Litigating the Tragic Crash of Air France Flight 447

Litigating the Tragic (and preventable?) Crash of Air France Flight 447*

I. Facts/Questions

Air France Flight 447 ("AF447") crashed into the Atlantic with 228 people onboard while flying through severe turbulence. The Airbus A330-200 took off from Rio de Janeiro on 31 May 2009 at 19:03 local time, final destination - Paris. The last contact with the crew was a routine message to Brazilian air traffic controllers at 01:33 UTC, as the aircraft approached the edge of Brazilian radar surveillance over the Atlantic. Forty minutes later, a 4-minute long series of automated messages was received from the plane, indicating numerous air data faults and warnings. The last transmission was sent at 2:14 UTC, indicating a pressurization advisory. The exact meaning of these messages is unknown.

After the aircraft failed to contact air traffic control on either continent, a search for it was initiated. The aircraft is believed to have been lost shortly after it sent the automated messages. On 6 June, two bodies were found, along with debris, 680 miles northeast of the Fernando de Noronha islands off Brazil's northern coast. The debris included a briefcase containing an AF 447 boarding pass. 22 more bodies have since been found. Paul-Louis Arslanian, the head of the Bureau d'Enquetes et d'Analyses pour la Securite de l'Aviation Civile ("BEA"), described this incident as the worst accident in French aviation history. It was the worst commercial air accident since 2001 worldwide.

The first flight of the aircraft was on 25 February 2005, and at the time of the accident, it had flown 18,870 hours. On 17 August 2006, the aircraft was involved in a ground collision at Charles de Gaulle ("CdG") Airport. It suffered only minor damage, but underwent a major overhaul on 16 April 2009. Between 5 May and 31 May, the aircraft made 24 flights from Paris to and from 13 different worldwide destinations. The aircraft departed Galeao Int'l Airport with a scheduled arrival at CdG approximately 11 hours later. Tragically, it never arrived.

According to an aviation expert, a complete systems failure would require 100% failure of the electrical system, which did not happen because the system was still uplinking data to the maintenance facility, indicating there was some electricity on the airplane. During the 4-minute long series of automated messages, there were 5 failure reports and 19 warnings. These messages resulted from equipment failure, including navigation auto-flight, flight controls, and cabin air-handling. The warning messages indicated that the

autopilot and auto-thrust system had disengaged. At 2:12 UTC, a warning message indicated that there was a disagreement between the independent air data systems, and at 2:13 UTC, a fault message for the flight management guidance was sent. One of the two final messages transmitted at 2:14 was a warning referring to the air data reference system, the other was a "cabin vertical speed warning".

The French accident investigation agency, BEA, found that the doomed plane received inconsistent airspeed readings by different instruments as it struggled in a massive thunderstorm. Without its black box recorders, however, aviation investigators have little information to help them determine precisely what caused the crash. The BEA reported that airspeed instruments on AF447 had not been replaced as the maker recommended before the plane crashed. Airbus had recommended to all its airline customers that they replace speed-measuring instruments known as "pilot tubes" on the A330, the model used for AF447. "They hadn't been replaced" on the plane that crashed, said Mr. Arslanian. Air France declined comment.

The investigation is increasingly focused on whether these pilot tubes may have iced over, confusing speed sensors and leading computers to set the plane's speed too slow or too fast – a potentially deadly mistake in severe turbulence. The pilot tubes, protruding from the wing or fuselage of a plane, feed airspeed sensors and are heated to prevent icing. A clogged or malfunctioning tube could cause an airspeed sensor to work incorrectly and cause the computer controlling the plane to accelerate or decelerate in a potentially dangerous fashion.

A meteorological analysis of the area surrounding the flight path showed a mesoscale convective system extending to an altitude of around 50,000 feet before Flight 447 disappeared. According to commercial transport pilots familiar with this route, it is likely that the crew of AF447 was aware of the intensity of the storm in their flight path at that altitude long before actually encountering the thunderstorms. Currently, the National Transportation Safety Board is questioning Air France authorities who gave clearance to fly. Detailed analysis of the weather conditions for the flight makes it clear that the aircraft's final 12 minutes were spent "flying through significant turbulence and thunderstorm activity for about 75 miles". Satellite imagery loops clarify that the flight was coping with a series of storms, not just one. Commercial air transport crews routinely encounter this type of storm in this area. Generally, according to pilots familiar with this route, when storms of this type are encountered, a course either circumnavigating the storm or diverting to weaker portions of the storm is normally taken.

II. Legal Analysis

The Montreal Convention ("MC") of 1999 succeeded the Warsaw Convention ("WC") of 1929 and was "designed to replace the WC and all of its related instruments". Accordingly, the language in most of the MC's articles is very similar to the

corresponding articles in the WC. The MC is an international treaty ratified by the US, and it provides greater access to US courts than its predecessor.

a.) Forums

The MC provides 5 different forums under which plaintiffs may bring their claims against a carrier:

1) The domicile of the carrier;

2) Its principle place of business;

3) The place where the ticket was bought;

4) The place of destination; or

5) In the case of personal injury, the principal and permanent place of residence of the plaintiff.

The MC expanded on the 4 forums provided for in the WC. This really is what the MC is all about. Under the MC, the plaintiff's "permanent and principal residence" came into play. For example, under the WC, a US citizen who purchased a ticket abroad for an international flight that did not depart from or arrive in the US would be prohibited from suing in the US courts. The drafters of Article 33 of the MC sought to resolve that problem by adding the fifth forum.

According to Article 33, a passenger's principal and permanent residence is defined as "the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard". In defining the term "permanent abode", courts have found that that a passenger does not abandon his domicile simply by leaving it. He must move to a new location with the intent to stay there permanently.

Of course, it is unclear at this time where the victims of AF447 permanently resided. As the story unfolds, however, the fifth forum provided by the MC likely will open up US courts to their families and estates.

b.) Liability

Under the WC, passengers could seek recovery only against the actual carrier, not the contracting carrier. Only the carrier that performed the transportation could be held liable for a passenger's injury, not the carrier that only sold the passenger his ticket. The drafters of the MC attempted to remedy this shortcoming in Article 39 of the MC by providing the passenger with the option of seeking damages from either the actual carrier

or the contracting carrier. Thus, the addition of Article 39 provided passengers with the ability to seek damages from more carriers.

As does the fifth forum, contracting carrier liability under the MC provides the families and estates of AF447 with more options in pursuing damages against those at fault in the untimely loss of their loved ones.

For more information regarding the above article or to discuss litigation options in the US or a foreign jurisdiction, please contact Jon R. Fritz at +1 703.992.7647 or at jon@hfkllp.com.

**This article has been prepared by Hauswiesner Fritz King LLP for informational purposes only and does not constitute legal advice. The drafter compiled this article referencing a number of public sources, including The Gaea News, AP writers Patrick McGroarty and Bradley Brooks, and The Brief (ABA's Tort Trial & Insurance Practice Section, Spring 2009 Vol. 38 No. 3), "Recent Developments in Air Carrier Liability under the Montreal Convention", by Bartholomew J. Banino.*