



## **NOVEL CORONAVIRUS AN AVIATION PERSPECTIVE**

SARS, MERS, Ebola – the aviation sector has been no stranger to dealing with epidemics in recent times. To that list must now be added a novel coronavirus (named “2019-nCov”), declared a public health emergency by the World Health Organisation.

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In this bulletin we look at the potential impact of the novel coronavirus on the aviation sector and, drawing on our experience of advising on previous epidemics such as Ebola and SARS, we consider the extent to which airlines may be exposed to liabilities.

## **What is the new virus?**

The 2019-nCov virus was first detected in Wuhan, the capital city of Hubei province in China. Initially, many of the people falling ill with the virus had some link to a large seafood and live animal market in Wuhan, which is believed to have been the source of the outbreak.

Coronaviruses are a large family of respiratory viruses that are common in many different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then spread between people such as with the Middle-East Respiratory Syndrome (MERS) and the Severe Acute Respiratory Syndrome (SARS). This person-to-person transmission is

now occurring with 2019-nCov, with the virus thought to spread through respiratory droplets produced when an infected person coughs or sneezes.

Common symptoms of the new virus include coughing, shortness of breath and fever, which can then progress to pneumonia and, ultimately, can be fatal. The incubation period for the virus (from exposure to developing symptoms) is estimated to be 2-14 days, with it apparently being contagious during the period prior to symptoms appearing. Based on the latest official figures (which some experts believe substantially underestimate the position), in comparison to SARS the novel coronavirus appears to be spreading more quickly, but with a lower mortality rate.

## **What has been the response?**

In an effort to control the spread of 2019-nCov, the Chinese government has restricted or shut down public transport in a number of cities in Hubei Province, along with other restrictions on people's movement. Wuhan itself, a city of over 10 million people, was locked down just before Chinese New Year – the equivalent of shutting London down on the eve of Christmas. A significant number of flights have been cancelled at Wuhan airport, which is a major international

transport hub in central China handling approximately 25 million passengers annually.

As with any epidemic, there is a danger that misinformation and rumours, particularly on social media, create anxiety and fear which is more contagious than the illness itself. One recent headline referring to a “plague plane” in relation to foreign nationals being repatriated from Wuhan is not only misleading but unhelpful.

A number of countries have announced that they will deny entry to all foreign visitors who have recently been in China, as well as imposing 14-day quarantine for residents returning from Hubei Province.

In reaction to the spread of the novel coronavirus stock markets have declined, hitting in particular the airline, tourism and leisure sectors. Containing the anxiety is therefore as important as containing the spread of the virus. This is best achieved by effective quarantine, public education, quashing inaccurate information, and transparent reporting of the spread of the virus. Although a vaccine is under development in a number of countries, its use is some months away.

## **The international regulatory regime**

The World Health Organisation (WHO), an agency of the United

Nations, is responsible for managing the global regime for controlling the international spread of disease. To that end, it developed International Health Regulations. These were revised in light of the SARS outbreak in 2003, resulting in the latest edition being issued in 2005.

The aim of the International Health Regulations is to provide a public health response to the international spread of disease, commensurate with the risks, in ways which avoid unnecessary interference with international traffic and trade. Individual States are meant to uphold the principles of the Regulations in their national legislation – which obviously relies on States actually doing so, and not following their own rules and regulations.

From an aviation perspective, Article 20 of the International Health Regulations requires States to certify designated airports in relation to the detection and control of communicable disease. Article 14 of the 1944 Convention on International Civil Aviation (the Chicago Convention) also concerns the prevention of the spread of disease, and requires States to take effective measures to prevent the spread by air transport of communicable diseases.

### **What does a “public health emergency” mean?**

On 30 January 2020, the Director-General of the WHO declared that the 2019-nCov virus was a ‘public health emergency of international concern’. In reaching this decision, the International Health Regulations oblige him to take into account various factors, including information provided by the State where the event is occurring (in this case China), the available scientific evidence, and the risk of international spread of the disease. Once declared, the Director-General issues temporary recommendations. So far 7 recommendations have been made, which essentially call on countries to work together supporting each other, to develop vaccines, and to implement decisions based on evidence rather than rumour and misinformation. No recommendations have yet been

made curtailing air travel, trade or movement or people generally. Indeed, the WHO has been critical of countries closing their borders to foreigners who have recently visited China.

### **How is the aviation sector responding?**

A large number of international airlines have suspended their flights to mainland China. Those airlines which are still flying have allowed cabin crew to wear face masks, and crew layover time has been reduced or ended altogether. Some airlines have also modified their in-flight services, for instance by no longer providing pillows or blankets, suspending duty-free sales, and changing the nature of meal service.

Based on experience from previous epidemics, the International Air Transport Association (IATA) has produced an Emergency Response Plan for use by airlines in the event of a public health emergency. Although a number of airlines do have an emergency response plan to deal with public health emergencies, the template Emergency Response Plan has been issued by IATA for those airlines that do not. It details the roles and responsibilities of the emergency response team, along with specific checklists to be adopted.

In relation to suspected communicable disease generally, IATA has also issued various best practice guidelines for airline employees and agents. These cover, for example:

- Cabin crew: setting out how to identify passengers with a suspected communicable disease, and the actions to take once such a person is identified. These include informing the Captain, who is required to report the suspected case to air traffic control under international regulations. Similar guidance for cabin crew has been issued by the US Centers for Disease Control and Protection, which has also issued recent recommendations for dealing with the 2019-nCov virus.
- Cleaning crew: setting out the procedures to follow to clean and disinfect an arriving aircraft with a

suspected case of communicable disease.

- Cargo and baggage handlers: drawing on previous experience with SARS, avian flu and Ebola, this guideline notes that there is no evidence that these infections could be transmitted by cargo or baggage handling. Although it recommends proper hand hygiene, no specific measures are advised.

Guidance has also been issued by the European Aviation Safety Agency (EASA), who issued a Safety Information Bulletin on 27 January 2020. EASA recommended that airlines provide information to crew members as to how to identify and manage a case of acute respiratory infection on board an aircraft. It also recommended that airlines performing passenger flights to or from affected countries should be equipped with protection kits for crew members assisting with potentially infectious cases. In addition, the Bulletin calls upon airlines and airport operators to collaborate as much as possible with public health authorities, in order to provide support in tracing passengers in the event of flights where 2019-nCov infection has been confirmed.

As far as airports are concerned, the responsibility for managing the risk of communicable diseases at airports rests with both national and local public health authorities and the relevant airport operator. The Airports Council International (ACI) has issued an Advisory Bulletin in relation to the 2019-nCov outbreak, stressing the importance of being prepared, as well as of the need for good communication between airports and their employees, local authorities and with passengers. Screening of both arriving and departing passengers should be considered, although the Bulletin notes that this is likely to be less effective where the virus can be transmitted during its incubation period without symptoms showing (as is the case with the novel coronavirus).

More detailed guidelines for airports to deal with outbreaks of communicable disease generally have been issued jointly by ACI



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and the International Civil Aviation Organisation (ICAO). These include recommendations which are designed to reduce exposure to an infectious agent at airports and to improve the response to health-related emergencies by establishing mechanisms for rapid decision-making and action.

#### **Are airlines potentially exposed to claims?**

As mentioned above, one of the challenges presented by the 2019-nCov virus is the fact that infected passengers can seemingly spread the virus during the incubation period, before symptoms are showing. Obvious cases of ill passengers with the virus being present on board aircraft are therefore likely to be few and far between, particularly where the departure airport has implemented exit screening for departing passengers.

Even so, as with any communicable disease, there are a number of potential liability exposures for airlines in relation to the 2019-nCov virus. These include the following:

- 1 At check-in: failing to deny boarding to a passenger showing symptoms consistent with potential 2019-nCov infection;

- 2 On board: failing to isolate a passenger who is exhibiting 2019-nCov symptoms, or to await the attendance of medical authorities at the destination before disembarking passengers;
- 3 On board: passengers becoming infected with 2019-nCov due to a failure of the cabin air conditioning system; and
- 4 Post-flight: failing to trace fellow passengers when the airline is notified that a passenger on one of its flights was diagnosed as having the 2019-nCov virus.

In relation to post-flight notification, in January this year the European Centre for Disease Prevention and Control issued Risk Assessment Guidelines for infectious diseases transmitted on board aircraft. These Guidelines arose from a study by a panel of experts of in-flight transmission of the MERS coronavirus in 2012, and recommended that tracing passengers should focus on those at highest risk of infection, i.e. all passengers sitting in two seats in all directions from the ill passenger, as well as any crew member serving that area. If the crew member is the one confirmed with the 2019-nCov virus, then all passengers served by that crew member should be traced, as well as other crew members.

In reality, there is a low risk of contracting a disease from an ill person on board an aircraft. According to IATA, the risk is similar to that which exists in other confined areas with high occupant density, such as a bus or cinema. In addition, most modern aircraft use cabin air filtration systems equipped with HEPA filters, which are very effective at trapping microscopic particles as small as bacteria and viruses.

Passengers claiming to be infected face two specific hurdles in order to establish that an airline is liable:

- 1 The infection must have occurred during carriage by air. Under the international aviation conventions applying to air travel such as the Montreal Convention 1999, or equivalent national legislation, this means proving that the infection occurred either in flight, or during embarkation or disembarkation. Without clear evidence of this, it is always arguable that the passenger became infected at some other time, before or after travel. This would include infection on the way to or from the airport, or in check-in queues, at security or immigration check-points, or in duty-free shops. In those circumstances, the airline should not be held liable. Clearly, the



incubation period for the 2019-nCov virus of up to 14 days increases the scope for infection to occur somewhere other than during carriage by air.

- 2 The infection must constitute an “accident” for airline liability to arise under the applicable international aviation conventions. In many jurisdictions, an “accident” is construed as an unexpected or unusual event external to the passenger. Although clearly external, it is questionable whether the transmission of the 2019-nCov virus would be regarded as unexpected or unusual. By analogy, catching a common cold virus whilst flying is not unusual, and so the position in relation to the novel coronavirus should arguably not be any different (assuming that any such infection does not result from the deliberate or negligent act of another).

In light of these evidential problems and lack of legal certainty, although some claims may arise, as with the SARS outbreak a flood of claims connected with the 2019-nCov virus seems unlikely.

That said, it would be sensible for both airports and airlines to mitigate

the potential risk of claims by adopting prudent measures. These include following the guidelines published by IATA and other relevant bodies such as those mentioned above. Increased vigilance for passengers displaying 2019-nCov symptoms is essential. In cases of apparent symptoms, passengers should be denied boarding in order to prevent a health hazard to other passengers and crew. Any such ill passengers should be handled appropriately, with respect for their dignity, especially in relation to medical treatment and quarantine (in accordance with Articles 31 and 32 of the International Health Regulations).

Suitable measures should also be taken by airlines to protect cabin crew, in order to avoid employers’ liability claims by any crew falling ill with the novel coronavirus. These measures may include allowing crew to wear face masks, providing other protective kit where required, and ensuring suitable training and understanding of the procedures to be followed where a passenger is displaying 2019-nCov symptoms.

#### **Are airlines liable to pay compensation for cancelled flights?**

All flights operated by international airlines departing from the European Union (EU), and all flights operated

by EU airlines, are subject to EU Regulation 261/2004. That Regulation requires compensation to be paid for cancelled flights unless there are ‘extraordinary circumstances’ which could not have been avoided even if all reasonable measures had been taken. The outbreak of novel coronavirus would likely constitute such extraordinary circumstances – owing to the WHO’s declaration of a public health emergency and, if applicable, also as a result of the decisions by some countries to exclude or restrict flights from mainland China. Airlines would though still be obliged under the Regulation to provide passengers with a refund or re-routing. However, where flights are cancelled for commercial reasons, such as a reduction in market demand, that is unlikely to constitute extraordinary circumstances. If less than 2 weeks’ notice of such a cancellation is given, and passengers cannot be rebooked on to flights with very similar arrival and departure times, compensation would be payable.

#### **What will be the likely impact of 2019-nCov on aviation?**

It is too early to tell how 2019-nCov will affect aviation. However, outbreaks of disease can result in disrupted operations, potential damage to reputation, and decreased

demand for travel. Without doubt, the current 2019-nCov epidemic will present a significant challenge for airlines in the Asia Pacific region.

Inevitably comparisons are being drawn with the SARS epidemic in 2003, with its economic impact still relatively fresh in the memory of many in the Asia Pacific region. According to IATA<sup>1</sup>, passenger traffic for Asia-Pacific airlines (measured by revenue passenger kilometres) fell by 35% at the peak of the SARS outbreak and took more than 6 months to recover, resulting in Asia-Pacific airlines losing US\$6 billion in revenue. Since 2003, aviation in the Asia-Pacific region has grown substantially, resulting in the possibility of greater losses. By contrast, the avian flu outbreaks in 2005 and 2013 had less impact, with air travel rebounding quickly as fears of the global spread of those viruses eased.

In terms of the current 2019-nCov virus, those airlines which are heavily reliant on Chinese routes will inevitably be hit hardest, potentially leading to the re-allocation, grounding or retirement of aircraft. As one airline CEO has observed, it is not inconceivable that struggling airlines will go out of business, as people postpone or avoid air travel altogether.

In conclusion, as the WHO's Director General has said, it is time for facts, not fear; science, not rumours; and solidarity, not stigma. Undoubtedly the aviation industry will be challenged by the 2019-nCov virus, with much depending on its severity and duration. However, the industry has overcome similar challenges before, and we are confident that it will do so again.

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