

THE AVIATION LAW
REVIEW

SEVENTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the seventh edition. Aviation has from the outset been one of The Law Reviews' most successful publications; its readership has been vastly enhanced by making it accessible online to over 12,000 in-house counsel, as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome a new contributor from Cyprus, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate considerable time and effort needed to make these contributions as useful as possible to readers. They are carefully selected for their knowledge and insights into their subject and we are fortunate to enjoy their support.

At the time of writing, the shocking B737 Max disaster story continues to unfold. The method of self-approval adopted by Boeing with the support of the FAA has been the subject of much criticism, the more so since approval by the FAA has routinely been followed by other regulators hitherto without serious challenge and because the FAA was the last substantial regulator to ground the type following the two fatal accidents. In an unprecedented break with previous practice, EASA has announced that it is conducting its own 'independent' review of the design of the Max and that 'completion of it was a prerequisite for return to service of the aircraft'. EASA itself had adopted the practice of reciprocal recognition. There can be no doubt they knew of its drawbacks. There are eerie parallels between this and the Helios 737 accident where Boeing incorporated a warning system that it had superseded in other models, notwithstanding warnings following other depressurisation incidents from European accident investigation boards and NASA itself! The complacency of both the manufacturer and the FAA following the two fatal accidents has left many aghast.

Inevitably following the news, plaintiffs are seeking a route to the US for their compensation claims and seeking to avoid the *forum non conveniens* rule that in principle directs such lawsuits back to the countries with jurisdiction over the carrier – usually with the requirement of full Boeing cooperation with the plaintiffs' alternative choice of jurisdiction and provision of all discovery that would otherwise be mandated in US litigation. The manufacturer will also be seeking an early agreement with the operators' insurers, and any other interested parties, to a settlement agreement to try to limit its own exposure to non-US jurisdictions. The shortcomings discovered in the regulator's own processes may, however, hamper Boeing's efforts to escape US judicial oversight, as may the involvement of the Federal Bureau of Investigation in the criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process. In the meantime, as a result of the grounding of the 737 Max, claims are mounting from operators that will dwarf the insurance coverage available (reportedly capped at US\$250 million). In the meantime, Boeing's loss of orders will redound to the benefit of Airbus and other

single-aisle aircraft manufacturers, as has been seen from orders announced at the Paris Air Show; notwithstanding the loyalty displayed by the International Airlines Group with regard to its order for 200 737 MAX aircraft.

It is hoped EASA will also reconsider its reliance on other regulators' type certificates, as well as any reliance it places on European manufacturers for type approval. The cost of adequate regulation in all jurisdictions must be met centrally, as was heavily recommended as long ago as 2000 in the Rand Institute's report 'Safety in the Skies' on the aviation accident investigation process.

Inevitably, the European aviation legal scene continues to be dominated by Brexit where reassuring words, at least by regulators in the UK, have yet to be converted into terms of final agreements. This has led major carriers to focus on developing European air operator certificates and some are also now ensuring they satisfy the European tests for majority ownership, which may cause interesting issues in the future for some of the low-cost carriers that heretofore have been able to operate from the UK – although the UK has signalled by means of a draft statutory instrument that it will not apply the EU majority ownership and control rules once the UK leaves the Union.

Another current project of note within Europe concerns the infamous EU Regulation 261/2004, which from its beginnings as an attempt to ensure fair treatment of passengers (or, as frequently rumoured, the reprisal of a snubbed EU Commissioner determined to show she was not to be ignored) has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets and threatening the safety of European airlines. The Regulation has been grotesquely judiciously distorted since its adoption. The ECJ has devastated the balance of the regulation by destroying the defence of 'exceptional circumstances' as a defence to claims, as well as by applying a time limit for making claims of up to 10 years, and finally by eliding delay and cancellation in determining availability of compensation. This was achieved without any attempt to determine the financial impact on carriers who have seen regional routes in particular become inoperable due to cost resulting in losses of prized European connectivity. All this in return for the sake of a few hundred euros' 'compensation' to individuals for minor inconvenience and perhaps a misguided boost to the popularity of the nanny super state!

The regulation is being reviewed by the EU on the assumption that the UK is leaving, and that Spain will withdraw its blockade on this and other projects as a result. The Steer group has been commissioned to review and report back and has instigated a number of enquiries to various organisations as a result. The omens are not good. The review is being conducted of the effect of the regulation, but has consciously ignored regional carriers in its case studies and has been heavily weighted to claimants' associations whose *raison d'être* is the collection of fancy percentages on claims made.

As was made clear at a recent conference of the European Regions Airlines Association, the uninformed extrajudicial legislative impulses of the CJEU in this area threatens regional connectivity and the operation of routes that are only marginally profitable. The European Regions Airline Association continues, with other industry groups, to lobby for change. Local governments whose industry and regional connectivity is threatened by this project need to join forces with consumer associations interested in consumers' freedom of movement and industry interested in logistics to make their interest in continued connectivity heard.

The second European Aviation Environmental Report (EAER) was published this year and provides an updated assessment of the environmental performance of the aviation sector published in the first report of 2016. It reports that continued growth of the sector has

produced economic benefits and connectivity within Europe and is stimulating investment in novel technology but recognises that the contribution of aviation activities to climate change, noise and air quality impacts is increasing, thereby affecting the health and quality of life of European citizens. Countermeasures are being developed, but their combined effect has reportedly not kept pace with the recent strong growth in the demand for air travel, thereby leading to an overall increase in the environmental impact. If Member States would stop pandering to uninformed sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme the direction of travel would be altered overnight, but as usual incompetent short termism prevails in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the recent EU decision to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to pollution reduction.

The tension between ‘just culture’ and the criminal law and their inherent incompatibility has been highlighted again by the convictions in Switzerland of three air traffic controllers in relation to separate incidents of conduct found by the Swiss court to have been negligent. One of the instances involved a separate conviction of the pilot of one of the affected aircraft. The incidents involved serious mistakes by air traffic control, which were corrected either by the controller or the affected pilots, so the Swiss law requirement of a ‘real collision risk’ seems unduly aggressively to have been applied in these cases. Criticisms of the Swiss courts aside regarding the convictions, the fact of prosecutions highlights again the ‘myth’ of ‘just culture’ as being a philosophy in actual practice, as opposed to a touching expression of faith dispelled by the reality that prosecutors and courts will recognise that some priority should be given to safety over criminalisation. Unnecessary prosecutions make confidential reporting an ever more risky approach for those at the sharp end of aviation.

Following the high-profile collapse of Monarch Airlines preceded by a number of other highly expensive forays by the state into the provision of private air transport, an airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines. The review has now reported. The obvious solution adopted elsewhere of using the assets of the insolvent airline to repatriate its customers is one of the alternatives recommended and it is hoped, notwithstanding the current stasis in legislation in the UK for other reasons, will be one given urgent attention. The creation of a special administration regime changing the purpose of an airline’s administration to the repatriation of its passengers as a first priority over payment of creditors and ensuring payments of salaries and costs during rescue efforts would enormously mitigate the cost otherwise imposed on taxpayers via the UK government’s current approach of arranging and paying for alternative air transport from other operators where inevitably the rates charged are at the highest end of the spectrum.

Illicit drone activity has been a significant feature of the past year and has resulted in the closure for significant periods of time of a number of major airports. Those incidents, including threats by environmental groups deliberately to use drones to close Heathrow Airport, highlight the fact that technology has got ahead of regulation and counter technology. Last year ICAO issued guidance material on safety management, seeking a ‘total system safety’ in which all users of the aviation environment operate within a fully integrated safety system. How that might affect rogue users is not clear given the ease with which operators can interfere with any inbuilt protections in the drone itself. Inevitably claims from passengers arise as a result of delays and equally inevitably, by virtue of the operation of EU261, airlines will continue to bear significant costs regardless of fault simply for caring for passengers. This may compel them at last to take seriously the prospects for claims against third parties such

as airport operators, air navigation service providers and conceivably the drone manufacturers themselves.

Once again, I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

Sean Gates

Gates Aviation Ltd

London

July 2019

SWITZERLAND

Heinrich Hempel and Daniel Maritz¹

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 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 economy. Cooperation was institutionalised with the bilateral agreements between Switzerland and the EU, which covers various areas, including air transport.²

Aviation plays an important role in Switzerland. Zurich Airport (2018: 31.1 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 those of Geneva (2018: 17.7 million passengers) and Basel-Mulhouse-Freiburg, the tri-national EuroAirport on French territory (2018: 8.6 million passengers). Pilatus Aircraft Ltd is a Swiss manufacturer of small aircraft and business jets. Geneva hosts the executive offices of the International Air Transport Association (IATA).

Civil aviation is governed by the Swiss Aviation Act³ 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 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 and Regulation (EC) No. 261/2004 are applicable also in Switzerland. To the extent liability

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).

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 Ordinance⁴ 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 gratuitous) either fall under the Montreal Convention or the 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 of care applies, but there is no limitation of the liability amount in statutory provisions.

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 governmental 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.

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 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 a terroristic act of 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 application to 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' of 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 case 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 requirements¹⁴ (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 Regulation¹⁵ 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 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/EFTA carrier may serve any routes between Switzerland on the one hand and EU/EFTA Member States on the other. Swiss carriers may also serve routes between EU/EFTA Member States. The authorisation to serve routes between Switzerland and non-EU/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 economical 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/EFTA companies or citizens.

This only applies, however, to the relation between Switzerland and EU/EFTA states. With respect to the relation between Switzerland and non-EU/EFTA states, the respective bilateral agreements with the non-EU/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/EFTA operating licences are accepted in Switzerland (as are Swiss operating licences in EU/EFTA Member States).

A non-EU/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 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, also foreign carriers, including EU/EFTA carriers, require an authorisation for commercial carriage of passengers or cargo on a specific route to and from non-EU/EFTA states. Such authorisations will be granted in accordance with the bilateral agreements of Switzerland with the non-EU/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, the 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 level 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 take-off weight. It starts at 750,000 special drawing rights (SDR) for a take-off weight of below 500 kilograms and reaches 700 million SDR for a take-off weight of 500 tons or more. The Swiss authorities may request evidence of compliance in the event of overflights by non-EU/EFTA carriers or aircraft registered outside EU/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 take-off weight of 2,700 kilograms or less), 1,131 SDR per passenger for baggage in commercial operations and 19 SDR per kilogram for cargo in commercial operations. These requirements do not apply to flights over Swiss territory carried out by non-EU/EFTA carriers or by operators using aircraft registered outside the territory of the EU/EFTA.

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

VI COMPETITION

Article 8 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 economical effects. Heavy fines may be imposed on undertakings – not, however, on individuals – for anticompetitive behaviour. Swiss competition law further provides for a 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 case 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 the 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 damages) 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 one year from the date when the claimant could have knowledge of the damage and the liable party, in any event no later than three years after the accident. 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 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 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 case 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 or not 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 (1) was not the result of the negligence or other wrongful act or omission of the carrier or its servants or agents; or (2) 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 Act¹⁹ provides for an extra-contractual strict liability of the manufacturer or importer for damage caused by product defects. The Swiss Product Liability Act is largely in line with the 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 damages 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 a 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 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 hand. 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

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

the impossibility 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 or not 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 whether the carrier is at fault. This is certainly true for the claims of the injured based on the 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: (1) 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 (2) 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 kilograms are specified in the Ordinance on Special Category Aircraft. The general rule is that drones weighing less than 30 kilograms may be operated without a permit, as long as the operator maintains visual contact with the device at all times. Also, drone flights using video eyewear do not require a special permit as long as direct eye contact can be established with the drone at any time. 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 which shows the locations where restrictions and bans apply.²⁰

Further, it is prohibited to operate a drone above gathering 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 website of the FOCA includes comprehensive information and refers to the EASA website for the submission of requests.

XI THE YEAR IN REVIEW

Since 2001 the overflight of southern German territory, which is essential for the traditional northern approach of Zurich Airport, has been a major issue in the relations between Switzerland and Germany. Unilateral limitations of overflight by Germany, designed to protect the German population from noise, forced the airport to change the approach. As a

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

consequence, a considerable part of the population living near the airport is exposed to noise beyond the limits that should not be exceeded. The ratification of a bilateral agreement seems destined to fail, thus leaving the issue unresolved. The unilateral restrictions by Germany adversely affect Zurich Airport's capacity. The federal government is examining various measures to enhance capacity. On 23 August 2017, the Federal Council approved the Sectoral Plan for Aviation Infrastructure for the future development of Zurich Airport, which will enhance the airport's capacity. Yet, because of the unilateral restrictions by Germany, certain approach and take-off routes cannot be implemented, which means that various noise-related issues remain unresolved. Strong opposition is therefore to be expected.

The Federal Supreme Court changed its practice to the recovery of insurers in its landmark decision of 7 May 2018 (4A_602/2017). In the past, recovery claims by certain insurers (e.g., hull insurers) required negligence, and in many cases even gross negligence or wilful misconduct of the tortfeasor. Based on the new decision, the insurer may seek recovery whenever the insured party is entitled to a claim against the tortfeasor.

XII OUTLOOK

Discussions regarding the overflight of southern Germany (see Section XI) will continue as Germany is pushing hard to further reduce the number of flights over this territory. Political discourse about Zurich Airport's capacity will continue with uncertain results. Future passenger claims in Swiss courts may lead to more Swiss precedents and thus contribute to further clarification of open questions regarding Regulation (EC) No. 261/2004 (see Section II.iv).

Furthermore, Brexit will affect aviation not only between the EU and the United Kingdom but also between the United Kingdom and Switzerland. Switzerland and the United Kingdom entered into a bilateral agreement which shall be effective in the event of Brexit and provides that the existing traffic rights survive a hard Brexit.

The proposed Regulation of the EU on safeguarding competition in air transport, repealing Regulation (EC) No. 868/2004, will also be implemented in Switzerland in accordance with the EU-CH Agreement on Air Transport. The interpretative guidelines on Regulation (EC) No. 1008/2008 – rules on ownership and control of EU air carriers of 8 June 2017 will presumably be taken into consideration by Swiss authorities, even if not yet formally applicable.

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