Aerospace

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AEROSPACE BULLETIN

We warmly welcome Pierre Fruhling to the global HFW Aerospace team. Pierre, who will divide his time between our Brussels and Paris offices, combines expertise in aviation liability, regulation, competition and aircraft financing and enables us to provide an enhanced service to our insurance and airline clients in continental Europe, the London market and globally. Pierre is joined by Associates Elizabeth Decat and Stephanie Golinvaux and Trainee Advocate Kevin Beheydt. Meanwhile in our London office we are delighted to announce the promotion of Ed Spencer to partnership with effect from 1 April 2012. We also welcome Associate Kate Seaton who joins the team in Singapore, and newly qualified Associates Vicky Cooper and James Jordon who join our London and Hong Kong offices respectively.

Asia is currently the fastest-growing market for luxury private aircraft. In this our second HFW Aerospace Bulletin, Ashleigh Williamson examines some of the peculiar characteristics of business jet damage claims and discusses possible safeguards which service providers may wish to consider in order to control their liability exposure. Partner Ed Spencer examines the recent Court of Appeal decision of *Stott v Thomas Cook /Hook v British Airways* in which two disabled persons sought redress, including monetary compensation, for injury to feelings arising from alleged carrier failure to meet their seating needs under EU PRM legislation. The two year limitation period has been a cornerstone of international aviation liability conventions dating back to the Warsaw Convention of 1929. In *United Airlines Inc v Sercel Australia Pty Ltd*, the New South Wales Court of Appeal has held that the Convention two year time limit is no bar however to workers' compensation indemnity claims against carriers. Zohar Zik then reviews a recent decision in which the Commercial Court, London re-visited a number of key provisions of the Unfair Contracts Terms Act 1977 (UCTA), chiefly its application to international supply contracts. In our final article, Consultant David Greves reports on the second World Space Risk Forum Dubai 2012.

For further information about any of these articles, or aviation and aerospace issues in general, please contact one of the team, or your usual contact at HFW.

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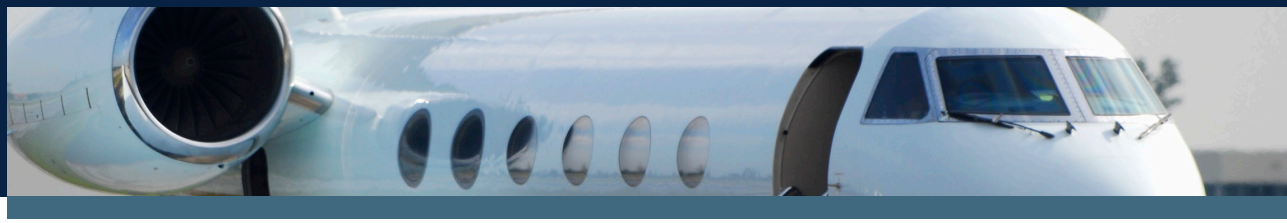


Business jet damage claims

On 3 February 2012 Embraer proudly presented Hong Kong movie legend Jackie Chan with a shiny new Legacy 650 private jet. The gift of the US$30 million aircraft with “Jackie” emblazoned on the tail marked Chan’s appointment as Embraer’s first ever “brand ambassador”. In choosing a Chinese star to market their product, Embraer have brought to the attention of the rest of the world the fact that Asia is the fastest-growing market for luxury private aircraft, driven by the emergence of a new crop of billionaires all over the region. Half of all Gulfstream’s orders in the third quarter of 2011 came from the Asia-Pacific region. Within China alone, business jet deliveries are expected to reach 1,000 in the next decade, while the Financial Times recently turned the spotlight on booming business jet sales in Indonesia.

Private jet operations are supported by a growing number of service providers, from operating companies to hangar managers to MROs and ground handlers. With growing operations will inevitably come increased claims. In this article we examine some of the peculiar characteristics of business jet damage claims and suggest safeguards which these service providers may wish to consider in order to control their liability exposure.

Diminution in value

Unlike commercial airlines, which may take a more pragmatic approach to the cosmetic appearance of their aircraft, private jet owners tend to be more aggressive in seeking compensation beyond costs of repair for even minor bumps and scrapes. Business jets are seen by their owners as status symbols, something which is particularly pronounced in Asia where buyers favour brand new aircraft and often consider anything with more than 200 hours or over a year old to be undesirable. Frequently we see included in claims an element of “diminution in value” (DIV) which far outstrips the cost of repairing the damage. DIV can be characterised as a direct loss flowing from the physical damage and so a simple contractual exclusion of consequential losses may be insufficient protection; where possible contractual language should make express reference to diminution in value as an excluded head of loss.

DIV is a very difficult concept to pin down as there is a dearth of case law upon which to draw. It arguably goes further than simple reduction in resale value and courts may be open to the argument that the subjective view of the owner should be taken into account. The repair may be invisible (for example if the damaged part is removed and replaced) but the replacement will then become part of the damage history of the aircraft. However the replacement of certain parts may be expected over the life of the aircraft, so a damage history may become less significant as time passes - if the owner has no intention to sell at the time that the claim is made then arguably the loss has not crystallised. On the other hand damage to the pressurised body of the aircraft would go beyond normal wear and tear and would have a lasting impact on resale value. In the absence of a clear exclusion the approach should be to identify and retain the best available expert as quickly as possible, then to put the claimant to strict proof of the loss and require him to support his quantification with expert evidence.

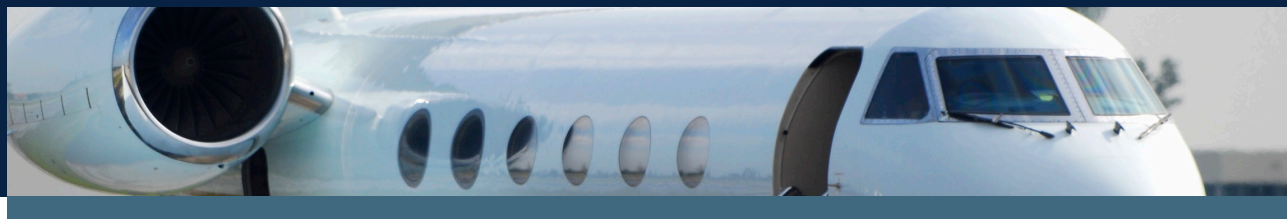
Private owners often have unlimited funds to pursue legal action and we have seen them rush to issue proceedings for publicity purposes and use the media in furtherance of their objectives. There can therefore be a tension between the understandable desire of a bizjet service provider to protect its reputation and customer relationship and the underwriter’s need to adjust the claim on the basis of a solid legal analysis of actual liability. It is therefore important to maintain constructive dialogue from the outset. An unreserved apology at an early stage may go some way towards minimising the consequences of an incident, but this must of course be balanced with care not to admit liability. A contractual provision for compulsory arbitration may reduce the scope for publicity-seeking tactics.

Claims in bailment

If liability is in dispute, service providers should also be aware that in common law jurisdictions a claim arising out of damage sustained by a business jet while it is in their custody could be advanced in the law of bailment. In a bailment claim the burden of proof is reversed, meaning that it is for the service provider to prove that it did take reasonable care, rather for the claimant to prove that it did not. This reinforces the need to put forward a positive case, something which is best achieved by taking comprehensive witness statements at an early stage and ensuring that all standard procedures are documented and followed to the letter.

Terms and conditions

As business jet schedules are irregular and often arranged at short notice,



services are often provided on an ad-hoc basis. It is therefore important for service providers to ensure that all arrangements are underpinned by standard terms and conditions containing exclusions and limitations of liability, and that these are brought to the attention of the aircraft owner or operator at the time of booking. A link in an email to a website may not be sufficient. Consideration should also be given to obtaining appropriate indemnities from other parties involved in the provision of the services.

Fingers crossed however that Jackie and his Legacy 650 will fly their ambassadorial missions without incident: his adversaries don't usually come out on top.

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Collision Course: Stott v Thomas Cook/Hook v British Airways

Consistent with historical trends, the English Court of Appeal has upheld the cornerstone of exclusivity under the Montreal Convention 1999 - but this time at the expense of European passenger rights legislation.

"...it was and is not appropriate to apply a novel approach to the construction of the Convention by reference to a perceived second strand or sea change in the European instruments. Nor would it be appropriate to depart from the comity approach which extends beyond the Member States of the European Union."

So ruled three English Appeal Court justices in a judgment which will undoubtedly be welcomed by the airline community and others who have voiced concerns over the legal compatibility of recent European legislation aimed at enhancing the rights of individual passengers.

In unrelated actions, two disabled passengers brought claims for compensation against airlines who had left them disappointed by failing to provide appropriate seating arrangements in accordance with the requirements of EU and UK provision relating to the rights of passengers with reduced mobility when using air transport (PRM legislation). At first instance, both claims were dismissed which did nothing to soothe the passengers' disappointment. They appealed.

Exclusivity

Faced with an already strong body of case law espousing the principle of exclusivity under the Montreal Convention 1999 and its predecessor conventions, the passengers sought to draw a distinction by arguing that the Montreal regime was irrelevant to their claims because it was simply unconcerned with the subject-matter of the PRM legislation. Alternatively, the PRM legislation was introduced after the Montreal regime and therefore the same had to be applied to give effect, come what may, to fundamental passenger rights. Attempting to draw support for their primary argument, the passengers relied on the notorious decision of the *European Court of Justice in IATA v Department of Transport* [2006] 2 CMLR, in which a challenge to the implementation of the EC Regulation 261/2004 was, in part, rejected on the grounds that the regulation was not in any way inconsistent with the Montreal Convention.

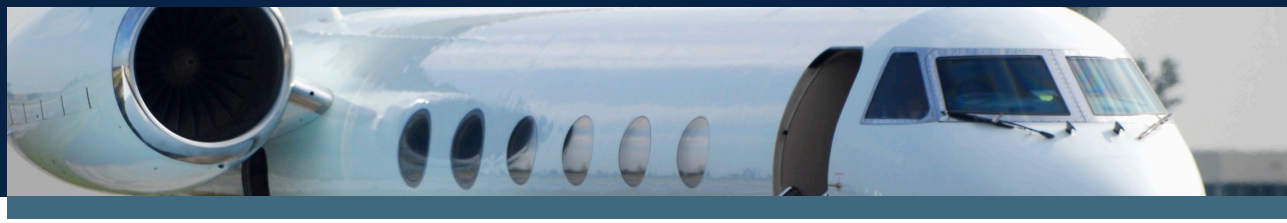
In response, the airlines asserted that the passengers' arguments effectively missed the point and that the Montreal Convention, pursuant to its own very clear provisions at Article 29, provides passengers with their sole and exclusive causes of action and remedies. Because the Convention does not recognise any liability for disappointment or hurt feelings, the claims had to fail.

Temporal considerations

It was common ground between the parties that whilst the Montreal Convention was only capable of applying to events between embarkation and disembarkation, the PRM legislation had a broader temporal scope. This assumed importance, particularly in circumstances in which there was a clear risk of a conflict between the two sets of legal apparatus if they were capable of occupying the same "legal space". In addressing this, the Court determined that the critical temporal question was: when exactly were the passengers' feelings truly injured? If the answer was "only after they had commenced the process of embarkation", there was undoubtedly a conflict which needed to be resolved.

Judgment

In answering the question, the Court of Appeal determined that the real injuries to the passengers' feelings were sustained after the process of embarkation had begun and therefore at a time when the Montreal Convention governed their situations. Heavily influenced by the Supreme Court authority of *Sidhu & Others v*



British Airways Plc [1997] 1 All ER 193 HL and numerous related decisions, the Court of Appeal was unanimously persuaded to uphold the principle of Convention exclusivity at the expense of the PRM legislation. Accordingly, the appeals were dismissed. The UK Equality and Human Rights Commission is considering an appeal to the Supreme Court.

Perhaps regrettably, the Court of Appeal left open the question of whether the PRM legislation is capable of providing compensatory remedies or merely criminal sanctions and an administrative complaints machinery. Hints at the latter were ultimately offset by the substance of the decision and the determination of the Court to refute any suggestion by the ECJ that passenger rights cannot be considered inconsistent with the Montreal Convention.

What is however clear is that, in determining issues of exclusivity under the Montreal Convention, the English courts will continue to place great emphasis on when carriage by air begins and ends, as well as when the relevant event giving rise to a cause of action occurs.

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"The UK Equality and Human Rights Commission is considering an appeal to the Supreme Court."

Beware: the Convention two year time limit is no bar to workers' compensation indemnity claims against carriers

United Airlines Inc v Sercel Australia Pty Ltd [2012] NSWCA 24, 8 March 2012 sss.

On 8 September 2005, Mr Sandeep Arora, an employee of Sercel, traveled on a business trip to the United States. On his outbound United Airlines flight he suffered an accident: after landing, he was hit on the head by an object that detached from the interior of the aircraft and he suffered neck and knee injury. He attributed the incident to heavy braking of the aircraft. No convention claim was brought by Mr Arora against United for damages for personal injury. However, Sercel made workers' compensation payments to Mr Arora through its insurer and more than two years after the accident Sercel sought to recover those payments from United before the Australian court under provisions of the Workers Compensation Act 1987 of New South Wales.

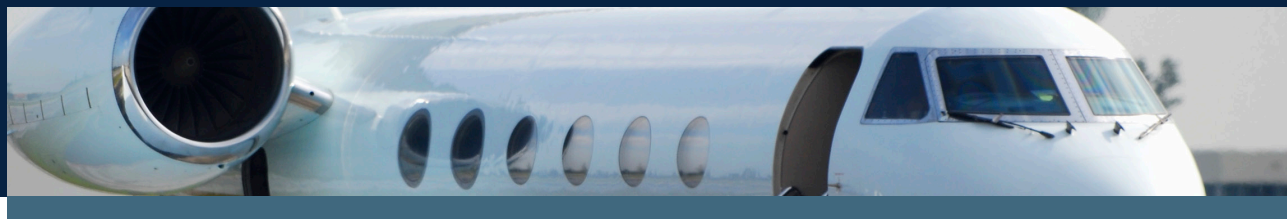
As an international flight from Sydney to Houston in September 2005, United's liability as air carrier to Mr Arora fell to be determined by the Warsaw Convention as amended by the Hague Protocol of 1955 and by Montreal Protocol No 4 of 1975 (together, the Convention), The same is given force of law in Australia by the Civil Aviation (Carriers' Liability) Act 1959 (the 1959 Act).

Before the New South Wales Court of Appeal United argued that by the express words of Article 24 of the Convention, any action for damages, however founded, can only be brought subject to the conditions and limits of the Convention. United relied also on Section 36 of the 1959 Act under which …*'the liability of a carrier under the Convention in respect of personal injury suffered by a passenger is in substitution for any civil liability of the carrier under any other law in respect of the injury'.* Since by operation of Article 29 of the Convention the right to damages is extinguished if an action is not brought within two years, United argued that Sercel's claim was time-barred.

Sercel submitted that a six year limitation period applied to its cause of action brought under the 1987 Act by reference to the Limitation Act 1969 (NSW), with limitation running from each payment of compensation, each such payment giving rise to a new cause of action. Further, Sercel relied on Section 37 of the Act by which nothing in the Act and/or the Convention is deemed to exclude any liability of a carrier to indemnify an employer of a passenger in respect of any payments made by that employer providing for compensation in the nature of workers' compensation.

The court's finding

Each of the regimes of liability provided for by the Act has a provision dealing with indemnity and contribution and Section 37 of the Act operates in its terms to protect the rights there identified. Section 37 does not in itself give rise to a "right to damages" but rather it creates a liability to indemnify and pay contribution. The provision does not assume that indemnity and contribution rights are incorporated within the cause of action created



by Article 17 of the Convention or Section 28 of the Act. Rather, Section 37 of the Act stands apart from the Convention.

The New South Wales Court of Appeal found that the right of the employer to indemnity with respect to workers' compensation payments does not accrue until payment of the compensation is made. This will always be much later than the date of the original injury and, *"…it would be an unexpected operation of a law (and one that would also be unjust and capricious) if a time bar provision could operate to extinguish the right to sue, before it arose"*. The position would of course be different if the employer's action against the carrier was founded in subrogation, entitling it to succeed to the rights of the worker (passenger). In those circumstances the subrogated action for damages would be subject to the Convention Article 29 time bar.

The appellate court therefore held that that the Convention two year time-bar does not apply to a workers' compensation indemnity claim and so dismissed United's appeal. Airlines and their insurers should take note of the decision. Further, although decided on its facts by reference to Warsaw/Hague/MAP 4, the same decision would have resulted in a claim subject to the Montreal Convention 1999, which entered into force in Australia on 24 January 2009.

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UCTA and international supply contracts

In *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm) the commercial court has re-visited a number of key provisions of the Unfair Contracts Terms Act 1977 (UCTA), chiefly its application to international supply contracts, and continued the current judicial trend of interpreting contracts in a manner that is both commercially attuned and pragmatic.

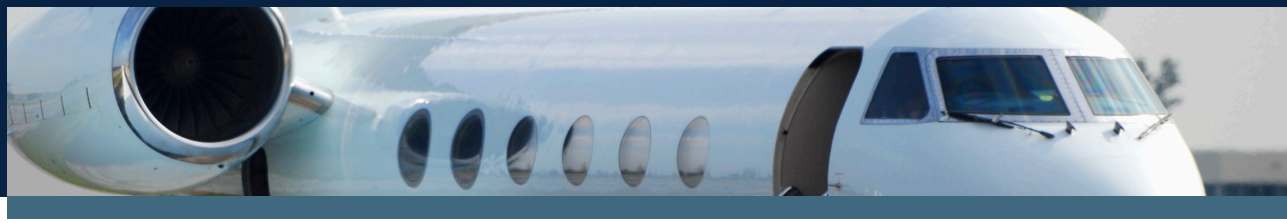
The facts of the case were not uncommon in the context of private jet acquisitions. Mr Mosquito, an Angolan resident, agreed to purchase a new private jet from Bombardier Inc., through an Angolan company that he controlled. The aircraft purchase agreement was stated to be governed by English law. The Angolan company subsequently assigned its rights under the contract to a Gibraltar based company that was also controlled by Mr Mosquito. It was asserted that the jet was brought for his private use.

The aircraft was rejected fourteen months or so after delivery on the basis that it did not correspond to its description, was not of satisfactory quality and was unfit for purpose within the meaning of the Sale of Goods Act 1979, as amended (the SGA).

The main questions for the court were whether the contracts ousted statutory implied terms as to description, quality and fitness and, if they did, whether the contractual exclusion clauses fell within UCTA.

In the High Court the Honourable Mr Justice Cooke held that:

- The exclusion clause in the aircraft purchase agreement ousted the SGA statutory implied conditions as to satisfactory quality, despite the fact that the agreement terms did not refer specifically to "conditions". Cooke J took the view that, given that there was no ambiguity in the exclusion clause, any other construction of its wording would amount to a distortion of words used: *"it was what the parties agreed and the parties… should be kept to their bargain".*
- The purchase agreement and the assignment were international supply contracts within the meaning of UCTA. The requirement under section 26(4)(a) that the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one state to the territory of another was met: the aircraft was to be delivered in Canada and then exported to Angola were it was to be registered. It was enough that the parties contemplated, when signing the contract, that the aircraft would be transported across boundaries, not necessarily to fulfil the terms of the contract but to achieve its commercial object. Further, the requirement under section 26(4)(b) that the acts constituting the offer and acceptance be done in the territories of different states, on examination of the facts, was also met.
- The contract was excluded from UCTA by section 27 under which the Act does not apply to a contract governed by English law where this is by reason of the parties' choice of English law. The choice of English law as the governing law of these contracts



was artificial because none of the parties had any particular links to England. But for that choice, the contracts would probably have been governed by the laws of Quebec, where the seller was based.

- Mr Mosquito had not been "dealing as a consumer" within the meaning of UCTA. Cooke J examined Mr Mosquito's past dealings with aircraft and concluded that this was not a private purchase; whilst the claimant company was regarded as Mr Mosquito's alter ego, it was also found to be solely in the business of buying, owning and operating that particular aircraft.

- The exclusion clause wording was reasonable. Cooke J did not need to decide on this point but noted *obiter* that had UCTA applied, the exclusions would have been reasonable. The parties had allocated the risk between them on the terms of the agreement and the terms were reasonable.

This case is yet another example of judges adhering to current trends and applying commercial and common sense to their judicial interpretation. While this outcome is positive, it reflects a trend that could just as easily be reversed by future judgments and parties should, therefore, continue to ensure that the commercial terms they agree during negotiations are clearly reflected in the contracts they subsequently sign.

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World Space Risk Forum, Dubai 2012

The second World Space Risk Forum, (WSRF) was held in the Ritz Carlton Hotel, Dubai International Financial Centre, between 28 February and 1 March 2012, two years after the inaugural conference, also in Dubai. The main focus of the 2012 conference was on issues relating to future opportunities and trends affecting the risk management of space activities worldwide, with particular regard to insurance. Over 300 participants attended, comprising senior managers and executives, leading professionals representing satellite and launch manufacturers, launch service providers, satellite operators, space agencies, financiers, space insurance underwriters, reinsurers and brokers, academia, providers of legal services and various technical and regulatory experts.

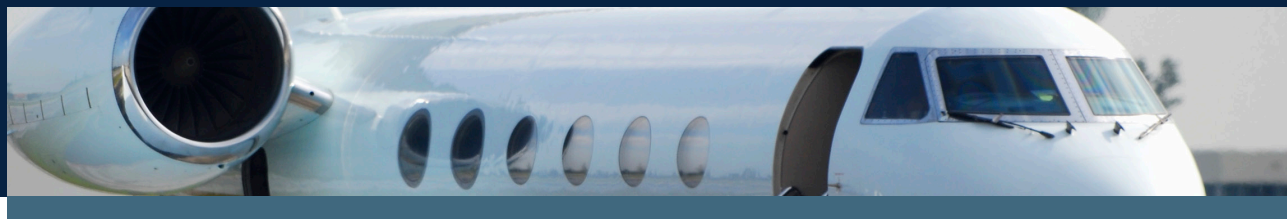
In addition to a well thought out programme comprising panel sessions on key risk-related issues providing excellent opportunities for debate and contributions from the floor, there was a briefing session by Arianespace for its customers and plentiful opportunities for networking and bi-lateral meetings.

The Space Risk Management Award was presented to the Space Data Association (SDA), a collaboration between satellite operators, for its cooperation in exchange of data and joint efforts to reduce the risk of satellite operations.

HFW was a conference sponsor and was represented by Aerospace Partner Nick Hughes, and by Consultant David Greves. In addition, Charlie Cockrell, an Associate in our local Dubai office and Richard Gimblett, a Partner with responsibilities in London and Dubai were able to attend some of the sessions and events. We distributed to attendees a HFW briefing note on the Unidroit draft Space Mobile Assets Protocol and an article on Satellite Interference written for the Space Insurance Day.

The panel sessions included Future Space Activities and Risk Management Activities, Capital for Space Finance (parts 1 and 2), How to improve (insurance) Coverage, Space Environment and Liabilities (parts 1 and 2) and New Technologies and Markets. Nick Hughes participated in the Space Environment and Liabilities Panel, specifically addressing the Liability Convention. The issues and risks addressed in this panel session relating to space debris, loss of satellite control, satellite interference and hacking and product liability are of fundamental importance, not only to satellite operators and insurers but to the whole space community. Nick referred to the relevant international treaties defining liabilities (The Outer Space Treaty of 1967 and the Liability Convention of 1972) and questioned whether these instruments are still fit for purpose or if that they are in need of updating to reflect current trends, risks and uncertainties. He also drew attention to the lengthy process of agreeing international treaties, to problems of enforcement and to the short-term nature of insurance as compared to the long-term nature of space liability exposure, an issue which is generally not well understood or acknowledged.

The value and importance of the



conference is undeniable and must surely have caused all who attended to seriously reflect on risks which are likely to materialise sooner or later, some of which could be of enormous significance and severity. The priority has to be to define risk mitigating measures (such as those being taken to strengthen the protection of satellites against the impact of space debris and space weather) but also to consider the legal and regulatory framework and the future role of insurance in an increasingly commercial space sector.

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News

HFW promotes three to Partner

The firm is delighted to announce three internal promotions (effective 1 April 2012) across core sectors of focus, including aviation, insurance and logistics. The firm's Dubai office is boosted with the promotion of Sam Wakerley, specialising in shipping, trade and insurance (marine and non-marine), while in London, Ed Spencer, an aviation insurance specialist, and Justin Reynolds, who focuses on logistics and multimodal transport, are welcomed to the partnership.

Conferences & Events

PICC Aviation Products and Products Insurance Conference

Xi'an, China
(15-18 May 2012)
Ashleigh Williamson

Airline Conference hosted by HFW in association with IATA

China World Hotel, Beijing
(13 June 2012)
Giles Kavanagh, Mert Hifzi, Peter Coles, Sue Barham, Konstantinos Adamantopoulos and Guy Hardaker

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