

Aviation Liability 2021

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Aviation Liability

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Aviation Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew J Harakas of Clyde & Co US LLP, for his continued assistance with this volume.



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APPLICABLE TREATIES

Major air law treaties

1 | To which major air law treaties related to carrier liability for passenger injury or death is your state a party?

Malaysia has ratified the following conventions in relation to international carriage of passengers, baggage and cargo by air through domestic legislation – namely, the Carriage by Air Act 1974 (the CAA 1974):

- the Warsaw Convention 1929 as amended at the Hague 1955: the Warsaw-Hague Convention was given force of law by its incorporation in the First Schedule of the CAA 1974;
- the Warsaw-Hague Convention amended by Montreal Protocol No. 4: the Warsaw-Hague Amended Convention was given force of law by its incorporation in the Fifth Schedule of the CAA 1974;
- the Guadalajara Convention 1961, a convention supplementary to the Warsaw Convention signed in Guadalajara: the Supplementary Convention was given force of law by its incorporation in the Second Schedule of the CAA 1974; and
- the Montreal Convention 1999, a convention signed in Montreal on 28 May 1999: the Montreal Convention was given force of law in 2007 through amending legislation, the Carriage by Air (Amendment) Act 2007, which amended the CAA 1974 and incorporated the Montreal Convention in the Sixth Schedule of the CAA 1974.

INTERNATIONAL CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH

Montreal Convention and Warsaw Convention

2 | Do the courts in your state interpret the similar provisions of the Montreal Convention and the Warsaw Convention in the same way?

The High Court in *Wang Bao' An & Ors v Malaysian Airline System Berhad & Other Cases* [2018] 11 MLJ 585, a case in connection to the Malaysia Airlines flight MH370 incident, held that the principles of law relating to the construction and interpretation of similar articles of both the Montreal Convention and Warsaw Convention would be the same. The position taken by the Malaysian High Court is consistent to the stand taken by both the Supreme Court of Canada and the United Kingdom.

3 | Do the courts in your state consider the Montreal Convention and Warsaw Convention to provide the sole or exclusive basis for air carrier liability for passenger injury or death?

Yes. The Malaysian Court of Appeal in *All Nippon Airways Co. Ltd v Tokai Marine & Trading Co. Ltd* [2013] 4 MLJ 744 and the subsequent High Court case of *Wang Bao' An & Ors v Malaysian Airline System Berhad*

& *Other Cases* [2018] 11 MLJ 585 have upheld and endorsed the exclusivity principle in that the Montreal Convention and Warsaw Convention provide for the exclusive cause of action in connection to liability of the carrier resulting in the personal injury or death of passengers in an international carriage by air within the scope of both the Conventions.

Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

The question of who is considered to be a carrier or whether ground handling agents or other ancillary service providers are considered as a carrier has not been decided by a Malaysian court. Neither the Warsaw Convention nor the Montreal Convention defines what is meant by 'carrier'. The Carriage by Air Act 1974 (CAA 1974) does not define a 'carrier'.

However, an 'actual carrier' and 'contracting carrier' were defined under the Guadalajara Convention 1961, which is incorporated in the Second Schedule of CAA 1974. Chapter V of the Montreal Convention incorporates the provisions of the Guadalajara Convention in articles 39 to 48 and regulates the rights and liabilities of the actual and contracting carrier.

There are no reported cases in Malaysia on the meaning, ambit and scope of 'successive carrier'.

Carrier liability condition

5 | How do the courts in your state interpret the conditions for air carrier liability – 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' – for passenger injury or death in article 17(1) of the Montreal Convention and article 17 of the Warsaw Convention?

The High Court in *Wang Bao' An & Ors v Malaysian Airline System Berhad & Other Cases* [2018] 11 MLJ 585 ruled that the carrier's strict liability under article 17 of the Montreal Convention is triggered once it is established that a passenger has died or suffered bodily injury and that the accident took place on board the aircraft or in the process of embarking or disembarking. Both the High Court and a prior decision of the Court of Appeal in *All Nippon Airways Co. Ltd v Tokai Marine & Trading Co. Ltd* [2013] 4 MLJ 744 had affirmed the principle that international jurisprudence on the interpretation and construction of the convention must be given due cognisance and there must be reluctance to depart for established consensus, particularly that of the apex court of contracting parties to the Convention. It is anticipated that the Malaysian Court would adopt the interpretation of the term 'accident' as expressed by the US Supreme Court in *Air France v Saks* (1955) 470 US 392.

There are no reported decisions as to what constitutes the 'operations of embarking and disembarking', but it is likely that the Malaysian court would follow international jurisprudence in this regard.

No negligence defence

- 6 | How do the courts in your state interpret and apply the 'no negligence' defence in article 21 of the Montreal Convention, and the 'all reasonable measures' defence in article 20 and the 'wilful misconduct' standard of article 25 of the Warsaw Convention?

There are no reported cases in Malaysia on interpretation or application of the 'no negligence' defence under article 21 of the Montreal Convention or the 'all reasonable measure' defence in article 20 or the 'wrongful misconduct' stated in article 25 of the Warsaw Convention.

Advance payment for injury or death

- 7 | Does your state require that advance payment be made to injured passengers or the family members of deceased passengers following an aircraft accident?

No. However, advance payments have been made to the families of deceased passengers in fatal aviation accidents in Malaysia in the past.

Deciding jurisdiction

- 8 | How do the courts of your state interpret each of the jurisdictions set forth in article 33 of the Montreal Convention and article 28 of the Warsaw Convention?

There are no reported cases on the interpretation of article 28 of the Warsaw Convention or article 33 of the Montreal Convention.

The doctrine of forum non conveniens is recognised in Malaysia and the maxim has been applied in a commercial litigation setting by the Malaysian Supreme Court 1995 and the principle has been recently reaffirmed by the apex court in 2014. It is anticipated that the Malaysian courts would similarly apply the maxim in a Montreal or Warsaw Convention action.

Period of limitation

- 9 | How do the courts of your state interpret and apply the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention?

There are no reported cases on article 35 of the Montreal Convention in Malaysia. However, the Malaysian High Court had an occasion to construe article 29 of the Warsaw Convention and held that the effect of article 29 differs from that found in the general statute of limitation in that article 29 extinguishes the right to damages. It is anticipated that a similar construction and effect would be held by the court when applying article 35 of the Montreal Convention. The two-year limitation under the Convention is absolute.

Liability of carriage

- 10 | How do the courts of your state address the liability of carriage performed by a person other than the contracting carrier under the Montreal and Warsaw Conventions?

There are no reported cases in Malaysia on this point.

DOMESTIC CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH

Governing laws

- 11 | What laws in your state govern the liability of an air carrier for passenger injury or death occurring during domestic carriage?

For domestic carriage, the Warsaw Convention and the Guadalajara Convention 1961 apply with certain exceptions and modification. The Carriage by Air (Application of Provisions) Order 1975 (the 1975 Order), made pursuant to the powers conferred under section 12 of the Carriage by Air Act 1974 (CAA 1974), provides for non-international carriage and carriage of mail and postal packages.

The liability of an air carrier for passenger injury or death is that provided under the Warsaw-Hague Convention – namely, article 17 as is incorporated under the 1975 Order. The provisions in section 5 of the CAA 1974 and the Third Schedule will apply to non-international carriage in the case of death of a passenger.

Nature of carrier liability

- 12 | What is the nature of, and what are the conditions for, an air carrier's liability?

In the case of passenger injury or death, article 17 of the 1975 Order read together with section 5 of the CAA 1974 renders the carrier's liability for passenger injury and death strict, subject to the carrier's ability to exonerate itself under article 20 or that the passenger was contributorily negligent under article 21.

Liability limits

- 13 | Is there any limit of a carrier's liability for personal injury or death?

Under article 22(1) of the 1975 Order, the liability of the carrier is limited to the sum of 250,000 francs. The conversion to ringgit equivalent is regulated by the Carriage by Air (Ringgit Equivalents) Order 1978, and Order 2 prescribes the ringgit equivalent to be 48,000.

The compensation limit in article 22(1) can, however, be dislodged or removed by the passenger under article 25 of the 1975 Order if the passenger succeeds in proving that the damage that resulted from an act or omission of a carrier was done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Article 22(4) provides that legal costs can be awarded in addition to this limit.

Main defences

- 14 | What are the main defences available to the air carrier?

The carrier can avail itself to various defences under the provisions of the 1975 Order:

- article 20 exonerates the carrier if it proves that he, she or its servants or agents took all necessary measures to avoid the damage or that it was impossible for him, her or them to take such measures;
- article 21 provides the carrier with the defence of contributory negligence. In this defence, the carrier bears the burden to prove that the damage was caused or contributed by the injured person's negligence; and
- article 29 prescribes that a right to damages is extinguished if an action for damages is not brought within two years.

Damages

15 | Is the air carrier's liability for damages joint and several?

Yes. The carrier's liability for damages is joint and several with any contributing party or tortfeasor for any one single indivisible loss.

Rule for apportioning fault

16 | What rule do the courts in your state apply to apportioning fault when the injury or death was caused in whole or in part by the person claiming compensation or the person from whom the right is derived?

In the event that the carrier succeeds in the defence of contributory negligence, article 21 of the 1975 Order and section 8 of the CAA 1974 mandate the application of the rules of apportionment of liability as prescribed under section 12 of the Civil Law Act 1956 (CLA). Under section 12 of the CLA, damages recoverable will be reduced to such extent as the court thinks just and equitable having regard to the passenger's share in the responsibility for the damage.

There are no provisions that exempt the application of section 12 of the CLA to minors or persons with reduced mental capacity.

Statute of limitations

17 | What is the time within which an action against an air carrier for injury or death must be filed?

Article 29(1) of the 1975 Order prescribes the limitation to be two years reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived or on which the carriage stopped. The High Court in Malaysia has decided that the right to damages would be extinguished if an action was filed in court outside the two-year limitation and that this limitation is absolute.

There are no provisions for tolling under Malaysian law.

THIRD-PARTY ACTIONS

Seeking recovery

18 | What are the applicable procedures to seek recovery from another party for contribution or indemnity?

Where the carrier's liability to the passenger is contributed by a third-party tortfeasor, the carrier is entitled to pursue what is referred to as third-party proceedings by the issuance of a third-party notice on the third-party tortfeasor to bring him or her as a party to the ongoing proceedings instituted by the passenger against the carrier to seek contribution or an indemnity.

Alternatively, the carrier is entitled to institute a separate action against the third-party contributor or tortfeasor.

The apportionment of liability and damages in an action for contribution would be further regulated by section 10 of the Civil Law Act 1956 (CLA).

Time limits

19 | What time limits apply?

In an action for contribution by the carrier against a third party, the limitation period prescribed under the Limitation Act 1953 would be applicable. The time limit for an action against a third-party contributor or tortfeasor would be six years from the date of any judgment awarding damages.

In an action for contribution by the carrier against its servant or agent who were acting within the scope of its employment, the limitation period under section 7(1) of the Carriage by Air Act 1974 (CAA 1974)

of two years would apply as per article 35 of the Montreal Convention. Similarly, if contribution is sought by the carrier from another carrier, the two-year limitation under article 35 of the Montreal Convention is as reflected in section 7(2) of the CAA 1974.

LIABILITY FOR GROUND DAMAGE

Applicable laws

20 | What laws apply to the liability of the air carrier for injury or damage caused to persons on the ground by an aircraft accident?

The liability of an air carrier would be that as set out under section 19(1) of the Civil Aviation Act 1969 (the CAA 1969).

Nature and conditions of liability

21 | What is the nature of, and what are the conditions for, an air carrier's liability for ground damage?

Liability of an air carrier under section 19(1) of the CAA 1969 is strict, in that no proof of negligence or intention or acts proven to be wilful, neglect or default is required.

Liability limits

22 | Is there any limit of carriers' liability for ground damage?

No limit is set on liability under the CAA 1969.

Main defences

23 | What are the main defences available to the air carrier in a claim for damage caused on the ground?

Under section 19 of the CAA 1969, two defences are available to the air carrier:

- where damage or loss was caused by or contributed to by the negligence of the person by whom it was suffered; and
- where an aircraft has been bona fide demised, let or hired out for a period exceeding 14 days to any other person by the owner of it and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, the person to whom the aircraft have been so demised, let or hired out would be considered the owner.

LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

Applicable laws

24 | What laws apply to the liability of the air carrier for injury or death caused by an unruly passenger or a terrorist event?

On an international carriage by air, the liability of the carrier would be based on the relevant Convention as given force in Malaysia through the Carriage by Air Act 1974 (CAA 1974) on condition that the act complained of – that is, the actions of the unruly passenger or the terrorist event – is considered an 'accident' and that it occurred on board the aircraft or in the course of any operations of embarking or disembarking.

For domestic carriage, the position as regards the liability of the carrier would be the same in light of article 17 of the Carriage by Air (Application of Provisions) Order 1975 (the 1975 Order).

Nature and conditions of liability

25 What is the nature of, and what are the conditions for, an air carrier's liability for injury or death caused by an unruly passenger or a terrorist event?

In the case of an unruly passenger or a terrorist event on an international carriage, once the conditions laid down in article 17(1) of the Montreal Convention are satisfied, the liability of the air carrier is strict. The High Court in *Wang Bao' An & Ors v Malaysian Airline System Berhad & Other Cases* [2018] 11 MLJ 585 ruled that the carrier's strict liability under article 17 of the Montreal Convention is triggered once it is established that a passenger has died or suffered bodily injury and that the accident took place on board the aircraft or in the process of embarking or disembarking.

In the case of a domestic carriage, the conditions for the carrier's liability are governed by article 17 of the 1975 Order and section 5 of the CAA 1974. Where passenger injury or death occur, article 17 of the 1975 Order read together with section 5 of the CAA 1974 renders the carrier's liability for passenger injury and death strict, subject to the carrier's ability to exonerate itself under article 20 or that the passenger was contributorily negligent under article 21.

Liability limits

26 Is there any limit of liability for injury or death caused by an unruly passenger or a terrorist event?

On an international carriage, the carrier's limit of liability would be that prescribed under Montreal Convention, in particular article 21(1), as well as any of the defences that the carrier may avail itself as prescribed in the Convention.

For domestic carriage, the limits of liability are that prescribed under article 22(1) of the 1975 Order and is limited to the sum of 250,000 francs. The conversion to ringgit equivalent is regulated by the Carriage by Air (Ringgit Equivalents) Order 1978, and Order 2 prescribes the ringgit equivalent to be 48,000. The compensation limit in article 22(1) can, however, be dislodged or removed by the passenger under article 25 of the 1975 Order if the passenger succeeds in proving that the damage that resulted from an act or omission of a carrier was done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Main defences

27 What are the main defences available to the air carrier in a claim for injury or death caused by an unruly passenger or a terrorist event?

For international carriage, the following defences are available to the carrier:

- it proves under article 21 that the damage was not caused by the negligence or wrongful act or omission of the carrier or the said damage was solely owing to the negligence or wrongful act or omission of a third party;
- under article 20, it can also exonerate itself from liability if it can prove that the damage was caused or contributed by the negligence or other wrongful act or omission from the person claiming compensation; and
- a further defence available is the limitation period provided under article 35 of the Montreal Convention.

The defences available to the air carrier for domestic carriage would include the following:

- article 20 exonerates the carrier if it proves that it or its servants or agents took all necessary measures to avoid the damage or that it was impossible for it or its servants or agents to take such measures;

- article 21 provides the carrier with the defence of contributory negligence. In this defence, the carrier bears the burden to prove that the damage was caused or contributed by the injured person's negligence; and
- article 29 prescribes that a right to damages is extinguished if an action for damages is not brought within two years.

LIABILITY FOR HARM CAUSED BY DRONES

Applicable legislation

28 Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

The Civil Aviation Regulations 2016, as amended by the Civil Aviation (Amendment) Regulations 2019, provide specific regulations on the operations of 'unmanned aircraft'. An unmanned aircraft is defined under the Regulations as an unmanned aircraft system that weighs no more than 20kg without its fuel. Drones would fall within this definition. Neither the Civil Aviation Act 1969 nor the Civil Aviation Regulations 2016 specifically regulate the liability for injuries or damage caused by an unmanned aircraft. The operator or owner of the unmanned aircraft would, however, be liable for injuries or damage caused by an unmanned aircraft or drone under the common law tort of negligence or nuisance.

CONSUMER PROTECTION AND PASSENGER RIGHTS

Applicable legislation

29 Summarise aviation-related consumer-protection laws or regulations related to passengers with reduced mobility, flight delays and overbooking, tarmac delay and other relevant areas.

The only consumer protection law dedicated specifically to the commercial airline industry is the Malaysian Aviation Commission Act 2015 and its accompanying Malaysian Aviation Consumer Protection Code 2016, which has been amended by the Malaysian Aviation Consumer Protection (Amendment) Code 2019 (Code 2019). Code 2019 provides for the minimum service levels and standards that an airline or an aerodrome operator is to perform and adhere to.

For passengers with reduced mobility, paragraph 9 of Code 2019 encapsulates the rights of such passengers, the underlying theme being that no discrimination should be made against them. Code 2019 also provides for specific compensation and care for passengers owing to incidents of denied boarding, flight delays, flight cancellation and also loss or damage to mobility equipment or assistive devices.

LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS

Relevant laws

30 What laws apply to the liability of the government entities that provide services to the air carrier?

In Malaysia, while the Civil Aviation Authority of Malaysia (CAAM) remains the regulatory body for the airports and aviation industry under the Civil Aviation Act 1969 (as amended by the Civil Aviation (Amendment) Act 2017) and Civil Aviation Authorities of Malaysia Act 2017, the operation, management and maintenance of airports is privately entrusted to an entity known as Malaysian Airports Berhad, a public company on the main board of the Kuala Lumpur Stock Exchange. As an airport operator, the liability regime would be that in the common law of negligence. The liability regime of the government entities would also be governed under common law negligence.

Nature and conditions of liability

31 | What is the nature of, and what are the conditions for, the government's liability?

The government's liability would be fault-based for any wrongful act done or neglect or default committed to the same extent as that to which a private person is liable for in the common law of negligence.

Liability limits

32 | Are there any limitations to seeking recovery from the government entity?

Under the Government Proceedings Act 1956, any tortious claims against the government cannot be maintained unless the officer of the government has been named as party and liability against him or her has been established.

There is no immunity from suit.

Any claims against the government or its officers would be time-barred if not instituted within three years after the act, neglect or default complained of. This limitation period is prescribed in section 2(a) of the Public Authorities Protection Act 1948.

CRIMINAL PROCEEDINGS

Responsibility for accidents

33 | Can an air carrier be criminally responsible for an aviation accident?

Under the Civil Aviation Act 1969 (CAA 1969), the carrier can be liable for penal consequences in the event an aircraft is flown in a manner to be the cause of unnecessary danger to person or property. Section 4 of the CAA 1969 (as amended by the Civil Aviation (Amendment) Act 2017) makes the pilot, or the person in charge of the aircraft as well as the owner of the aircraft liable for the penal consequences that result from the offence.

No specific offence relating to criminal responsibility for aviation accident is found under the Malaysian Penal Code.

It is anticipated that, in the event of any investigation in which criminal intention has been found to have been committed by the pilot or any employee of the carrier, the carrier and the said officer may be open to criminal prosecution under the Aviation Offences Act 1984 or general Penal Code offences. There are, however, no reported cases in Malaysia to guide us in this regard.

Effect of proceedings

34 | What is the effect of criminal proceedings against the air carrier on a civil action by the passenger or their representatives?

There is no impediment to parallel criminal proceedings to be brought by the state against the air carrier or its officers while civil proceedings are pending by the passenger or their representatives.

Compensation

35 | Can claims for compensation by passengers or their representatives be made against the air carrier through the criminal proceedings?

Claims of compensation by passengers or their representatives can only be brought by way of civil proceedings. Such claims, when brought, must be confined to the strict parameters of the Convention to which it relates (ie, Warsaw or Montreal Convention).

EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

Liability

36 | What is the legal effect of a carrier's conditions of carriage or tariffs on the carrier's liability?

The contract of carriage between the air carrier and the passenger is evidenced by the passenger ticket, which contains the carriers' conditions of carriage. As long as the conditions do not limit liability or contain other limitations or have terms that are favourable to the carrier that contravene or are inconsistent with the provisions of the Carriage by Air Act 1974 or the relevant Conventions, the conditions of carriage would apply and be enforced in a similar manner to any other contract.

DAMAGES

Damage recovery

37 | What damages are recoverable for the personal injury of a passenger?

In an action for damages for personal injury, the passenger has the legal standing to institute the action and if the passenger is a minor, then the action would be instituted by the guardian ad litem or next friend.

The damages for personal injury of a passenger would be governed by the Civil Law Act 1956 (CLA) in which various heads of damages would be made available subject to proof by the passenger. The following are the heads of damages that are available to the passenger:

- general damages for pain and suffering;
- loss of future earnings; and
- reasonable expenses including medical expenses and nursing care.

No damages would be recoverable for any loss of expectation of life and no deductions would be made of any sums received from any proceeds of life insurance policy, pension or gratuity. For the purposes of computing loss of future earnings, section 28A of the CLA (as amended by the Civil Law (Amendment) Act 2019) prescribes a formula for assessing damages for loss of future earnings.

As regards punitive damages, article 29 of the Montreal Convention disallows such damages.

38 | What damages are recoverable for the death of a passenger?

In the event of death of a passenger, section 5 of the Carriage by Air Act 1974 (the CAA 1974), read together with the Third Schedule, enumerates the identity of persons who are entitled to enforce the benefit of the liability provision under article 17(1) of the Montreal Convention or article 17 of the Warsaw Convention. Members of the passenger's family entitled to enforce this right have been specified as the wife or husband, parent or step-parent, grandparent, brother or sister, half-brother or half-sister, child or step-child and grandchild. These members of the passenger's family would be the dependants who are permitted to make a dependency claim in the event of an international aviation accident resulting in death.

The High Court ruled in *Wang Bao' An & Ors v Malaysian Airline System Berhad & Other Cases* [2018] 11 MLJ 585 that in the case of a death of a passenger under section 5 of the CAA 1974 read together with article 17(1) of the Montreal Convention, the applicable law to determine the measure and quantum of damages would be that laid down in section 7 of the CLA (as amended by the Civil Law (Amendment) Act 2019). This action would be a dependency action for the benefit of the deceased dependants as described in the Third Schedule of the CAA 1974.

Under the amended section 7 of the CLA:

- the dependant is entitled to a fixed sum of 30,000 ringgit representing damages for bereavement;
- damages for loss of support is to be computed in accordance with the prescribed statutory formula laid down under section 7(3) of the CLA; and
- expenses that may be awarded would include funeral expenses and services incurred owing to the death.

As regards punitive damages, article 29 of the Montreal Convention disallows such damages. Section 7 of the CLA also envisages that there would be no award for exemplary damages.

ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

Investigatory authority

39 | Who is responsible in your state for investigating aviation accidents?

The governing statutes relating to aviation accident investigation are the Civil Aviation Act 1969 (CAA 1969) (as amended by the Civil Aviation (Amendment) Act 2017), the Civil Aviation Regulation 2016 (as amended by the Civil Aviation (Amendment) Regulations 2018) and the Civil Aviation Authority of Malaysia Act 2017. Under Part XXVI of the Malaysian Civil Aviation Regulation 2016, the Minister of Transport will appoint persons as investigators to conduct investigation of an accident or incident, and among them an investigator in charge who will have powers to direct, organise and supervise the overall investigation. This investigation will be conducted in accordance with Annex 13 to the Chicago Convention 1944.

The objective of any such investigation is not for purposes of apportioning blame or liability, but merely for the prevention of any future accidents or incidents.

Disclosure restrictions

40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information or cockpit voice recordings in litigation.

Annex 13 to the Chicago Convention 1944, which was given effect in Malaysia pursuant to the powers conferred under the CAA 1969, specifies non-disclosure of certain information or records, unless the courts find that the disclosure outweighs any impact it may have on the investigation conducted. This information and records would include, inter alia, cockpit voice recordings and transcripts of the same and recordings and transcripts of recordings from air traffic control units. However, this aspect of Annex 13 has not been specifically dealt with or addressed in the CAA 1969 or its amending Acts, or the Civil Aviation Regulations 2016.

For restrictions concerning other information or records, the Minister may appoint any public officer with powers to restrict the disclosure by classifying the information, record or material under the Official Secrets Act 1972.

Relevant post-accident assistance laws

41 | Does your state have any laws or regulations addressing the provision of assistance to passengers and their family after an aviation accident?

No. However, advance payments have been made to the families of deceased passengers in fatal aviation accidents in Malaysia in the past.

INSURANCE REQUIREMENTS

Mandatory requirements

42 | Are there mandatory insurance requirements for air carriers?

Apart from the provisions under article 50 of the Montreal Convention, where it is mandatory for state parties to require the carrier to maintain adequate insurance covering their liability, there are no statutory requirements for mandatory insurance apart from the specific insurance to be taken out by the Authority of Civil Aviation Authority Malaysia on any aircraft detained for default of payment of fees or charges against the loss of or any damage to the aircraft during detention as provided under Regulation 182 of the Civil Aviation Regulation 2016. The beneficiary of this insurance policy would include the owner of the aircraft.

LITIGATION PROCEDURE

Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

The Malaysian court structure comprises the Federal Court – being the apex court; the intermediary Court of Appeal; two High Courts of coordinate jurisdiction – one for West Malaysia (the High Court of Malaya) and one for East Malaysia (the High Court of Sabah and Sarawak); and the subordinate courts (the sessions and magistrates' courts). Currently, the monetary jurisdiction of the magistrates and sessions' courts is limited to 250,000 ringgit and 1 million ringgit respectively. There is no limit on the jurisdiction of the High Courts as far as the monetary amount and subject matter are concerned. Trial proceedings before the High Courts are held before a single judge. A civil action may be initiated in the Magistrates' Court, the Sessions Court or the High Court wherein appeals would be heard in the High Court or Court of Appeal (as the case may be) and finally by the Federal Court upon the granting of leave to appeal if the threshold requirements for leave are met.

There are no special courts that specifically deal with civil aviation claims.

Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

Order 24 of The Malaysian Rules of Court 2012 sets out the rules relating to an application for discovery or disclosure and the extent of what document or material is allowable. An application for discovery may be made against a party where the documents sought to be discovered were, or at some time were, in the possession, custody and power of the other party. The category of documents envisaged under this rule would be documents on which the applicant party relies or would rely on, which could adversely affect his or her case or the other party's case or support the other party's case or documents that may lead to a series of inquiry resulting in information that may adversely affect his or her own case or adversely affect the another party's case or support another party's case.

Discovery is always subject to the rule of relevancy and necessity in connection to the cause or matter.

Evidence

45 | Does the law of your state provide for any rules regarding preservation and spoliation of evidence?

Apart from the provisions in Annex 13, Regulations 72(7), 91, 119, 163 and 165(5) of the Civil Aviation Regulation 2016 provide for the preservation of various documents, records and data in connection to the aircraft or the flight crew.

Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

Yes. Article 22(6) of the Montreal Convention allows the court to award costs and other expenses of litigation incurred by the party including interests. Litigation costs are also allowed under Order 59 of the Rules of Court 2012 and these costs are awarded by the court at their discretion.

JUDGMENTS AND SETTLEMENT

Pre- and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

Pre-judgment interest is allowed under section 11 of the Civil Law Act 1956 (CLA) (as amended by the Civil Law (Amendment) Act 2019) if the court thinks it fit and just to make such an award on the whole or part of the damages between the period when the cause of action arose and the date of judgment. Though the court has an unfettered discretion on the award of pre-judgment interest, the court must necessarily also take into consideration factors such as the nature of the claim, whether a party was guilty of delay, the conduct of parties as well as the reasonableness of the defence presented.

Post-judgment interest is provided for under the Schedule of the Courts of Judicature Act 1964 and this is further provided for under Order 42, rule 11 of the Rules of Court 2012, and this rate of interest is currently set at 5 per cent by the Chief Justice of Malaysia.

Settlements

48 | Is court approval required for settlements?

Court approval is a mandatory requirement for settlements involving minors and persons under disability as provided for under Order 76 of the Rules of Court 2012.

49 | What is the effect of a settlement on the right to seek contribution or indemnity from another person or entity? Can it still be pursued?

The right to seek contribution or indemnity from a third party would depend on the terms of the settlement. The terms of the settlement may reserve the right of the claimant to pursue its action against a joint tortfeasor if the settlement excludes the joint tortfeasor of the single indivisible loss. However, the terms of the settlement could encompass all known and unknown joint tortfeasors, in which case the claimant's right for contribution from another person or entity would be non-existent.

A tortfeasor's right to contribution from a joint tortfeasor under section 10(1)(c) of the CLA makes no specific reference to the tortfeasor's liability for damages arising out of a judgment, as is the case in sections 10(1)(a) and 10(1)(b) of the CLA. In those circumstances, there appears to be no impediment on the right to seek contribution and indemnity from another party after a settlement has been reached. In such a case, any action by a tortfeasor seeking a contribution from a

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joint tortfeasor must be brought within the appropriate limitation period under the Limitation Act 1953 or the Carriage by Air Act 1974.

50 | Are there any financial sanctions, laws or regulations in your state that must be considered before an air carrier or its insurer may pay a judgment or settlement?

There are no such provisions in Malaysia.

UPDATE AND TRENDS

Key developments of the past year

51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Apart from the introduction of air worthiness safety guidelines to aircraft operators for the cleaning, disinfection and safety measures of flight decks, passenger cabin and cargo compartments by the Civil Aviation Authority of Malaysia (CAAM), there have been no further developments relating to aviation liability.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There have been several policy changes and initiatives made by a number of governmental bodies to accord with the unprecedented covid-19 pandemic. The first would be changes made to Malaysian Aviation Consumer Protection (Amendment) Code 2019 (Code 2019) by the Malaysian Aviation Commission. Paragraphs 7A(4) and 17(4) stipulate that an airline is given 30 days to remit refunds and resolve complaints made by passengers. The Malaysian Aviation Commission has now accorded airlines an extended timeline of 60 days for the resolution of complaints and remittance of refunds from the date of the complaint and claim of refund for the period between 1 February

2020 and 30 September 2020. The Malaysian Aviation Commission has also waived the requirement for airlines to communicate to passengers and the public about any change of flight status, which is prescribed under paragraph 8 of Code 2019. Similar to the extended time period, this waiver is only applicable to affected flights for the period between 1 February 2020 and 30 September 2020.

For the safety of air travel, CAAM had issued air worthiness safety guidelines to aircraft operators for the cleaning, disinfection and safety measures of flight decks, passenger cabin and cargo compartments, which are in line with the ICAO Council Aviation Recovery Task Force Report and Guidance for Air Travel through the covid-19 Public Health Crises, and ICAO Doc. 10144. These guidelines have been further adopted by respective Malaysian-based airline companies in implementing their own flight safety guidelines.

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