

Covid-19 - Emerging trends in aviation claims: the new 'normal'?

The unprecedented grounding of much of the world's airline fleet during the ongoing Covid-19 pandemic has led to some developing trends in the types of aviation claims presented and how those claims are being advanced.

Background

The immediate and dramatic impact of the Covid-19 pandemic on the global aviation industry from early 2020 is, by now, a well-trodden story. Widespread national lockdowns, international (and, in some cases like Australia, interstate) border closures, and other containment measures, have taken a heavy toll. In January 2021, ICAO reported there had been an estimated 60% decline in world passenger numbers in 2020 compared to the year prior. Airports have, similarly, suffered an estimated 65% decline in revenue, equating to more than USD 111.8 billion.

The steep drop in passenger numbers has, at least temporarily, altered the risk exposure profile for airlines, aviation insurers and other industry participants. 'Traditional' liability claims – for example, in-flight passenger injury claims, slip and fall incidents at airports, and property loss or damage claims – have become far less frequent. This is consistent with the significant reduction in traffic.

To date comparatively few liability claims have been notified that are connected with the pandemic directly. Mostly they concern passenger claims for compensation for flight cancellations or delays. The US has seen some consumer class actions commenced in that context, a topic addressed in our last Aviation Newsletter and discussed further below.

Emerging claim trends

The downturn in traditional aviation claims has in turn been replaced with an increased risk of other emerging claims. It has been noted that loss exposures do not disappear simply because much of the aviation industry has been on hold; rather, those exposures evolve to reflect the new environment in which aviation participants are operating.

The types of claims that have become more frequent since the outset of the pandemic, or are expected to in the near term, include:

- (i) Disputes/litigation arising out of commercial contracts between aviation participants. These include aircraft leasing or charter agreements, airline supply contracts such as ground handling agreements or maintenance contracts, and other operational agreements. Such disputes are likely to bring into focus legal avenues potentially available to parties to avoid contractual commitments, such as the interpretation of express force majeure provisions. Commentary on the application of such provisions was provided in our last Aviation Newsletter.
- (ii) Claims arising from the increased risks of long term storage of aircraft. It is estimated that more than USD 164 billion of insurable aircraft value is currently parked. Ground risks to aircraft in that context are many and varied, and include damage exposure to severe environmental events (such as hurricanes, tornados, windstorms, and typhoons) and hull claims following ground collision events.

- (iii) Organisations already fighting steep financial losses may be subject to class action proceedings or other legal action advanced by shareholders seeking to challenge the strategic and financial decisions made by company boards during the pandemic.
- (iv) In order to adapt to the declining number of flights worldwide, businesses have furloughed or laid off employees such as pilots, maintenance engineers, and ground crew, many of whom have since moved on to alternative employment. This has created a skills shortage in the industry. Once operations have resumed, there will be a heightened risk of claims involving human factors. Managing the return of skilled workers (or integration of new workers), including recertification/licensing and training requirements, will be an important focus for stakeholders.
- (v) Compliance with obligations concerning deep cleaning and disinfection to prevent the spread of Covid-19 at airports and on aircraft through additional health and safety requirements. Employees working to ensure aircraft are 'Covid-safe' through measures such as frequent deep cleaning may be entitled to bring workers' compensation claims if they are exposed to the virus and become ill and/or are unable to work for a period of time.

- (vi) In the US, consumer class actions relating to Covid-19 flight cancellations and disruptions have been filed against both domestic and foreign air carriers. Those actions primarily involve allegations such as failure to refund, breach of contract and violations of State consumer law. Other countries have seen far fewer claims in that context but there remains an ongoing risk exposure for airlines, particularly in consumer-friendly jurisdictions.

The shape of these claim trends into the future remains a little uncertain. Much will depend on the success of global vaccination efforts and the resultant (and expected) loosening of travel restrictions. However, with airline numbers not forecast to return to pre-pandemic levels until 2024, the prevalence of these types of claims is likely to continue for at least the medium term.

As the financial losses suffered by the aviation sector caused by the impact of Covid-19 continue, we expect to see the aviation sector increasing its utilisation of innovative ways of financing their claims. Disputes finance allows companies to access non-recourse finance secured against the outcome of a claim or claims. This non-recourse finance allows the company with the benefit a claim to outsource the legal costs and risk of pursuing that claim to a third party funder on the basis that the funder will only be repaid should the claim be successful. In a time when cashflows are tight and legal budgets limited, this model removes legal costs from a company's balance sheet, which can have a positive effect on operating profit and subsequently on company value.

In addition to the payment of legal costs, there is a recent trend towards more innovative disputes finance models. For example, a party with the benefit of the claim can also monetise their claim and receive an upfront payment on the basis that the funder will receive a portion of the proceeds should there be a successful recovery. This monetisation of claims is in effect a pre-payment of claim proceeds to a claimant, which can have the effect of operating profit at a time that best suits the company.

Disputes funders are also increasingly providing holistic solutions to companies in the form of a facility for the payment of legal costs. 'Portfolio finance' provides a finance solution for a company's entire disputes exposure, providing funding for large and small claims. Such facilities can include finance for the legal costs of the claims where the company is the defendant (such as the class action risk referred to above). Providing finance for a portfolio of claims carries a lower degree of risk to the funder than finance for a single case and for this reason the cost of this type of finance is less expensive than the finance for a single claim.

As the aviation sector comes under significant financial pressure and is facing a variety of claims as a result of the unforeseen pressures resulting from Covid-19, we anticipate that many in the sector will turn to these innovative models in order to finance these claims.

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