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The 2017 Gulf crisis and its impact on regional aviation

*Michael Rawlinson QC
Gordon Aber*



For the past two decades the three big Middle Eastern carriers; Emirates, Qatar Airways and Etihad Airways have grown robustly. Collectively, they now fly about 565 aircraft, a far cry from the roughly 25 aircraft Emirates and Qatar Airways operated in 1996. And collectively they have placed orders for more than 200 Boeing 777X aircraft at the 2017 Dubai Airshow. In 2013, the number of passengers passing through Dubai Airports was 66 million. This figure is projected to increase to 103.5 million by 2020. IATA reports that some 400 million passengers will use a Middle Eastern carrier by the year 2020.

The Middle East & North Africa also remains a buoyant market for general aviation: Bombardier Business Aircraft, one of the industry leaders in the region, has around 350 aircraft scheduled for delivery through 2025 with an estimated total cost in excess of US\$10 billion.

But continued regional conflict could well be the undoing of this robust growth.

The conflict in Libya in 2014, together with the two major losses suffered by Malaysia Airlines in that year unsettled the aviation insurance market globally. The Malaysia Airlines losses radically changed the airline loss profile resulting in an increase in aviation insurance premiums. Further unsettling the aviation risk environment was the damage to aircraft in attacks on airports, including Taliban attacks on Karachi airport in Pakistan in June 2014. Between 13 and 22 July 2014, a range of aircraft were destroyed or damaged during fighting in and around Tripoli Airport. The hull war reserve for those losses was estimated at US\$407 million and led to recovery claims in multiple jurisdictions.

Some aviation insurers estimated that the industry would see massive insurance premiums rises as a result of these incidents. While those losses did lead to higher premiums for “all-risk” policies, the increases were short-lived. As AON noted in its

2016 market outlook, “...after hardening at the end of 2014, the airline insurance market returned to the soft market conditions that have been a feature of the last decade.”

In mid-2017, the United Arab Emirates (UAE), Saudi Arabia, and Bahrain escalated an ongoing conflict with their Gulf neighbour, Qatar by cutting diplomatic ties and closing air, sea, and land routes. Egypt followed suit by cutting diplomatic ties with Qatar and access to its airspace. The immediate result was Qatar Airways having to halt dozens of flights and re-route others. According to a report in “Bloomberg News” on 19 June 2017, *“[Qatar Airways] is keeping tabs on the business impact of its higher fuel bill after the barriers imposed by Saudi Arabia, the United Arab Emirates, Bahrain and Egypt shut down 52 routes and forced remaining services into diversions ranging from five minutes to two hours, Qatar Air Chief Executive Officer Akbar al Baker said. The restrictions have doubled the flying time on some routes.... Qatar Air is making sure that all our business streams are properly documented in order for us in future to go to international tribunals to reflect the pain”*.

For Qatar, the inability to enter Bahrain’s and the United Arab Emirates' airspace has been hugely problematic: Qatar's airspace is small, and its principal carrier relies on overflying its neighbours to access a range of routes. The inability to overfly its boycotting neighbours increases route length and costs.

Leaving aside the odd historical reasons for Qatar’s relatively small “flight information region” (FIR) when compared to its boycotting neighbour, Bahrain, Qatar Airways quickly adapted. According to Alex Macheras, an aviation analyst, *“Faced with a sudden air blockade, ... Qatar Airways used it as a catalyst to accelerate their existing five years plan. Where it may have taken other airlines a few weeks or months to recognise the urgent need to adapt their aviation strategy, Qatar Airways wasted no time launching new routes in the Gulf to Oman, and further afield to Poland, Czech Republic, Turkey, Russia and Thailand.*

...

[Qatar airways] firmed up agreements to acquire stakes in airlines all around the world, from Cathay Pacific in Hong Kong, to Meridiana in Italy.

Flight crew adjusted overnight to the limited access routes in and out of Qatar, and the tone was kept positive both inside the airline, and in the state of Qatar by Emir Sheikh Tamim bin Hamad al-Thani. Sheikh Tamim met with French president

Macron and the president of Airbus Commercial Aircraft Fabrice Bregier, about signing another aircraft deal at the end of 2017.

While the carrier is expected to announce a loss for FY2017-18, ending March 2018, the airline has solid plans to continue to replace lost destinations with new destinations within the next 12 months, and should continue to adopt the "global thinking" mentality that began seven months ago".

The gulf crisis has dragged on into 2018. In February, Kristin Smith Diwan, a Senior Resident Scholar at the Arab Gulf States Institute in Washington noted; *"There is mounting evidence that the Gulf crisis is far from resolution. Indeed, recent weeks offered more signs of escalation, as Qatar and the United Arab Emirates traded accusations over military violations of air space and the interception of civilian aircraft. The United States has looked to consolidate its close ties to players on both sides of the Gulf divide, as demonstrated by the first ever Qatar-U.S. strategic dialogue in January. But while there is the prospect of the Trump Administration convening a Gulf Summit, there is little appetite for compromise on the part of the Gulf rivals"*.

The anticipated increase in risk is highlighted by a stark warning from the Economist in a piece entitled; *"No end in sight: The GCC – Qatar crisis"*; *"The Economist Intelligence Unit expects the current diplomatic crisis to take years—rather than months—to resolve, owing to the deep level of mutual distrust between Qatar and its Arab neighbours.*

...

Operational risks facing corporates in Qatar in particular, and in the Gulf region in general, will rise in light of the sanctions, which we expect will be tightened further".

Four months after the crisis erupted the "Economist" noted the pervasive and deleterious economic impact across the region in a report entitled, *"The Boycott of Qatar is hurting its enforcers"*. Qatar's economy is slowing down because of the crisis; GDP will slow to 1.9% from 2.2% last year. The IMF has forecast Qatar's non-oil economy will slow a full percentage point from last year.

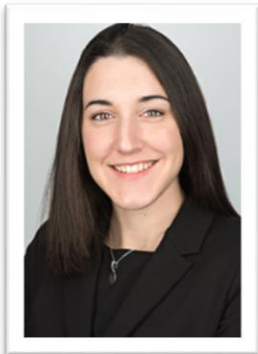
While Qatar's economy certainly has taken a hit from the crisis and deferrals of orders by Qatar Airways for new aircraft from both Boeing and Airbus could be on the cards, its economy is surprising nimble. The economic impact of the blockade has been tempered because oil and gas exports continue to flow freely. Despite the crisis, the UAE continues to receive gas from Qatar via the Dolphin pipeline.

Some analysts suggest the worst may be over for Qatar. It's too early to make that call or to fully appreciate the impact the crisis has had – and will continue to have – on Qatar's economy or other GCC member states more generally. According to IATA, Middle East-based airlines will see profits shrink by some 50% in 2017/2018. The aviation sector in the Gulf, both airline and general aviation, has clearly been impacted. But a crisis of this magnitude and duration will surely have some lasting – and perhaps structural – impact.



Package Travel and Linked Travel Regulations 2018

*Philip Mead
Elizabeth Boulden*



The new Package Travel and Linked Travel Regulations provide potential for non-European Economic Area-based travel operators to be joined into claims brought in England and Wales.

The UK Regulations are intended to come into force on 1 July 2018 (except for regulation 38(4))¹ and are a response to the EU's new Package Travel Directive 2015², which is aimed to clarify unclear areas in the law as to what constitutes a "package" and to update the law in light prevailing online booking arrangements using the internet³.

The new regulations themselves broaden the scope of holidays that fall under the legislation to linked travel arrangements as well as packages⁴: to include holidays where the purchase of the two or more separate travel components is not in the same contract, but either at the same point of sale, or one travel component is purchased after the other but in a targeted manner from and within 24 hours of the first purchase⁵.

Further, the new regulations enable the shifting of responsibility onto organisers established outside the European Economic Area ("EEA"). Regulation 27 reads as follows:

Specific obligations of the retailer where the organiser is established outside the European Economic Area

27. Where—

(a) an organiser is established outside the European Economic Area, and

(b) a retailer established in the United Kingdom sells or offers for sale packages combined by that organiser,

the retailer is subject to the obligations for organisers set out in Parts 4 and 5, unless the retailer provides evidence that the organiser complies with those Parts.

Therefore, if a retailer can show that the organiser based outside the EEA complies with Parts 4 and 5 of the new regulations, the obligations no longer fall on the retailer. These obligations include the responsibility for the performance of the package, price reduction for lack of conformity, the obligation to provide assistance and insolvency protection.

Prospective Claimants are unlikely to sue only the non-EEA based organiser directly due to jurisdictional issues. However, it is likely that a UK-based retailer and a non-EEA based organiser will become co-defendants to the same claim. A Claimant would seek to sue both the UK-based retailer and the non-EEA based organiser in order to ensure there is a defendant whose obligations are covered by the regulations. Equally, a retailer defendant is likely to bring in a non-EEA based organiser as a Part 20 Defendant/Third Party to an existing claim in order to shift liability onto the organiser. Both examples are possible under the English Civil Procedure Rules.

Non-EU operators are likely to be faced with litigation in the Courts of the EU Member States for the first time. This will require a review of their terms and conditions and indemnities against the suppliers of services, when exposed to increased liabilities to pay compensation. Equally insurers of such operators may need to review their exposure to this increased risk.

[1] Package Travel and Linked Travel Arrangements Regulations 2018, Regulation 1(2)-(3)

[2] Directive (EU) 2015/2302

[3] https://ec.europa.eu/info/law/law-topic/consumers/travel-and-timeshare-law/package-travel-directive_en

[4] Package Travel and Linked Travel Arrangements Regulations 2018, Regulation 2(3)-(6)

[5] Package Travel and Linked Travel Arrangements Regulations 2018, Regulation 2(3)



Regulation 261

David Green

Flight Compensation Regulation 261/2004's delicate balance between consumer protection and economic reality continues to generate confusion and litigation at the top of the EU's judicial hierarchy.

Amongst other things, the Regulation requires air carriers to compensate passengers when their flights have been cancelled or subjected to particularly long delays. The exception to this rule, found at Regulation 5(3), is when the cancellation or delay has been caused by "*extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*". The application of the phrase "extraordinary circumstances" is at the centre of an ongoing battle between Claimant solicitors and airline operators.

The earliest authoritative judgment on the issue came in *Wallentin-Hermann v Alitalia* (C-549/07), when the CJEU ruled that a problem could only be said to be "extraordinary circumstances" if it stemmed from events which, by their nature or origin, are not inherent in the normal exercise of the activities of the air carrier concerned, and are beyond its actual control.

Unfortunately, whether a circumstance was "inherent in the normal exercise of the activities of the air carrier concerned" came to be seen – in some quarters – as a shorthand for "foreseeable by an air carrier undertaking its normal operations". This interpretative slide led to a number of decisions in England and Wales where quite exceptionally destructive lightning strikes on aircraft were held not to be "extraordinary circumstances" since, although they were undoubtedly beyond the control of the air carrier, such strikes are a rare, though foreseeable, risk of air travel.

There is good reason to doubt the reasoning in these cases after the CJEU's judgment in *Pešková v Travel Service* C-315/15, published on 4 May 2017, on the closely analogous issue of "bird strike" – that is, the rather grisly occurrence of birds being struck by the fuselage or engines of aircraft, and the resulting damage and disruption to flights.

The (perhaps surprising) result was that consequent delays to flights scheduled to be undertaken with the damaged aircraft were affected by “extraordinary circumstances”: although “bird strike” was foreseeable, it was not intrinsically linked to the aircraft’s operational systems, and was therefore not “inherent in the normal exercise of the activities of the air carrier”. This judgment has been particularly welcomed by carriers affected by adverse weather conditions, including lightning, and although *Monarch* and *Tsang* are still routinely cited by Claimants, these arguments are becoming increasingly easy to resist at final hearings.

More recently, the CJEU has been asked to rule on whether wildcat industrial action by air crew constituted “extraordinary circumstances” in *Krüsemann and others v TUIfly* (C-195/17, judgment dated 17 April 2018). The air carrier announced unexpected restructuring plans to its workforce, which immediately resulted in a dramatic increase in staff absenteeism due to “illness” – the strong implication being that the majority of crew were failing to report for duty in order to protest their employer’s plans.

Recital 14 to Regulation 261/2004 provides a number of examples of circumstances likely to constitute “extraordinary circumstances” for the purposes of Regulation 5(3), stating that “*such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of the air carrier*”. However, in this case the action taken by workers was not an official “strike” within the requirements of German employment law, but rather informal, wildcat action.

The CJEU decided that the wildcat absenteeism was not an extraordinary circumstance, and so the carrier was not absolved of the need to pay compensation. The main reason was that the absenteeism had been prompted by the carrier’s announcement of a surprise corporate restructuring: the court considered that restructuring, and consequent disagreements with the workforce, are not outside of the inherent operation of a carrier’s main operations; they are also, by the same token, not beyond the carrier’s control.

This unusual decision comes close to removing strike action from the list of circumstances likely to qualify as “extraordinary circumstances”, and the court was at pains to indicate that it was not the strike’s illegal nature which placed it outside

of Article 5(3). The court justified this stance on the basis that circumstances must always meet the two-limbed *Wallentin-Hermann* test in order to qualify.

This will undoubtedly be an unwelcome decision for airlines, who are now apparently fixed with the blame for the independent actions their workforces take in response to the air carrier's commercial decision making.



DIFC Employment Law: significant change is afoot

*Carolyn D'Souza
Jeremy McKeown*



In early 2018, the Dubai International Finance Centre (“DIFC”) Authority published for consultation its draft of the new DIFC employment law. The intention seems to be to usher in a substantially different regime of law and practice.

The proposed ‘DIFC Law No. 6 of 2018’ (“New Law”), if adopted, will replace Law No. 4 of 2005 as amended by Law No. 3 of 2012 (“Existing Law”). The period of consultation closed at the beginning of March 2018 with an expectation that feedback and suggestions may lead to some further enhancements in the draft provisions.

However, even before the final refinements have been published it is clear that significant and wide-ranging changes are afoot.

Reasons for the change

Throughout the process leading to the proposed changes, two key motivations can be identified:

First, to align more closely DIFC employment law with UAE labour law and, generally, international best practice and comparable models in other jurisdictions.

Second, to ‘correct’ obvious lacunae and unintended consequences flowing from the substance and procedure of the Existing Law which have caused concern for employees and employers alike.

For example, employees have been frustrated by the existence of a prohibition against discrimination yet find themselves with no good remedy against an employer found to have violated the prohibition. Similarly, employers find themselves exposed to near-unlimited penalties for failure to pay within 14 days of termination an employee’s wages or other amounts owed. Under Article 18 of the Existing Law, even the most minor underpayment can attract a penalty equal to

one day's wages for each day that the underlying amount remains unpaid. If an employee waits until the end of the limitation period to claim for the amount, the penalty sum owed by the employer could be ruinous.

The DIFC's consultation paper succinctly summarises the aims of the New Law as follows:

"The Proposed Law attempts to balance the needs of Employers and Employees in the DIFC with the emphasis being on providing a framework of minimum employment standards and fair treatment of Employees in the DIFC to enable businesses in the DIFC to thrive, while also ensuring the attraction of human capital to the DIFC."

Regulations

It is envisaged that the New Law will be accompanied by Regulations to supplement, explain and provide guidelines to the changes. These will need to be read alongside the provisions of the New Law.

Important changes

The following are some of the key changes expected.

Employee Duties

The New Law increases the employee's duty to their employer, including:

serving an employer faithfully;

complying with reasonable and lawful instruction;

exercising reasonable skill and care in performing duties;

not disclosing confidential information, personal data of other employees or trade secrets;

not disrupting an employer's business activities.

Discrimination

This is one of the areas which will undergo substantial change in both the scope of characteristics now protected and the remedies available to employees who suffer employment-related discrimination:

- Pregnancy and age have been added as new protected characteristics, in addition to those characteristics currently protected under the Existing Law (sex, marital status, race, nationality, religion, mental or physical disability);
- Employees can request information from the employer to determine whether they have been subject to discriminatory practices. In the event the employer fails to comply with such a request, the employee can approach the DIFC Courts and seek an order to compel the employer to provide the information. However, the Regulations will limit the scope of what can be requested to avoid unduly onerous disclosure requirements for employers;
- put in place an informal, non-legislative approach to questions and answers to gain access to information relating to potential grounds for discrimination, similar to the UK's Acas Guidance;
- Any claim for discrimination must be initiated within six months from the date of the act or, where there are several acts, the six-month period is calculated from the end of the period during which the acts occurred;
- Compensation in relation to a discrimination complaint will be capped at equal to one year's wages, or two years' wages in respect of a repeat offender;
- the Courts gain the power to make a declaration or recommendation to the employer about its conduct and the necessary actions it should take to avoid a reoccurrence of this behaviour.

Paternity leave and ante-natal care

Article 38 of the New Law introduces paternity leave of five work days within the first month to male employees to whom a child is born or who adopts a child under the age of five years. It also extends the right to attend medical appointments for ante-natal care or adoption proceedings to male employees.

There are also considerations of a potential discrimination claim under the expanded grounds for discrimination if expectant fathers are not afforded requested paternity leave.

Applicability – which employees benefit?

The New Law will apply to short-term and part-time employees. As to jurisdiction, those who can demonstrate a “close connection” to the DIFC may bring a claim.

Probation periods

If a probationary period is agreed between the employer and employee it must form part of the employment contract. That said, there is no specific length of probation period stipulated in the proposed changes. Minimum notice periods will not apply during any probation period.

Penalties

As noted above, the potential harshness of Article 18 of the Existing Law, in particular the penalties to be paid by employers for their failure to pay sums owed to a terminated employee was a key consideration in the reforms.

The key proposed changes to Article 18 are as follows:

- the effects of the Article are only triggered if the outstanding amounts exceed 5% of the total amount due to the employee upon termination. This alleviates the problem of employees being able to claim for even the most de minimis shortfall;
- penalties will be capped at six months’ wages, a measure clearly designed to exclude claims spanning the entire period after termination but brought just within the expiration of limitation;
- any penalty may be reduced or waived by a Court if deemed unreasonable in a variety of circumstances, for example where there is an ongoing dispute with the Courts or it can be proven that the employee is the cause for the delay in payment.

If the employer fails to provide the employee with a written employment contract within seven days of the date on which the employment commenced or, if there is

a written contract but it fails to comply with the requirements set out in new Article 13, the corresponding fine/penalty will be USD \$2,000.

Similarly, where the employer fails to cancel or transfer the employee's sponsorship on termination of the employee's employment, it will incur a penalty/fine of USD \$2,000.

Sick Pay

The Existing Law provided for sixty days statutory sick pay. The New Law proposes a reduction in sick pay entitlements:

the first ten working days = 100% payment of the employee's daily wage;

the next twenty days = 50% of the employee's daily wage;

thereafter = zero.

Termination for cause

One potentially controversial change, from the employer's perspective at least, is the removal of the employer's ability to withhold payment of an end of service gratuity where the employee's employment is terminated for cause.

The DIFC Authority has suggested that the rationale for this change in favour of employees is that a gratuity is akin to a pension benefit. Therefore, it is unfair for employees to lose a pension benefit which may have accrued over many years due to a single act of misconduct, even if a serious one.

Dismissal / 'constructive dismissal'

A significant shift is the proposal that an employee who terminates their employment for cause, citing the employer's unreasonable conduct (i.e. constructive dismissal) may claim an amount equal to their annual wage in compensation. In effect, this is a departure from the previous authorities which decided that there was no recognised protection against unfair dismissal under the Existing Law.

The proposals do not introduce as wide-ranging protection against constructive dismissal as in, say, English law but doubtless now allows employees to claim compensation arising out of the manner of their dismissal. However, the changes

do not envisage compensation where the employer decides to terminate the employment for cause; only where the employee does so.

Vicarious liability

The New Law seeks to clarify the liability of employers for the conduct of its employees, bringing it in line with the position under English law. If the proposed amendments are accepted, in order for the employer to be liable for the employee's acts, it must be shown that the employee's act was sufficiently connected with what they were authorised or expected to do, alternatively the employer did not take adequate steps to prevent the employee from carrying out the act in question.

Next steps

Now that the consultation has closed we await any final refinements. Unfortunately, as yet there is no definitive date for when we can expect the final draft. Until further notice, the Existing Law continues in force.

It appears from the draft proposals that a better balance has been struck between employers and employees, with both groups benefiting and losing out in different areas of substantive law and procedure.

Undoubtedly, what results will constitute the largest shake-up in DIFC employment law in many years.



Michael Rawlinson QC

Michael is frequently instructed by overseas insurers and much of his litigation contains elements of foreign jurisdictional issues. He is regularly instructed in respect of air crashes (fixed and rotary wing) and other aspects of aviation health and safety. More generally, Michael is instructed by insurers where a wider strategic interest arises out of specific litigation.



Philip Mead

Philip is named as a Star Individual in Chambers & Partners in respect of International and Travel Claims, and has appeared in the leading cases on jurisdiction and conflict of laws. He has particular expertise in the field of European law, in respect of the application of the Judgments Regulation and the Rome II Regulation. Philip's International experience typically arise from road traffic accident claims, direct actions against foreign insurers and compensation bodies, employer's liability claims, product liability claims, fatal accident claims, package holiday claims and maritime and aviation claims. His international employment practice has involved peripatetic and overseas workers, seafarers, claims against foreign embassies and international organisations, in relation to claims for breach of contract, discrimination and breach of statutory rights.



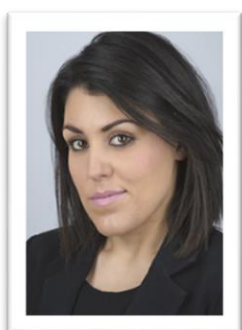
Carolyn D'Souza

Carolyn is head of the 12 KBW employment and discrimination team. She handles all aspects of employment law in both the employment tribunal and at appellate levels. Carolyn has a particular strength in the field of whistleblowing, and recent clients in this area have included whistle-blowers in the financial services, healthcare, education and union sectors. She also handles commercial employment cases, including those involving restrictive covenants and injunction applications.



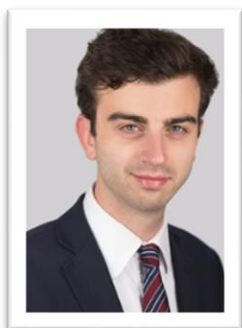
Gordon Aber

Gordon specialises in aviation and aviation insurance disputes, which frequently involve complex multi-jurisdictional claims. He is instructed on behalf of a wide range of commercial aviation interests, including airlines, airport owners, charter operators, ground handling companies, aircraft maintenance organisations (and their insurers) in a range of claims. He has argued some of the leading aviation insurance cases in the South African High Court and the South African Supreme Court of Appeal, and regularly appears in High Courts, in neighbouring countries.



Ghazaleh Rezaie

Ghazaleh has experience of advising clients in cases concerning jurisdictional disputes and has advised both Claimants and Defendants on the applicability of foreign laws. She has extensive knowledge of the UAE labour code and employment disputes in the Middle-East. The crossover between UK and UAE employment law in the context of expatriates living in the UAE is an area of law which Ghazaleh is particularly adept at advising on. Her practice encompasses all areas of International and Travel Law and she is familiar with the Package Travel Regulations, the Montreal Convention, the Brussels Regulations and Rome I and Rome II.



Max Archer

Max routinely deals with cases involving questions of jurisdiction and applicable law and is experienced in handling Montreal convention, Rome I, Rome II and the Brussels Regulations. He is comfortable dealing with foreign law experts and has experience applying foreign law from a wide range of jurisdictions. Max regularly acts in claims brought under the Package Travel Regulations and is experienced in bringing recovery actions on behalf of their insurers and suppliers.



David Green

David has extensive experience in cross-border cases under the Rome II and Brussels Regulations, and experienced in dealing with cases under the Package Travel Regulations. He also acts in delayed flight claims, injuries aboard aircraft in flight, including injuries caused by the negligence of passengers, and in particular of the jurisdictional challenges of these claims.



Jeremy McKeown

Jeremy has worked on a range of Employment Tribunal and High Court employment matters, including restrictive covenant, confidential information, bonus, and severance claims and has been frequently involved in interim applications for injunctive relief, particularly relating to breach of confidence and post-termination restrictions, including non-solicitation, non-poaching and non-compete provisions. He is often instructing in claims involving the Package Travel Regulations, and in-depth knowledge of the rules surrounding jurisdiction and service out.



Elizabeth Boulden

Elizabeth has experience in international and travel cases, mainly in the context of Package Travel Regulations. Recently co-authored a paper on the Voluntary Principles on Security and Human Rights.