THE AVIATION LAW REVIEW

NINTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The Aviation Law Review continues to be among the most successful publications offered by The Law Review, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations that, from certain jurisdictions, flow like a river in full spate. Now that subscribers to Bloomberg Law and Lexus Nexus have access online, that of course has also significantly increased the readership.

This year I welcome a new contribution from Turkey, and extend my thanks and gratitude to all of our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication what it has succeeded in being; the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law. We are fortunate indeed that they recognise the value of the contribution they make and the value of the *Review* that it enables.

Notwithstanding the risks posed by new variants, at the time of going to press at least the threats posed by covid-19 to the world and the aviation business sector seem to be beginning to recede in some parts of the world, while others continue to languish where vaccinations have yet to become available, and where vaccine hesitancy is encouraged from dark alleys in social media up to the level of irresponsible political figures around the world. The damage wrought on aviation has been particularly severe consequent upon the grounding of airlines, the closure of airspace and the uncertainty as to when, and to where, flights may safely be taken. So far as lessors are concerned, attempts by lessees to moderate their financial exposure by reliance upon the pandemic by arguing that contracts have thereby been frustrated have been denied in several courts. As yet, no decisions have crossed my desk regarding operating leases, and decisions in respect of them will, of course, depend upon the terms of those leases. While there have been some bankruptcies, the majority of carriers have managed to cling on to financial life by virtue of reliance on governmental support, although this has not been routinely and equally available throughout the world.

In last year's preface I referenced the difficulties encountered by Boeing with regard to the damage to its reputation as well as the reputation of the Federal Aviation Administration (FAA) following the 737 MAX grounding. It was eventually, after extensive modification, declared safe to fly, but then came under renewed scrutiny six months later as a result of a potential electrical problem that led to the renewed grounding of more than 100 aeroplanes belonging to 24 airlines around the world in April 2021. The practice of the major aviation authorities around the world of accepting the type certificates of other regulators appears likely to be the most enduring victim of this debacle, with airworthiness authorities under very considerable pressure to make sure for themselves they are satisfied with the certification

of aircraft manufactured in other countries. The European Air Safety Authority has been under a particular spotlight in this respect and, according to European Aviation Safety Agency (EASA) Executive Director Patrick Ky:

> *we have a bilateral safety agreement (between EASA and the FAA) that was signed some time ago, under which the direction had been taken to reduce more and more the level of involvement of EASA on FAA-approved projects. Of course, given those tragedies for which we have seen, we have stopped this trend and we will increase our level of involvement and our independent review of US projects in order to build our own safety assessment of those projects.*

The impact of Brexit on aviation continues to be worked out, although the EU–UK agreement on the subject came into force alongside the trade agreement in 26 pages of the 1,449-page text. The agreement provides in broad measure that traffic rights between the UK and EU are preserved, cabotage rights are removed, cargo fifth freedoms are permitted allowing cargo to be on carried from one European destination to a third country, and vice versa, subject to bilateral agreements between the UK and the individual Member States of the EU. Ownership and control restrictions require that airlines must be owned and effectively controlled by nationals in their headquarters and that airlines must have their principal place of business in their own territory and hold an air operator's certificate from the competent authority in their own jurisdiction. There is an exception to this in that UK airlines are permitted to be effectively controlled by nationals of the EU, the European Economic Area or Switzerland. This ownership provision is echoed in the UK–US bilateral agreement permitting UK airlines to be owned by EU nationals while operating from the UK to the US. Clearly, the principal beneficiary of these provisions is British Airways, owned by IAG headquartered in Spain, which also owns other EU airlines.

The UK is no longer part of EASA, but there is close coordination between the Civil Aviation Authority of the UK and EASA as well as mutual recognition of licences.

The EU–UK agreement also touches upon the thorny and troublesome issue of EU 261 in that it aims for a high level of consumer protection and cooperation between the EU and the UK in this area. The European Union (Withdrawal) Act 2018 provides that regulations such as EU 261 are automatically incorporated into UK law, being known as retained EU law, unless and until they are revoked by an Act of Parliament. The regulation itself, therefore, continues to apply unless and until it is changed by the UK Parliament. That power does seem currently unlikely to be exercised among the myriad issues falling to be addressed by the newly empowered Parliament, although the opportunity may arise if the long-promised review of EU 261 in Europe is finally brought forward by the Commission for decision, when the issue could at least be debated. One can but hope that the regulation will be made more compliant with the terms of its preamble and original content before it is subjected to the legislative whims and activist fancies of the European Court of Justice (ECJ). However, decisions made up until 31 December 2020 will be retained in the UK and will be binding at least at first instance level, with limited powers given to the Court of Appeal and the Supreme Court to depart from past case law. Decisions after December 2020 will not be binding but will continue to be persuasive. The extent to which the UK will depart from ECJ case law has already been reviewed in two Court of Appeal cases, *Tuneln v. Warner* and *Lipton v. BA Cityflyer*. The Court of Appeal held that the power to depart from ECJ decisions should be used as an exception only, and that in the first case actually applied to a post-Brexit ECJ ruling in reaching its decision. In *Lipton*, the Court set out a list of matters to be considered

in determining its approach. These early decisions seem at least to indicate that the Court of Appeal and Supreme Court will require significant reasons to exercise their inherent power to depart from the law promulgated by the ECJ.

In the meantime it is clear that the Court of Justice of the European Union continues on its rampage against the safety, security and financial viability of aviation by its latest decision on the subject in the case of *Air Help v. SAS* of 23 March 2021. In this case, the Court has held, against the recommendation of its Attorney General, that a strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an extraordinary circumstance capable of releasing the airline from its obligation to pay compensation for cancellation or non-delay in respect of the flights concerned. The Court relied on its earlier decisions to the effect that in order to qualify as extraordinary, the event must not be inherent in the normal exercise of an air carrier's activity, and must be beyond its actual control, because the regulation has to be strictly interpreted to afford a high level of protection for air passengers and because the exemption from the obligation to pay compensation is a derogation from the principal that air passengers have the right to compensation.

As so frequently in the past, the Court has made these comments by ignoring some elements of the preamble to the regulation in favour of others, and misinterpreting other elements of the preamble so as to make the payment of pocket money to passengers take priority over the obligation imposed on Member States to procure general compliance by air carriers with the regulation and appoint an appropriate body to carry out enforcement tasks. In other words, states should make sure operators do not wrongly delay or cancel flights, with compensation being paid in the limited circumstances set out in the regulation, and not as a device to punish errant carriers or to jeopardise their financial viability. It cannot be said too often that the payment of compensation does not protect passengers and can be carried to extremes and, as in this case, actually jeopardise connectivity and safety.

In an act of particular judicial gymnastics in its *SAS* decision, the ECJ held that Preamble 14, which specifically states that extraordinary circumstances 'may, in particular, occur in cases of . . . strikes that affect the operation of an operating air carrier', did not assist SAS in the current case because a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity and that, therefore, a strike whose objective is limited to obtaining an increase in pilots' salaries is an event that is inherent in the normal exercise of that undertaking's activity. The Court also, extraordinarily, held that 'since a strike is foreseeable for the employer, it retains control over events in as much as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences'. In a continuing feat of legerdemain, the Court held that just because a carrier may have to pay compensation to passengers for cancellations or delays does not mean that the carrier has to accept without discussion strikers' demands. The air carrier 'remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners'. The effect of the decision, of course, is to hand to unions a weapon in their armoury of almost nuclear capacity to destroy the undertaking altogether unless its demands are met, since failure to comply leads to what are increasingly becoming ruinous levels of obligations to pay 'compensation' to passengers in respect of cancelled flights. It is becoming increasingly difficult to escape the conclusion that the ECJ has a covert purpose of the destruction of the airline industry in Europe, but it is hopefully difficult to imagine that this decision is one that the UK Court of Appeal would follow without demur.

Airlines in Europe need to stand together to resist the continued assault of the regulation on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

Once again, many thanks to all our contributors to this volume including, in particular, those who have joined the group to make *The Aviation Law Review* the go-to resource.

Sean Gates
Gates Aviation Ltd
London
July 2021

Chapter 23

SWITZERLAND

Heinrich Hempel and Daniel Maritz[1]

I INTRODUCTION

Switzerland is a democratic state with a modern society and an advanced and open economy. Even though geographically in the centre of Europe, it is not a member of the European Union or the European Economic Area, but it is a member of the European Free Trade Association (EFTA). The EU and its Member States are the most important trading partners of Switzerland. Therefore, close cooperation with the EU and its Member States is instrumental for Swiss politics and its economy. Cooperation was institutionalised with the bilateral agreements between Switzerland and the EU, which cover various areas, including air transport.[2]

Aviation plays an important role in Switzerland. Zurich Airport (2019: 31.5 million passengers; 2020: 8.3 million passengers) is one of the major European airports and a hub for Swiss International Airlines Ltd, the Swiss national carrier that is part of Lufthansa Group and a member of Star Alliance. The two other national airports are Geneva (2019: 17.9 million passengers; 2020: 5.6 million passengers) and Basel-Mulhouse-Freiburg, the tri-national EuroAirport on French territory (2019: 9.1 million passengers; 2020: 2.6 million passengers). As in most other countries, air traffic has drastically fallen since March 2020 due to the measures and travel restrictions imposed by governments worldwide to combat the covid-19 pandemic (see Section XI).

Civil aviation is governed by the Swiss Aviation Act[3] and numerous implementing ordinances. Switzerland is party to most international treaties in the field of aviation, including the Chicago Convention of 1944, the Geneva Convention of 1948, the Warsaw Convention of 1929 and the Montreal Convention of 1999. Switzerland has also signed the Cape Town Convention of 2001; however, it is not yet in force. Based on the EU–CH Agreement on Air Transport, aviation-related EU legislation is also applicable in Switzerland; usually, European law is implemented a few months or a few years later than in the EU.

II LEGAL FRAMEWORK FOR LIABILITY

Liability for carriage is shaped by international law. Switzerland is a party to the Montreal and Warsaw Conventions. Based on the EU–CH Agreement on Air Transport, Regulation (EC) No. 2027/97, as amended by Regulation (EC) No. 889/2002, Regulation (EC) No. 785/2004

1 Heinrich Hempel and Daniel Maritz are partners at Schiller Rechtsanwälte AG.

2 Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999 (SR 0.748.127.192.68; the EU–CH Agreement on Air Transport).

3 Federal Act on Aviation of 21 December 1948 (SR 748.0; the Aviation Act).

and Regulation (EC) No. 261/2004 are applicable also in Switzerland. To the extent liability for carriage does not fall within the scope of these international treaties and EU regulations, liability has to be determined either based on the Air Transport Ordinance (see below) or in accordance with general legislation on liability.

The Aviation Act contains special provisions for damage caused by aircraft in flight to persons and objects on the ground. Where no special legislation has been adopted, aviation is subject to the same legislation as all other industries.

i International carriage

Switzerland is a party to the Warsaw and Montreal Conventions. Based on Regulation (EC) No. 2027/97, as amended by Regulation (EC) No. 889/2002, the liability for international carriage by Swiss or EU carriers for passengers and baggage has to be determined in accordance with the Montreal Convention even if this treaty is not applicable. The carriers are also obligated to make an advance payment as provided by Article 5 of this Regulation. Issues not covered by the Warsaw or Montreal Convention or the Regulation, such as, for instance, the validity of contract or the calculation of damages, have to be determined in accordance with general contract or tort law.

ii Internal and other non-convention carriage

Switzerland also implemented the Montreal system of liability into its national legislation by enacting the Air Transport Ordinance[4] when the Montreal Convention was ratified. The Ordinance applies to certain internal and other flights not covered by the international treaties or EU law.

In substance, liability under the Air Transport Ordinance is more or less the same as under the Montreal Convention. However, certain differences exist. In particular, the Ordinance does not stipulate a place of jurisdiction. Therefore, certain actions based on the Ordinance may not be brought before the court at the domicile of the passenger (see Article 33(2) of the Montreal Convention for claims thereunder).

iii General aviation regulation

Carriage by aircraft for reward as well as carriage by an air transport undertaking (for reward or gratuitously) either fall under the Montreal Convention or Regulation (EC) No. 2027/97 (international carriage or carriage by an EU carrier), or under the Air Transport Ordinance (national carriage or international carriage not covered by the Montreal Convention or Regulation (EC) No. 2027/97).

In cases of gratuitous carriage by other, non-licensed carriers, the above legal instruments do not apply. Liability has to be determined in accordance with general contract and tort law that is found in the Code of Obligations.[5] If the flight is a mere courtesy to the passenger, there may be no contract and liability may have to be based on tort.[6] A reduced standard

4 Ordinance on Air Transport of 17 August 2005 (SR 748.411; the Air Transport Ordinance). The competence to enact such an important piece of legislation in an ordinance (enacted by the government body), and not in a federal act (enacted by parliament), is provided for in Article 75 of the Aviation Act. This provision, however, constrains the government to use the applicable international treaties as guidance.

5 Federal Act on the Amendment of the Swiss Civil Code (Part Five: the Code of Obligations) of 30 March 1911 (SR 220; the Code of Obligations).

6 BGE 137 III 539.

of care applies, but there is no limitation of the liability amount in statutory provisions. The parties may by agreement limit the liability within the limits provided by the Code of Obligations (in particular, according to Article 100(1) of the Code of Obligations, the exclusion for unlawful intent and gross negligence is deemed void). For this reason, private pilots often require a reward and issue a document of carriage so the Air Transport Ordinance applies.

The above system regarding the liability of carriers to passengers (and transported goods) applies to all types of aircraft, such as aeroplanes, helicopters, airships, balloons, 'ecolight' aircraft, etc.

Further, Article 64 et seq. of the Aviation Act provide for an unlimited strict no-fault liability of the operator for any damage to persons and objects on the ground caused by an aircraft in flight or by any person or object falling therefrom. 'In flight' encompasses, according to Article 64(3) of the Aviation Act, the time from the beginning of the departure manoeuvre until the end of the landing manoeuvre, thus excluding, for example, damage caused during taxiing. In the event of a collision of two or more aircraft, the operators of these aircraft are jointly and severally liable to the claimant (the internal distribution of the damage follows the ordinary rules on recovery between jointly liable parties). The Aviation Act does not provide for an exclusion or reduction of liability if a third party or an act of God was the cause of the accident. However, for damage caused by a person on board the aircraft and not being a crew member, the operator's liability is limited to the minimum insurance to be taken (see Section V). In the event of an act of terrorism by a person who is not on board the aircraft, it is arguable that, by analogy, the same liability limitation applies.

iv Passenger rights

Switzerland has not enacted specific legislation concerning passenger rights but, based on the EU–CH Agreement on Air Transport, Regulation (EC) No. 261/2004 is applicable in Switzerland.[7] According to the introductory comments in the Annex of the Agreement listing the applicable EU acts, references to EU Member States in such acts shall, for the purpose of the Agreement, be understood to equally apply to Switzerland, and the term community air carrier shall include an air carrier having its principal place of business in Switzerland. Further, Article 1(2) of the Agreement provides that acts mentioned in the Annex of the Agreement shall be interpreted in conformity with decisions of the Court of Justice of the European Union (CJEU) and the European Commission rendered prior to the date of signature of the Agreement (21 June 1999), and decisions rendered after that date shall be communicated to Switzerland and their implications shall be determined by the Joint Committee, which is composed of Swiss and EU representatives, to ensure the proper implementation of the EU–CH Agreement on Air Transport. The scope and content of these provisions give rise to several questions; in particular the following.

The EU–CH Agreement on Air Transport grants traffic rights to EU carriers and Swiss carriers between any point in Switzerland and any point in the EU (Article 15 of the Agreement). In particular, this limitation of the territorial scope of the Agreement gives rise to the argument that Regulation (EC) 261/2004 is not applicable to flights from Switzerland to a country outside the EU or EFTA. A Basel court declined an application for flights to and

7 AS 2006 5987.

from third countries. The German Federal Court of Justice, in its decision of 9 April 2013,[8] submitted this question to the CJEU, but the proceedings were completed without addressing the issue.

Decisions of the CJEU rendered after the adoption of Regulation (EC) No. 261/2004 were not officially communicated to Switzerland. Therefore, the direct application particularly of the following judgments in Switzerland is questionable: *Wallentin-Hermann*,[9] where the CJEU applied a restrictive interpretation of extraordinary circumstances under Article 5(3) of the Regulation; and *Sturgeon*[10] and related decisions, in which the CJEU introduced an obligation to pay compensation in the event of a delay of three hours or more. The Swiss courts are not bound by these decisions, but they are, of course, free to follow them. The District Court of Bulach confirmed this in a decision of 2 February 2016. Based on an interpretation of Regulation (EC) No. 261/2004 in accordance with the standards applicable in Switzerland, the Court held that passengers are not entitled to compensation in the event of delay.

v Other legislation

The aviation sector is submitted to the same general liability rules applicable to all businesses in Switzerland. However, specific provisions for the aviation sector apply based on the EU–CH Agreement on Air Transport. Particularly, EU competition law applies to all cases where trade between the EU and Switzerland may be affected (see Section VI for more details). In addition, product liability law may grant a legal basis for claims against manufacturers or importers of aircraft (see Section VIII.iii).

III LICENSING OF OPERATIONS

i Licensed activities

Commercial carriage of passengers or cargo requires a licence from the Swiss civil aviation authority, the Federal Office for Civil Aviation (FOCA).[11] Air transport is deemed commercial if it is offered to an undefined number of customers and any form of remuneration has to be paid to cover the costs of use of the aircraft, the fuel, airport and air transport services.[12] All flights of licensed operators are considered commercial.[13]

Aviation law distinguishes between services provided by national carriers and services provided by foreign carriers. A national carrier may fly within the Swiss territory as well as to and from foreign destinations to the extent permitted under the bilateral agreements of Switzerland with other states. A foreign carrier may serve only the routes between Switzerland and its home state as provided by such bilateral agreements of Switzerland with the home state.

8 Judgment of the Federal Court of Justice of Germany of 9 April 2013, Case X ZR 105/12.

9 Judgment of the CJEU of 22 December 2008, *Wallentin-Hermann v. Alitalia*, case C-549/07.

10 Judgment of the CJEU of 19 November 2009, *Sturgeon et al. v. Condor et al.*, joined cases C/402-07 and C/432-07.

11 Article 27(1) of the Aviation Act.

12 Article 100(1) of the Ordinance on Aviation of 14 November 1973 (SR 748.01; the Aviation Ordinance).

13 Article 100(2) of the Aviation Ordinance.

A national carrier must meet the following requirements[14] (for foreign carriers, see Section III.iii):

a the undertaking meets the ownership requirements described in Section III.ii;

b the undertaking has the technical qualification and organisation required to ensure the safe and, to the extent feasible, ecological operation of aircraft. In particular, it must hold an air operator certificate (AOC) covering the services to be rendered. The AOC is issued by the FOCA in accordance with the European Operation Regulation[15] and the International Civil Aviation Organization (ICAO) five phases model;

c the undertaking disposes of the number of aircraft required for the intended use, and such aircraft are registered in Switzerland or in another state that, based on a bilateral agreement, allows use equal to that of the Swiss registration. At least one aircraft must be owned by the undertaking or leased for a period of six or more months;

d the undertaking has the right to use the airport at the place of operation to the extent required to provide the services;

e the undertaking has sufficient insurance cover;

f the aircraft meet the actual technical standards – at least the internationally agreed minimal standards – regarding noise and pollution; and

g operators of aeroplanes and helicopters are required to introduce and maintain a safety management system in accordance with the ICAO standards and recommended practices.

Undertakings that operate balloons, gliders or special categories of aircraft are exempt from some of the above requirements. Special licences may be granted for short-term operations or a limited number of flights.

Pursuant to Article 28 of the Aviation Act, commercial carriage of passengers or cargo on a specific route additionally requires an authorisation by the FOCA. However, this does not apply to destinations in the EU and EFTA. Based on the EU–CH Agreement on Air Transport and Regulation (EC) No. 1008/2008, every Swiss and EU or EFTA carrier may serve any routes between Switzerland on the one hand and EU and EFTA Member States on the other. Swiss carriers may also serve routes between EU and EFTA Member States. The authorisation to serve routes between Switzerland and non-EU or EFTA States on a regular basis is granted to national carriers for a limited period only. The operator requires an operating licence in accordance with Article 27 of the Aviation Act. The FOCA has to take into account the public interest and how the national airports are served. In its application the operator has to submit route plans, timetables, tariffs, information about the aircraft that shall be used, cooperation agreements with other airlines and information about the commercial aspects of the operation. Other airlines that could operate the same route are involved in the proceedings. For its decision, the FOCA will take into account the effect on competition as well as economic and ecological aspects. The maximum term for the authorisation is eight years, but it is renewable. The authorisation can be transferred to another operator with the consent of the FOCA.

14 Article 27 of the Aviation Act and Article 103 et seq. of the Aviation Ordinance.

15 Council Regulation (EEC) 3922/91.

ii Ownership rules

A national carrier is a company with domicile in Switzerland. It must be registered in the Swiss commercial registry, have the objective to commercially operate aircraft and be owned and controlled by a majority of Swiss citizens or companies controlled by a majority of Swiss citizens. The EU–CH Agreement on Air Transport provides, however, that EU and Swiss companies shall be treated alike. This means that a national carrier may also be owned and controlled by a majority of Swiss or EU or EFTA companies or citizens.

This only applies, however, to the relation between Switzerland and EU or EFTA States. With respect to the relation between Switzerland and non-EU or EFTA States, the respective bilateral agreements with the non-EU or EFTA states define the nationality requirement. While Switzerland favours liberalised definitions that focus on the place of business and also allow ownership and control by foreign individuals or companies, many bilateral agreements rely on traditional strict ownership requirements.

The undertaking must further be economically sound and have a reliable accounting system. The undertaking has to demonstrate that it can likely meet its obligations for a period of 24 months from the start of operations and meet its fixed and operational costs incurred by operations according to its business plan for a period of three months from the start of operations without taking into account any income from its operations.

iii Foreign carriers

Undertakings with a domicile outside Switzerland that commercially carry passengers or cargo to and from Switzerland require an operating licence unless an international agreement provides for an exemption. Such an exemption can be found in particular in the EU–CH Agreement on Air Transport and the agreement on air transport of the EFTA states.[16] EU and EFTA operating licences are accepted in Switzerland (as are Swiss operating licences in EU and EFTA Member States).

A non-EU or EFTA undertaking will be granted the operating licence if:

a it holds a licence of its home state for the international carriage of passengers and cargo;
b it is under the effective supervision by the authorities of its home state in technical and organisational respects;
c it can ensure the safe and, to the extent feasible, ecological operation of aircraft in accordance with internationally agreed standards;
d the grant of the licence does not violate essential Swiss interests;
e the home state of the undertaking grants licences to Swiss carriers to the same extent as Switzerland does to the carriers of such a state;
f liability for damages on the ground is covered; and
g there is sufficient insurance cover for other third-party liability.

As national carriers, foreign carriers, including EU and EFTA carriers, also require an authorisation for commercial carriage of passengers or cargo on a specific route to and from non-EU and EFTA states. Such authorisations will be granted in accordance with the bilateral agreements of Switzerland with the non-EU or EFTA states. The FOCA is also free to grant an authorisation if there is no basis in a bilateral agreement.

16 Annex Q (Air transport) to the Convention establishing the European Free Trade Association of 4 January 1960 (SR 0.632.31).

IV SAFETY

Based on the EU–CH Agreement on Air Transport, the EU regulations on safety are also applicable in Switzerland. The Swiss authorities strive for the highest possible safety standards in accordance with EU legislation and ICAO standards and recommended practices.

V INSURANCE

Based on the EU–CH Agreement on Air Transport, revised Regulation (EC) No. 785/2004 is also applicable in Switzerland. In accordance with this Regulation, air carriers and aircraft operators flying within, into, out of or over Swiss territory have to meet the following levels of insurance:

a Insurance in respect of the operator's liability for damage caused by an aircraft in flight to persons and objects on the ground: the minimum insurance cover depends on the takeoff weight. It starts at 750,000 special drawing rights (SDR) for a takeoff weight of below 500 kilogrammes and reaches 700 million SDR for a takeoff weight of 500 tonnes or more. The Swiss authorities may request evidence of compliance in the event of overflights by non-EU and EFTA carriers or aircraft registered outside the EU or EFTA as well as with respect to stops by such aircraft for non-traffic purposes.

b Insurance in respect of liability for passengers, baggage and cargo: the minimum insurance cover shall be 250,000 SDR per passenger for bodily injury (100,000 SDR in respect of non-commercial operations by aircraft with a minimum takeoff weight of 2,700 kilogrammes or less), 1,131 SDR per passenger for baggage in commercial operations and 19 SDR per kilogramme for cargo in commercial operations. These requirements do not apply to flights over Swiss territory carried out by non-EU or EFTA carriers or by operators using aircraft registered outside the territory of the EU or EFTA.

The law does not include any provisions on how the insurance cover has to be evidenced.

VI COMPETITION

Article 8 et seq. of the EU–CH Agreement on Air Transport prohibit agreements and concerted practices between undertakings with anticompetitive effects as well as the abuse of a dominant position. According to these provisions, such anticompetitive behaviour shall be controlled by the EU institutions in accordance with Community legislation, taking into account the need for close cooperation between EU and Swiss authorities. Only anticompetitive behaviour that exclusively affects trade within Switzerland shall be subject to Swiss law and remain under the competence of the Swiss authorities. Thus, standards of EU competition law apply also in the relation between Switzerland and the EU.

Swiss competition law prohibits agreements or conduct that eliminate or substantially restrict trade without having beneficial economic effects. Heavy fines may be imposed on undertakings – not, however, on individuals – for anticompetitive behaviour. Swiss competition law further provides for merger control.

Cooperation agreements will usually affect trade in the EU and therefore be controlled by the EU authorities in accordance with EU law. There is no case law as to merely national cooperation agreements concerning aviation.

VII WRONGFUL DEATH

In the event of wrongful death, the ensuing expenses, in particular the funeral expenses, shall be compensated (Article 45 of the Code of Obligations). Persons who lose their source of support are entitled to compensation for this loss, including household damage (i.e., compensation for the loss of the deceased's contribution to the daily chores). Further, persons close to the deceased – spouse, children, parents – are entitled to compensation for pain and suffering (moral damage) up to an amount of 50,000 Swiss francs. See Section VIII.iv.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Usually, in liability cases the parties first try to reach an amicable solution. If the dispute cannot be settled out of court, the claimant may bring an action against the defendants before the competent court. The proceedings are governed by the Civil Procedure Code.[17]

In principle, the ordinary civil courts are competent for liability disputes. However, before the litigation starts, usually an attempt at conciliation has to be made before a conciliation authority. In the four cantons, Aargau, Berne, Zurich and St Gallen, however, specialised commercial courts are competent to adjudicate commercial cases (e.g., disputes between insurers) if the value in dispute is at least 30,000 Swiss francs. In these cases, no conciliation proceedings will be held. Parties can bring the case before an arbitral tribunal if they have concluded an arbitration agreement.

The limitation periods for bringing the claim to court are part of substantive law. Liability claims under a contract of carriage against the carrier have to be brought within a period of two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Article 35(1) of the Montreal Convention; Article 14 of the Air Transport Ordinance). This two-year limitation cannot be extended, thus the claim is forfeited if the action is not brought before the expiration of this limitation.

Claims against the operator for personal or property damage on the ground caused by an aircraft in flight have to be brought within three years from the date when the claimant could have knowledge of the damage and the liable party, and in any event no later than 10 years after the accident (20 years in cases of death or personal injury). This statutory limitation period can be waived by the defendant or interrupted by debt enforcement proceedings. In addition, any time limitation may be met by an application for conciliation (if applicable), or submission of a statement of claim to a court or arbitral tribunal in due time.

The plaintiff can bring an action for compensation against one or more of jointly and severally liable defendants, for example against the carrier (for breach of contract), against the manufacturer (for product liability) or against a third party (action in tort). However, there is no direct claim against the liability insurer of the carrier. The plaintiff can choose to sue only one or more of the possible defendants (for a joinder of actions, the court must have jurisdiction against all defendants under the applicable jurisdictional provisions). A party (usually the defendant) may notify a third party of the dispute if, in the event of being unsuccessful, the notifying party might take recourse against a third party (third-party

17 Swiss Civil Procedure Code of 19 December 2008 (SR 272).

notice). In addition, the notifying party may bring an action against the notified third party in the court that is dealing with the main action in the event that the notifying party is unsuccessful (third-party action).

Where two or more parties are jointly and severally liable, recovery can be sought based on Article 50 et seq. of the Code of Obligations. The damage has to be borne first by the party liable in tort, second by the party in breach of contractual obligation and third by the party deemed liable by statutory provision. A recent decision of the Federal Supreme Court lifted the barriers to recovery by insurers (see Section XI).

Civil litigation may be complemented by criminal prosecution, for example against a pilot for bodily injury caused by negligence, or against any person breaching a generally accepted rule of transportation and endangering persons or goods on the ground (Article 90 of the Aviation Act). Further, criminal sanctions may be imposed on the operator in the event of repeated or serious breach of obligations towards passengers under international treaties (Article 91(4) of the Aviation Act). This provision was adopted in particular to address breaches of Regulation (EC) No. 261/2004. In certain instances, for example in the event of bodily injury, civil claims may be brought in the criminal proceedings.

ii Carriers' liability towards passengers and third parties

The court forms its opinion based on its free assessment of the evidence (Article 157 of the Civil Procedure Code). It is up to the parties to present to the court the facts in support of their case and submit the related evidence (Article 55(1) of the Civil Procedure Code). According to Article 8 of the Civil Code,[18] the burden of proving the existence of an alleged fact rests on the party deriving rights from that fact. Therefore, it is, in principle, up to the plaintiff to assert the relevant facts, and to establish them, so that the court may award compensation.

The liability of carriers under the Montreal Convention and under the Air Transport Ordinance is, in principle, a liability for breach of contractual obligations. The plaintiff has to prove the damage that occurred because of an accident on board or during embarking or disembarking that caused the death or bodily injury of a passenger. The carrier is liable for personal injury of passengers up to the amount of 113,300 SDR irrespective of whether the carrier committed a fault. If the plaintiff claims higher compensation, the carrier is liable for damages exceeding the mentioned limits unless it proves that the damage was not the result of the negligence or other wrongful act or omission of the carrier or its servants or agents; or that such damage was solely the result of the negligence or other wrongful act or omission of a third party.

Claims for damage to persons and objects on the ground caused by an aircraft in flight are based on a strict liability of the operator (no fault of the operator is required).

In principle, Swiss law does not limit the liability. For certain exceptions, see Section II.iii.

18 Swiss Civil Code of 10 December 1907 (SR 210).

iii Product liability

The Swiss Product Liability Act[19] provides for an extra-contractual strict liability of the manufacturer or importer for damage caused by product defects. The Product Liability Act is largely in line with Directive 85/374/EEC of 25 July 1985 concerning liability for defective products.

The Product Liability Act particularly provides for compensation in personal injury cases. The amount of compensation in the event of death or bodily injury and the possible amounts for moral damage are established according to the relevant provisions in the Code of Obligations (see Section VIII.iv). Damage to property only entitles the claimant to compensation if the product is ordinarily intended for private use or consumption. The commercial user of an aircraft, for example, is not entitled to bring a claim under the Product Liability Act against the manufacturer or importer of the aircraft. In the event of damage to commercially used products, the claimant may possibly base a claim alternatively on Article 55 of the Code of Obligations (liability of the employer for damage caused by its employees or ancillary staff).

According to Article 7 of the Product Liability Act, several parties liable for damage caused by a defective product are jointly and severally liable. According to leading authors in Switzerland, the joint and several liability also applies if the other party is liable on a legal basis other than the Product Liability Act. Therefore, in the event of an air accident, the manufacturer and the carrier may be jointly and severally liable. The internal distribution of the damage will be established in accordance with Article 51 of the Code of Obligations (see Section VIII.i).

The statutory limitation period for product liability claims is three years from the date when the party suffering harm has or should have knowledge of the damage and the liable party; in any case, the claim expires 10 years after the date when the product was put into circulation (Articles 9 and 10 of the Product Liability Act).

iv Compensation

In principle, Swiss law requires that the claimant substantiates and proves the damage, the unlawfulness of the damage, a sufficient causal link between damaging conduct and damage and (if required by the respective legal basis), negligence or other wrongful conduct of the wrongdoer. These requirements will be elaborated in further detail below.

Swiss law is based on the principle that the economic damage has to be compensated, neither more nor less. Compensation will be awarded if and to the extent the unlawful conduct caused a reduction of assets or an increase of debts. Damages, therefore, are established as the difference between the actual financial situation of the claimant as a consequence of the incident on the one hand, and the hypothetical financial situation without the incident on the other. In this regard, Swiss law accepts various compensable types of damage. In personal injury cases, damage owing to death or bodily injury includes any financial consequences of the death or injury; for example, funeral costs, medical costs and loss of income. In addition, reasonable and adequate costs for legal representation have to be compensated. Finally, damage interest of 5 per cent has to be paid for the time between the date when the damage occurred until the date of payment. An abstract loss of use without causing costs will normally not qualify for compensation. For example, frustration owing to the impossibility

19 Federal Act on Product Liability of 18 June 1993 (SR 221.112.944; the Product Liability Act).

of going on vacation does not give rise to a claim for compensation. As an exception to the calculation and compensation of the actual loss or damage, the household damage can be calculated abstractly. Where a person can no longer, or only to a reduced extent, do the household chores because of injury or death, the damage will be established irrespective of whether there actually is a financial damage. It suffices to establish what a substitute would cost. The household damage is usually calculated based on statistical data with regard to a person of the same gender, similar age and family situation (number of people in the same household) as the deceased or injured.

Liability requires an unlawful act or omission. Any violation of the human body or integrity and any damage to property is unlawful, and all damage that is the consequence of such a violation is to be compensated. The causation of mere financial damage is unlawful only if a contract or a specific legal provision prohibiting such conduct is violated. This distinction may be relevant in cases where a party is only indirectly damaged because of the damage of another party, for example the employer in the case of bodily injury to its employee, or a creditor in the case of the death of his or her debtor. In principle, the (third) party suffering indirect damage is not entitled to compensation. There is one exception provided in Article 45(3) of the Code of Obligations: where somebody is deprived of his or her means of support as a result of homicide, he or she is entitled to compensation for that loss. Such damages owing to loss of support are often at stake in cases of death of a passenger in an aircraft accident, particularly for claims of the widow or the widower and the children of the deceased.

In addition, there must be a sufficient causal link between the unlawful conduct and the damage. Acts of God, gross contributory negligence of the injured or gross contributory negligence of a third party may exclude liability. In the event of contributory negligence of the injured, the compensation may be reduced. In cases of strict liability (such as the liability of the operator for damage caused by an aircraft in flight on the ground), even gross negligence of the injured or of third parties does not exclude liability.

In most aviation law cases, the liability of the carrier is irrespective of the question of whether the carrier is at fault. This is certainly true for claims of the injured based on strict liability under Article 64 of the Aviation Act (see Section II.iii). In personal injury cases concerning passengers, the question of fault may (only) be of relevance for damage exceeding the amounts stipulated in Article 21 of the Montreal Convention and Article 7 of the Air Transport Ordinance: if such damage was not the result of the negligence or other wrongful act or omission of the carrier or its servants or agents; or if such damage was solely the result of the negligence or other wrongful act or omission of a third party.

If liability is established according to the above, there may be an additional claim for moral damages. In cases of death or personal injury, the court may award the victim of personal injury or the dependants an appropriate sum. The amounts to be awarded depend on the relevant circumstances in the individual case. In cases of serious bodily injury leading to invalidity, the injured may be entitled to moral damages of up to 200,000 Swiss francs. The next of kin are also entitled to moral damages. For example, a widow may be entitled to approximately 50,000 Swiss francs in the event of the death of her husband, similarly in the event of serious bodily injury of the husband; a child to 30,000 Swiss francs in the event of the death of the child's father or mother. In addition, unmarried partners are entitled to claim moral damages in the event of the death or serious bodily injury of their partner.

In personal injury cases, there are usually payments of social security institutions. For example, accident insurance pays medical costs, daily allowances in the event of loss

of income and a pension if the accident causes permanent incapacity to work. There may be additional payments of the invalidity insurance or (in the event of death) the survivors' insurance. Additionally, the pension fund may make payments to the injured or his or her next of kin. The payments of such institutions have to be deducted from the compensation owed to them by the liable party insofar as they are intended to cover the damage. The social security institutions subrogate into the claims of the insured (or their survivors respectively) up to the amount of the payments made based on social security law. The insured (or their survivors) are only entitled to claim compensation from the liable party for the remaining damage not covered by such social security institutions (the direct damage).

IX DRONES

Drones (i.e., remotely controlled, usually very small aircraft) are subject to the same legislation as model aircraft.

The criteria for the operation of drones with a weight of up to 30 kilogrammes are specified in the Ordinance on Special Category Aircraft. The general rule is that drones weighing less than 30 kilogrammes may be operated without a permit as long as the operator maintains visual contact with the device at all times. Drone flights using video eyewear also do not require a special permit as long as direct eye contact can be established with the drone at any time. A FOCA authorisation is required in all other cases, in particular in the absence of direct eye contact.

Prior authorisation is required to operate a drone within 5 kilometres of landing fields and heliports. There is an interactive map published by the FOCA that shows the locations where restrictions and bans apply.[20]

Further, it is prohibited to operate a drone above gatherings of people without authorisation of the FOCA. Plain standard application forms exist for weddings and company events.

X VOLUNTARY REPORTING

Switzerland introduced a system for voluntary reporting in 2011. On 1 April 2016, this system was replaced by Regulations (EU) Nos. 376/2014 and 2015/1018, which are applicable in Switzerland based on the EU–CH Agreement on Air Transport. The Regulations provide for mandatory reporting of occurrences that may present a serious risk, encourage voluntary reporting and protect the information source to some degree.

The FOCA's website includes comprehensive information and refers to the EASA website for the submission of requests.

XI THE YEAR IN REVIEW

As in all other countries, the covid-19 pandemic has also had a dramatic impact on aviation in Switzerland. In some weeks, flight movements at Zurich Airport dropped to levels recorded in the 1950s, and the overall passenger turnover stood, in 2020, at 16.5 million passengers,

20 See https://www.bazl.admin.ch/bazl/en/home/good-to-know/drones-and-aircraft-models/drohnenkarte.html.

a drop of almost 72 per cent (i.e., at levels seen in the 1980s). In the entire year of 2020, the following decreases were recorded: freight (incoming and outgoing traffic) 30 to 40 per cent, airmail (incoming and outgoing traffic) 56 per cent and aircraft movements (takeoffs and landings) 64 per cent. The government promptly addressed the financial aspects of the crisis and granted financial aid to the aviation industry to secure its survival. SWISS was given access to a bank loan of 1.5 billion Swiss francs, secured with collateral from the government.

Furthermore, Brexit is affecting aviation not only between the EU and the United Kingdom but also between the UK and Switzerland. Switzerland and the UK have now entered into a bilateral agreement that provides that the existing traffic rights survive Brexit.

XII OUTLOOK

The most important issue for the aviation sector worldwide as well as in Switzerland is and will remain overcoming the consequences of the covid-19 pandemic. The current crisis will almost certainly continue to adversely affect aviation in the coming years. Pre-pandemic traffic will most likely not be reached before 2023.

In a referendum of 13 June 2021, the Swiss population voted against legislation on a reduction of carbon emissions that, among other things, provided for heavy air traffic charges (including ticket charges between 30 Swiss francs and 120 Swiss francs) and would have constituted a considerable competitive disadvantage for the Swiss aviation industry. To meet climate targets, the executive and legislative will have to make new proposals, which may also adversely affect aviation.

Appendix 1

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Heinrich Hempel is a partner at Schiller Rechtsanwälte. Over the past decades, Schiller Rechtsanwälte has been involved in all major cases of accidents affecting Swiss airlines or passengers. Heinrich Hempel has practised aviation law since he joined Schiller Rechtsanwälte. He advises international and national airlines and insurers, as well as airports and other clients, in the field of aviation on cases including liability and regulatory matters. He represents these clients in civil as well as in administrative and criminal proceedings.

Heinrich Hempel graduated from Zurich University in 1987, and obtained a doctorate degree from Zurich University in 1991 and an LLM from Columbia Law School, New York, in 1996. He was admitted to the Bar in 1993. He was a clerk at the District Court of Bülach, joined Schiller Rechtsanwälte in 1993 and became a partner in 1997.

Heinrich Hempel also practises general contract and commercial law. He lectures on aviation law at the Zurich University of Applied Sciences and is the author of a number of aviation-related articles in various publications, including the *Cologne Compendium on Air Law in Europe*. He is also an author of the Basel Commentary on the Swiss Civil Procedure Code, for which he wrote on the jurisdiction for tort claims. He is president of the Swiss Air and Space Law Association.

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