

## **Aviation Intelligence Reporter June 2009**

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Once, there was a dream that aviation could be global: globally lead; globally regulated. It is a global industry after all. Reality has mugged that dream. Welcome to regionalisation – the new reality.

In all arenas you can think of we are watching regional issues take control. We are also watching regions join up. Almost globalisation by stealth, if you will.

The current hot issue in the air traffic management world, for example, is that of 'interoperability'. That means being sure that NextGen (the new proposed US ATM system) and SESAR (the European equivalent) can talk to each other. The assumption is that once that happens, other systems will be designed to talk to both of them.

In the security area we saw the American system imposed unilaterally if reflexively, but now Europe is starting to push back. Not re-screening interline passengers, by way of example. Imagine that in the US. We are surely going to die.

And it is not just in the security area of airports that this is happening. The regionally based structure of the ACI, which represents airports, is active, and CANSO, representing the air navigation service providers, admits that it too needs more regional strength. It has recently established both Asia Pacific and Middle Eastern groupings. Its European group is now five years old.

In airlines too, this new truth has seen the rise of the regional airline associations. They have always been around of course, but now, at least from the perspective of an informed outsider, they seem to be running much of the intellectual debate as well.

That may be down to two reasons. First, ICAO seems determined to disappear from view. It is impossible to think of a single thing that ICAO has recently done that it can hold up in its own defence. It is not even able to find a revision of the Rome Convention that is acceptable to any thinking person.

Second, the emergence of Europe as a single aviation entity means there are now two major global markets. Game on. What happens in Europe is important to the rest of the world. We are seeing it in the environment debate, the ownership and control debate, business aviation and now in slots as well.

That is why Aviation Advocacy is delighted to announce that from 1 June, Jonathan Kapstein is joining us, based in Brussels. Jon has had a long and distinguished career in journalism. He worked for Business Week in various locations around the world, including Brussels and in aviation, most recently, as Continental's government affairs representative in Brussels. We welcome Jon and know that it makes our ability to help you in Brussels much stronger.

For the aviation industry, Brussels will certainly be in the news this month. The Commission hosts the US delegation for further negotiations towards the second round of the EU-US Open Skies agreement. And, Europe will go to the polls. That is not all good news for air transport. We also look in depth at the recent business aviation conference EBACE, another example of Europe and the US doing things differently.

## **Business Aviation – Cliché, custom and the way forward\***

As perhaps befits a conference and exhibition devoted to business and small aircraft flying, there were a number of dog-fights going on at EBACE – the European Business Aviation Conference, held in Geneva in May. Obviously, the most important was to see which would be the most abused cliché. Yes, it was ‘opportunity, not threat’ versus ‘flying through turbulence’. So very droll.

The official title was ‘the right tool for challenging times’ but that was never going to catch on. A phrase that was heard more as EBACE continued was ‘quiet optimism’. Frankly, it might be time to paraphrase Churchill’s comment about Atlee – a modest man with much to be modest about. There was quiet optimism – and much to be quiet about.

But there were a few other more important tussles. The environment and how to bring BusAv into the European ETS was one. Slots was another. More importantly than all of these though, out on the floor of the exhibition we saw old and new business models slugging it out. There was no knock out victory for any of the business models at the conference, and as many questions as answers.

The European Business Aviation Association (EBAA) president Brian Humphries was adamant that the compliance costs for bus-av from the currently proposed ETS scheme in Europe will be a disaster. It is hard not to be sympathetic.

It is not only in the compliance area that bus-av is at a distinct disadvantage. The scheme was (over) designed with the scheduled carriers in mind. To qualify for free allowances you need to take a share from the available pool of credits on the basis of passenger numbers. Bus-av will be obliterated in the rounding.

David MacMillan from Eurocontrol was trying to sell his Pagoda modelling system as a low cost compliance solution for what the ETS scheme calls small emitters. Trouble is he was selling it to DG TREN and to Daniel Calleja, Director of air transport within DG TREN. He believes already. But as we said last month, in the internecine war between the directorates general, that is of no real help in the real world.

Nor did Calleja offer much help on other matters. After his mandatory apology for the non-appearance of Commissioner Tajini he was blunt. Polite, but to the point. The ETS is here to stay, EASA is here to stay, the Single European Sky is here to stay, he said. Straighten up and fly right.

He did not opine on slots, which was a pity. Because there was plenty of heat, if little light, there too. Business aviation is starting to realise that whilst their most effective sales pitch to customers might be that they are not part of the mainstream of aviation, in aero-political terms they might need to be more focused in that direction.

Their interests are going to be very badly affected by the slots debate if they do not engage. Bus-av operators are not really huge hoarders of grandfather rights after all. But they have legitimate views and positions in the slots debate. They need to be marshalling their arguments and their troops now.

A year ago, EBACE 2008 was heralded with triumphant headlines: high corporate profits, business globalization, emerging market growth and a weak dollar supported buoyant growth forecasts. Year on year, business aviation traffic is down at least 20-30% this year. The major airframe manufacturers have slashed jobs, and Detroit's car bosses have turned executive travellers into a laughing stock. EBACE 2009 nervously waited on the reckoning.

As it turned out, it was the 3rd largest attendance on record (OK there have not yet been 10 shows). The old-stagers took the prime spots – Jet Aviation, PrivatAir, Air Partner in the operator's hall, Embraer, Bombardier, Cessna and Gulfstream in the manufacturers'. The pavilions were multi-decked and turreted, brochures hyper-glossy, sandwiches triple-stacked. The message there was quietly optimistic business as usual.

But amongst the shanty towns of more peripheral participant stands – ranging from fabric designers and leather suppliers to the most provincial of airport authorities – several relative newcomers appeared to set out their stores for the industry's future.

There were two approaches that were noteworthy. They show up some very interesting perspectives on the current, and proposed, business models.

The first approach concerns operators. New operators, such as Vista Jet and Jet Republic, promise to bring unprecedented focus, scale and service level scope to the charter business. They have only one aircraft type, or at least one aircraft family, for example. Worryingly, this is considered an innovation in the business aviation market. Indeed, they also promise continent wide fleet access and customer service. To date, NetJets has had that field to itself.

The other perspective is that of brokerage, where Avinode and Charter X aim to bring a stubbornly antediluvian industry online. Their business model is an internet based platform, where paying members – primarily brokers – can query availability and pricing inventories for all industry members, and prompt operators to respond to their customers' ongoing flight requests.

The online charter market place is a paradox. Online marketing is absolutely standard in commercial aviation but brand new to general aviation.

Interestingly, EBACE has still not brought forward a service provider prepared to market jets online directly to users. Even the new services Charter X and Avinode work with the brokers, not the actual customers. They are bringing some transparency and efficiency to the industry, but are limiting themselves to the wholesale market. In this space it seems an Expedia or Travelocity copycat is still notable by its absence.

Generally, e-commerce penetration has barely slowed during the recession, and the tendency is towards ever higher value and more complex transactions. Yet end-user buyers of business jet flights, not normally the passenger but a PA or secretary, are largely fenced off from the end supplier. There are opportunities here.

Partly, the time warp is attributable to the complexities of a highly fragmented market and a constantly mobile inventory. But mostly it's redolent of this stubbornly old-

fashioned service industry. The service providers have never had to prioritise sales and marketing over operations and are ill-equipped to make the switch.

Neither the glossy solidity of the 'traditional' performers nor the aspirations of the arrivistes were wholly reassuring. Even in the good times, the traditional mixed business model of aircraft management, charter, brokerage and ground handling looked dislocated. Can one business combine the needs of its primary customer, the aircraft owner, with those of that aircraft's rental market? And could operators satisfy both retail and wholesale charter channels?

The EBAA recently commissioned PriceWaterhouse to produce a report on the value the business aviation sector brings to Europe. They are therefore probably keen to see the newcomer mega-fleets being introduced by Jet Republic and Vista Jet, succeed. It would be consistent with their basic argument that it's time for the business community to recognise that business aviation can offer a more effective tool than its commercial counterpart.

The EBAA commissioned report suggests that bus-av contributes 0.2% of European GDP. That is bigger than it sounds, but sadly, it was compared to other go forward, get ahead sectors like textiles, and shoes.

What was missing, to encourage the demand side, was surely not a macro but a microeconomic illustration of the business jet as a business tool. Here was the much-hyped VLJ 'taxi jet' operators' opportunity to take the limelight; the latest most airport-accessible jet type, flying at half the operating costs of traditional jets and at a per-seat price comparable with business class. In 2008 they promised they'd be at EBACE, but in 2009 they were nowhere to be found.

To be fair, a few such operators are still active, and at least a couple serious. It seems some made the right aircraft choice, raised money at the right time; have the focused taxi-jet plan and are building their operations. Clearly, they've slowed their market entry, yet it was strange that they chose not to exploit an industry show so much in need of inspiring stories.

\*This is an extract of a longer report on EBACE and what it means for business aviation, prepared by Aviation Advocacy. Copies of the full report are available on request.

## **Slots – not even the coordinators are coordinated**

Slots are shaping up as the big aviation story of the new European parliament. There are three strands that need to be watched to make sense of this.

First, the legacy carriers, in getting the Commission to suspend the use it or lose rule for this summer angered the European Parliament so much that they have insisted that the entire slot regulation be reviewed. That of itself is interesting.

At the same time, the Single Sky Committee looked at air traffic flow management. It then broadened a conversation that would historically been about air traffic control slots to all slots, including gate slots. They also insisted on involving all parts of the industry.

They then took a view that abuse of slots must be stopped. Consistently filing flight plans with creative interpretations of existing slots would see the slot lost. Flight plans filed with no slot would be rejected. Airlines are up in arms over this.

The proposed solution includes the involvement of all players in the debate, including the airports and the ANSPs. That is exactly not what the airlines wanted at all. The airlines have refused to continue discussing this until their requested legal ruling on the draft rules is resolved.

Discussing this at EBACE, the chairman of the airport coordinators – who oversee slot trading and slot coordination procedures in each country – threw a hand grenade into the room. He noted that many of the coordinators feel that slot transfers also need to involve consideration of the routing involved. In other words, slots are not an isolated airport-based timing access point – they are half of a route. If this is true, and we should note that the coordinators cannot coordinate a position on this, this will severely restrict the right of airlines, or indeed airports, to trade slots.

He was at EBACE because business aviation is an often overlooked player in the slot debate. Bus-av is often squeezed out of airports for slot reasons. That they add value to the region around the airport is irrelevant in the arcane and isolated world of slot management. And the scheduled airlines most certainly do not want to hear about it.

It all comes down to what exactly is a slot, and what are its purposes. Is it to generate connectivity for an airport, to regulate users (even if it delays new users arriving) or is there a value component? Is so, value to whom? How should these purposes be weighted?

The slot debate is now in uncharted water. Airlines, airports, ANSPs, the coordinators and business aviation are all likely to be impacted by whatever comes out of the discussions. It is time for all parties to start to think very deeply about what they want, what is achievable and what needs to be done.

## **What the European election means for aviation**

In early June Europe will go to the poll in one of the world's great tributes to the time-honoured saying that all politics is local politics. Despite increasing its power, the European Parliament, and its MEPs continue to disappear in a sea of apathy in the electorate.

It is currently expected that only a third or so of eligible voters will vote, and those that do will use the opportunity to send a very strong message to somewhere other than Brussels. Most usually it is a message directed to their national capital.

The election has already seen some bad news for aviation. Two of the MEPs most interested in air transport and most knowledgeable about it are either retiring, in the case of Georg Jarzembowski, or have been shuffled to difficult positions on the party lists. This is the case for Ulrich Stockmann. You may not always agree with these MEPs but

at least they took the time to learn and understand the issues. They will be greatly missed.

Predicting the election is going to be hard – not only because of the message the global financial crisis is inspiring the voters to send to their national capital. The number of seats is being reduced and rebalanced (mainly eastwards). A number of new parties and new alliances are also being forged.

Most predict that both the main centre right party, the EPP and the centrist ALDE will lose seats. They are likely to combine to be a major force. The socialists and the greens are likely to increase their seat count slightly. The EUL, chiefly the former Communist parties of Spain, Greece and Italy are also expected to do well.

It will take a good few months for all of this change to settle down, and for the committees to get back to serious work. In the meantime, one can be sure that the NGOs will be lobbying hard. The environment movement has already foreshadowing doing exactly that. The aviation industry will need to do so too.

## **Round three in negotiating round two of the EU-US Open Skies deal**

In the middle of June the Commission will host the US negotiating team to talk, again, about the next round of the EU-US Open Skies deal. At some levels not much has changed, and you might ask why is this negotiation happening? At other levels, much is changing. It will be fascinating.

What seems not to be changing is any mood swing in the US Congress about the limits on ownership and control. Rep Oberstar has been consistently vocal in opposing any changes in ownership. So no change there. He has strong support amongst labour, and has tried to make this debate a debate about jobs. It is of questionable logic, but touches a nerve at the moment.

Strictly, if it is the case that the US side can offer no substantive change to the ownership and control provisions, the UK has previously noted that it intends walking away. That will bring the deal down about our heads. Sources very close to the negotiation and the UK position have previously counselled against underplaying that threat. But tellingly, the nearer that moment has got, the quieter the rhetoric has become. No change there then either, you might think.

But, at the same time, the US has been a staunch supporter of the IATA Agenda for Freedom campaign. It has quietly floated a draft agreement that would in effect circumvent much of the ownership and control restrictions by mutually allowing complex ownership structures. The Agenda for Freedom team is gearing up for a renewed push soon.

Hard heads on the European side have always said that this deal is a two stage process only. This is not to be a multi-stage, multi-year process. That might be more acceptable to the US side. They need to play for time.

The US side may say that their original promise was to consider the ownership and control changes requested by Europe. They have considered it, and thus they have discharged their obligations, but if they had more time... That would turn the heat back on to the European side.

What has changed is that the global financial crisis is focusing minds like never before. If airlines are unable to obtain capital, are governments willing to nationalise them again? Are airlines too big to fail?

The second major change is that the European side is determined to isolate the US position. It recently did a much more liberal deal with Canada. It is hoped that the sight of Canadians reaping the benefit of competition and open markets will so incense the US citizenry that they will march, pitch-fork in hand on Washington. Or something.

The European strategy is good. Prove both the benefits and the fact that the current US position is the reason why the US is missing out on those benefits and try to win the debate slowly. It is a very European approach.

## **Updating the Rome Convention causes damage on the ground**

ICAO headquarters can be a strange place. Last month ICAO delegates spent two weeks in a Francophone city, in a Stalinist building, following Byzantium procedures, discussing updating Rome. No, not finally finishing the coliseum or anything like that – updating the Rome Convention on damage to third parties on the ground, caused by aircraft.

The Rome Convention has always been a bit of a sleeper in world aviation. Originally negotiated in 1952, it has never been a crowd puller. It was only after the 9/11 terrorist attacks that saw considerable damage on the ground from aircraft that it moved into focus. ICAO felt that it was time to act – urgently. So, a mere 8 years later, the new draft was presented.

In fact, two new conventions on liability for surface damage caused by aircraft were tabled: the Unlawful Interference Convention, covering damages resulting to third parties from acts of unlawful interference; and the General Risks Convention. This latter convention covers damages resulting to third parties from normal aircraft operations. It is the first that is the more interesting.

It is interesting because the unlawful interference is usually from a ‘non-State player’ such as a terrorist. That makes questions of liability, and compensation more vexing. It also focuses attention on questions such as who is ultimately responsible for aviation security.

Going into the last stages of the preparation for the diplomatic convention a framework appeared to have been agreed. The Convention would be the exclusive remedy. A compensation fund would be established, paid for by passengers and shippers, and a cap on claims imposed. There would be no punitive or ‘non-compensatory damages’.

Then, at the Legal Committee meeting to finalise the document, immediately before the diplomatic conference, there was a major change of heart on the part of the States; or a coup, depending on your perspective. The revised draft proposed that Airlines were to be strictly liable.

Industry was moved to draft a very tense paper, noting that without change, it could not support the draft convention. The diplomatic conference was turned on its head.

At the end of the day there was a compromise. That was a surprise. The exclusive remedy bit stays. The cap stays. Depending on the size of the aircraft it is up to 700 million SDR. The fund is to be established, assuming the Convention comes into force. But now, it pays out only once the liability limit that carriers can insure for is exhausted.

In other words, the States have neatly swung the airlines into the firing line. They seem to be saying that they do not want to be seen to be liable, merely a backstop when all else fails. Or, perhaps, we want you to know that we think that unlawful interference is your and your service providers' problem, not ours.

In the event of unlawful interference causing damage to third parties, the strict liability provisions of the Convention apply to the operator of the aircraft. The International Fund provides additional top-up compensation. If the damage is caused by another service supplier (a "sleeper terrorist" working as an air traffic controller, a failure of security screening, that sort of thing) the airline would continue to be strictly liable. Its insurer would be expected to pay the initial claim. The airlines would then have a right of recourse against the supplier.

But the airline has a right of recourse only to the extent that the claim could have been covered by insurance available to the supplier, on a commercially reasonable basis. What commercially reasonable might mean, and the eyes of which beholder is to be used to judge that question are not provided for in the draft convention.

The International Fund would top up the compensation when the air carrier's insurance has been exhausted and can also seek recourse from these suppliers. This additional right of recourse can be taken when that supplier has contributed to the occurrence of the event by an act or omission done recklessly and with the knowledge that damage would probably result. Only the Fund can make such a claim; victims and the airlines cannot. That right is not limited to the reasonably insurable limit.

The General Risks Convention is less controversial. The two major provisions are that the convention becomes the exclusive Remedy for seeking compensation. Compensation for punitive and non-compensatory damages will be prohibited.

It has to be said that the diplomatic conference was not well attended – only 87 States attended and only 6 of those States actually signed the Conventions on the day. Each convention is a stand-alone international instrument and States are free to ratify one, both or neither of them. States can also decide that the convention regimes apply to domestic carriage in their territory.

A total of 35 States will be required to ratify each convention before one or both can enter into force and effect. Given that IATA's initial reaction to the draft treaties (not improperly) is that they will create additional operational and financial burdens and thus they will not support them, even by ICAO's glacial standards, this is likely to take several years.

So, something that took several years to bring to this stage is such a damp squib that at the very best it will take several more to be of practical value. That, frankly, is of no practical value.

**For further advice or information on any of these issues please do not hesitate to contact us at [info@aviationadvocacy.aero](mailto:info@aviationadvocacy.aero)**

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