

Aviation Liability

Contributing editors

Andrew J Harakas, Jeff Ellis, Chris Carlsen and Kevin Sutherland



2019

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Aviation Liability 2019

Contributing editors

Andrew J Harakas, Jeff Ellis, Chris Carlsen and Kevin Sutherland
Clyde & Co US LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2017
Second edition
ISBN 978-1-912377-18-3

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Malaysia	71
Andrew J Harakas Clyde & Co US LLP		Saranjit Singh and Dhiya Damia Shukri Saranjit Singh, Advocates & Solicitors	
Argentina	8	Mexico	76
Elizabeth Mireya Freidenberg Freidenberg, Freidenberg & Lifsic		Juan Manuel Estrada Abogados Sierra	
Australia	15	Netherlands	81
Matthew Brooks, Simon Liddy and Richard Davis HWL Ebsworth Lawyers		Gerbrich Oreel, Robert Pessers and Hanna Wielhouwer Van Traa Advocaten NV	
Brazil	21	Nigeria	87
Guilherme Amaral, Nicole Villa and Priscila Zanetti ASBZ Advogados		Etigwe Uwa San, Chinasa Unaegbunam and Queenette Hogan Streamsowers & Köhn	
Canada	27	Panama	94
Michael Dery, Darryl Pankratz and Shaun Foster Alexander Holburn Beaudin + Lang LLP		Juan José Espino Sagel Pardini & Asociados	
China	33	Portugal	98
Paul Zhou, Leslie Shen and Mervyn Chen Wintell & Co		Geoffrey Graham Edge International Lawyers	
France	38	Russia	103
Aurélia Cadain Kennedys AARPI		Elena Stepanenko, Konstantin Ponomarev, Olga Legalova, Ekaterina Martyshina and Evgeny Baryshev Baker Botts LLP	
Germany	44	Spain	111
Rainer Amann and Claudia Hess Urwantschky Dangel Borst		Enrique Navarro and Diego Olmedo Clyde & Co LLP	
Greece	49	Switzerland	117
Stratis Georgilas G - H Law Chambers		Andreas Fankhauser Proton Legal LLC	
Indonesia	54	United Kingdom	122
Eri Hertiawan Assegaf Hamzah & Partners		Chloe Challinor Stephenson Harwood LLP	
Italy	59	United States	128
Maurizio Corain, Chiara Santoboni, Caterina Papalia and Mario Barbera R&P Legal		Andrew J Harakas and Jeff Ellis Clyde & Co US LLP	
Latvia	65		
Ivars Mēkons Novius Law Firm			

Preface

Aviation Liability 2019

Second edition

Getting the Deal Through is delighted to publish the second edition of *Aviation Liability*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 new chapters on China, Italy, Latvia, Malaysia, Portugal and Russia.

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.gettingthedealthrough.com.

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.

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 editors, Andrew J Harakas, Jeff Ellis, Chris Carlsen and Kevin Sutherland of Clyde & Co US LLP, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH

London
November 2018

Panama

Juan José Espino Sagel

Pardini & Asociados

Applicable treaties

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

The Republic of Panama is party to the Montreal Convention, effective since 2002 by Law 31 of 2002 and the Warsaw Convention, effective by Law 44 of 1996 but contemplated in the Decree Law of 1963.

In regard to other Conventions, Panama has recognised specific articles related to the repression of illicit acts against aviation safety as declared in article 5 of Law 21 of 2003:

- article 3 of the Tokyo Convention;
- article 4 of the Hague Convention 1970, and article 5 of the same Convention as per 1971; and
- article 3 of the Protocol for the repression of illicit acts of violence in airports providing services to civil aviation, complementary to the Convention for the repression of illicit acts of violence against civil aviation as per the Montreal Convention of 1971.

International carriage – liability for passenger injury or death

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

In matters of personal injury or death, Panama's courts have not had the opportunity to provide an established doctrine on interpretation of any of the Conventions nor on the application of Panama's Civil Aviation Law.

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

Law 21 of 2003 regulates domestic aviation liability in Panama. In its article 151, it acknowledges that for international carriage Panama recognises both conventions. Consequently, any chosen Convention in a contract of international carriage will be respected by a Panama court.

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

The primary definition of 'carrier' is provided by Law No. 21 of 2003, which, in its drafting, is influenced by the Montreal and Warsaw Conventions. It extends to ground handling agents and other service providers when their services are provided within the airport confines.

For international carriers, Law 21, article 151 considers that liability will be subject first to the international Conventions recognised by Panama and Panama's law will be applied in its defect. In the specific case of successive carriers, Law 21, in article 113, considers that transportation provided by several carriers successively will be considered as one single operation.

Panama's courts do not have a defined test for the successive carriage but will consider the doctrine or interpretation provided by known academics or international case law.

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?

Panamanian courts have not had the opportunity to review the matter in order to create a precedent for its interpretation.

Article 138 of Law 21 establishes that the carrier is responsible for the harm or death of a passenger, including in the course of operations of embarking or disembarking, which is essentially what both Conventions contemplate.

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?

No court precedent exists on this matter that has reviewed any of the defences as per either of the Conventions. At present, there is a case against the state pending of resolution before the Supreme Court that may become a future reference on the matter.

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

There are no legal obligations to advance payment to injured passengers or the family members of deceased passengers, except for the established limitation amounts set by Law 21 or the applicable international Conventions.

Civil courts may accept a carrier's motion of a voluntary deposit in certain instances.

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?

Panama's courts have not defined an interpretation of these articles; they would initially rely on the academic interpretations and international case law.

With regard to the doctrine of forum non conveniens, the Supreme Court has declared that Panama is not a party to the doctrine as per common law interpretations. However, by means of a decision from 2015, the Court declared it may be possible to hear cases when coming from abroad rather than be automatically dismissed when the claimant argues harm or damage has been suffered in a different jurisdiction.

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?

Law 21 acknowledges the same period of limitations in article 170 and courts may take into consideration whether the time limitation has been interrupted if brought as an argument by a claimant.

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?

Courts have not reviewed the matter and, consequently, will rely on international academic interpretations and international case law.

Domestic carriage – liability for passenger injury or death

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

Law 21 of 2003 in its Title XII, Chapter IV regulates liability for domestic carriage.

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

Article 158, Law 21 establishes that the air carrier and its employees liability must be fault-based or with the intention to cause harm.

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

Article 157, Law 21 establishes the limit of liability as US\$25,000.

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

The principal defence is contemplated in article 156, which establishes that the carrier must prove it has taken all necessary measures to prevent an accident.

In cases where it can be proven that the injured party contributed to his or her injury then the liability may be reduced or completely exonerated.

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

The liability will include the carrier and its employees or dependants.

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?

Article 166 considers the possibility of apportioning fault to the claiming party for injury or death. It is worth mentioning that even though it is considered in this special legislation, the principle of contributory negligence is not characteristic of our civil law system and the application of the article has not been properly tested in the courts. With regard to minors or persons with reduced mental capacity, applicable special legislation would need to be considered.

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

Article 170 is clear in establishing that the time limitation is two years from the time the accident occurred.

Third-party actions

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

Most third-party actions may be included by either claimant or the defence at the beginning of litigation process and would be resolved at the same time within the same decision.

19 What time limits apply?

In principle, two years as per article 170, Law 21. However, it should be noted that an extra contractual civil action may be available for damages and negligence, as per article 1644 of the Panama Civil Code, for which the time limit is one year.

Liability for ground damage

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 applicable legislation is contained in Title XII, Chapter IX of Law 21.

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

The principle established is strict; as per article 183, the harm or damage must be caused by an aircraft in any circumstance.

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

Article 187 contemplates the possibility of limiting liability for repairable damages. The amounts of indemnity have to be calculated in accordance to the weight of the aircraft as per the scale set in article 187.

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

The main defence is proving that the carrier has not acted with any fault and that it has taken all necessary measures to prevent the accident.

Additionally, and in the event of collision of two aircraft, both will be solidarily responsible.

Liability for unruly passengers and terrorist events

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

As in many other countries, this matter has not been tested.

Since Panama is party to the Warsaw and Montreal Conventions and Law 21 of 2003 contents are similar, it will be mostly an academic discussion that these laws will become the initial reference to a claim against a carrier for injury or death caused by an unruly passenger or terrorist event. Importance will also be given to discussions over the matter and existing legal precedents in other jurisdictions.

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

The tests for liability would be via fault, negligence or intent, the latter by an employee, for example.

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

The limitations of liability available will be in principle those applicable by the international applicable conventions recognised by Panama in the event of international flights and secondarily Law 21. The latter would apply for national flights as per article 151.

Special attention will be drawn to the international legal precedents where decisions have applied and interpreted articles 17 and 21 of the Montreal Convention in these types of events.

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?

The main defences would be those available by the Conventions and would be that the carrier had taken all necessary measures to avoid the damage, and that damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or that damage was solely owing to the negligence or other wrongful act or omission of a third party.

Consumer protection and passenger rights

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

Panama has a general consumer protection legislation, Law 45 of 2007, which allows passenger consumer-related complaints to be received through its regulator, the Authority for Consumer Protection and Competition.

The Regulator has not dealt with flight delays, overbooking or tarmac delays. The majority of the claims entail loss of baggage, overcharging or damages.

Additionally, Law 134 of 2013, article 2(3) grants a 25 per cent discount to generally handicapped person, be it reduced mobility or not.

Specifications for servicing passengers with reduced mobility at airports and on aircraft are regulated by Law 42 of 1999 and Executive Decree No. 88 of 2002.

Liability of government entities providing services to carriers

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

Any autonomous entity, such as an airport administrator, may be subject for a civil extra contractual action for damages in accordance with the Civil Code of Panama. Similar actions may be available against the employees individually.

Additionally, the entities or the employees will be subject to their own special legislation, the Administrative Code and the Criminal Code.

In most instances where the state is involved, the claim is known as a 'direct repairs' administrative claim and is presented before the Supreme Court.

30 What is the nature of, and conditions for, the government's liability?

The nature of the liability is similar to that of an air carrier – it must be fault-based and be at the administrative, civil or criminal level.

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

There are no limitations as to possible claims against government entities when seeking recovery for damages.

Criminal proceedings

32 Can an air carrier be criminally responsible for an aviation accident?

There are possibilities for an air carrier to be investigated and charged criminally, but any proceedings charges will be pending on the results of the experts and technical investigation.

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

Both actions are completely separate and will not have an impact on the other.

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

Compensation claims are processed in the civil court system and are a completely separate process.

Effect of carrier's conditions of carriage and tariffs

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

The carrier's conditions of carriage are binding on the passenger; as per Panama's Commercial Code, it is a private agreement between the two parties. Panamanian courts would rely on the carrier's conditions and the applicable legislation for its resolution.

Damages

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

A claimant may try to request extra contractual damages in accordance with the Civil Code of Panama, article 1644 and subsequent.

The damages claimed can be related to loss of income or patrimony, as well as moral; the latter relates to the personal loss and psychological impact suffered by the claimant. The concept of damages in our civil law system is not punitive but based on the principle of repair.

The principal limitation on the damages is that the claimant has the burden of proof of demonstrating the negligence of the carrier or its employees.

If the injured party has not survived the accident, all immediate relatives are entitled to claim on the deceased's behalf. No court appointment is necessary to seek recovery unless the surviving relatives are under age or handicapped.

37 What damages are recoverable for the death of a passenger?

See previous question.

Accident investigation and family assistance

38 Who is responsible in your state for investigating aviation accidents?

The Civil Aeronautics Authority (CAA) investigates accidents by means of article 104 of Law 21. The standards of investigation are equal to those set in the Chicago Convention, which are contemplated in the Civil Aeronautics Regulations. The CAA maintains a special department for the prevention and investigation of accidents, which manages all investigations in accordance with established rules and procedure.

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

Any of the above will be available at proof stages or at discovery during the proceedings in any claim.

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

Panama's legislation does not specifically demand assistance for passengers and their family after an aviation accident, but it demands protocols of safety and procedure of carriers that may include such provisions.

Insurance requirements

41 Are there mandatory insurance requirements for air carriers?

Article 196, Law 21 of 2003 establishes the obligations and conditions for air carriers.

Litigation procedure

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

Aviation liability claims are the competence of the civil courts of Panama. Civil procedure is mostly managed via written statements from each party and the judge. The only instances open for oral discussion are depositions, cross-examinations and discussions over practice of proof. Civil claims proceedings do not have a jury.

The procedure of a civil claim is as follows:

- presentation of the claim before the civil courts;
- court admission of the claim and notification of it to the defendant;
- upon notification, the defendant has 10 working days to answer and request proofs if available and counterclaim; and
- once the claim has been answered, the court will announce a 15-day review for each party to make any observations to the proceedings.

Following the above instance, the court will allow the period for which both parties are permitted to invoke or request the evidence for their case, upon which each party may have the opportunity of counterproof and to object to each party's evidence.

Once the judge has evaluated the above instance, he or she will instruct the parties on its valuation and practice, for example, expert witness depositions, visit to a site, among other things.

The next stage is the practice of evidence, discovery, depositions and cross-examinations.

The following stage is the closing statements upon which the judge will declare sentence, which can be appealed by any of the parties.

Appeals will have one instance at the Superior Court and, upon its decision, a final appeal may be available before the Supreme Court.

As in many other countries, these procedural steps may take years to conclude.

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

Discovery is ample and, on most occasions, information is agreed or disclosed at the will of each party unless requested by one of the parties.

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

Yes, the parties to a claim may request and justify the protection of evidence when it requires special care or needs proper protection or preservation to avoid its deterioration or loss.

45 Are attorneys' fees and litigation costs recoverable?

Panama's civil courts award expenses and litigation costs (including legal fees) in their decisions. Judges in civil courts may also contemplate and award discretionary fines related to the claim amount, or establish fines at appeal stage.

Judgments and settlement**46 Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?**

If a case is decided by the court, the interest will be rated from pre-judgment. Most damages judgments in a civil court will date the interest annually from the date the claim is presented. The rate is 7 per cent per year.

47 Is court approval required for settlements?

The parties can terminate the litigation at any stage. If there is litigation in process, the court must be notified of the settlement and admit it to close the claim.

48 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?

If the entity or a person is not part of settlement, there may be possibilities of it being pursued, but in order to be legally feasible, the party must have a link with the possible cause of the claim and the claim must not be time-barred.

49 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?

Settlements are agreements between private parties in accordance with Panama's procedural laws; they are also denominated as 'extrajudicial agreements' and as such they become a contract between the parties. In the event the settlement is to conclude a claim, the court must be notified of the settlement in order to approve the termination of the case and its process. In either case, settlement or judgement, there are applicable financial regulations to the payment.



Juan José Espino Sagel

jjes@padela.com

Plaza 2000 Tower, 10th Floor
50th Street
Panama City
Panama

Tel: +507 223 7222
Fax: +507 223 7535
www.pardinilaw.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com