

GLOBAL GA



Welcome to HFW's Global GA, a bulletin that is dedicated solely to General Aviation.

In this second edition of our bulletin, **Peter Coles** examines the legal complications arising out of a helicopter rescue mission and also explains the potential benefits of insurance-backed product integrity bursary schemes. **Edward Spencer** reports on a recent US case which highlights the ever recurring problems associated with ambiguities in an insurance policy, and **Fernando Albino**, **Adam Shire** and **Anthea Agathou** provide a topical country focus on Brazil.

This bulletin also includes details of some upcoming events in the GA sector, plus contact information for a number of our Global GA team. For further information about any of these articles, or aviation in general, please contact any of the contributors to this bulletin, members of the team listed, or your usual contact at HFW.

Giles Kavanagh, Partner and Head of Aerospace.



Air ambulances beware - it does not pay to force a rescue

The Munich State Court has dismissed an appeal of an air ambulance operator to recover the cost of a rescue operation to recover a hiker who overexerted herself.

The hiker was suffering from circulatory problems at the time and gave her agreement to a fellow hiker to call the mountain rescue service. The emergency dispatch centre sent a rescue helicopter with an emergency doctor on board. As it was unable to land, it lowered the doctor to the ground with a hoist. He noted that the patient was pale, had clammy skin, was exhausted, was suffering from hypertension and should be examined in a hospital. Despite this, he later described in court that the hiker's condition was not life-threatening and that she might have been able to get up and walk, but would probably have to sit down again.

However, the hiker refused both transportation by helicopter and hospital treatment, and stated that she wished to be carried down to her vehicle by the mountain rescue service. The evidence showed that four men could have carried her down to her car in 20 minutes.

Instead, the doctor gave her a sedative, and she was hoisted into the helicopter and carried to the hospital, neither of which she resisted. However, on arrival, she immediately left.

In an action before the Munich District Court to recover the cost of the air ambulance operation, the operator argued that at the time the

call was made to the emergency dispatch centre, it was not possible to ascertain whether the hiker was suffering from a life threatening condition. Also, that it was not possible to bring the emergency doctor to the site in time, unless a helicopter was used.

The difficulty for the operator was that it could not prove that the hiker had agreed to be bound by a contract to be transported by air. Nor could it make a claim on the basis of the law of agency, without specific authorization. Under German law, a voluntary agent can demand reimbursement of expenses of an authorized service provider if agency is assumed in the interest of or based on the actual or presumed will of the principal.

A number of factors stood in their way. The Court stated that accepting another hiker's offer to call the emergency services cannot be regarded as a declaration of intent to enter a legal contract. The fact that a lucid and responsive patient clearly stated that she did not want to be transported by helicopter to the hospital also undermined the claim that a contract had been concluded. Her mental capacity was not impaired. The fact that she then

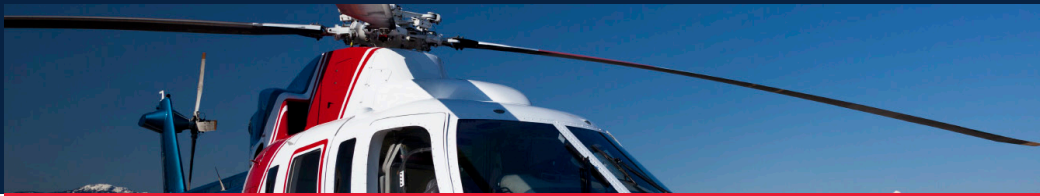
allowed herself to be lifted in to the helicopter without complaint could not amount to an implicit agreement to a transportation contract. It also did not help that the helicopter operation was unnecessary, given the emergency doctor's diagnosis and the ability to carry the patient on foot.

Missing from the evidence were the facts upon which the emergency dispatch centre made its decision to commence an air ambulance operation. This might have made a difference in circumstances where the caller was panicking, and the patient was visibly injured and unresponsive.

In conclusion, air ambulance operators need to consider very carefully whether they seek to recover the cost of operations from patients, where they ignore a patient's demand not to be transported by air and in circumstances where an alternative operation is viable. Emergency services centres can also help if they ensure that the ambulance operator participates in the decision as to whether to uplift a patient.

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Contractual ambiguity: not worth flirting with

In the case of *Knezovich v Hallmark Insurance Co, NE2d, 2012 WL 3191964 (Ill App. Aug 3 2012)*, the Appellate Court of Illinois recently decided on whether ambiguity in an insurance contract should deprive insurers of a defence to cover arising out of a fatal mid-air collision of two light aircraft.

The claim in question was brought by the estate of a passenger, who was killed when the Cirrus in which he was travelling was hit by a Cessna that had been rented by a student pilot. The issue was whether the insurers of the Cessna's owner/operator could deny cover on grounds of a policy exclusion. The passenger's estate argued not, on the basis that there were conflicting provisions in the policy which created ambiguity:

- “Who is not protected: the policy does not cover a renter pilot with respect to any occurrence arising out of the operation of the aircraft by a renter pilot.”

- “This policy does not cover property damage or bodily injury if the aircraft is being operated in flight by a Student Pilot with passengers unless a passenger is a pilot acting as pilot in command.”

In this case, the student pilot was flying solo and so the second exclusion was not triggered. However, the estate of the deceased passenger from the other aircraft sought to contend that the two provisions were ambiguous when read together, because the student pilot could be classified as either a renter pilot (thus triggering the first exclusion) or a student pilot without passengers (thus failing to trigger the second exclusion and thereby confirming the existence of cover).

Perhaps not surprisingly, the court was unimpressed by this argument. It ultimately held that the policy was not ambiguous, because the two provisions addressed two separate issues and did not therefore conflict. Specifically, the first exclusion concerned who was an insured and the second exclusion concerned what risk

was insured. This being the case, the first exclusion was found to apply and the denial of cover was upheld.

Although the outcome in this case was ultimately favourable to insurers, the case serves as a reminder that the mere hint of ambiguity can leave insurers facing a problem, particularly in circumstances where many jurisdictions around the world will construe any ambiguity in an insurance exclusion very strictly against the party (i.e. the insurer) seeking to rely upon it. Although insurers were successful in this case, they became exposed to litigation that had no certainty of outcome other than, at best, some unrecoverable costs.

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Regional focus: Brazil

Aircraft seizures - a new weapon in the fight against tax evasion

In June of this year, a task force, comprised of Brazilian tax and federal police, in collaboration with the Brazilian Civil Aviation Agency (ANAC), seized twenty one business jets for alleged tax evasion and since then they have been targeting a number of other aircraft. The aircraft in question were apparently being used regularly in Brazil, but under the financing structures in place were registered overseas, namely N-registered in the US. In accordance with Brazilian legislation, aircraft registered overseas are permitted to enter Brazil on a temporary admissions permit and remain there for up to sixty days without paying any import duties, which currently stand at up to just under 35%, depending on which state the aircraft may be imported into. It was alleged by ANAC that a number of aircraft were flying in and out of Brazil repeatedly, to renew the temporary admissions permits of the aircraft. According to media reports, in order to build its case, ANAC matched its overflight authorisations with Brazilian customs temporary admission permits and Air Force ATC flight plans, while tax authorities monitored intra-country flights. The federal police also tracked passenger lists. As a result of the aforementioned investigations, usage patterns consistent with Brazilian ownership and use were apparently established.

As a result of these investigations, banks active in financing business jets have been carefully monitoring the situation, and working with current and prospective owners and with operators with a view to

avoiding becoming embroiled in any future clamp-down by the Brazilian authorities. They are also focusing on structures which would see any aircraft flown for a substantial number of hours within Brazil, registered in that country and properly imported, with customs clearance documentation confirming that the current rate of tax has been paid. This will be an expensive outlay for owners and many will argue that the N registration is perfectly legitimate for their type of operation.

On May 26 2011, National Congress in Brazil approved, through Legislative Decree, the texts of the Cape Town Convention on International Interests in Mobile Equipment and the Protocol on thereto on Matters Specific to Aircraft Equipment, (collectively the "Cape Town Convention"). This indicated the last legislative step in the process to approve the convention and supplementary protocol. The final step is for President Dilma Rousseff to issue a decree enacting the legislation into law and to deposit the Cape Town Convention with the International Institute for the Unification of Private law in Rome. At a high profile conference, which took place in Sao Paulo in April 2012, discussing the

Cape Town Convention, the Presidential decree was considered imminent or at most not more than six weeks away.

At the time of writing, the Presidential Decree has still not been issued. One possible contributor to the unusual delay is apparently a difference in opinion in respect of the express requirement of a Presidential Decree. There is also speculation that the delay in issuing the Presidential Decree is linked to the seizure of the business jets in Brazil and the need to have such incidences investigated prior to adhering fully to a system such as the Cape Town Convention. In accordance with the terms of the Cape Town Convention, the effective date will follow the third complete month after the decree being placed before the President.

It is still widely anticipated by the Brazilian aviation industry that Brazil will become a Cape Town Jurisdiction before the end of 2012. Whilst there are some areas of implementation that will inevitably require clarification, ratification of the Cape Town Convention is widely viewed as a step forward for Brazil in raising its profile in the aviation industry and sending a

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message that the country is adhering to international standards for aircraft finance. But it remains to be seen what owners will do when it comes to paying the taxes currently required to import business jets.

Discussions in Brasília to defend agricultural aviation

The Brazilian union of agricultural aviation companies is reported to be working together with the civil aviation secretariat to promote public programs which support the training of pilots and mechanics specifically for agricultural aviation.

The sector, like other civil aviation sectors, is facing serious financial challenges given the lack of qualified pilots and mechanics in the market.

Some of the issues being looked at are financial, like more support to flying schools and the reduction of taxes on aviation fuel for agricultural aviation, and also legal and administrative, such as the removal of administrative barriers to the employment of pilots and mechanics,

and the approval of a new regulation for the agricultural aviation sector (which replaces the current RBAC 137 - generally seen as outdated).

Another issue which has recently come to light is the transfer of the regulatory powers from the Federal sphere to the States which, in addition to the unnecessary duplication of certain registrations and other bureaucracies, has resulted in the lack of adequately trained state agents who actually understand the specific nature and challenges of the agricultural aviation sector.

ANAC creates temporary licences for new pilots

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According to industry sources quoted in the local press, the delays in

processing the applications are due, not only to the exceptional increase in the number of applicants (an average of 133 applications each day), but also to the fact that during the course of 2011 (five years after its creation), a lot of ANAC officers and agents went back to their posts in the Air Force, and their positions within the state-owned airport operator, Infraero.

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records) are really an attempt to disguise the fact that there are simply not enough people within ANAC to ensure that processes are checked, documents reviewed and the quality of pilot training ensured.

Flying school owners have complained publicly that the quality of student-pilots has decreased significantly over the last few years and some point the finger at the excessive ease that on-line and remote training offers.

Young and aspiring pilots, an ever growing class in Brazil's booming economy, disagree and are only too happy to start working immediately upon successfully completing their training.

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Product integrity bursaries: cash in the bank?

You are a business jet operator and manager. You own and manage a fleet comprising 11 aircraft that operate regionally and domestically. Last year, another aircraft under your management crashed following a missed approach. The occupants were killed. Your aviation insurers stepped in and their lawyers settled the claims. However, they expressed concern about the contract you entered into with the owners and financiers of the aircraft.

This year started off badly. You have been sued by an owner of an aircraft not in your fleet, for an ad hoc towing service which went badly wrong. The service was actually performed by another party whom you have no contract with. It was performed without sufficient supervision or wing tip observers. To make matters worse, you have no short form agreement for the provision of ad hoc services. There are the repair costs, and the owner has also brought a significant loss of use and diminution of value claim.

Your broker has just offered you a new product. US\$50,000 every year by way of a product integrity endorsement. Great you cry; US\$50,000 a year to me which I can bank! Wrong, your Insurers are setting aside an annual “spend or lose it” bursary to assist you in your Claims Prevention and Loss Mitigation programme.

When bursaries were initially introduced on airline and manufacturer placings, the principal rationale of insurance markets and brokers was to offer companies assistance on improving and focusing upon risk management practices and operational

safety and security systems. The brokers negotiate the bursary/services with markets on the premise that with enhanced focus and better defined risk management disciplines, the airline and product loss ratios and underwriting profitability will improve, and thus benefit primarily both the aviation industry and insurers...and not the broker! Brokers assist with delivery of the product and receive the bursary. The broker then either pays the contracted parties directly or reimburses the Insured ..everyone's a winner!

Products vary, but typically they include bursaries that can be used to pay for lawyers to:

- Provide seminars on your liability exposures and managing the liability exposures through the allocation of risk in contracts and insurance, and creating product integrity and safety programmes.
- Conduct a desktop audit of how you manage your risks in your contracts. This involves a review of key commercial and aviation/product risk terms, like the parties' obligations, warranties, liability, indemnity and insurance provisions; and the all important credit risk, termination and governing law and dispute resolution clauses. The reports will point out what deficiencies exist and make recommendations for improvement.

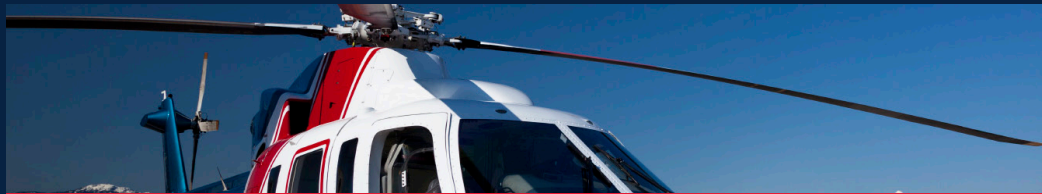
Your insurers and brokers will want to ensure that the lawyers performing the work are specialist aerospace lawyers who they know. They are also likely to want to see the work product, whether these be presentation materials or an audit report together with

recommendations for reducing your exposure to claims.

In our experience, new operators of aircraft often do not consider establishing Claims Prevention and Loss Mitigation programmes until a significant event occurs. We believe that it is advisable to do so at the earliest opportunity. It is also good risk management practice for mature businesses to conduct desktop audits of their contracts and training on claims prevention every two to three years, as the regulatory and legal framework governing their operations is never static.

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Conferences & Events

International Corporate Jet & Helicopter Finance London 2013
London
(11-13 February 2013)
Adam Shire

Indian Business Aviation Expo
Delhi
(19-20 February 2013)

CHC Safety Summit
Vancouver
(18-20 March 2013)
Nick Hughes and Peter Coles

Asian Business Aviation Conference & Exhibition (ABACE)
Shanghai
(16-18 April 2013)

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