



McGill IASL Aviation Liability Conference

(Non-) Criminalization of Aviation Safety Regulators

Relevant issues and state practice in the EU

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Outline

- 1 Chicago Convention – The international dimension
- 2 EU certification concepts - EASA
- 3 National Regulators of OEM
- 4 Accident investigations (1, 2, 3 or 4?) =>Conflict of findings and objectives
- 5 EU product liability litigation and insurance

1 Chicago Convention – The international dimension

- Chicago Convention : State Sovereignty (Art. 1)
« The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. »
- Chicago Convention : Certificate of Airworthiness (Art. 31)
« Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered. »
- Chicago Convention : Adoption of international Standard and Procedures (Art. 37, e): airworthiness of aircraft – (Annex 8: 10th Ed. April 2005)

ART. 37: Each contracting **State** undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the **International Civil Aviation Organization** shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(...)

(e) Airworthiness of aircraft;

The first edition of Annex 8, entitled Airworthiness of Aircraft, which contained these minimum standards was adopted by the ICAO Council on 1 March 1949.

1 Chicago Convention – The international - EU dimension (ctd)

- Chicago Convention : Recognition of certificates and licenses (Art. 33)

“Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.”

- ⇒ MUTUAL RECOGNITION <-> NATIONAL CERTIFICATION LEGISLATION
- ⇒ NEED FOR MULTILATERAL COOPERATION IN CASE OF IMPORT OF FOREIGN AIRCRAFT
- ⇒ POTENTIAL STATE LIABILITY IN PUBLIC INTERNATIONAL LAW

POTENTIAL INTERNATIONAL LIABILITY <-> IMMUNITIES

- Failure to comply with Standards and Recommended Practices and absence of notification of differences

--Gradual erosion of the doctrine of State Immunity: Many jurisdictions have gradually adopted a restrictive doctrine of immunity. There is no one authoritative version of that doctrine:

- 1972 European Convention on State Immunity
- 1976 USA: Foreign Sovereign Immunities Act
- 1978 UK: State Immunity Act

COURT FOCUS MORE ON THE ACT THAN ON THE ACTOR:
PERSONAL PLEA OF THE ACTOR

THEREFORE THE PERSONAL NATURE OF THE PLEA AS BASED
ON THE STATUS AS A STATE OF THE PARTY TO THE
PROCEEDINGS IS UNDER CHALLENGE

IMMUNITY FROM EXECUTION (ENFORCEMENT) REMAINS

--> **EU Council Study: : “State Practice State Immunities” Martinus Nijhof
Publication, 2006**

2 EU certification concepts - EASA

- EU Commission – DG TREN: 27 Member States (Brussels, Belgium) °1957
(http://ec.europa.eu/transport/air_portal/)
- EASA : 27 + 4 Member States (Cologne, Germany) ° 2003
(www.easa.eu.int)
- EUROCONTROL : 38 Member States (Brussels, Belgium) ° 1960
(www.eurocontrol.int)
- ECAC : 44 Member States (Paris, France) °1955
(www.ecac-ceac.org)

There are many entities in Europe involved in the development of civil aviation. From ECAC to EASA, from ACI to AEA, from the European Commission to the national authorities, from CANSO to Eurocontrol. And many more. They are all dealing with safety: They are regulating, developing, implementing, and training in the field of safety. Moreover, each entity deals with its segment of safety activities. What is clearly missing is a total system approach to civil aviation matters. In Europe on the regulatory level EASA, the European Aviation Safety Agency is gradually becoming up and running. But it does not have all competencies and resources it needs/desires in order to fulfill that role. And it does not have all the members it should have, in order to be able to speak of a truly pan-European organization.

ECAC: Established in 1955 with legal seat in Paris. Intergovernmental organization with 42 Member States

2 EU certification concepts – EASA (Ctd)

- EASA (successor of the JAA) took over EU member State responsibilities for aircraft type certification, the environmental certification of aircraft and other aeronautical products (other responsibilities: licensing MRO, airports ...)
- is an independent executive body with a legal personality and autonomy in legal, administrative and financial matters. It adopts certification specifications and guidance material, conducts technical inspections, and issues certificates.
- The EU has not granted EASA the authority to issue legislation or regulations, but the agency assists the European Commission in developing aeronautical legislation (in consultation with users, industry etc ...)

JAA: Associated body of ECAC with seat in Hoofddorp started in 1979 as Joint Airworthiness Authorities. Its activities have been gradually transferred to EASA as of 2003. Finally the JAA was disbanded on 30 June 2009. (The JAA Training Organization will continue to deliver training courses). The so called Cyprus Arrangement, signed in 1991 was on the basis of the development of a complete basic set of European rules for the design, production, maintenance and operation of aircraft and for the licensing of persons and for the approval of organizations involved in those fields the so-called JAR. In 1991 JAA requirements were transposed in EU law through Regulation (EC) 3922/915.

EASA:

2 EU certification concepts – EASA (Ctd)

The role of the EASA in improving aviation safety:

- To assist the European Commission in preparing legislation, and support the Member States and industry in putting the legislation into effect
- To adopt certification specifications and guidance material, conduct technical inspections and issue certificates where centralised action is more efficient
- To assist the European Commission in monitoring the application of EU legislation

- ⇒ **POTENTIAL LIABILITY UNDER PUBLIC INTERNATIONAL LAW**
- ⇒ **PRIVILEGES AND IMMUNITIES OF AGENCY/OFFICERS**
- ⇒ **POTENTIAL CIVIL LIABILITY**
- ⇒ **POTENTIAL CRIMINAL LIABILITY**

LIABILITY/IMMUNITY OF EASA

Sources:

1) International agreements: see reference documents: compare with EFTA/ESA (constituent treaty of the organization; Article 288 EC TREATY

2) Agreement with Germany/Land

Distinction between: RESPONSIBILITY UNDER DOMESTIC LAW

RESPONSIBILITY UNDER INTERNATIONAL LAW

3 National Regulators of OEM

In all aviation domains the EASA is responsible for the development of common rules and for standardisation of their practical application within Member States.

Substantial tasks aviation safety relate to certification, licensing, approval and supervision of airlines, airports and other organisations. In the EU there is a distribution of tasks between the EU Commission, EASA and the national authorities, whose role will remain essential. Recently EASA's role has been extended to airport certification. Space related activities could follow soon.

NOTE: REGULATION (EC) No 1899/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation

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⇒ **Overlaps of potential liabilities and contributory negligence? Subrogation issues? Channeling of liabilities? Need for a specific EU legislation (Directive or Regulation)?**

ANALOGY WITH LIABILITY OF CLASSIFICATION SYSTEM AND THE LIABILITY OF CLASSIFICATION SOCIETIES (SEAWORTHINESS – CONTINUING SEAWORTHINESS)

-> Work done under the auspices of the C.M.I.: "Report and Panel Discussions concerning the Joint Working Group on a study of issues re Classification Societies", C.M.I. Yearbook, 1994, 228-234.

Conclusion: after 7 sessions: **It would not be useful to prepare a new international convention.** Solution: drafting Model contracts with Ship-owners and contracts with National Authorities: contractual allocation of risks and liabilities + "Statement of principles of conduct" and "model clauses"

-> EU Directive 94/57/EC: relating to common standards and recommended practices for the undertakings entrusted with inspection and supervision of ships and the activities of maritime instances.

-> IMO resolution A741: "International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management, ISM – Code)"

4 Accident investigations in the EU

- CHICAGO CONVENTION ANNEX 13 INVESTIGATION
- CRIMINAL INVESTIGATION
- POLITICAL INVESTIGATION
- INSURERS' INVESTIGATIONS
- MEDIA INVESTIGATIONS

The European Commission has the right of initiative in the area of judicial co-operation in civil and commercial matters. The Commission is responsible for devising policies and actions and implementing them. The Commission also co-operates with international organizations, such as the Hague Conference on Private International Law, the Council of Europe and the United Nations.

Entry into force of the Montreal Convention 28 May 1999 on 28 June 2004:

Article 21 Compensation in Case of Death or Injury of Passengers :

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
 - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
 - (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

5 EU product liability litigation and insurance



25 July 2000:

Montreal Convention was not in force! EASA did not exist!

Nothing new on the EU Product Liability front (national legislation)

All civil claims have been settled many years ago but the Criminal Trial will start in 2010!

BEA report (France) (Annex 13 investigation = public!)

The States of Manufacture, Design, Operator, and Registry should be formally notified of the accident. They have each a right to appoint an accredited representative. This person has a right to follow the investigation in detail and has wide-reaching powers; such as those to question witnesses and examine objects. He also has a right to appoint advisors to assist him in his work. These advisors have, under the supervision of the accredited representative, the same rights as the representative. The representative also has a right to read a draft of the final report before publication and to comment on it. If the comments are not taken into account, the investigating state has an obligation to append the comments to the final report. If the State of Occurrence does not institute an investigation, it is the responsibility of the State of Registry to do so. There are powers to delegate, by mutual consent, the whole investigation, or parts of it to another State.

Conclusion

- Regional cooperation in the EU on :
 - Certification
 - Aircraft accident investigation and reporting
 - SAFA (EU Black list of operators)
- Total lack of uniformity in the EU in respect to criminal procedures relating to aviation accidents; conflicting case law.
- Class actions are coming in Europe!
- Lessons learned from Concorde/Mount St.Odile/Uebelingen:

=>BE PREPARED FOR LONG TRIALS IF YOU CANNOT AVOID THEM
=>SPECIFIC RISK MANAGEMENT TOOLS/ADR/ALLOCATION OF RESPONSIBILITIES/ARBITRATION REDUCE OVERALL LITIGATION COSTS
=>NEW LIABILITIES? NEW TRIAL MANAGEMENT ISSUES!

The EU Council Directive (94/56/EC) mainly reflects the rules of the Chicago Convention Annex 13. However, there is one very important difference; the Directive makes it compulsory for EU Member States to make arrangements for **air accidents investigation that are independent of the state regulatory body for aviation**. The Council Directive (2003/42/EC) on accident reporting complements it. **Victims' Families associations and some media question the independence of these examinations and prefer to rely on the « independence » of the state prosecutors who are not specialized in aviation disaster litigation. Not all EU Member States have specialized police forces trained to investigate aviation claims.**

MONTREAL CONVENTION 1999: The large majority of claims can be settled within the strict liability zone. It is therefore not necessary first to find the airlines guilty, but the question now is whether the claims made are realistic. **The 100,000 strict liability zone does not entail that a compensation of this size will automatically be granted: claims must be justified. This is also the case for claims higher than 100,000 SDRs but in this case the air carriers may choose to defend themselves within the framework defined by the Montreal Convention.**

STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS

-Council Framework Decision of 15/03/2001 on the standing of victims in criminal proceedings (2001/220/JHA): class actions are coming!

-Report on the Commission of 16/02/2004 (status of legislation in the Member States)

-- IUAI