DLA CLIFFE DEKKER HOFMEYR

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AVIATION MATTERS

AFRICAN UNITY: TOWARDS A REGIONAL COMPETITION AND CONSUMER PROTECTION REGIME

Airlines operating in Africa are both drivers and beneficiaries of moves towards African economic unity. The concept of regional economic community and eventual African unity is not new. Indeed, the South African Customs Union (SACU) is the oldest customs union in the world, dating back to 1910. It is widely accepted that economic unity may be the region's best chance at redressing Africa's colonial past and promoting economic development.

Colonialism has left a 'command economy' legacy in Africa, but economic integration heralds a move towards a market economy in which the private sector can play a major economic role across borders. In doing so, architects of various Regional Economic Communities (RECs) in Africa have realised that unrestricted private sector globalisation can lead to market distortion and consumer exploitation. There is also a need to promote a level investment environment through reform of private sector policies and regulatory regimes.

The removal of trade barriers means that abusive conduct by a firm in one nation can quickly contaminate a region. The need to harmonise legal principles and enforcement is therefore a clear priority and most treaties and protocols include express provisions relating to the need to introduce regional competition and consumer protection law.

For instance:

- The 2009 SADC Declaration on Regional Cooperation and Consumer Policies requires member states to "implement measures… that prohibit unfair business practices and promote competition". It also recognises a need for "case specific cooperation" and "convergence of competition and consumer laws".
- The 2010 Draft COMESA, EAC and SADC Tripartite Agreement contains specific provisions relating to competition policy and consumer protection, with which member states are required to comply.

The Common Market for Eastern and Southern Africa (COMESA) has led the way. It has established the COMESA Competition Commission, which will have the primary jurisdiction among the 20 member states to regulate competition law and consumer protection where this affects trade between member states (ie where two or more member states are affected).

The business activities of airlines flying between COMESA States will *as a result* meet the 'regional dimension' test for their business activities and will be subject to the COMESA Commission. Airlines will also know that their business activities potentially bring principles of both competition and consumer protection law into play.

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COMESA regulations are not without teeth – a contravention can attract an order to pay compensation to affected persons and administrative penalties of up to 10% of turnover in the COMESA region. These sanctions are enforceable in local courts.

The COMESA Commission is expected to be up and running by 2013. This means that mechanisms will be in place to lodge complaints and conduct investigations into alleged breaches of competition or consumer protection law. It remains to be seen how COMESA will interpret and enforce the regulations, which are broadly stated and capable of wide interpretation. Although the competition law principles are well established and largely borrowed from the EU, robust consumer protection is a new frontier and it remains to be seen what COMESA will treat as 'unconscionable conduct' in the course of consumer or business transactions.

Although teething problems can be expected, once COMESA has set the precedent, other RECs will certainly follow suit. This is in keeping with the interlaced nature of various RECs in Africa. An acceleration of local laws and enforcement is inevitable. Therefore, airlines will need to know about local and regional laws in all jurisdictions in which they operate. Increased case-specific cooperation between enforcement agencies is logical. It is also a specific undertaking by most member states, which means that airlines will increasingly be dealing with both the regional regulator with jurisdiction and a number of other regulators.

An advantage of regionalisation is the promise of harmonised local legislation, ensuring a secure regulatory environment for regionally active players. This levels the playing fields for competitors in various markets.

Airlines need to be aware that in future, obligations will arise in Timbuktu and not just on landing in Copenhagen. In the meantime, they will need to adjust to the laws specific to each country as these become more widespread.

Chris Charter

AIRCRAFT OWNERS MIGHT ATTRACT ENVIRONMENTAL LIABILITY

The National Environmental Management Act, No 107 of 1998 (NEMA), states that "no person may unlawfully and intentionally or negligently commit any act or omission which causes significant or is likely to cause significant pollution or degradation of the environment".

NEMA specifically requires proof of fault in the conviction of this offence. Interestingly, fault does not need to be established in a civil claim for environmental damages under the Civil Aviation Act, No 13 of 2009 (Act), making it easier to claim compensation from aircraft owners who cause environmental damage to property.

Section 8(2) of the Act imposes strict liability on registered owners and reads:

"Where material damage or loss is caused by –

(a) an aircraft in flight, taking off or landing;

(b) any person in any such aircraft; or

(c) any article falling from any such aircraft.

to any person or property on land or water, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his or her wilful act, neglect or default".

This section allows for the recovery of 'material damages', a term not defined, but we think is wide enough to include environmental damages. This was confirmed in the case of *Walker v Weedair (NZ) Limited [1959] NZLR 777* where damages were awarded for the loss of crops on a farm in New Zealand.

The *Walker* case is particularly relevant for the aviation industry in South Africa because s5(3) of the Civil Aviation Act, 1948 in New Zealand has identical wording to s8(2) of the Act.

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In this case, the crops failed as a result of herbicide accidentally discharged from an aircraft while it was flying over the farm. Although obviously not binding on our courts, they would be entitled to be guided by the application of an identically worded provision.

The farmer was only required to prove a) the event; b) the identity of the registered owner; and c) the quantum of the damage. Although the defendant argued the herbicide liquid released is not an article as defined in the Act, the court held that the material damage was caused by 'an aircraft in flight'. Because all elements were proved, the claim was successful and the owner had no defence to the claim.

It is important to note the 'registered owner' is defined quite widely to include not only the person in whose name the aircraft is registered, but also any person who is or has been acting as an agent in South Africa for the foreign owner, or any person by whom the aircraft is hired at the time. What if an agent, who is not responsible for maintaining the aircraft on behalf of the foreign owner, was flying the aircraft at the time?

If, for example, as a result of the failure to maintain the aircraft, dangerous fluids are discharged onto property on land or water below the flight path, causing environmental damage, the agent will ordinarily have to pay the damages as the 'registered owner'. Although the Act gives the agent the right to claim these damages from the foreign company where it was not responsible for committing the wrongful act, the agent must ensure that the agency agreement includes a clear provision for that recovery.

Registered owners of aircraft must ensure that appropriate provisions have been included in agreements entered into with foreign owners or lessors, or they may be faced with faultless claims under the Act and find it difficult to recover damages from the party actually responsible for the harm.

An owner of land should be mindful that if an aircraft causes environmental harm to land or water, the claim is a fairly easy one to prosecute.

Terry Winstanley and Li-Fen Chien

EMPLOYMENT STRIKES AND LABOUR DISPUTES: LESSONS FOR THE AVIATION INDUSTRY

The recent spate of violent industrial action has left many analysts pondering over the cause and effect of the conflict. While there has been a progressive increase in strike action over the past years, prolonged or violent strikes remained blips on the radar. In 2012, these blips grew to fill the radar screen, with the on-going strikes in the mining sector continuing to dominate headlines.

Should the aviation sector take notice of the issues of miners and their employers? The two industries seem far apart: one operating at 30 000 feet above sea level, the other more than a kilometre below the ground; state of the art technology propels the one industry while the other relies heavily on manual labour. Yet, their underlying labour issues offer valuable lessons for the aviation industry.

Key areas include negotiations with trade unions and the role of sound employee relations.

The role of collective bargaining warrants closer scrutiny. Justice Andre van Niekerk recently lamented the role played by parties in the collective bargaining process where "… work-place-based collective bargaining remains as adversarial as ever" (Key-note address at SASLAW Conference, 18 October 2012, Van Niekerk J). He dismissed the notion that the Labour Relations Act is to blame for recent events and that there is a need to rewrite this Act to avoid a similar occurrence.

Undoubtedly, the frailties of our collective bargaining processes and practices contribute to breakdowns in negotiations and industrial action. Most labour negotiations still employ positional or distributive bargaining. In this process, the respective parties adopt positions or table demands at opposing ends of the negotiating spectrum, whittling down their demands in an effort to negotiate into an area of common ground. This process is also known as 'win/lose' negotiations. The draw-back is that whatever one party wins the other loses. If the negotiation is about R100,000 to be shared between the parties, the more one party gains, the greater the loss to the other. In practice, this type of bargaining frequently leads to unintended breakdowns in negotiations. The parties are often forced to defend their positions and it then becomes impossible for them to agree to a lower offer. If you motivate vigorously why you need R16 500 a month to survive, it becomes difficult to accept that R10 000 would suffice as well.

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Interest, inclusive, needs-based or 'win-win' labour negotiations may hold the key to lowering the conflict associated with labour negotiations in many industries. Using this approach, employers and trade unions identify their respective needs and assist one another during negotiations to find ways of accommodating the other's demands. Labour negotiators accustomed to going in high so they can settle low may find this style unorthodox, but when used in the right industry with trained negotiators, inclusive bargaining can yield wonderful results.

Negotiation theory gave us the parable of the orange to illustrate the value of interest negotiations. Two chefs are said to have fought over the use of the single orange left in the kitchen. Both needed the orange for their recipes. Each chef unsuccessfully tried to convince the other to give up his half share of the orange. They then agreed to split the orange in half. This resulted in one chef being left with juice of half an orange while the other had only the rind of his half of the same orange – neither had the volume needed for their respective recipes. Had each party tried to understand what the other needed, they would have realised that the one needed the juice of a whole orange while the other need only the rind of one orange. They could have given each other exactly what they needed without having to compromise on their own needs.

The lesson here is that negotiators often adopt an approach based on what they know and trust. As Maslow famously said: "If you only have a hammer, you tend to see every problem as a nail".

If negotiators are not trained in negotiation theory, they will not be able to identify where the traditional positional bargaining approach will increase conflict and hamper relations. Employers should consider negotiation skills training for management and union negotiators when they wish to maximise gains and manage inherent conflicts during collective bargaining. It may sound counter-productive to train your bargaining adversary, but trained negotiators help to achieve the goal of long-term labour peace and stability.

Sound employee relations play a critical part in managing workplace conflict. This is especially true in an industry that employs staff as diverse as highly skilled pilots and engineers to specialised yield management experts, and those requiring passenger-handling skills, such as check-in staff and cabin crew. Keeping a finger on the pulse of a company's employee relations helps to determine their level of satisfaction with conditions and work practices. Regular meetings with employees (departmental or otherwise) and trade unions are essential tools to assist managers in identifying areas of discord.

An important lesson to be learnt from recent events is never to underestimate the value of sound employee relations. The divergent needs of the parties mean that conflict is inherent in any employment relationship. But a focus on sound employee relations will allow employers actively to manage this conflict to the benefit of the organisation. What's more, adopting a more creative approach to collective bargaining may result in relations between employer and employees taking off rather than being stranded on the runway.

Johan Botes

DEPARTING BUSINESS RESCUE – A ONE-WAY TICKET TO LIQUIDATION

On 21 August 2012, 1Time Holdings Limited announced that it was placing its subsidiaries, 1Time (Pty) Ltd and Jetworx Aircraft Services (Pty) Ltd, under business rescue as a result of their being in financial distress. The two subsidiaries respectively conduct the business of 1Time Airlines and 1Time Holidays, and provide maintenance services for the 1Time fleet and other South African and African operators.

Business rescue proceedings can be initiated in one of two ways: the board of directors of the financially distressed company can resolve to place the company in business rescue; alternatively creditors, shareholders, employees or trade unions of the company may apply to the High Court for a business rescue order.

According to the published cautionary announcement, the board was of the view that reasonable prospects of rescuing the subsidiaries exist, an integral requirement of the Companies Act, No 71 of 2008 for business rescue. The question is, however: how will external factors contribute to the success or failure of business rescue proceedings?

Business rescue (as envisaged in Chapter 6 of the Companies Act) serves as an alternative mechanism to liquidation for companies on the brink of insolvency. Companies experiencing financial hardships, to the extent that they could be classified as 'financially distressed', would qualify to engage in this rather optimistic procedure.

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In fact, the Companies Act not only entitles, but indirectly obliges, the board of a company to at least consider business rescue proceedings where the company is teetering. Section 129(7) provides that if the board has reasonable grounds to believe that the company is financially distressed, and has not resolved to place the company in business rescue, the board needs to explain the situation to its stakeholders and why it hasn't opted for business rescue.

Business rescue concerns proceedings to facilitate the rehabilitation of a company that is in financial distress by providing for:

- the temporary supervision of the company and of the management of its affairs, business and property;
- a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or at least results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Business rescue plans must be objective and not speculative. The plan must provide a sustainable solution for the cause of the failure in order to enable the company to continue on a solvent basis. There must be a genuine attempt at rehabilitating the company or providing a better return to creditors and shareholders than liquidation would. Using business rescue as a delay tactic that merely postpones an inevitable liquidation does not serve this purpose.

Earlier in 2012, a 1Time aircraft reportedly made an emergency landing because of an alleged failed engine, raising issues about maintenance and an ageing charter fleet. 1Time's fleet consists of twelve McDonnel Douglas MD80's. Some of the aircraft date back to the 1980sand are far less fuel efficient than the Boeing 737-800s more commonly used by their competitors.

Legally and financially, success may be conceivable within a hypothetical vacuum, however, external factors like consumer conduct and reactions, rising input costs and marketplace competition could ultimately emerge as the defective engine to the business rescue flight.

On Friday, 2 November 2012, the 1Time Board announced that the company, after consultation with the business rescue practitioner, had no reasonable prospects of being rescued. Accordingly, 1Time filed for liquidation

The announcement of 1Time's business rescue and eventual liquidation could be considered to impact negatively on the public's perception of the airline's reliability (a particularly sensitive point in the airline industry). The recent liquidation of VelvetSky Airlines has many passengers still smarting after being left stranded at airports. 1Time passengers are now added to this vessel of grievance. While the airline hoped that the business rescue would send a message to passengers that the airline was serious about remaining in business and that it would exhaust all measures in an effort to do so, the overwhelming reality of their extensive debt and inability to pay creditors proved to be its downfall.

In addition, it is undeniable that the availability of alternative carriers to a relatively small market also cannot be ignored as a factor contributing to the failed business rescue attempt. Although 1Time boasted to be the second most preferred airline, four alternatives remain, among them two low-cost carriers namely Mango and Kulula.

It appears that a slim majority of business rescue cases, since the enactment of the Companies Act, have yielded successful turnarounds. One could be forgiven for not being overly optimistic about the prospects of success of business rescue proceedings for a struggling company.

1Time will now be added to the many companies that have taken off in business rescue and landed in liquidation.

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