU went on to say:

“Although such inconveniences must be regarded as unavoidable as long as a flight does not exceed the scheduled duration, the same is not true if there is a delay, since the time by which, in the circumstances described (in the preceding paragraph), the scheduled duration of the flight has been exceeded, represents “lost time” in the light of the fact that the passengers concerned cannot use it to achieve the objectives which led them to go at the desired time to the destinations of their choice.”

In those circumstances, the CJEU found that the situation of passengers does not change substantially when their aircraft touches down on the runway, or when the aircraft reaches its parking position and the parking brakes are engaged or the chocks applied, as the passengers remain confined; it is only when the doors are opened, that passengers can resume their normal activities. It was on this basis that the CJEU found that the meaning of “time of arrival” in EC Regulation 261 “means the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft.”

The CJEU said that although a number of European Regulations and IATA documents refer to the concept of “actual arrival time” as the time the aircraft reaches its parking position, that interpretation was not relevant to EC Regulation 261 and did not invalidate their finding.

This somewhat bizarre ruling adds further misery to airlines in that passengers will now be “clock watching” even more when delays are on the cusp of three hours, and scheduled arrival times have always been calculated and recorded by reference to the time of the application of chocks at their parking position not the time when the first door is opened. It will perhaps be an all the more bizarre decision when passengers are allowed to use their mobile phones, laptops and tablets throughout flights.

The European Economic and Social Committee, and the European Parliament’s, rapporteur, Georges Bach, rejected most of the Commission’s proposals and recommended that the time limits for delay should be 3 hours for flights over 2,500km, 5 hours for flights over 2,500km and 7 hours for flights over 6,000km.

The European Parliament voted on the Commission’s proposals in plenary forum in February 2014 adopting the 3, 5 and 7 hour thresholds for delays, and €300, €400 and €600 compensation levels for the three different flight lengths.
The draft proposed Regulation then went to the European Council, who suggested in their first working paper going back to the 5, 9 and 12 hour thresholds for delays proposed by the Commission, and compensation levels of €250 for flights up to 1,500km and intra EU flights of 1,500-3,500km, €400 for flights to and from third countries of 1,500-3,500km, and €600 for all flights over 3,500km.

The Member State representatives of the European Council then had a falling out among themselves in relation to the delay thresholds. Spain and Austria opposed the 5 hour threshold, and are insisting on 3, 5 and 9 hours, but a reduced level of compensation of €100 for intra-EU flights. Denmark and Slovakia want a single trigger of 5 hours for all flights, and the UK, Ireland and Poland support the 5, 9 and 12 hour proposals. There are also differences of opinion between Council members on reactionary delays caused by extraordinary circumstances, re-routing and limits on accommodation. A row has also broken out at both European Parliament and Council level between the UK and Spain over the proposed removal of the Gibraltar exclusion clause. Gibraltar is not currently within the scope of the Regulation and the UK government wants to include Gibraltar, but Spain is adamant that Gibraltar should remain excluded, and is making its feelings very clear about this at Council and Parliament levels.

These differences of opinion, the elections for the European Parliament in May 2014 and the subsequent summer recess, have stalled progress on the revision of the draft Regulation. The European Council’s final proposed revision was supposed to be published in Autumn 2014, but the Italian Presidency has said that it will only resume discussions within Council if a solution to the Gibraltar impasse is found. It seems likely in these circumstances that while the Gibraltar issue remains unresolved, the Italian Presidency will not be able to pressurise Council into agreeing a common approach. The net effect of this is that any progress in the revision of the Regulation remains stalled, and the earliest that trialogue meetings will take place between the Council, Commission, and Parliament (assuming agreement can be reached in Council) is 2015. It is conceivable that the finalised new Regulation could be agreed and adopted in 2015, but even if it is, it will not take effect for a period of 18 months after its publication in the Official Journal. So the earliest the new Regulation would come into effect would be in 2017, with 2018 looking like a more realistic proposition now.

The major problem with ongoing delay in the progress of the revision of the new 261 Regulation is that judgments in national courts, such as the recent Huzar v Jet2.com and Dawson v Thomson Airways judgments, will continue to be delivered, interpreting the Regulation in its present form or interpreting other CJEU judgments on the Regulation, and judgments will continue to come out of the CJEU like the Germanwings v Henning judgment, all or some of which may influence the drafting of the new Regulation, or at the very least, influence the thinking of the European legislators.

CJEU rules that airlines are within their rights to charge passengers for checked baggage

On 18 September 2014, the CJEU gave a preliminary ruling in a case called Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, that “checked-in baggage cannot be considered to be compulsory or necessary” for carrying passengers.

The original case was brought in a Spanish court by a Spanish passenger, Ms. Villegas, who paid €241.48 for four return flights on Vueling Airlines between La Coruna in Spain and Amsterdam in the Netherlands, but was charged a further €40 by Vueling when she checked in two bags online.

Ms Villegas complained to the Spanish consumer protection authority, which fined Vueling €3,000 on the basis that Spanish law prohibits airlines from charging for checking in passengers’ baggage in the form of an optional price supplement. The relevant provision of Spanish law provides:

“As part of the price of the ticket, the carrier is required to carry passengers and their baggage, subject to weight limits established by regulation, irrespective of the number of items and their size. Separate provisions shall govern excess baggage.”

Vueling argued before the Spanish courts that EU law, in particular Article 22 of EC Regulation 1008/2008, lays down a principle of freedom to set prices, according to which air carriers may set a base price for tickets that does not include checking in baggage, and add to that price, subsequently, if the carrier wishes to check in baggage.

The Spanish court referring the case up to the CJEU asked for a preliminary ruling on whether the Spanish legislation was compatible with the principle of pricing freedom laid down in EU law.

The CJEU ruled that the Spanish law requiring airlines to carry checked-in baggage without a surcharge infringed EU law, and that there were grounds for charging those fees saying:

“The processing and storing of checked-in baggage is likely to lead to additional costs for the airline, which is not the case for carrying hand baggage. Furthermore, the extent of the liability of the carrier for damage to baggage is greater when baggage is checked in than when it is not.”
The CJEU also noted that many airlines follow a business model of offering flights at the lowest prices, and that with fees rising for checking in baggage, many passengers choose to bypass the surcharges by travelling only with carry-on baggage. It said that “having regard to those considerations, the service of carriage of checked-in baggage cannot be considered to be compulsory or necessary for the carriage of passengers.”

The case will now be returned to the Spanish court, which must reach a judgment based on the CJEU’s preliminary ruling.

**CJEU rules that airlines are within their rights to charge passengers for checked baggage**

**Single European Sky (SES II+) initiative remains in gridlock**

Under the Single European Sky legislation, European national air traffic control organisations (known as Air Navigation Service Providers or ANSPs) are supposed to work together under a scheme in which nine regional airspace blocks across the EU (called Functional Airspace Blocks or FABs) are established, so as to cut costs, procure efficiencies, and most significantly perhaps, reduce carbon emissions.

The establishment of the FABs is one of the cornerstones of the Single European Sky legislation, which, as its name suggests, is designed to create a single European airspace, and reduce fragmentation along national borders in air traffic management. The FABs should deliver the following benefits:

- **Higher safety standards:** by enabling aircraft to fly without dealing with border crossings; FABs will remove the risk of border interference and national inconsistencies in safety procedures; and

- **Reduced costs and fuel consumption:** by enabling aircraft to fly straighter lines at better altitudes, FABs are expected to save fuel and reduce delays, thereby improving services, reducing noise and carbon emissions, and reducing the cost of flying, all to the tune of billions of euros annually.

Artice 9a of EC Regulation 550/2004 mandated the full implementation of FABs by all EU Member States by 4 December 2012, but progress on the establishment of the FABs has been painfully slow, principally because of issues of national sovereignty, and the fear among ANSPs that there will be significant job losses (see our article on this in our Aviation Legal Eye Autumn/Winter 2013 edition).

**Stephenson Harwood awarded Transport Law Firm of the Year Award 2014**

Our work in the aviation industry has been recognised by the Legal 500 UK directory, which recently announced Stephenson Harwood as the winner of the “Transport Law Firm of the Year” award. The Legal 500 UK directory awards recognise the best private practice and in-house legal teams and leading individuals over the past 12 months. The awards are based on comprehensive research to gather feedback from clients and peers, with over 50,000 interviews conducted to ascertain the winners.

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The European Commission is losing patience with EU governments, who are dragging their feet on implementation of the Single European Sky legislation, and on 10 July 2014, it sent formal letters to 18 EU governments, urging them to step up the implementation of the nine FABs. The FAB between Italy, Greece, Cyprus, and Malta (Bluemed FAB) is still being formally established, and although the State Agreements establishing the FAB between Austria, Czech Republic, Slovakia, Slovenia, Hungary and Croatia (FABCE), the FAB between Bulgaria and Romania (Danube FAB), the FAB between Lithuania and Poland (Baltic FAB), the FAB between Spain and Portugal (Southwest FAB), and the UK/Ireland FAB, have come into force, the governments of the relevant EU Member States are not taking the steps necessary to implement these Agreements and make the FABs themselves functional.

The previous Vice-President of the European Commission responsible for transport, Siim Kallas, has said:

“We have finally overcome national borders in the European airspace: FABS are a necessary, vital component of the Single European Sky. Right now these common airspaces exist only on paper; they are formally established but not yet functional. I urge Member States to step up their ambitions and push forward the implementation of the Single Sky.”

Following the receipt of formal letters of notice in July 2014, EU Member States had two months to respond giving a progress update on implementation to the European Commission. Depending on the nature of those responses, the Commission may now have to issue a Reasoned Opinion in accordance with Article 258 of the Treaty on the Functioning of the European Union, and take infringement proceedings against EU Member States who have not undertaken to remedy the breach of EU law in failing to make the FABs functional.

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European political impasse delays implementation of the EU Airports Package of Regulations

particularly at Frankfurt and Munich airports, have been exerting considerable lobbying pressure on MEPs.

The proposed new groundhandling regulation has been the most contentious component of the Airports Package because the proposed increase in the minimum number of groundhandling companies to be given licences at large airports is very politically sensitive.

The Transport Committee watered down the European Commission’s proposal to increase the number of groundhandling companies from two to three at airports with over 5 million passengers, by proposing to raise the threshold to airports with over 15 million passengers, with the increase in groundhandling companies from two to three to be phased in over a ten year period. The Transport Committee also proposed more stringent social terms and conditions and protection of employment conditions. These revisions were narrowly voted through the European Parliament in April 2013, but European Council member representatives have not been able to reach agreement on the proposed revisions, with Germany in particular resisting any increase in the current number of groundhandlers at European airports and pushing for more protection of employment and social conditions.

Several organisations, including airline associations, have suggested that the Commission should withdraw the proposed new groundhandling regulation, on the basis that the benefits of the addition of one extra groundhandling company are outweighed by a significantly increased social burden.

It remains to be seen whether the European Council Member State representatives will be able to resolve their political differences, and agree on revisions, and then whether the newly elected European Parliament will be able to find a consensus with the Council on both the slots and groundhandling regulations.

State aid update and European legacy airline restructuring

In 1987 the European Union agreed to liberalise the air transport sector and create a single European aviation market by giving all airlines in possession of a Community licence unrestricted access to the intra-European market. Before liberalisation the European aviation sector was dominated by the national or legacy carriers that were making minimal profits (if any) on the short haul side of their business, and were often propped up financially by their national governments. International air transport in Europe was governed by bilateral air services agreements between pairs of European countries, which often allowed only one airline from each country to operate services on a limited number of specific routes. Some of these bilateral agreements contained ownership and control restrictions (i.e. restrictions on foreign ownership), and heavily restricted market access and capacity.

Following a series of Aviation Liberalisation Packages introduced in 1987 and 1990, and the introduction of the right of one EU Member State airline to operate on routes within another Member State in the third Liberalisation Package, European carriers were granted an almost unfettered freedom to fix their own routes, schedules, fares, and capacities, without any state intervention.

It was this liberalisation and unrestricted access to the intra-EU market that facilitated the emergence of the low cost carrier, which operates a completely different model to the legacy or national carriers; i.e. low cost high capacity flights, single passenger class, unreserved seating, single aircraft type fleets, point to point traffic, fast turnarounds to optimise aircraft utilisation, payment for any additional services including on board refreshment, checked baggage, and credit card payments, and reliance on regional secondary airports located in cities “reasonably close” to the passengers’ final destination.

The advantages of using secondary regional airports are:

- Lower landing and service fees;
- Less congestion than hub airports;
- Reduction in turnaround times enabling more efficient utilisation of aircraft and higher frequencies.

Legacy or national carriers, already struggling before the emergence of low cost carriers to make money on their intra-EU short haul routes, which were used as feeder routes to channel passengers onto their long haul flights through the traditional “hub and spoke” model, realised they had to restructure in order...
Guidelines, which superseded and replaced the previous Guidelines on State aid to airports and airlines (the 2014 Guidelines) on 20 February 2014, the EU Commission adopted new rules governing the financing of airports. The need for more clarity on the application and active consultation in 2011, which was repeated in 2013, emphasised the development of regional airports, while ensuring there was strict compliance with the principles of transparency, non-discrimination and proportionality. The framework of the Guidelines specified how public financing for airports and the grant of state aid for starting up new routes were to be assessed in accordance with EU competition law, so as to avoid the distortion of competition.

The 2005 Guidelines specifically addressed the financing of airports and start-up aid to airlines departing from regional airports. The purpose of the Guidelines was to encourage the development of regional airports, while ensuring there was strict compliance with the principles of transparency, non-discrimination and proportionality. The framework of the Guidelines specified how public financing for airports and the grant of state aid for starting up new routes were to be assessed in accordance with EU competition law, so as to avoid the distortion of competition.

In 2011, the European Commission announced that it would carry out public consultations on the 2005 Guidelines, because of the changes that had taken place in the European aviation sector since 2005, with the low cost carriers accounting for a larger share of intra-EU traffic than legacy carriers, and the transformation of the airport sector, with regional and local authorities investing in and subsidising terminals and runways to try and attract low cost carriers and regional carriers so as to develop their local economies. The responses to the public consultation in 2011, which was repeated in 2013, emphasised the need for more clarity on the application and active enforcement of the applicable rules, and more transparency in the rules governing the financing of airports.

On 20 February 2014, the EU Commission adopted new Guidelines on State aid to airports and airlines (the 2014 Guidelines), which superseded and replaced the previous Guidelines on state aid in the aviation sector. The 2014 Guidelines set out the conditions which public funding for airports and airlines must comply with to be deemed compatible with EU law, and are applicable to all operating aid cases, both pending notifications and non-notified existing aid cases, in relation to operating aid granted before March 2014. The 2014 Guidelines are applicable only to investment aid notified or granted after March 2014 – any investment aid granted prior to March 2014 is to be assessed under the previous Guidelines.

The key changes in the 2014 Guidelines are as follows:

- **Operating aid**: in contrast to previous Guidelines, smaller airports (with fewer than 3 million passengers) are allowed to receive aid for operating purposes for a transitional period of 10 years, under certain conditions, in order to give airports time to adjust their business model. Any such operating aid has to be phased out completely by 2024. In order to receive operating aid, airports need to be able to demonstrate, through a business plan, that they can fully cover their operating costs at the end of the 10 year transitional period.

- **Investment aid**: greater restrictions are imposed on funding for airport infrastructure that can be received. Unless there are “exceptional circumstances”, aid to finance infrastructure investments is allowed only for airports with fewer than 5 million passengers a year.

- **Start-up aid**: there are some changes to the conditions in which airlines can receive aid for launching new routes. Start-up aid will be restricted to airlines connecting airports with less than 3 million passengers a year. A slightly higher proportion of aid relative to eligible costs is allowed than under the previous Guidelines, and the conditions under which airlines can receive start-up aid are generally more flexible for those airports connecting airports located in remote regions.

- **The market economy operator test**: in contrast to the previous Guidelines, which did not stipulate any principles for assessing whether an agreement contained state aid, the 2014 Guidelines introduced the market economy operator test or MEO test for assessing the existence of aid in agreements between airports and airlines. The MEO test is comparable to the Market Economy Investor Principle (MEP), and tests whether a private investor would have undertaken a deal on terms similar to the state-owned entity, leaving aside all social, regional policy and sector considerations. In other words, public funding granted under normal conditions must not and will not constitute state aid. The MEO test requires, under the 2014 Guidelines, the existence of a business plan or analysis and internal documents showing clearly that a profitability analysis was conducted before the public financing was granted. If the MEO test is not passed, it will need to be demonstrated that any aid is compatible with EU state aid laws, and if not, it is deemed to be illegal, and has to be repaid by the beneficiary of the aid.
Increased transparency and monitoring measures: EU Member States will have to make publicly available and easily accessible, on the internet and elsewhere, information about state aid measures, including the granting authority, name of the beneficiary, the amount of the aid, and the expected benefits of the aid. Member States will also have to keep detailed records of all state aid grants for a period of 10 years, and submit to the European Commission an annual report on the progress made in reducing operating aid. A monitoring trustee may also be appointed, and the Commission can require an independent expert to produce an evaluation report on state aid schemes that involve large budgets, contain novel characteristics, or where it is likely that significant market technology or regulatory changes will take place.

It is too early to gauge the impact of the 2014 Guidelines, but it is clear that larger airports in particular will face greater challenges in showing that state aid for infrastructure investment is compatible with state aid law – for example the construction of a new airport in the South East of England would not be commercially viable without substantial state funding. The MEO test is undoubtedly also going to put agreements negotiated between smaller regional airports and airlines, and any state funding of airlines, very squarely under the microscope.

With low cost carriers now accounting for 45-50% of the short-haul market in Europe, and the continuing expansion of the Gulf carriers in Europe, "restructuring has become a regular agenda item, if not a constantly recurring one, for the management of Europe’s legacy airlines", and the circumstances in which state aid will be receivable are now far more restrictive and under much greater scrutiny. Taking just a recent snapshot of some of Europe’s legacy carriers; Slovakia’s Slovak Airlines, Lithuania’s FlyLal Airlines, and Hungary’s Malev all went under, Aegean Airlines acquired Olympic Air, Alitalia sought survival through Etihad, BA has restructured successfully, but Iberia is struggling, Air France-KLM, the Lufthansa Group and Air Malta continue with their restructuring efforts, Croatia Airlines and Cyprus Airways are seeking strategic investors, and LOT is looking for a merger. So with all this ongoing restructuring, it is probable that some of these legacy carriers will either sell significant stakes in themselves or merge within the next five years, in order to survive and try and make profit on their intra-EU routes.

As at 20 February 2014 there were 28 state aid investigation cases pending before the European Commission, which were to be decided under the new Guidelines. The rulings on state aid investigations that have been made by the Commission since the 2014 Guidelines came into effect (whether under the old Guidelines or the 2014 Guidelines) include:

- Belgium’s Charleroi Airport – illegal aid;
- Denmark’s Aarhus Airport – no state aid;
- France’s Angouleme Airport – illegal aid;
- France’s Marseille Provence Airport – no state aid;
- France’s Nimes Airport – illegal aid;
- France’s Pau Pyrenees Airport – illegal aid;
- Germany’s Altenburg-Nobitz Airport – illegal aid;
- Germany’s Dortmund Airport – no state aid;
- Germany’s Frankfurt-Hahn Airport – no state aid;
- Germany’s Leipzig-Halle Airport – no state aid;
- Germany’s Niederrein-Weeze Airport – no state aid;
- Germany’s Saarbrucken Airport – no state aid;
- Germany’s Schoenefeld Airport – no state aid;
- Germany’s Zweibrucken Airport – illegal aid;
- Italy’s Alghero Airport – no state aid;
- Italy’s Stretto Airport – no state aid;
- Latvia’s Air Baltic – no state aid;
- Poland’s LOT Airways – no state aid;
- SAS Scandinavian Airlines – no state aid;
- Slovenia’s Adria Airways – no state aid;
- Sweden’s Vasteras Airport – no state aid.

Restructuring has become a regular agenda item, if not a constantly recurring one, for the management of Europe’s legacy airlines.
Special focus on Ebola

On 8 August 2014, the World Health Organisation (WHO) convened an Emergency Committee under the International Health Regulations (“IHR 2005”), which declared that the Ebola outbreak in West Africa constituted an “extraordinary event and a public health risk to other States”, advised that “the possible consequences of further international spread are particularly serious in view of the virulence of the virus”, and that there should be “a coordinated international response to stop and reverse the international spread of Ebola”.

The Ebola outbreak began in Guinea in December 2013, then spread to Liberia, Nigeria, and Sierra Leone. As at 8 August 2014, 1711 cases had been reported, including 932 deaths, which made it the largest Ebola outbreak recorded to date.

On 8 August, acting on the advice of the Emergency Committee, the WHO Director General declared the Ebola outbreak a Public Health Emergency of International Concern (PHEIC), and issued Temporary Recommendations under the IHR 2005, which included recommendations that the Heads of State of the affected countries should declare a national emergency, activate national disaster/emergency management plans, personally address their nations to provide information on the situation, the steps being taken to address the outbreak and the critical role of the community in ensuring its rapid control, provide emergency financing to initiate and sustain emergency response measures, and mobilise the necessary health care workforce. The Director General also recommended affected States should conduct exit screening of all persons at all international airports, seaports and border crossings for unexplained febrile illness consistent with potential Ebola infection. He recommended that the exit screening should consist of, at a minimum, a questionnaire, a temperature measurement, and if there is a fever, an assessment of the risk that the fever is caused by Ebola, and advised that any person with any illness consistent with Ebola should not be allowed to travel unless it is part of an appropriate medical evacuation, and that individuals coming into contact with Ebola patients (which do not include properly protected health workers and laboratory staff who have no unprotected exposure) should be monitored daily, with restricted national travel and no international travel until 21 days after exposure. The WHO also recommended that affected States should ensure that appropriate medical care is available for the crews and staff of airlines operating in the country, and work with the airlines to facilitate and harmonise communications and management regarding symptomatic passengers under the

IHR 2005, mechanisms for contact tracing if required, and the use of passenger locator records where appropriate.

The WHO said in the same Statement that there should be no general ban on international travel or trade, and that the restrictions outlined in the Temporary Recommendations should be implemented. The advice to unaffected countries was that they should be “prepared to detect, investigate, and manage Ebola cases; this should include assured access to a qualified diagnostic laboratory for Ebola and, where appropriate, the capacity to manage travellers originating from known Ebola-infected areas who arrive at international airports, seaports, or major landing crossing points with unexplained febrile illness.”

In a further Statement issued on 14 August 2014, the WHO announced that in order to support the global efforts to contain the spread of Ebola and to provide a coordinated response for the travel and tourism sector, the heads of the WHO, the International Civil Aviation Organisation (ICAO), the International Air Transport Association (IATA), Airports Council International (ACI), the World Tourism Organisation (UNWTO) and the World Travel and Tourism Council (WTTC) had decided to activate a Travel and Transport Task Force to monitor the situation, and provide timely information to the travel and tourism sector as well as travellers.

In the 14 August Statement, the WHO said the following:

“The risk of transmission of Ebola virus disease during air travel is low. Unlike infections such as influenza or tuberculosis, Ebola is not spread by breathing air (and the airborne particles it contains) from an infected person. Transmission requires direct contact with blood, secretions, organs or other bodily fluids of infected living or dead persons or animals, all unlikely exposures for the average traveller. Travellers are, in any event, advised to avoid all such contacts and routinely practise careful hygiene, like hand washing. The risk of getting infected on aircraft is also small as sick persons usually feel so unwell that they cannot travel and infection requires direct contact with the body fluids of an infected person.”

The Statement emphasised that a person who is infected is only able to spread the virus to others after they have started to have symptoms, and said:

“A person usually has no symptoms for two to 21 days (“the incubation period”). Symptoms include fever, weakness, muscle pain, headache and sore throat. This is followed by vomiting, diarrhoea, rash, and in some cases, bleeding.”

“The risk of a traveller becoming infected with the Ebola virus during a visit to the affected countries and developing disease after returning is very low, even if the visit includes travel to areas in which cases have been reported.”
The WHO September 2014 guidelines also set out in detail the operational procedures that should be followed in the event that a passenger presents with symptoms compatible with Ebola on board an aircraft, which are based on those recommended in 2011 by IATA for dealing with passengers with communicable diseases (http://www.iata.org/whatwedo/safety/health/Documents/health-guidelines-cabin-crew-2011.pdf) which include:

- Storing soiled items in a biohazard bag or sealed plastic bag;
- Limiting contacts of the passenger to the minimum necessary—only one or two cabin crew should care for the ill passenger and only those who have already had contact—gloves should be worn and hand hygiene performed after removing them;
- Immediate notification of authorities at the destination airport in accordance with practices endorsed by ICAO; and
- Immediate isolation of the traveller on arrival.

The guidelines also recommend considering the following measures based on proximity to the index patient:

- Co-travellers and crew members who report direct body contact with the index case should undergo contact tracing;
- As direct contact is the main route of transmission, only passengers who were seated adjacent to the side, in front, behind, or across an aisle should be included in the contact tracing.

The US Centers for Disease Control and Prevention (CDC) raised its level of emergency alertness to "Level 1" for only the third time in its history in response to the threat raised by the Ebola outbreak (the first time was in 2005 following Hurricane Katrina and the second in 2009 in response to the H1N1 "swine flu" outbreak), but at the same time both the WHO and CDC have maintained the position that the risk of Ebola transmission on an aircraft is low.

IATA has issued a number of statements referring to the guidance issued by the WHO and CDC and has said:

"Aviation has dealt with various outbreaks over the years such as SARS and Avian flu. Guidance materials have been developed with WHO and ICAO for maintenance crew, cabin crew, cleaning crew, and passenger agents."

Since the announcement of the Public Health Emergency of International Concern (PHEIC) by the WHO on 8 August, the numbers of reported cases have increased from 1711 cases (and 932 deaths) to 13,567 cases (and 4,922 deaths) as at 29 October 2014.

By mid-August 2014, reports of the situation in Liberia’s capital Monrovia were being described as "catastrophic", with most of the capital’s health care system shut down, leaving Ebola patients without treatment. By late August, the disease had spread to Nigeria, with one reported case in Senegal. The situation in the three hardest hit countries, Liberia, Sierra Leone and Guinea, deteriorated dramatically in September, with reports of only 893 treatment beds being available as against a requirement for 2122 beds, more than 216 health care workers among the dead, partly due to lack of proper safety equipment, appalling working conditions and long hours of exposure to Ebola patients. In a statement on 26 September 2014, the WHO said:

“The Ebola epidemic ravaging parts of West Africa is the most severe acute public health emergency seen in modern times. Never before has a biosafety level four pathogen infected so many people so quickly, over such a broad geographical area for so long.”

On 30 September, the first confirmed case of Ebola was reported in the US, and as at 15 October, there have been 17 reported cases of Ebola treated outside of Africa, of whom four have died. On 30 September, US health officials reported the first case of Ebola in the US — a Liberian national, Eric Duncan,
flew home to Texas from Liberia and died on 8 October. Two healthcare workers who treated Eric Duncan in Texas were subsequently found to have contracted Ebola, and both recovered. In early October, a 44 year old Spanish nurse, Tessa Romero, contracted Ebola after caring for a priest who had been repatriated from West Africa—this was the first transmission of the virus to occur outside of Africa; she has since recovered from the infection. To date one British person, William Pooley, a nurse who had travelled to Sierra Leone as a volunteer, has contracted Ebola, and has since recovered.

Some US politicians have called for a total ban on travellers entering the US from the West African countries hit hardest by Ebola, which was resisted by the Obama administration. Bowing to political pressure however, the US government ordered medical teams to start screening arrivals from Liberia, Sierra Leone and Guinea at New York's JFK airport on 11 October and screening is now being undertaken at Chicago O'Hare, Washington Dulles International, Newark Liberty and Hartsfield-Jackson Atlanta. Heathrow followed suit on 14 October, and the UK then extended screening to Gatwick, the Eurostar, Manchester, and Birmingham airports. Initially European Health Ministers said there was no need to put in place screening procedures at European hubs, but domestic political pressure and the incidence of several cases among health workers in the US and Europe have caused some EU countries, including France, Belgium and the Czech Republic, to introduce screening for all arrivals from Ebola affected countries.

Both the WHO and the European Centre for Disease Prevention and Control (ECDC) have expressed reservations about the effectiveness of temperature screening of passengers, and some research has been published in the US and the UK showing that thermal scanners used to detect a fever are unlikely to identify passengers who are incubating the Ebola virus in the first stages of the disease.

Airlines have cancelled more than a third of international flights to Guinea, Liberia and Sierra Leone, and many airlines including BA, Air France, Emirates and Kenya Airways have curtailed or suspended flights to the worst affected Ebola countries. West African connectivity is being hit hard by the Ebola crisis; the region’s three leading carriers, ASKY, Arik Air and Gambia Bird, have suspended flights to Liberia and Sierra Leone, and are operating very restricted schedules to Guinea.

So what additional precautions, if any, should you be taking as an airline, as a reaction to the Ebola crisis, and can you have any legal exposure to claims?

The starting point in terms of taking precautions should be to follow to the letter the specific guidance issued by the WHO, CDC or ECDC (as appropriate) in relation to Ebola, and comply with all ICAO and IATA operational procedures referable to suspected communicable diseases. Failure to do so could give rise to public law liability, possible claims against the airline in negligence, and the imposition of fines for breaching domestic legislation enacted to prevent the spread of communicable diseases. Examples of actions that could be brought against an airline could be failure to alert the medical authorities to contact all passengers after becoming aware a passenger is an Ebola carrier, failure to carry the proper equipment on board the aircraft, failure to deny boarding to a passenger suspected of having been in contact with Ebola or manifesting symptoms, and failure to isolate or quarantine a passenger on board showing symptoms consistent with Ebola.

Additional precautions that airlines should consider taking include the introduction of additional passenger checks (even if screening is in place at the airport), such as additional questions at check-in about a passenger’s health and recent travel history, and potential contact with Ebola patients. If additional questions are asked at the check-in stage any subsequent delay to a flight caused by having to offload a passenger’s baggage if they fail a physical screening prior to boarding, could be avoided.

In terms of liability for denied boarding, where a passenger is suspected of having symptoms of Ebola, or refuses to answer questions relating to health or recent travel history, airlines will be able to rely on their general conditions of carriage, which generally include a right to refuse carriage where it is necessary to comply with government regulations, or if carriage is considered to endanger the health and safety or comfort of other passengers and crew. In Europe, airlines will be able to rely on EC Regulation 261/2004 to deny boarding on the basis of reasonable grounds of health and/or safety and/or security, and compensation will not be payable. The term “denied boarding” in EC Regulation 261 is defined as “a refusal to carry passengers on a flight, although they have presented themselves for boarding, under the conditions laid down in Article 3 (2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.” The problem that may arise with denying boarding on “reasonable grounds” of health and safety is that check-in staff are not medically qualified to make any assessment, so in those circumstances an airline should refer the passenger to be examined by a qualified medical practitioner.

Delays to flights or cancellations arising from government action will not afford passengers the right to compensation, and delays or cancellations where a passenger has to be offloaded once on board, by reason of having suspected Ebola symptoms or being an Ebola carrier, should be immune from claims for compensation on the basis of the “extraordinary circumstances” defence, subject to adequate questioning of the passenger at check-in having taken place, so as to meet the “all reasonable measures taken to avoid the delays or cancellations” test.
If a passenger is denied boarding, or there is a cancellation, the individual passenger or passengers affected may still be entitled to a refund or re-routing, and to care and assistance under EC Regulation 261, depending on the circumstances.

If airlines are undertaking their own screening and asking additional questions at check-in or during embarkation, care should be taken to ask the same questions of all passengers, so as to avoid inadvertently falling foul of any anti-discrimination legislation.

In the unlikely event that a passenger claims that they have been infected by another passenger during the course of embarkation, on board the aircraft, or during the course of disembarkation, their claim will be governed by the Montreal or Warsaw Conventions or the applicable domestic legislation implementing those Conventions. Article 17 of the Montreal Convention (and the Warsaw Convention) provides:

“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

For a passenger to succeed with a claim against the airline therefore, they would need to overcome two very difficult evidential hurdles. First, they would need to establish that they had been infected with Ebola during the course of embarking, disembarking or on board the aircraft, and secondly, that the injury or death has been caused by an “accident”.

It is likely to be very difficult for a passenger to prove they contracted the infection while embarking, or disembarking (as opposed to within the larger airport complex, the shops or restaurants), and probably slightly less difficult to prove they contracted the infection while “on board” the flight if they sat adjacent or close to an infected passenger, and had not been to any Ebola affected countries or knowingly come in to contact with any other Ebola carrier. If the passenger could overcome that causation hurdle, they would still have to establish however that the spread of the disease constituted an “accident” within the meaning of Article 17.

There is a long line of authorities, including the English House of Lords cases of Sidhu v British Airways Plc (1997), Deep Vein Thrombosis and Air Travel Litigation, Re (2005) and the US Supreme Court case of Air France v Saks (1985), that establish that the remedy provided by Article 17 of both the Warsaw Convention and the Montreal Convention is exclusive, and that there is no other common or civil law remedy available to a passenger who sustains bodily injury or dies during the course of international carriage by air. The DVT and Saks cases, among others, also established in law that an accident must be an “unexpected or unusual event external to the passenger”.

Although a passenger could almost certainly establish that being infected by another passenger with Ebola is an “external” event (i.e. not an ongoing internal condition they were suffering from), they would also have to prove that contracting Ebola was “unexpected” or “unusual” at the time of the flight. Given the media coverage of the Ebola epidemic, the public health warnings, and the steps taken by airlines and airports to screen passengers, it is certainly arguable that passengers would be aware that there is some risk, albeit very minimal, of transmission of the infection, and therefore it could be argued that if Ebola is contracted from another passenger, it would not constitute an “unexpected” or “unusual” event. The risk of contracting flu, a cold, or other airborne diseases while on board a flight would not be regarded as unexpected or unusual, so it would also be arguable that the risk of contracting Ebola on board a flight (albeit statistically very low as it is not an airborne virus), would also not be considered an unexpected or unusual event.

There is some US case law on refusal to move passengers, including Abramson v Japan Airlines (1984) where a passenger’s wife asked a stewardess to move her husband to a first class seat to ease his pain from a hiatus hernia. The stewardess said there were no empty seats in first class, when there were in fact nine free seats. The passenger claimed that the refusal to move him aggravated his injury. The court found that “aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an “accident” within Article 17.”

However, in Olympic Airways v Husain (2003), the US Supreme Court awarded damages, and found there was an “accident”, under Article 17 of the Warsaw Convention, when a passenger who was allergic to smoke and a severe asthmatic, whose wife had repeatedly asked a flight attendant to move him to a seat further away from the smoking section (in the days when smoking was allowed on aircraft), died from a fatal asthma attack from the inhalation of smoke. The flight attendant told Mr Husain’s wife there were no vacant seats when there were in fact several available positioned further away from the smoking section. The court found in that case that the airline was liable because the flight attendant’s “failure to act in the face of a known serious risk satisfied the meaning of “accident” within Article 17”, and that the flight attendant’s conduct was “unexpected and unusual”. It has to be said that the case was very fact specific, and that the flight attendant was found to have acted in “blatant disregard of industry standards and airline policies,” and the judgment has been heavily criticised on the basis that “inaction” or a “failure to act” cannot be an “accident”, and distinguished in subsequent cases, particularly in the DVT cases. However, the difference between the DVT cases and the Husain case is that claims in the DVT cases were principally brought on the basis of a “failure to warn” passengers (of DVT), as opposed to passengers asking for and being denied assistance, as in Husain.
Where next for Malaysian Airlines?

Following the two tragic crashes of Malaysian Airlines flights, with total loss of life, the investigations continue into the unexplained disappearance of flight MH370 en route from Kuala Lumpur to Beijing on 8 March, and the shooting down of MH17 over Ukraine on 17 July.

The Malaysian authorities believe the circumstances of the disappearance of flight MH370 suggest deliberate action by a person or persons on board. The aircraft took off shortly after midnight from Kuala Lumpur, en route to Beijing, and climbed to 35,000 feet. Over the Gulf of Thailand, just after Kuala Lumpur ATC had handed the aircraft over to Ho Chi Minh ATC, and the crew had acknowledged the handover call, the aircraft’s transponder stopped operating, so the aircraft was no longer visible to ATC on secondary radar. The last automatic ACARS transmission (ACARS is the Aircraft Communications Addressing and Reporting System – a digital datalink for the transmission of short messages between aircraft and ground stations via airband radio or satellite) had taken place during the climb to cruising attitude. On military primary radar, the aircraft was seen turning west and flying across the Malaysian peninsula, then it headed west over the Malacca Strait, before contact was lost. Inmarsat, the global satellite company, believes that the aircraft, when it was over the Andaman Sea, turned south towards the Indian Ocean. They made this deduction from automated aircraft responses to “handshake” signals from Inmarsat satellites, which contain no data, but enable a calculation of the range of the aircraft from the satellite. These range “pings” each provide a long arc on the globe’s surface, along which the aircraft should be located. The extrapolation of the “handshake” pings, taken together with the primary radar data showing the aircraft’s early track and speed, gives an estimated plot of the aircraft’s track. The last satellite ping was received around 08:00 Malaysian time, which would have been around the time the aircraft would have run out of fuel.

Initially searches were undertaken very intensively over a six week period from 18 March to 28 April by an international fleet of aircraft and ships, drawn from 26 countries, over a massive search area, stretching from the Gulf of Thailand to the Bay of Bengal, then finally, the Indian Ocean, but no debris was found, and there has been no trace found of the aircraft at all to date.

The search area was narrowed in April, after “pings” from the ACARS system analysed by investigators suggested that the aircraft may have turned south towards the Southern Indian Ocean earlier than previously thought. This data suggested the...
Where next for Malaysian Airlines?

Sabotage is largely being ruled out on the basis that if the aircraft had been shot down or bombed, it would not have flown on for so long.

Unfortunately, the time spent in trying to locate the black box in the MH370 crash, like many other crashes where there is a prolonged search, creates a vacuum of information, which has been agonising for the families of the 239 people on board the aircraft, presumed dead, but has also given rise to numerous theories, some plausible, others far-fetched conspiracy theories. Some of the theories suggest that the Captain, Ahmad Shah Zaharie, deliberately depressedurised the cabin before performing a controlled ditching into the Indian Ocean, others suggest a hijacking, others a “plane switch”, a landing on Diego Garcia Island, and sabotage by terrorists. Along with most conspiracy theories, sabotage is largely being ruled out on the basis that if the aircraft had been shot down or bombed, it would not have flown on for so long. There does, therefore, seem to be some circumstantial evidence to support the Malaysian authorities’ publicised belief that the disappearance of the aircraft was caused by “deliberate action by someone on board.”

The switching off of the ACARS system and then the transponder, followed immediately by a sharp deviation from the aircraft’s planned route, combined with radio silence, seems to point to deliberate action being taken. If it was the act of the captain committing suicide by ditching the aircraft, it would not be the first time; previous suicides include a Silk Air Boeing 737 pilot, an Egypt Air 767 pilot, a Royal Air Maroc ATR42 pilot and most recently, a LAM Mozambique Embraer 190 pilot, all of which resulted in fatal crashes.

The apparent purposeful deactivation of the tracking systems from within the cockpit on flight MH 370, if that is what happened, has caused a huge debate in the aviation industry about the introduction of flight tracking technology that cannot be deactivated. This debate is ongoing at both IATA and ICAO levels, and ICAO has said that the need to implement aircraft tracking, irrespective of location and destination, in order to provide early warning of abnormal flight behaviour, should be pursued as a matter of priority.

In contrast to the mystery shrouding the disappearance of Malaysian Airlines flight MH370, the cause of the crash of Malaysian Airlines flight MH17 over Ukraine, in broad daylight, appears to be clear – it was shot down, and the black box has been recovered and analysed. The real question is who was behind the shootdown?

Flight MH17 took off from Amsterdam’s Schipol Airport bound for Kuala Lumpur. At around 1:08pm there was a routine exchange with air traffic control about nearby aircraft before communications stopped completely at 1:19pm.

The aircraft was flying at 33,000 feet on a constant heading and speed, over Eastern Ukraine in airspace that had not been closed, according to Eurocontrol. It had filed the same flight plan for the two days immediately prior to the crash, but there had been “some modification” of the route because Ukrainian air traffic control assigned MH17 to a cruise altitude of 33,000 feet rather than 35,000 feet, for operational reasons, to ensure sufficient clearance between it and another aircraft. It was also possibly off its route slightly due to local thunderstorms.

Much of the world’s media blamed pro-Russian rebels in Ukraine, who are alleged to have used a ground to air SA-11 BUK missile launched from a separatist held area in Eastern Ukraine. Western leaders accused Russia of arming the separatist rebels, and in the immediate aftermath, the exchanges between Western leaders and Vladimir Putin were heated. The situation was not helped by reports that rescue teams and crash investigators were prevented from getting access to the crash site by armed rebels, which covered 30 square miles in a war zone, and reports of looting. A team of about 110 Dutch, Australian and Malaysian forensic experts had access to the crash site for less than a week before they were pulled out for their own safety. They have not been able to return.

The EU imposed sanctions on Russia, hitting officials closest to President Putin with asset freezes and travel bans, targeting Russian oil industry technology and dual use technology in the defence sector, and imposing restrictions on Russian banks accessing Western capital. President Putin retaliated,
Where next for Malaysian Airlines?

threatening an outright ban on European airlines using trans-Siberian airspace, which would force them to take longer and more expensive long haul routes to Asia.

Many Russians think the aircraft was shot down by the Ukrainian military, which also has BUK missiles, in order to blame it on Russia and the pro-Russian rebels, who are fighting for autonomy in the Ukraine.

In the immediate aftermath of the crash, emotions were running high in the aviation industry. The Director General of IATA, Tony Tyler, said: “The tragedy of MH17 is an outrage. Over the weekend it was confirmed that passengers and crew aboard the aircraft were the victims of a hideous crime. It was also an attack against the air transport system which is an instrument of peace.” “Malaysian Airlines was a clearly identified commercial jet. And it was shot down in complete violation of international laws, standards and conventions – while broadcasting its identity and presence on an open and busy corridor at an altitude that was deemed to be safe.”

Sir Tim Clark, the president of Emirates, said the MH17 disaster has “changed everything” and “amounted to premeditated mass murder.”

The designation of the flight corridor as safe was obviously not an accurate reflection of the actual dangers civil aircraft faced when operating above a ground-level war zone. The accident investigators are adhering to the ICAO standards set out in Annex 13 of the Chicago Convention, which dictate that their remit is not to allocate blame, but to establish the cause of the crash and prevent future such occurrences. It may be some time before the full report on the accident is published.

In the wake of these two disasters, analysts have questioned whether Malaysian Airlines can survive. It was already struggling financially before the crashes and announced at the end of August that it will have to shed 30% of its workforce (6000 employees) and delist from the Malaysian Stock Exchange. Malaysian Airlines’ majority shareholder Khazanah Nasional announced that the airline will be delisted by the end of the year, become 100% state-owned, and a recovery plan will be put in place, that will apparently cost £1.1 billion. A new airline will effectively be established, and it is almost 100% certain that the airline will be renamed and rebranded as part of the restructuring programme, given that its reputation for safety has been so badly affected that it has been operating some of its flights with only a handful of passengers.

Experts say this type of damage is consistent with a surface to air missile exploding alongside the aircraft and riddling it with shrapnel, causing it to break up mid-air.

Ukraine realised that it would not be seen as a neutral party in the crash investigation, so handed over leadership of the investigation to the Dutch Safety Board. The black boxes have been downloaded and analysed by the UK Air Accidents Investigation Branch and the Dutch Safety Board, and a preliminary report was published on 9 September by the Dutch Safety Board. The report stopped short of saying that a surface to air missile brought down MH17, but it does say the fuselage was perforated with “multiple holes and indentations”, and “the material around the hole was deformed in a manner consistent with being punctured by high-energy objects”, which “originated from outside the fuselage”. The physical evidence shows that the cockpit was severely damaged with “puncture holes”, suggesting “small objects” entered from above floor level. Experts say this type of damage is consistent with a surface to air missile exploding alongside the aircraft and riddling it with shrapnel, causing it to break up mid-air.

The designation of the flight corridor as safe was obviously not an accurate reflection of the actual dangers civil aircraft faced when operating above a ground-level war zone. The ICAO taskforce are going to look closely at the criteria used to identify flight corridors for use by commercial civilian aircraft above conflict zones.
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**Further information**

**London**

**Paul Phillips**

Direct line +44 20 7809 2302  
Email paul.phillips@shlegal.com

**Paris**

**Edward Campbell**

Direct line +33 1441 58003  
Email edward.campbell@shlegal.com

**Dubai**

**Rovine Chandrasekera**

Direct line +00 971 4386 2105  
Email rovine.chandrasekera@shlegal.com

**Greater China**

**Simon Wong**

Direct line +852 2533 2885  
Email simon.wong@shlegal.com

**Singapore**

**Saugata Mukherjee**

Direct line +65 6226 1600  
Email saugata.mukherjee@shlegal.com