

Aviation Law & Regulation

A Framework for the
Civil Aviation Industry

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Acknowledgements

There can be only one regret in writing this book and that must be that I did not do it some years ago. Whilst developing my career as an International Aviation Lawyer the opportunity to write more than articles and short publications never seemed to arise. However, I have now been able to produce the sort of book that would have been of great help to me during those years and I hope will in future be of benefit to others in my profession, the aviation industry and, not least, the students who I regularly lecture on Air Law both here and abroad.

Over the years many people have helped me gather the knowledge and experience which has enabled me to write this book. To all those I am grateful but I am especially indebted to those who with their particular expertise read and commented on relevant parts of the book. I would like to thank Dave Tompkins of the Civil Aviation Authority; Craig Orr and Bankim Thanki, both Barristers at Fountain Court and Katherine Holden for her scientific expertise.

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Carole Blackshaw
London, September 1991.

Introduction

The nature of aviation law and regulation

It is perhaps something of a paradox that the apparent freedom of rapid transit through the skies is a business bound by a complex regulatory framework unique to the aviation industry. This is to some extent inevitable: the reasons being manifold and persuasive. A certain degree of regulation is clearly necessary in such key areas as public safety, operational organisation and international relations. The extent and nature of this intervention is the subject of continual debate involving many different interests both from inside and outside the industry.

Regulatory development is a constantly evolving process at all levels and this book intends to plot a clear course through the various areas of law and regulation affecting the industry and particularly the airline operator. Before enquiring further into the different types of regulation, it is useful to bear in mind the various levels at which they can occur. In general terms these can be summarised into three categories; international, national and local measures.

International level

Internationally the relationship between nations imposes rights and obligations both for the protection of individual states and to enable air transport between, over and into their boundaries. An obvious example is the negotiation and agreement of traffic rights. These Air Service Agreements (commonly known as ASAs) are mostly bilateral in form, being between two states. They may, however, be multinational agreements to which a number of nations are party. For example, the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe of 1956 regulates certain charter flights between a number of European countries. ASAs aim to enforce an acceptable balance of traffic between states. Commonly this is achieved by limitations on the number of airlines to be designated and on capacity provided on a flight or seat basis. Realistically, wider political considerations often influence the negotiation of these agreements and merely serve to illustrate the extent of governmental intervention in aviation.

International control can also arise from multinational political groupings

such as the EEC (European Economic Community) or aviation organisations such as ICAO (International Civil Aviation Organisation) or IATA (International Air Transport Association), formed at government or industry level. Similarly aviation history is punctuated by a series of international conventions. These have made a significant contribution to regulation in areas of international relations, security and liability.

Notable is the Chicago Convention of 1944, which established a basic framework of regulation essential to the development of organised international aviation. The aims of the Convention were, through co-operation, to promote security and peace between nations. In particular, the representative governments met to agree certain principles 'in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on a basis of equality of opportunity and operated soundly and economically' (see preamble to the Convention).

To date, over 150 nations have ratified the Chicago Convention as originally in force as of April 1947. The main agreement is in three parts, dealing with Air Navigation, the International Civil Aviation Organisation (ICAO) and International Air Transport. More specifically, it deals with such important issues as the general principles of sovereignty over air space; traffic rights in respect of scheduled and non-scheduled flights; aircraft nationality and registration; crew regulation; air navigation services and airport provision. These general principles have been fundamental to the organisation of international aviation and its continued development, particularly in respect of international rights and obligations.

The Convention begins, for example, by clarifying the fundamental issue as to each nation's sovereignty over its airspace. Article 1 states perhaps the most essential principle of all, that: 'The Contracting States recognise that every state has complete and exclusive sovereignty over the airspace above its territory'. From this follows the logical premise that: 'No State aircraft of a Contracting State shall fly over the territory of another state or land thereon without authorisation by special agreement or otherwise....' (Article 3 (c)). Much attention was paid to the subject of traffic rights, both at the Convention and subsequently, out of which has developed the system of original and negotiated rights that we have today.

It was also the Chicago Convention that created ICAO, which in many ways continues the functions of the original convention. The objects of ICAO, as set out in article 44 of the Chicago Convention, are to 'develop the principles and techniques of international air navigation and to foster the planning and development of international air transport'. Over the years, ICAO has been responsible for carrying out a review of key issues on such matters as airports, air navigation, safety and environmental issues and subsequently passing resolutions for adoption by member states. For example, it made a fundamental contribution to the review and promotion of noise regulation under Annex 16 (see Part IV on environmental issues).

Another vital area of regulation originating at the Convention level is the

Warsaw System governing the liability of commercial airlines on international flights. Over 100 nations have ratified the Warsaw Convention of 1929, the aim of which was to establish a uniform international system of legal rights and liabilities between airlines and their passengers and consignors of cargo. The problem was obvious and a solution essential. Without regulation, there would be a mass of conflicting laws arguably applicable and many circumstances where none would be decisive.

The key to the solution at Warsaw was to balance the rights of an airline with those of its passengers: in general terms the carrier airline is liable for death, injury or damage occurring during the 'carriage by air' without proof of cause or liability. In return for this there are set monetary limits on the amount of compensation payable. These limits have given uniformity and predictability but have also proved to be the Achilles heel of the system. Not only has the method of conversion into national currencies been difficult to achieve, but the standard itself difficult to agree. Attitudes towards acceptable damages in different jurisdictions vary enormously.

Subsequent conventions such as the Hague Protocol in 1955 have attempted to update and amend the Warsaw System, but to no satisfactory conclusion. The conflicting views, particularly those of the United States of America who argue for far higher limits of compensation, are stronger today than ever. It is possible, therefore, that the Warsaw system will disintegrate in future or that a system of new regulations will replace the old in this vital area of aviation law. (The Warsaw System is dealt with at some length in Part III.)

National level

Individual nations legislate to give effect to these international agreements and to control the operators of their airlines, aircraft and airports. In most jurisdictions, airline operators must comply with three basic areas of regulation: first, they must obtain the appropriate authorisations to operate an airline; secondly, every aircraft must be airworthy and subject to regular checks; thirdly, they are subject to various economic regulations and, in particular, the requirement for route licences. There are, in fact, many permits, certificates, licences and similar authorisations to be obtained before air transport services can be operated. In essence, these centre around three things: the operator, his aircraft and the routes served.

In the United Kingdom, the Air Navigation Order 1989 provides, for example, that an operator of United Kingdom registered aircraft must have in force an air operator's certificate. The Civil Aviation Authority grants operators certificates only once it is satisfied that the applicant is competent having regard to his conduct, experience and facilities. The Air Navigation Order also provides that no aircraft shall fly unless there is in force a certificate of airworthiness valid under the laws of the country in which it is registered. Further provisions deal in detail with the registration of aircraft.

These regulations illustrate the provision of detailed regulation by a particular state based on the general principles in the Chicago Convention. We will see many instances in Part II of the book (dealing with operational regulations) where the source is international, often laying down the general principles, and national legislation provides the detailed regulations. For example, the Chicago Convention provides in Articles 17 and 19 that aircraft shall have the nationality of the state in which they are registered and that registration in a contracting state shall be made in accordance with its laws and regulations. Article 31 states that every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued by the state in which it is registered.

The third basic area of regulation affecting an airline operator is that of route licensing. Such licences are valuable assets essential to the commercial viability of an airline. In the United Kingdom application is made to the Civil Aviation Authority which has a wide discretion within certain statutory criteria to grant, vary or revoke licences. Other operators can oppose applications, in which case a public hearing is held. The Civil Aviation Authority's stated policy is firmly committed to competition as being in the best interests of the industry and consumer alike. This can result in several carriers operating a particular route. This is a fundamental divergence from the one-route one-airline policy still followed by many nations. It also reflects the move away from the dominance of state-owned monopolistic airlines.

These changes, of course, reflect the movement towards deregulation led by the United States of America from 1978. Europe – and the United Kingdom in particular – is looking towards a freer and more competitive environment, where potentially licensing restrictions will be at a minimum necessary to protect safety standards and financial fitness requirements. The single market of post 1992 within the European Community is bound to have a dynamic effect on European aviation.

The final part of this book, Part IV, deals with environmental issues: a matter of increasing concern and significance to all of us. Aviation is by no means untouched by these considerations; the regulation of aircraft noise, in particular, has become an important and highly significant issue. To many airlines, it still represents a further unwelcome restriction on their commercial operations and to some a serious threat to their financial viability. This is particularly so in the case of cargo carriers and developing world airlines, where a high proportion of their fleets do not meet Chapter 2, let alone Chapter 3, requirements.

Airlines, however, ignore environmental issues at their peril. The strength of the environmental lobbies in Europe is increasing. This in turn provokes greater public awareness, criticism and eventual political action. We will see in Part IV that there are other improvements that could be made by the aviation industry to protect the environment. Whereas noise was very much the concern of the 1980s we now see aircraft emissions emerging as the environmental issue of the 1990s.

Local level

Noise regulation is also highly relevant at the local airport level, where anti-noise pressure groups are most prevalent. Airport authorities have for some time adopted local measures such as night curfews and further restrictions are likely. Of course, many other regulatory measures originate at the local airport level. Their source is normally either the Airport Authority itself or the appropriate local Government authority for that area. The latter will inevitably have been involved in planning matters and such issues as public health and local transport considerations.

Aviation regulations span many issues at all levels and provide a system of international travel that is detailed and complex but, hopefully, efficient and safe. Regulation of air transport is in a state of constant and often rapid change. The issues for the future are likely to be the legal liability of carriers with the possible disintegration of the Warsaw System, liberalisation in the European Community with increased competition in a single, common market, and, last but not least, the introduction of further noise restrictions working towards Chapter 3 compliance and no doubt, in addition the regulation of aircraft emissions.

The purpose and use of this book

This book aims to be both easy to read and informative. It is a friendly guide through a potentially vast and complex subject. It is, therefore, inevitably selective and seeks to provide a framework of information to give the reader a positive overview and general understanding of the subject. It is not intended as a legalistic tome of comprehensive proportions, but instead attempts to simplify and clarify, and is intended to be read either as a dip-into desk companion or as a broad introduction to the fascinating world of civil aviation and its regulation. For clarity and ease of reference, the book is divided into four parts, each covering a distinct and separate area.

Part I, sets the scene by taking the reader through key organisations in civil aviation, both international (with particular reference to Europe) and national, notably here in the United Kingdom. These bodies are in fact the rule-makers and, therefore, the source of much of the regulation reviewed in Parts II, III and IV of the book.

Part II, deals with the many regulatory aspects of an air transport operation. It shows the wide and extensive controls and restrictions so unique to the aviation industry.

Part III, deals with a vital aspect of air transport: the risks and dangers when things go wrong. It demonstrates the difficulties presented by international carriage on national legal systems and how the conflict of law problems has been mostly solved.

Part IV, is concerned with the main environmental problems caused by aircraft operations and how the regulators have begun to deal with these. A whole section of the book is devoted to this increasingly important subject, which affects aviation as much as many other aspects of industry and commerce.

Finally, the reader should always remember that the law is a complex, vast and ever-changing subject, especially in aviation. It is, therefore, essential that when dealing with any particular case proper professional advice should be sought.

Contents

Acknowledgements vii

Introduction ix

Part I Aviation Organisation and Control

- 1 International Organisations of Civil Aviation 3
- 2 The European Economic Community 18
- 3 National Organisation of Civil Aviation 30
- 4 The Civil Aviation Authority 33

Part II Establishment of an Airline Operation

- 5 Airline Formation 41
- 6 Air Transport Licensing: The Role of the CAA 45
- 7 Air Transport Licensing: the UK System 53
- 8 Air Transport Licence Applications 55
- 9 Objections and Representations 58
- 10 Preparation for a Hearing 63
- 11 Procedure at a Hearing 75
- 12 Appeals 80
- 13 Transfer and Surrender of Licences 84
- 14 Air Operator's Certificate 88
- 15 Aircraft Registration 91
- 16 Aircraft Mortgages 97
- 17 Aircraft Airworthiness 102
- 18 Aircraft Documentation 108
- 19 Crew Licensing 111
- 20 Accidents 116
- 21 Third Party Rights Against Aircraft 121
- 22 Detention and Sale of Aircraft for Unpaid Eurocontrol Charges 128
- 23 Customs and Excise 131

Part III Liability

- 24** The Concept of Legal Liability 139
- 25** Contract Law 142
- 26** Tort 148
- 27** Product Liability 154
- 28** Carriage by Air 157
- 29** International Carriage: the Warsaw Convention 159
- 30** The Carriage by Air Act 1961 162
- 31** The Hague Protocol 202
- 32** The Guadalajara Convention 204
- 33** Post-Guadalajara 208
- 34** The United States of America 214
- 35** The Future 221
- 36** Non-international Carriage 224

Part IV The Environment

- 37** Noise 229
- 38** Air Pollution 242
- 39** Aircraft-related Pollution 245
- 40** Regulation of Aircraft Emissions 247
- 41** Other Areas of Aircraft-related Pollution 251

Appendices

- I** The Freedoms of the Air 257
- II** Specimen CAA Route Licensing Forms 258
- III** The Carriage by Air Act 1961 273

Bibliography 291

Index 295

Part I

Aviation Organisation and Control

Before commencing our journey through the labyrinth of law and regulation affecting the air transport industry, we will take a look in this, Part I of the book, at some of the institutions that dominate aviation both internationally and here in the United Kingdom. In Parts II, III and IV we will, in effect, be looking at the regulations produced by these bodies, but first we need to establish who the rule-makers are. These bodies are the source of, and authority for, the rules. We need to know who and what they are, their respective roles, functions and powers. They are numerous and varied but all have a vital part to play.

We will look first at the international bodies, with particular reference to the European Economic Community. This is followed by a review of the United Kingdom scene showing the hierarchy of national power and, in particular, explaining the important role of the Civil Aviation Authority.

1 International Organisations of Civil Aviation

The International Civil Aviation Organisation

The International Civil Aviation Organisation, or ICAO as it is commonly known, was created in 1944 as the brain child of the Chicago Convention ('Convention') of that year. As we will see, the foresight of the parties to that Convention enabled them to realise that to achieve their goals of security, co-operation and organisation in international aviation would require more than a one-off convention. They were ideals that needed a permanent organisation in which to carry on their work by establishing regulations based on the general principles in the Convention, developing, updating and enforcing them through the future years. Thus ICAO was created, and exists today as a flourishing organisation playing a vital role on the stage of international aviation.

Chapter VI of the Convention, under the heading of 'International Standards and Recommended Practices' essentially creates ICAO. It commences with the general principle that

'each contracting state undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation'.

The key word is, of course, uniformity: the ideal is to achieve a system of uniform regulation on matters affecting international aviation. To achieve this end, the Convention created ICAO to 'adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures' dealing with specific matters.

These matters are:

- (a) communications systems and air navigation aids, including ground marking;
- (b) characteristics of airports and landing areas;
- (c) rules of the air and air traffic control practices;
- (d) licensing of operating and mechanical personnel;
- (e) airworthiness of aircraft;
- (f) registration and identification of aircraft;

- (g) collection and exchange of meteorological information;
- (h) log books;
- (i) aeronautical maps and charts;
- (j) customs and immigration procedures;
- (k) aircraft in distress and investigation of accidents;

and finally such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

ICAO is actually created, its objectives specified, powers stated and constitution established in Part II of the Convention headed, 'The International Civil Aviation Organisation'.

Formation

First, it states that an organisation of that name is to be formed (see Article 43). Its basic composition is to consist of an Assembly, a Council and such bodies as may be necessary. The permanent seat of the organisation is to be a place determined by the Assembly and is in fact in Montreal, Canada. (Article 45).

Status

The organisation is to be an independent body with a certain legal status defined by the Convention (Article 47). It is to 'enjoy' in the territory of each contracting state such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the state concerned. These theoretical rights are somewhat more difficult to clarify in reality and are subject to the usual problems of enforcement within an independent jurisdiction unless adopted as part of its law. However, the Convention stated the ideal for the future in an attempt to ensure the organisation it was creating would have the force of law behind its regulations.

Objectives

The broad objectives of ICAO are expressed as follows (Article 44): the aims and objects of the organisation are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) ensure the safe and orderly growth of international civil aviation throughout the world;

- (b) encourage the arts of aircraft design and operation for peaceful purposes;
- (c) encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) meet the needs of peoples of the world for safe, regular, efficient and economical air transport;
- (e) prevent economic waste caused by unreasonable competition;
- (f) ensure the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines;
- (g) avoid discrimination between contracting states;
- (h) provide safety of flight in international air navigation;
- (i) promote generally the development of all aspects of international civil aeronautics.

Constitution

There are two main bodies within the organisation (Article 48): namely, the Assembly – in which is vested the ultimate authority and control – and secondly the Council, which is in practice more like an executive body concerned with the day-to-day running of the organisation.

The Assembly

The Assembly meets annually, though extraordinary meetings can be held at the instigation of the Council or of not less than one fifth of the total number of contracting states. Importantly, all contracting states have an equal right of representation at meetings of the Assembly and each is entitled to one vote. A majority of contracting states is required to constitute a quorum and decisions are normally taken (unless otherwise provided) by the majority of votes cast. It is, therefore, a fairly simple structure: one state, one vote and (most) decisions taken on a majority of votes.

It is interesting to note that a very large and powerful state will have no more voting power than a small, insignificant one; it is fundamental to the idealism that created ICAO that it is based on democratic, non-discriminatory principles. To understand this one only need consider the objectives of the organisation as stated above.

The powers and duties of the Assembly relate to its (legislative) control of the organisation, in particular the Council. Apart from electing its own President and other officers, it elects the contracting states that are to be represented on the Council. It sets its own rules and procedure and generally controls the finances of the organisation.

It also deals with Council matters such as examining and taking action on reports of the Council and other matters referred to it from the Council, and generally dealing with matters not dealt with by the Council. It can delegate to the Council the powers and authority necessary or desirable to carry out the