

## Brexit has landed

What are the consequences for the aviation industry?



On 23 June 2016, the people of the United Kingdom (UK) made history by becoming the first Member State to vote to leave the membership of the European Union (EU).

Fast forward three and a half years and, at 23:00 GMT on 31 January 2020, the UK ceased to be a member of the EU (popularly known as 'Brexit'). An 11-month transition period then commenced, which will come to an end at 23:00 GMT on 31 December 2020.

During its 47 years of membership of the EU, the UK was a key player in establishing the existing complex framework of EU aviation law and regulation. Following its departure from the EU, the challenge for the UK was to create a new legal and regulatory structure for the UK's aviation industry. In this note, the Stephenson Harwood aviation litigation and regulation team examines this new UK framework, which will come into effect on 1 January 2021, and considers its practical impact upon the global aviation community. Matters affecting English law contracts, such as applicable law, jurisdiction, and enforcing English law judgments, are also discussed.

### Setting the scene

During the transition period, also known as the implementation period, EU law continued to apply in the UK, and the UK was treated as if it were still an EU Member State. Upon the end of the implementation period at 23:00 GMT on 31 December 2020, the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020)

(the "Withdrawal Act") acts to create a new body of UK aviation law based on the EU law which applied in the UK as at that date. This is known as the retained EU law. The Withdrawal Act was necessary to give effect to the Withdrawal Agreement between the EU27 and the UK signed in January 2020.

To ensure that the retained EU aviation law functions properly from an English law perspective, the Withdrawal Act provides for UK Statutory Instruments to correct 'deficiencies' in existing UK legislation and retained EU law as a result of Brexit (e.g. to remove redundant references to EU entities and replace these with an equivalent UK entity). These Statutory Instruments will enter into full effect on 1 January 2021, when the UK's new aviation legal and regulatory framework will be established.

From 1 January 2021 onwards, the UK is no longer constrained by EU law and may choose to amend the retained EU aviation law as it sees fit.

### Trade deal: a no-deal Brexit

Despite nearly a year of negotiations, as of 21 December 2020 there is no trade deal in place between the UK and the EU to apply from 1 January 2021 onwards. Several 'deadlines' have been missed and time is running out for a deal to be struck.

With no trade arrangements, the EU and the UK will be forced to trade on World Trade Organization (WTO) terms. This could have wide-ranging ramifications including increased costs for aircraft products as a result of import tariffs, and increased waiting times at airports for passengers travelling between the EU and the UK.

## Aviation safety

Although the UK is formally leaving the European Union Aviation Safety Agency (EASA) system, the UK's aviation safety requirements will remain substantially the same, although the UK will no longer be included in EU-level Aviation Safety Agreements. The body of EU law that governs aviation safety will be adopted more or less wholesale by the UK, with only minor amendments necessary to ensure that the legislation makes sense in a UK context, such as by substituting references to EASA for those of the UK's aviation regulator, the Civil Aviation Authority (CAA).



The majority of certificatory and oversight tasks required by the EASA regime are already undertaken by the CAA (such as issuing Part-145 approvals to MROs and Part-66 licences to engineers), but the CAA will also need to adopt responsibilities that are currently undertaken by EASA and were previously performed by the Joint Aviation Authorities (JAA). For example, the CAA will assume 'State of Design' responsibility for the UK, including responsibility for the BAe-146 design type.

The biggest change for European Economic Area (EEA) and UK-based operators will be the lack of automatic mutual recognition of approvals, certificates and licences. From 1 January 2021 onwards, CAA-issued documents will cease to be automatically recognised as valid within the EASA system. This has led EASA to adopt an early application process for applications from existing UK approval holders to obtain EASA approval to apply from 1 January 2021 onwards. This will mean that some companies and individuals will hold dual approvals: one for each of the CAA (UK) and EASA (EU) systems.

The CAA will, however, continue to recognise the vast majority of EASA-issued documents in force on 31 December 2020 as valid for up to two years from 1 January 2021. A notable exception to this is pilots' Part-FCL licences, which will need to be validated by the CAA before UK-registered aircraft can be operated.

## Licensing and air services

The CAA will continue to issue Air Operator Certificates (AOCs) and Operating Licences to UK carriers albeit under UK law rather than pursuant to Regulation (EC) 1008/2008. Although the CAA will no longer require applicants to satisfy the current ownership and control requirements (i.e. that the carrier is majority owned and controlled by an EU national), the CAA will still enforce this requirement in respect of UK nationals through a Route Licence, which is required for carriers to operate flights between the UK and third country destinations.

At present UK carriers can operate freely throughout the EASA system. As of 1 January 2021, this will no longer be the case. UK carriers will need to obtain third country approvals from EASA in order to enter EASA airspace and will also need to obtain an operating permit from each EU Member State that the carrier intends to fly to, from or across. Similarly, EASA carriers will need to obtain third country approval and an operating permit from the CAA before they are able to operate between the UK and the EU.



The UK's traffic rights with other states are currently governed by a patchwork of Air Services Agreements (ASAs) that the UK has either entered into in its own right or which the EU has agreed on its behalf. Effective from 1 January 2021 onwards, the latter category of ASAs will need to be replaced to ensure that UK carriers continue to enjoy the same traffic rights that they do now. So far, the UK has agreed ASAs with at least 10 other states, including the US and Canada, which will come into force on 1 January 2021 but no deal has yet been agreed with the EU. The EU has indicated that temporary measures will be put in place in the event of a no-deal Brexit so that flights between the EU and the UK can continue until an EU-UK agreement can be concluded. The UK has not yet reciprocated this action, which means that, in theory, EU-registered carriers may not be able to operate routes between the UK and the EU as from 1 January 2021.

## Passenger rights

Passenger rights will remain broadly the same following the UK's departure from the EU. The EU regime set out in Regulation (EC) 261/2004 ("EU261") will be transposed into UK law in an amended form so that it applies to:



- all carriers operating flights from the UK
- both EU and UK carriers operating flights from an airport in a third country to the UK
- UK carriers who operate flights from a third country to an EU Member State ("UK261").

**Under the UK regime, passengers retain the same rights in the event of denied boarding, delay and cancellation as set out in EU261, with fixed compensation amounts converted into Sterling from Euros. Passengers' rights under EU261 will be limited in respect of UK-inbound flights as EU261 will no longer apply to flights from the UK to EU.**

The rights of disabled persons and persons with reduced mobility (PRM) set out at an EU level will be retained in the UK after Brexit and remain unchanged other than having a more limited scope of application to UK territory and UK air carriers. The CAA will continue to follow the guidance set out in the European Civil Aviation Conference (ECAC) Code of Good Conduct in Ground Handling for Persons with Reduced Mobility.

The CAA will remain as the enforcement body under UK261 and in relation to PRM matters. Any relevant case law from the Court of Justice of the European Union (CJEU) in relation to EU261 and handed down before 31 December 2020 will continue to apply to the interpretation of UK261 by the CAA, English courts and ADR providers. However, from 1 January 2021 onwards, the English courts are not required to follow any new decisions from the CJEU, nor is the CAA required to follow any guidance from the European Commission on passenger rights. There is therefore a risk of inconsistencies between the interpretation of UK261 and EU261, especially regarding the meaning of 'extraordinary circumstances' which is defined by case law.

The rights and liabilities under the Montreal Convention 1999 exist in their own right as the UK is a signatory independently of the EU, and therefore these rights and liabilities are unaffected by Brexit.

## Operational aspects other than safety

The Slots Regulation (Council Regulation (EEC) 95/93, as amended) will be transposed into UK law with amendments to its scope so that it applies to UK airports, and to UK air carriers or any air carrier eligible to operate services on the route concerned under or by virtue of an agreement between the UK and another country.



More interesting is the potential for the UK to reform slots at a UK level following Brexit. The UK is in the process of putting UK legislation in place to allow for further slot waivers in the instance that the reduction in air traffic caused by the COVID-19 pandemic continues. Furthermore, there have been calls from both the UK Department for Transport and in a House of Commons Briefing Paper on Airport Slots for reforming the slot allocation process to strengthen competition and connectivity once the implementation period has ended. This has included a suggestion by UK MPs that slots are allocated based on an airline's investments in the UK and its social responsibility.

Amendments to the UK Airports (Groundhandling) Regulations 1997 (that implement Council Directive 96/67/EC in the UK) correct deficiencies arising out of the UK's exit from the EU, namely that it will no longer be appropriate for the operators of UK airports to publish an invitation to tender in the Official Journal of the European Union (now replaced by the CAA's Official Report), for the EU Commission to have an approval role for determinations by national aviation authorities granting exemptions from the rules at particular airports, or for the UK to take action against third countries where reciprocal access to their airports is not provided to suppliers of groundhandling services who are not from the UK.

Changes have been made to the UK Airport Charges Regulations 2011 (that implement Council Directive 2009/12/EC in the UK) as data from the EU Commission (Eurostat) will no longer be used to assess whether an airport is subject to the rules on airport charges.

The current EU framework of laws relating to civil aviation security that sets out the baseline aviation security standards, and is contained in Regulation (EC) 300/2008 and the EU instruments made under it, is being retained in UK law.

## Environmental

The expiry of the implementation period will see no drastic change to the carbon emissions obligations of UK aircraft operators. These will be governed by a mixture of the EU Emissions Trading System (EU-ETS) and the newly established UK Emissions Trading System (UK-ETS): the EU regime will continue to apply to all flights to the UK originating in an EEA state, while the UK scheme will apply to all UK domestic flights and all flights to EEA states originating in the UK. The two systems are very similar and this reflects a conscious decision on the part of the UK Government to ensure that UK operators will retain access to the world's largest carbon market. The largest difference between the systems is that the cap on emissions imposed by the UK scheme is currently 5% lower, but there are plans to equalise this by January 2023.



The UK will also continue to participate in the CORSIA scheme initiated by the International Civil Aviation Organization (ICAO), which means that operators could potentially face reporting obligations from several different schemes from 2021 onwards. As regards noise regulation, there will be no significant changes as the relevant EU legislation is being retained in UK law with only minor amendments to reflect the change in the relevant governing bodies.

## Air traffic management

A no-deal Brexit would not disrupt the UK's provision of Air Navigation Services (ANS) as this is subject to the international obligations set out in the Chicago Convention and its ICAO Annexes. The rights for airlines to operate air services over EU or UK territory continue via the International Air Services Transit Agreement, to which the UK is a signatory.



However, the UK will no longer participate in the EU's Single European Sky (SES). To ensure the continuity of a functioning regulatory framework for Air Traffic Management (ATM) and ANS, the UK will retain the EU-derived SES legislation for UK ATM arrangements with some important changes:

- The roles of EU bodies and functions that cannot be performed by the UK after exit, and provisions where there is already satisfactory UK legislation, are being removed.
- The legislation establishing Functional Airspace Blocks (FABs) will not be retained. Any future involvement by the UK, as a third country, in FABs would be discretionary.
- The CAA will have an increased role in overseeing the implementation of the regulatory framework, in addition to continuing the effective oversight of ANS providers. Some of the oversight functions of EASA are being given to the CAA.

Some important functions of ATM and ANS will remain unchanged:

- Eurocontrol pre-dates the SES and is not an EU body. As the UK is a signatory to the Eurocontrol Convention independently of its former EU membership, it will remain a Eurocontrol member and will continue to receive Eurocontrol's Air Traffic Flow Management (ATFM) services.
- The UK will revert to the domestic system of performance and economic regulation for en route ANS under the Transport Act 2000 that was in place prior to the SES.
- The UK will still have obligations under the Eurocontrol Multilateral Agreement on Route Charges relating to the setting and promulgation of route charges.
- As the UK's economic aviation regulator, the CAA will continue to regulate the performance of NATS, the UK's current national provider of en route air traffic services.

## Borders, freight and duty free

From 1 January 2021, the UK will no longer be part of the EU customs union and, between January and July 2021, the UK will start to impose its own import controls on goods moving from the EU.



UK passengers travelling to the EU for trips under 90 days will not require a visa but will need a passport with more than three months' validity remaining and will not be able to use e-passport gates, but EU, EEA and Swiss passengers will be able to continue using e-passport gates in the UK. Passengers travelling to and from the EU will be able to purchase duty-free goods, subject to inbound and outbound allowances.

Shipping air freight to the EU is likely to become a lengthier and more expensive process as UK airports will now have to apply 'Rest of the World' controls. The UK is, however, allowing a six-month temporary customs approval to UK airports from 1 January 2021 to allow them to build up the necessary infrastructure to deal with UK-EU air freight.

## Leasing

The new leasing arrangements provided for in UK law will not change significantly from the current arrangements set out in Regulation (EC) 1008/2008:



- UK carriers may freely operate wet-leased aircraft registered within the UK or the EU except where safety would be endangered.
- A dry lease agreement to which a UK carrier is a party or a wet lease agreement where the UK carrier is the lessee are subject to the prior approval of the CAA.
- A UK carrier wet leasing aircraft registered in a 'third country' (a country other than the UK or an EU Member State) must obtain prior approval from the CAA. This may be granted if all safety standards equivalent to those imposed by UK law are met, and the UK carrier: (i) justifies such leasing on the basis of exceptional needs; (ii) demonstrates that the leasing is necessary to satisfy seasonal capacity needs, which cannot reasonably be satisfied through leasing EU or UK registered aircraft; or (iii) demonstrates that the leasing is necessary to overcome operational difficulties and it is not possible or reasonable to lease EU or UK registered aircraft.

The situation is different from the EU perspective; following Brexit, the UK will be treated as a third country under Regulation (EC) 1008/2008. This will affect the current freedoms enjoyed by EU carriers in leasing UK-registered aircraft and in all cases would require regulator approval:

- For dry-leasing, the lessee would have to demonstrate that: (i) it had an operational need that could not be satisfied through leasing an EU-registered aircraft; (ii) the duration of the dry lease would not exceed seven months in any 12-month consecutive period; and (iii) compliance with the requirements of EU law on continuing airworthiness would be ensured. It would also have to provide copies of the intended lease documentation and all other relevant documents.
- For wet-leasing, the same 'third country' requirements as adopted by the UK into UK law would apply.

## Insurance

The minimum insurance requirements for air carriers and aircraft operators set at an EU level are being incorporated into UK law with reference to UK air carriers. The CAA will continue to ensure compliance with these minimum levels and any consequential enforcement action.



The insurance marketplace Lloyd's of London has been impacted by Brexit in several ways.

- Insurance policies where all or part of the risk underwritten is located in an EEA state or where the policyholder is an EEA resident (which therefore has relevance to aviation policies) will be moved to a Brussels-based subsidiary, Lloyd's Insurance Company S.A. (LIC) from 00:01 on 30 December 2020. This Part VII transfer of EEA policyholder business will not change the terms and conditions of any policy, except that LIC will become the insurer and data controller in respect of EEA policies. Lloyd's will continue to write new EEA business via LIC.
- Lloyd's members will no longer benefit from EU passporting provisions permitting access to the EU single market for EU authorised insurers, reinsurers and intermediaries, and to the UK market for those authorised in the EEA. Several UK (re) insurers and intermediaries have subsequently established an EEA subsidiary to act as a 'hub' for their group's EEA business within a single EEA authorisation.

- In June 2017, the Aviation Insurance Clauses Group (AICG) produced a new model EU contract continuation clause designed with aviation policies and Brexit in mind. The EU Contract Continuation Clause (AVN 121) allows for an insurance contract to be transferred to another provider if the original (re)insurer is unable to continue cover or pay out on a cross-border claim because of Brexit. In 2012, Lloyd's Market Association (LMA) issued a Euro Contract Continuity Clause (LSW1820), albeit this was in response to fears of a 'Grexit' rather than a specific response to Brexit.

## Data protection

Under the present regime, and for the purpose of combatting cross-border crime and terrorism, all carriers must submit Passenger Name Record (PNR) data to the relevant authority of any EEA state where they land or depart. From 1 January 2021 onwards, the UK will no longer be able to transfer PNR data freely to and from EEA states or collect PNR data concerning inbound flights from the EEA unless it agrees a third country PNR agreement with the EU; no such agreement is currently in place, but negotiations continue.



The EU General Data Protection Regulation ("EU GDPR") will be incorporated into UK law ("UK GDPR") and will supplement the UK Data Protection Act 2018. The key principles will remain the same with the new UK GDPR, albeit in relation to the personal data of individuals located in the UK. Likewise, the EU GDPR will continue to apply to UK controllers if they deal with the personal data of individuals located in the EEA. If a UK controller subject to the EU GDPR does not have an establishment in the EEA, it will need to appoint a representative there from 1 January 2021 onwards. Controller and processors should be aware that if a data breach occurs that affects personal data from the UK and the EEA, they may be subject to fines under both the UK and EU GDPR.

After 1 January 2021, UK aviation organisations should be able to continue freely transferring personal data to the EEA on the basis of existing adequacy decisions without the need for any extra safeguards. However, before personal data processed after 31 December 2020 can be transferred from the EEA to the UK, the European Commission will first have to determine whether the UK's data protection regime is 'adequate' otherwise any such transfers will need to take place on the basis of the EU's standard contractual clauses or binding corporate rules.

### Data protection take-aways

- ✓ **Transfer of personal data from the EEA to the UK will be restricted and organisations will need to adopt specific legal safeguards to support the lawful transfer of personal data to the UK. This would include preparing EU standard contractual clauses to ensure that data flows can continue after 31 December 2020.**
- ✓ **Appoint a UK and/or an EU representative.**
- ✓ **Nominate a new lead supervisory authority in the EU and register with the ICO for the UK.**
- ✓ **Appoint a separate data protection officer for both UK and EU.**
- ✓ **Manage potential exposure to sanctions / fines under both EU and UK regulatory enforcement regime.**

## English law contracts and judgments

Brexit will impact on English law contracts and judgments issued by the English courts in several ways.



### Applicable law

Parties' choice of governing law will be essentially unaffected by Brexit (either with a future deal after 31 December 2020 or not). On the UK side, the relevant EU Regulations (Rome I and Rome II) are being copied into UK law with minor modifications. On the EU side, the Regulations are based on a principle of 'universal application' and apply whether or not the law chosen is that of an EU Member State.

Accordingly, there is no need to change applicable law clauses unless you are changing jurisdictions, in which case it will usually be advantageous to match law to jurisdiction.

### Jurisdiction

Parties' choice of English courts, however, will be affected in the event no future deal is agreed after 31 December 2020. The key legislation ("**Brussels Recast**") only supports jurisdiction agreements in favour of courts of an EU Member State. On repeal of this legislation on 31 December 2020, neither the Brussels Recast nor the Lugano Convention 2007 (similar to the Brussels Recast but operating between the EU, Norway, Iceland and Switzerland) will be copied back into UK law. In some circumstances, therefore, courts in an EU Member State may ignore the parties' choice of jurisdiction and accept jurisdiction on the basis, for example, that the defendant is domiciled there.

To mitigate the effect of this change, the Withdrawal Agreement provides that in both the UK and EU Member States courts:

- For proceedings commenced but not concluded prior to 31 December 2020, current jurisdictional rules will apply.
- For proceedings commenced but not concluded prior to 31 December 2020, current rules on enforcement will apply.

Further, to a certain extent, the disruption caused by the repeal of the Brussels Recast may be mitigated by the UK's possible participation in the Lugano Convention and the Hague Convention on Choice of Court Agreements 2005 ("**Hague Choice of Court Convention**").

Without a future deal, where neither the Hague Choice of Court Convention nor the transitional provisions in the Withdrawal Agreement apply, jurisdiction decisions in England will revert to the common law rules. In essence, jurisdiction under the common law turns upon serving the claim form on the defendant either because the defendant is in the jurisdiction or because the courts have given permission for service to be effected out of the jurisdiction.

### Enforcement of judgments

Without a future deal, unless the transitional provisions in the Withdrawal Agreement apply (i.e. proceedings were commenced prior to the end of the implementation period on 31 December 2020), it will no longer be possible to enforce English judgments in EU Member States under EU rules. Alternative enforcement mechanisms may be provided by the Hague Choice of Court Convention, under local (national) enforcement rules, or even old (pre-EU) reciprocal enforcement treaties between the UK and certain EU Member States. Advice should be sought from local counsel.

International arbitration will be largely unaffected by Brexit, since arbitration agreements and awards are supported by the New York Convention 1958, which the UK participates in independently of the EU.

To alleviate these issues caused by Brexit, some parties are choosing arbitration over litigation in their contracts, and where the English courts are chosen, either bolstering that choice with a 'Brexit clause'<sup>1</sup> (which may or may not be effective) or turning it into a different type of clause.

Consideration may also be given to the most appropriate form of jurisdiction clause. For example, an exclusive instead of asymmetric clause may be chosen because it may be more likely to be supported by the Hague Choice of Court Convention (depending on subject matter and date). On the other hand, a non-exclusive jurisdiction clause might be chosen because it allows a dispute to be tried in an EU Member State, if appropriate, to make enforcement of the resulting judgment easier across the EU.

### Conclusion

**On 1 January 2021, the UK's aviation industry will wake up to a new, although familiar, legal and regulatory structure which will remain largely based on the current EU framework. The CAA, which is already under resourced but has been involved in a large recruitment campaign, will play a crucial and enlarged role in regulating the UK aviation industry going forward especially in safety matters following the UK's exit from EASA. What remains to be seen is the UK's willingness and desire to amend areas of aviation law and regulation going forward to allow for greater flexibility, such as in relation to slot allocation and ownership and control of airlines.**

<sup>1</sup>A 'Brexit clause' is a contract clause triggering a change in parties' rights and obligations as a result of a defined event (related to Brexit) occurring. It attempts to govern what will happen should the legal and business environment change in the future.

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BD1124-Aviation Brexit-1220