

HFW Aero



Legal news round-up

Significant global developments

In conversation with...

Steffen Bay, Vertical and Paul Malicki, Flapper

The sustainable growth of air transport in LAC in the post-Covid era

IATA anticipates LAC figures will surpass those of 2019 between 2023 and 2025

Inflation Shock, Social Inflation and a Showing of Resilience

The LAC aviation industry's rebound shows the resilience of this industry

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¡Saludos y bienvenidos!

Hello and welcome to the Latin America and Caribbean (LAC) edition of the HFW Aero, our quarterly update of the legal, commercial and regulatory issues affecting the aviation industry.

In this edition, we are excited to introduce to our readers two tech entrepreneurs determined to take aviation into the future. We hear from Paul Malicki, the CEO of Flapper, the largest private aviation app with a fully automated reservation system that accepts bitcoin. We also speak with Steffen Bay, Head of Market Development-Latin America for Vertical, to learn about the VX4 project, their focus on sustainability and their plans to use eVTOL to transform air travel.

Looking at the region's tremendous green potential and its ambitions to fly net-zero by 2050, in this edition we, together with HFW's consultant Giselle Deiró, offer a perspective on sustainable growth of air transport in LAC, examining whether decarbonisation is achievable within this timeframe in today's current economic and political climates, post-Covid. In addition, we feature a piece that highlights LAC's aviation industry's resiliency, looking at the pace of growth since the vaccination rollout, we examine the region's inflation, prevailing pro-consumer attitudes characteristic of social inflation, and what airlines and their insurers should expect looking ahead when defending against liability claims. We hope you find these articles informative and thought provoking, and enjoy the photography we are showcasing with these two featured pieces.

In our global news roundup we look at an array of topics relating to dispute resolution such as the trend of widening the scope of Montreal Convention (MC99) liability and UK261 news and potential reform. We also look at sustainable finance and the latest on airline consolidations.

Finally, we are excited to share our link to the updated 2022 HFW Aviation Latin America Interactive Damages Map, which contains details on aviation liability regimes and on passenger rights regimes across LAC.

We hope you enjoy this 6th edition, and please do get in touch if you would like to talk more about any of the topics featured.

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Legal news round-up

Brazil's "Simple Flight Plan" gets more complicated

The Brazilian Government's "Simple Flight Plan" initiative looks to open the Brazilian aviation sector to counteract the economic crisis arising from the Covid-19 travel restrictions and the devaluation of the Brazilian currency, Real (R\$). In furtherance of this objective an executive order (**PM 1089**) was issued in late 2021.

However, Brazilian legislators had to be given the opportunity to propose changes to PM 1089 before it could be voted through by the Senate, enacted and made enforceable. This did not happen until March 2022, when a proposal was made to reinstate a rule in force prior to December 2016 requiring

local and foreign airlines to offer a mandatory "free of charge" baggage allowance (23 kg for domestic and up to 30 kg for international flights). The reintroduction of this requirement adds an extra layer of bureaucracy that runs counter to the objectives of PM 1089.

The revised law is now with the Senate for their vote. Since Brazil is a few months away from general elections at both federal and state level, it is unlikely that the senators or the current Brazilian President, who is running for re-election, will reject the amended version of PM 1089, given its populist appeal. If enacted, it will be included in the Consumer Defence Code, which already provides wide scope for passengers to claim against airlines.

For more information on the "Simple Flight Plan" see [our article](#).

Lat Am airlines consolidate

Competitive changes are coming to the post-pandemic aviation market in Latin America, with three major players announcing mergers that are expected to take place later this year.

In April, the Colombian flag carrier Avianca announced a merger with the two low-cost carriers Viva Air (Colombia) and Viva Air Peru. Viva Air, which operates primarily from Medellín, does not compete with Avianca on 44% of their domestic routes, and offers a significant network of international flights to Miami, Mexico City, Cancun, São Paulo, Lima, and Buenos Aires, amongst other destinations. By way of comparison, Avianca's historical hub is Bogotá, but in recent years it has been expanding to other key airports

in Colombia. According to Aerocivil, the Colombian civil aviation authority, in the first quarter of 2022 the two airlines, jointly transported 5.4 million passengers which corresponds to 50% of the market share in Colombia [1]. This merger will also include Viva Air Peru, which amounts to 4% of the local market share, providing domestic services within Peru and a number of international routes to Colombia. Viva will then become part of Avianca Group International Limited (Avianca Group) and Viva's founder will join its board, with all three companies preserving their separate branding and strategies. By estimation, this newly formed entity will hold approximately 65% of Colombia's domestic market.

Avianca is also looking to expand its reach in Brazil with the formation of Abra Group Limited, which will provide services for over one billion passengers with an estimated GDP of almost three trillion US dollars, operating a fleet of almost 280 aircraft over 300 routes.

Abra group will be controlled by the principal shareholders of Avianca, as well as the majority shareholders of the low cost Brazilian carrier GOL. It will also hold a non-controlling 100% interest in Viva's operations in Colombia and Peru, and a minority interest investment in Chile's Sky Airline. Each airline will "maintain independent brands, talent, teams, and culture".

UK Supreme Court judgment eases the way for claims agencies to recover their fees

A long-running dispute between Ryanair, and Bott & Co, a firm of solicitors which specialises in compensation claims for passengers on delayed flights under EU261 and its post-Brexit successor UK261, has now reached its conclusion with a Supreme Court Judgment in favour of the claims agency. The question considered was whether solicitors had an "equitable lien" over compensation recovered under EU261, allowing them to deduct their costs from that compensation before paying the balance to their clients.

"The current severe operational disruption across Europe as the industry struggles to find sufficient staff will be a fertile ground for claims."

We reported on the 2019 Court of Appeal judgment in [this article](#).

The first instance court and the Court of Appeal (CA) found that no equitable lien existed. This was because the service provided by Bott & Co in making claims for compensation under EU261 were "mechanical and formulaic" and assisting a passenger in their claim for compensation did not constitute litigation services, unless and until the airline disputed the claim.

However, earlier this year the Supreme Court, by a narrow 3-2 majority, reversed the CA decision and found in favour of Bott & Co.

The Supreme Court ruling in a nutshell

This disappointing decision may be summarised in two key points:

Litigation does not need to be commenced for a solicitor to have an equitable lien. Simply assisting passengers to make a claim for fixed 261 compensation is enough to entitle them to a lien to recover their costs. This is even in uncontested claims and despite the services provided being predominantly automatic and technology driven, as opposed to providing legal advice.

Access to justice underpins equitable liens. If solicitors have the security of a lien to recover their fees, they are more likely to take on small value claims. Passengers feel more comfortable with a solicitor's assistance and are thus more likely to make a successful claim for compensation. The Supreme Court found this was in line with the overall purpose of the legislation.

The Supreme Court is the highest court in England and Wales, meaning there is no right to appeal.

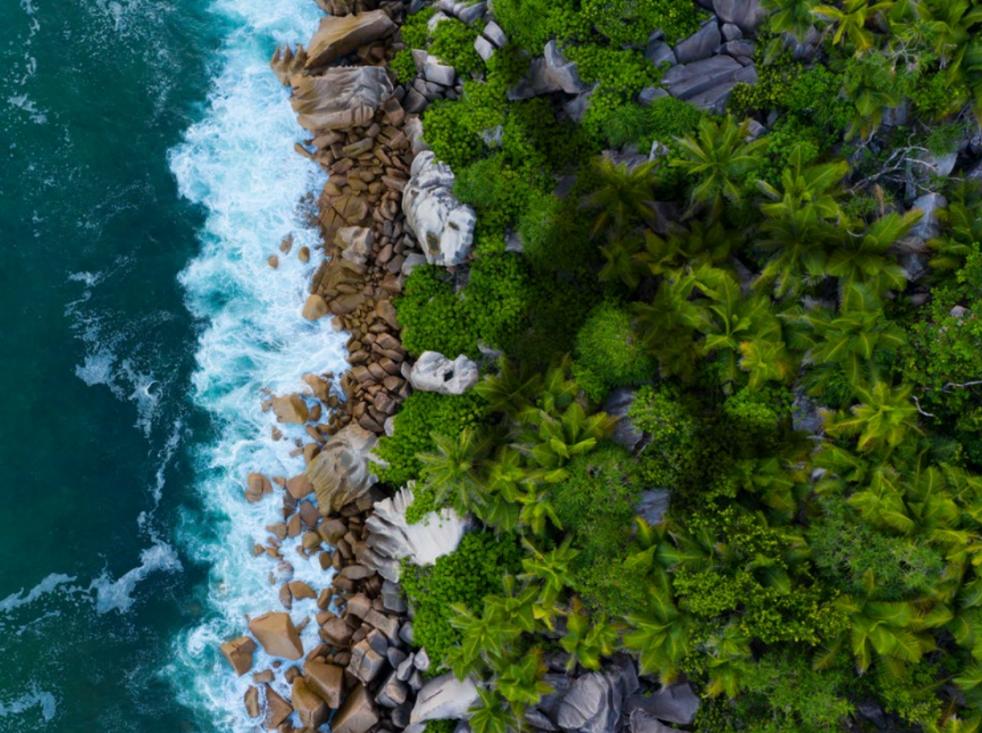
What does this mean for the airline industry?

With social media and freely available online information, passengers are increasingly aware of their rights and the above ruling means that solicitors firms specialising in volume pursuit of low value claims will not go away, but continue to thrive, and EU and UK261 claims will rise. In 2022, Bott & Co now advertise that they have recovered more than £73 million. The UK Government's recent proposals to reform UK 261 may reduce the overall value of claims made, but they also threaten to introduce the right to claim for shorter delays than is currently possible, and notably fail to consider the need to regulate and disincentivise the claims farm industry. The current severe operational disruption across Europe as the industry struggles to find sufficient staff will be a fertile ground for claims.

Montreal Convention – CJEU looks to widen scope

Two cases Austria referred to the Court of Justice of the European Union (CJEU) look set to continue the trend of widening the scope of Montreal Convention (MC99) liability. One relates to slips and trips, while the other revisits the thorny subject of liability for psychological injury.

In *JR v Austrian Airlines (C-589/20)*, a judgment handed down at the beginning of this month, the question was asked whether a passenger's fall down the aircraft steps during disembarkation was an "accident" for the purpose of triggering MC99 liability. Crucially, the fall had occurred "for no apparent reason" and there was absolutely no evidence that the



steps were defective or in any way operating other than expected. The leading international authorities on this subject (most notably the English Court of Appeal in *Barclay v British Airways*) are clear that for there to have been an accident there must have been some external cause or unexpected event, and that there is no liability in the event of the passenger's "particular, personal or peculiar reaction to the normal operation of the aircraft". This position was indeed endorsed by the CJEU's own Advocate-General (a lawyer who provides impartial legal advice to the Court to aid in its decision). However the CJEU is not bound to follow the Advocate-General and the brief final judgment appears to hold that there was indeed an accident for MC99 purposes, seemingly basing this conclusion on the premise that MC99 is a strict liability regime with the objective of ensuring the protection of consumers. It remains to be seen whether it was indeed the express intention of the CJEU to diverge from the accepted position and, if yes, whether judgment is sufficiently robust for future claimants to rely upon in EU jurisdictions and beyond.

In *BT v Laudamotion* (C-111/21), BT was evacuated from a Laudamotion aircraft at Stansted following an engine explosion just before take-off, and was subsequently diagnosed with PTSD. The Advocate-General's opinion has been delivered in the case,

but no final judgment has yet been handed down. The A-G here reaches the conclusion that, despite BT not having suffered any physical injury, she should be able to recover damages for her psychological trauma on the grounds that a contemporary society must include in the definition of "bodily injury" any impairment of mental integrity requiring treatment. Again, the consumer protection objectives of MC99 are cited in support. This moves away from the established analysis requiring a link between bodily injury and compensable mental injury. If the CJEU follows the A-G, this case will significantly increase the exposure of airlines to claims for psychiatric injury.

Sustainable Finance: Revised EU Aviation Taxonomy screening criteria published

The EU Taxonomy has been developed to provide a set of objective criteria against which ESG-related conditions in financing packages can be measured, counteracting allegations of greenwashing. Revised screening criteria including those for aviation were published in March by the EU's Platform on Sustainable Finance. They expand the scope into three clearly defined sections - manufacturing, leasing of aircraft and passenger and freight air transportation covering the purchase, finance and operation of

commercial aircraft. The taxonomy encourages a transition to a cleaner environment, including zero emission aircraft, re-fleeting of portfolios to 'best in class' aircraft types and increasing the use of sustainable aviation fuels (SAF). Business jets are not included in the taxonomy unless they operate on 100% SAF from the outset. For more information see the report here.

KLM threatened with legal challenge to "Fly Responsibly" advertising

Climate activist NGOs Fossil Free Netherlands and ClientEarth have issued a Letter before Action to KLM, inviting the airline to retract its sustainability claims on the grounds that they are misleading and amount to "greenwashing". This is the latest in a growing body of legal challenges based on climate change causes. If KLM do not agree, the activists say that they will issue court proceedings in the Netherlands based on breach of EU and Dutch consumer law.

In the **letter**, the NGOs state that "there is no such thing as sustainable flying" and that KLM are using misleading sustainability claims to encourage flying and continue the growth of the aviation industry, when the only way to address climate change is to put in place significant restrictions on flying. They also accuse the airline, along with IATA and other airlines and trade bodies, of "lobbying intensively against aviation regulation proposals that aim to achieve climate goals... in direct contradiction with the claims that they support those goals" and "impeding transition by blocking, delaying and weakening aviation climate regulation."

In addition to the request to retract all advertising, the activists ask that KLM introduce a prominent "health warning" on its booking tools and tickets which highlights the negative effects of flying.

It remains to be seen whether the Dutch Courts will agree that the NGOs have standing to make a claim, but the success of the recent action against Shell means that this is not out of the question.

In conversation with...

Steffen Bay

Head of Market Development, Latin America, Vertical



Click [here](#) to connect with Steffen



How would you describe Vertical's VX4 project, and when may we expect to see Vertical's first eVTOL flight?

Vertical is developing an all-electric take-off and landing aircraft that has the potential to revolutionize the way we travel for a more sustainable world. As congestion in urban areas is becoming an increasingly serious issue in Brazil and Latin America, we believe that we can be a part of resolving this by introducing a sustainable form of air travel with zero operational emission and minimal environmental infrastructure impact. We are connecting destinations using existing air mobility infrastructure in Brazil - we will just need to electrify it. We have planned to conduct first test flights with a full size prototype later this year, with production and start of commercialization being expected in 2025.

After many years working for the aviation industry in different countries around the globe, how would you describe your experience working on the VX4 Project? What have been the leading challenges, and looking forward, what do you hope to accomplish?

It is very different, I was used to operating aircraft from different OEMs on a daily basis, and now I

am part of an OEM myself that is building something revolutionary. It is exciting, but I am of course aware of the challenges we have ahead of us. Certifying a new aircraft with completely new technology is not an easy task. I hope to accomplish being a part of putting this amazing aircraft into service and help our customers, by introducing it into their daily operations without any major issues.

What role do you believe the VX4 project will play as we look to grow a more sustainable aviation industry? How does Vertical plan to handle the logistics related to the operation of its eVTOL to overcome the hurdles brought on by the lack of infrastructure and regulations for the operation of eVTOLs in Latin America, where current economically driven government decisions suggest sustainability is not a top and immediate priority?

In my opinion, this will be just a first step. Battery technology will further improve, and biofuels are being developed. The range and payload of eVTOLs will constantly increase in future decades, making some legacy technology obsolete. I am sure that even if governments will not drive this change, consumers and investors will. Some of the infrastructure in Latin

America is excellent. just take look at Sao Paulo, Rio de Janeiro, and Santiago de Chile - it just needs to be modified.

GOL, one of Brazil's largest airlines, announced it has reached a deal with the lessor Avolon for the incorporation of 250 Vertical eVTOLs. What are Vertical's plans for Latin America?

As you know, we have a strong partnership with Avolon, but our objective as an OEM is to provide aircraft to all customers that want to work with us. We are intending to work with airlines, rotary wing operators, and companies that benefit from eVTOLs.

How viable is it for UAM to develop in Latin America's largest cities, such as São Paulo and Mexico City, taking into account the availability of heliports in strategic areas and air traffic control services, amongst others?

Extremely viable. Congestion in these cities is very high and the positive impact eVTOLs can have on people's lives is immense. No other cities in the world, neither in Asia, Europe nor North America have such developed infrastructure that can be also used for eVTOLs after some modifications. I am very positive, that we will see eVTOLs operating out of major Latin American cities soon.

In conversation with...

Paul Malicki

CEO, Flapper

Click [here](#) to connect with Paul



LinkedIn



In only six years, Flapper became the world's largest private aviation app with a fully automated reservation system which includes payments by bitcoin. How did it happen so fast? How big is your operation today in Latin America? In addition to the charter flights, which other aviation services do Flapper offer in its portfolio?

In the world of start-ups it's pretty natural that you grow by leaps and bounds within the first 5 years, or so. Building **Flapper** put all our efforts into building disruptive mobile technology and our own aircraft inventory, something that none of the competition has really figured out until now. We currently have local teams in Colombia, Mexico, Chile and Argentina, while we also opened offices in Europe (Portugal) and the Middle East (Dubai). As a tech entrepreneur, I believe that digital products require global presence and that one can capitalize on building a global footprint.

In addition to charter flights, which are still our main line of business, we offer shared flights and empty legs. These are typically last-minute deals, priced at up to 60% cheaper than a regular flight. Our scheduled flights are available between São Paulo and Rio de Janeiro, as well as São Paulo and Angra dos Reis.

In June, we will officially announce our launch of aircraft sales and the feature is already available inside the app (in beta, still).

Over the last year or so, Flapper announced some really exciting deals with Eve (eVTOLs) and MagniX (electric propulsion units - EPU). Is 'zero-emission' passenger and cargo transportation the way to go for Flapper? Would you be able to describe some of Flapper's goals on sustainability?

Let me start by highlighting that the aviation sector corresponds to just over 2% of global CO2 emissions, out of which roughly 2% is typically attributed to general aviation. Globally, just over 5% of general aviation flights are "luxury" by nature, with the remaining part, being medical assignments, cargo flights, business flights and special services. Flapper is committed to a green future and we are currently carrying out a series of initiatives with the objective of changing the behaviour of the sector.

This is important to understand, as we are labelled a very polluting industry. The contribution to the economy and the transition to sustainable transportation are undeniable, however. Our plan for going "green" can be presented in the following way:

Our plan for green initiatives

Greenhouse Gas Offset (short term)

- Customers offset carbon emissions post-flight
- Currently, in the process of evaluating integrations with Carbon Trade eXchange and moss.earth, scheduled for 2022

Biofuel (mid-term)

- Sustainable Aviation Fuel (SAF) to be offered to all customers
- In Brazil, the solution is offered by Air BP

Electrification (mid to long-term)

- Partnerships with Autonomous Passenger Drone Companies (eVTOL) and Electric Motor OEMs
- Three agreements signed as of November 2021: Embraer, Electra and MagniX

The current challenges are temporary and will be overcome these challenges in the next 5 years. Electrification, in particular, will open up the market for the upper-middle class and it promises to reduce the ticket price by up to 50%.

When it comes to the popularisation of executive aviation, people are always concerned with safety. How does Flapper guarantee the highest safety standards of its operations?

To start with, Flapper works exclusively with certified air carriers, limited to holders of Part 135- and Part 121-AOCs. Both certifications encompass sets of rules that impose more stringent standards for charter and commuter commercial operations. During our on-site visits we thoroughly review the documentation of air carriers, including airworthiness certificates, insurance policies and maintenance manuals. We partner with financially sound companies, which boast impeccable safety records and operate aircraft equipped with last-generation avionics. We are currently the only broker in the region which boasts both ARGUS and Wyvern safety ratings.

Every time someone refers to Flapper, they also refer to your name as a very talented leader and entrepreneur. How did you get involved with aviation and how would you describe yourself in the business?

I appreciate it, there is still a long way to go. I got involved in aviation by accident, having joined my partners (who also didn't have an aviation background). We just saw a gap in the market and we decided to fill it in. Remember that Uber founder was not a taxi driver, while the guys from Airbnb did not work in the hospitality industry before. Sometimes to challenge the status quo one needs to start from scratch and help rebuild the industry.

flyflapper.com





Photograph: © Kasia Paras

The Sustainable Growth of Air Transport in Latin America and the Caribbean in the post-Covid Era

According to IATA, Latin America and the Caribbean (LAC) reported the best international air connectivity recovery in 2021, is forecasting a solid 2022, and anticipates figures throughout the region will surpass those of 2019 between 2023 and 2025.

In fact, as of April 2022 air recovery in Costa Rica, the Dominican Republic and Mexico were reportedly outperforming 2019 levels.¹ This is remarkable given how the Covid pandemic impacted the region: with a share of only 8% of

the global population, it accounts for almost a third of the world's deaths. In countries like Chile and Argentina, travel restrictions caused a drop in international travel below 90% compared to 2019. Tourism paralysis also had a dramatic economic impact bearing in mind that tourism accounted for half of the region's services exports, and countries like Aruba, Bahamas, and the British and US Virgin Islands shared some of the highest tourism generated GDP worldwide in 2019. However, despite a rebound GDP growth of 6.9% in 2021, the forecast for LAC for 2022 is only slightly over 2%, with a regional average inflation of 11.9%, a figure that looks to exceed countries worldwide.

Prior to the pandemic, the aviation industry, including in LAC, had been voicing ambitious goals to reduce its growing carbon footprint. The

pandemic did not alter this focus. In October 2021, the General Assembly of the Latin American Air Transport Association (ALTA) committed to making flying net-zero by 2050, echoing the decision approved weeks before by IATA's 77th Annual General Meeting. Critics called IATA's pledge *green washing*, by portraying a false impression of progress, claiming that the goals are unattainable, even for countries with reasonably developed environmental policies and initiatives. These targets appear further challenging for LAC countries, where governments seem more fixated on immediate, short-term solutions, and less on potential environmental policies that could contribute to long-term economic recovery. This is particularly concerning given the natural disasters that afflicted the region in the past years, and their economies' strong

reliance on agriculture, which accounts for 5% to 18% of their GDP, depending on the country. In fact, in April 2022, the World Bank reported that climate-related disasters caused countries in LAC to lose 1.7% of annual GDP, which could push nearly six million people into poverty by 2030,² notwithstanding the region's "green competitive advantage".

Can LAC achieve decarbonisation?

It is undisputed that LAC has tremendous green potential, and there is ambition within the region to achieve important reduction levels. Countries like Colombia have sought to improve their climate action laws to reach alignment with the Paris Agreement, and in Peru, new plans are in place to build a sustainable fuel plant in Lima. Moreover, 54 of 396 carbon accredited airports are in LAC, and increasingly, airlines in the region are committing to sustainability technology, like fuel data platforms and using biofuels, to reduce emission levels.

Nevertheless, faster momentum is needed to reach the desired goals. For airlines, transition to effective green practices means pushing for governments to work in alignment with the private sector, prioritising common missions, such as securing greater access to SAF.³

The role of SAF

There is industry consensus that SAF is critical to achieve decarbonisation. SAF, a biofuel compatible with most existing aircraft as drop-in fuel, has the potential of significantly reducing aviation emissions, and by some estimates, its contribution towards achieving Net Zero Carbon in 2050 is as high as 65%.⁴ Currently, though, SAF production is insufficient to meet demands, and prices are three to eight times higher than traditional fuels.

With almost the entire SAF production coming from the United States and

Europe, LAC's contribution to the SAF industry is currently inexistent, even though its geography and natural resources offer significant potential for its production, with some studies indicating that countries like Brazil have the capability of covering 100% of their domestic requirements with SAF.

These factors suggest that LAC can achieve decarbonisation. To seize these opportunities, however, the region requires a solid regulatory framework for de-risking and promoting investments, in addition to incentives for research and development. Few countries in the region have rules in place to achieve this. The most advanced is Brazil, which in November 2021, passed a new law creating the National Biokerosene Program, "to promote research and development of biomass energy for the sustainability of the Brazilian aviation".

IATA is working with other countries in the region with experience with biofuels, including Colombia, Chile and Mexico, to create policies for SAF development, and ICAO-led studies on SAF feasibility listed the Dominican Republic and Trinidad and Tobago, as countries with potential to help SAF production and supply in the region. Moreover, in April 2022, the Latin American Civil Aviation Commission (LACAC) approved a decision recommending its member states to consider policies to promote the development and use of SAF. LACAC's decision does not create obligations for its members, but it is a step in the right direction to prompt discussions, educate governments, and eventually, elaborate policies encouraging regional harmonisation.

LAC's private aviation sector's continued work towards decarbonisation challenges local governments' failings in bettering the region's sustainable growth. With growing numbers of airlines setting goals to increase their SAF use in the next decade, its producers will

hopefully respond to the demand signal to invest in the region. Bio-refinery projects focused on SAF production are underway, with significant investments in Brazil and Paraguay benefiting from tax incentives, with the first outputs expected in 2025. If properly implemented, these projects could help the industry to meet their environmental goals, in addition to becoming drivers of economic and social growth.

Conclusion

The environmental plans of the aviation industry are ambitious, and the pandemic did not derail its goals, but actions must be adopted soonest if the 2050 emission reduction targets are to be met. Whether technological advances or current events such as the war in Ukraine will also serve to catapult decarbonisation in the region is yet unclear. What is certain, though, is that the private and public sectors must collaborate to lead the energy transition, and more investments are required to satisfy the increased demand. In LAC, this can only be achieved if its governments provide a solid legal framework reassuring investors that they will see returns from their investments.

Attracting capital is only part of the equation. SAF use involves improving infrastructures, which has been historically lagging in LAC. Nevertheless, the vast amount of resources in the region do not make these challenges unsurmountable, so long as governments continue to acquire knowledge on the prospects for growth that decarbonisation offers. With at least 14 countries in LAC conducting major elections in the next 24 months, promoting awareness of the economic benefits might inspire collaboration, and impoverished constituencies, in return, may be more inclined to support those implementing long-term opportunities that support environmental goals.

² Consolidating the Recovery: Seizing Green Growth Opportunities. World Bank. Semi-annual Report for Latin America and the Caribbean. April 2022.

³ See e.g., IATA's Fly Net Zero Media Kit: [Media Kit - Fly Net Zero \(iata.org\)](#)

⁴ Id.

¹ <https://www.travelweekly.com/Travel-News/Airline-News/ForwardKeys-data-air-travel-recovery>

The Aviation Industry in Latin America and the Caribbean:

Inflation Shock, Social Inflation and a Showing of Resilience



Photograph: © Kasia Paras

The aviation industry in Latin America and the Caribbean's (LAC) is seeing a rebound, with a steady increase in passenger numbers and key players, including governments and private businesses, implementing significant restructuring plans to face the new realities of the market.

This shows the resilience of this industry affected like few others by the unprecedented closures the governments imposed to curtail the spread of Covid-19, and forced to find survival strategies to compete with little to no government support.¹

For many industries, including aviation, achieving growth without sacrificing profitability has become increasingly challenging as we transition into the next phase of Covid-19, and as we move slowly into familiar pre-pandemic

routines, the pandemic's impact on the economy becomes increasingly apparent. Surging inflation is hitting consumers hard around the globe, but LAC is seeing the highest rates worldwide, exceeding 10%² for the first time in 15 years,³ with the war in Ukraine only accelerating this inflationary shock⁴. Despite these challenges, there are reasons to be optimistic: even though a modest GDP growth is forecasted for the region in the coming years, pre-Covid growth

levels are expected by 2025.⁵ The IMF also expects inflation to remain "well anchored" in the next three years⁶ due to the discipline and credibility gained by some of the region's central banks. IATA, in turn, anticipates that the aviation industry in LAC will go back to pre-covid levels between 2023 and 2025.

On the insurance side, a topic that has become a source of concern for insurers is whether Covid has created a fertile environment to exacerbate

social inflation trends. Concisely defined, social inflation refers to non-economic factors that increase claim costs above general economic inflation due to litigation, legislative and societal shifts. Social inflation translates into higher awards and greater defence costs for insurers, higher premiums for insureds, and greater exposure risks for both. In the United States specifically, social inflation has translated into a widening definition of liability and to nuclear verdicts with awards exceeding USD200 million and up to USD1 billion⁷ in (non-aviation) wrongful death cases. It has encouraged class action litigation and litigation funding, providing plaintiffs with greater access to the ammunition needed to stay in the battle. Alarming, at least one survey found the class action trend was likely to maintain its upward momentum by 27%, a scary figure given that in 2021 it had already jumped by approximately 16%, surpassing USD3 billion in defence spending.⁸

Studies about social inflation in LAC are notoriously lacking, and the long-term effects of Covid in the handling of aviation-related claims will only become clear in the years to come. But it is important to bear in mind that some of the pro-consumer attitudes that characterise social inflation were present in the region well before the pandemic. For example, in Mexico we have seen judicial decisions supportive of punitive damages awards in wrongful death cases or questioning the constitutionality of statutory limitations periods. In Colombia, it is not unusual for the Super Intendency of Transportation to apply civil law to administrative decisions, which are invariably against airlines. In Brazil, we are following a class action that could open the floodgates to RETA claims (mandatory liability insurance) applied retroactively against airlines and their insurers in relation to the major aviation accidents that took place in the last two decades. And in countries like

Chile and Peru, courts are increasingly favouring the principle of full restitution over exclusivity, a cornerstone of liability regimes applied to aviation, using creative interpretations to ignore liability caps that are often seen as unfair protection for an industry perceived to have deep pockets.

Playing on public opinion and authorities highly susceptible to social and political pressures, LAC consumers and their lawyers are increasingly targeting airlines in social media, forcing criminal investigations and administrative actions known to favour consumers. This does not only result in reputational damage and hefty sanctions for airlines, but it is a strategy increasingly used by plaintiff lawyers to drive up defence costs in an effort to force airlines (and their insurers) to settle for figures way above the actual damages. US lawyers are also implementing more creative tactics to justify the filing of claims in US courts, such as commencing estate proceedings to establish a link to the United States, when otherwise a link would not exist. All these strategies translate into higher defence costs, often far exceeding the reasonable values of the claims, placing carriers and their insurers in the difficult position of having to decide between settling for sums that could risk setting a negative precedent or agreeing to pay the defence costs to reduce their exposure to extortionate demands.

Perhaps more clearly attributed to the pandemic is the engagement of consumer protection entities with class actions initiated in countries like Chile and Mexico due to the cancellation and reimbursement policies airlines adopted, a role they may continue to push to address other topics concerning the industry. Many governments also imposed court closures, causing an increase in litigation time and costs. To combat this, in some countries, such as Colombia, legislatures are looking to

allow for virtual hearings adopted in response to the pandemic to remain in place. The increased cost of living caused by the current inflationary wave may also lead to higher damages, although at least for the time being, this is being balanced by the depreciation of local currencies, which in some countries in the region dropped nearly 20%, which benefits foreign insurers when paying out liability claims.

Conclusion

Vaccination roll outs were key to helping LAC re-open economies, and whilst higher fuel prices, the war in Ukraine, and soaring inflation are challenging the potential rate of growth worldwide, LAC's natural resources, its focus on innovation and sustainability and its historical ability to rebound are all factors that fuel our belief in its capacity to achieve and exceed pre-pandemic levels within the next years. Moreover, whilst the pandemic catapulted extreme poverty from 81 million to 86 million⁹, poverty levels are already declining, and consumers who had pulled out of poverty pre-pandemic will be demanding of their governments and service industries as they work to regain upward mobility.

In aviation, we are already seeing increasing consolidation of operations between airlines and the continued implementation of the low cost carrier model, both expected to strengthen the industry in the region, which will support the region's overall economic growth. As one of the industries most severely affected by Covid-19, aviation also has been relatively shielded from anti-corporate sentiments, another strong driver of social inflation. This can change, however, as consumers face challenging economic pressures, whilst at the same time the aviation industry increasingly achieves recovery, potentially regenerating the belief that the aviation industry is one of deep pockets.

1 Latin America and the Caribbean : Aviation: Benefits Beyond Borders (aviationbenefits.org)

2 <https://labsnews.com/en/articles/economy/inflation-haunts-latin-americas-growth-in-2022/>

3 <https://www.reuters.com/world/americas/latam-inflation-anchored-risks-persist-imf-2022-01-31/>

4 <https://www.imf.org/en/News/Articles/2022/04/15/cf-latin-america-hit-by-one-inflationary-shock-on-top-of-another>

5 <https://www.cepal.org/en/pressreleases/latin-america-and-caribbeans-growth-will-slow-21-2022-amid-significant-asymmetries>

6 Id.

7 <https://www.cottinghambutler.com/news/nuclear-verdicts-increasing/>

8 <https://www.carltonfields.com/about-us/newsroom/news/2022/class-action-survey-developments-best-practices#>

9 See United Nations' Economic Commission for Latin America and the Caribbean (ECAL) report



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