

THE AVIATION LAW
REVIEW

EIGHTH 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 eighth edition. Aviation continues to be among 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 new contributions from France, South Korea and Spain, plus two new chapters concerning covid-19, as well as extending my thanks and gratitude to our other new contributors and to our regular 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 them. All contributors are selected based on their knowledge and experience in aviation law, and we are fortunate to enjoy their support.

Covid-19 is inevitably the focus of attention in our sector as in all others. The loss of life is the paramount concern and dominates one's thoughts. However, the commercial devastation also has consequences for the wellbeing of humanity given the financial damage it is wreaking, which is particularly pronounced in the travel industry. With airlines grounded by travel bans and the closure of airspace, all the participants in the industry at large are facing financial collapse as revenue disappears and fixed costs remain. Lessors still need to be paid, routine maintenance cannot be ignored, staff have to be paid or discharged, and even with the patchwork of governmental support around the world, there are bound to be many who fail and a few, not necessarily among the most efficient, that survive. At the time of writing, it is too early to forecast the landscape post pandemic, but it will certainly be changed forever, with probably the most significant impacts on leisure and regional carriage, the former being more expensive to address distancing practices and the latter with their smaller balance sheets being less able to withstand the loss of revenue.

Much has been written on the question of whether contractual liabilities will be impacted by the consequences of the pandemic, and in this edition I am pleased to have worked with colleagues in Belgium and Germany, to whom I extend my thanks, on articles addressing these issues and on EU 261. The latter is a work of the Commission in progress at the time of writing with short- and long-term discussions ongoing concerning the pernicious effects of this extensively juridically rewritten regulation. The outcome of those discussions is awaited, albeit with some dread!

When I last wrote this preface, the shocking B737 Max disaster was unfolding. 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, rather than the first, influential regulator to ground the type following the two fatal accidents. The consequences are still unfolding, but in the meantime, Boeing has managed to refinance itself

and continues to deal with the claims of airlines whose fleets were grounded pre pandemic. The intervention of that virus may have perversely given the company some relief from its continuing obligations, though the damage to its reputation for trustworthiness will take longer to repair, leaving Airbus in a much stronger position. In addition, the ending of the merger talks with Embraer may lead to the reemergence of the latter as challenger in at least the single aisle jet market. The Federal Bureau of Investigation continues its criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process and the investigations based on the embarrassing disclosures of emails from within Boeing graphically charting the recognition of their engineers of the unsafety of the type.

It is hoped EASA will 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. The appetite of the EU in this respect and the willingness of Member States to pay in the current financial and political environment, are not reliable grounds for optimism in this respect.

The impact of Brexit on European aviation remains unclear with the latest indications being that a comprehensive deal may not be reached, though an arrangement regarding traffic rights is likely to be made regardless. Major carriers are securing air operator certificates from within states in the EU, and some are also now ensuring they satisfy the European tests for majority ownership. How IAG manages its interests in BA and Iberia/Aer Lingus will be of particular interest.

The second European Aviation Environmental Report (EAER) was published last year and provided 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 recognised that the contribution of aviation activities to climate change, noise and air quality impacts had increased, thereby affecting the health and quality of life of European citizens. Indeed, air pollution has repeatedly been identified as a factor in covid-19. The impact of the pandemic on environmental pollution has been well documented, and the reduction in air travel has contributed to this. There is pressure to attempt to secure the environmental benefits of the lockdown on a more long-term basis, which might accelerate the development of new technologies. If Member States would stop pandering to solipsistic sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme, massive environmental advantages could be secured, but as usual incompetent short-termism seems likely to prevail in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the decision by the EU to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to the environment.

The UK airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines following the numerous recent high profile airline bankruptcies of Monarch, Thomas Cook, Flybe and others. 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. The government has yet to publish a formal response. However, on 25 September 2019, in response to questions about the collapse of Thomas Cook, the Secretary of State for Transport, Grant Shapps, told the House that the government would be looking at the reforms proposed by the review. In a subsequent letter to Lilian Greenwood, Chair of the Transport Committee, the Secretary of State wrote that he was determined to bring in a better system for dealing with airline insolvency and repatriation. The Queen's Speech delivered on 14 October 2019 included proposals for legislation on airline insolvency. Subsequent events have of course delayed the process but hopefully when normal services are resumed this too will be addressed.

The pandemic has highlighted the benefits of drone technology with medical and other supplies being delivered to vulnerable individuals and population centres by use of the technology. Airport closures have of course ceased to be a factor in the current times, but seem likely to resume and possibly even increase, led by environmental groups seeking to address the perceived threat of the industry to the environment. Various jurisdictions are contemplating a range of responses including tighter regulations on the use of drones over a low mass, and registration and insurance requirements for operators of larger and commercial vehicles. New technologies to counter potentially disastrous encounters with commercial aircraft are being developed, but inevitably these solutions will be met by new challenges in the remotely piloted vehicle arms race.

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 2020

BRITISH VIRGIN ISLANDS

*Audrey M Robertson*¹

I INTRODUCTION

As the British Virgin Islands is an overseas territory of the United Kingdom, registration of aircraft in the British Virgin Islands is governed by a UK statute, the Air Navigation (Overseas Territories) Order 2013. Air Safety Support International, a wholly owned subsidiary company of the UK Civil Aviation Authority, acts as the oversight regulatory body for the United Kingdom's overseas territories in relation to aviation matters.

Air Safety Support International has powers under the UK Air Navigation (Overseas Territories) Order 2013. In addition, the BVI Airports Authority (the Authority), a statutory organisation of the government of the British Virgin Islands, was incorporated in 2005 to oversee the effective and efficient operation of all airports in the British Virgin Islands. The objectives of the Authority include, *inter alia*:

- a* to acquire, own, operate, control, manage, develop, administer and maintain the international airport and any extension thereof, and any designated airport in the territory as a commercial undertaking in a manner that recognises its role in the first instance as an international airport and for the benefit of the economy of the territory;
- b* to provide and maintain, on a commercial basis, facilities and services for air transport and such other facilities and services as are necessary or desirable for, or in connection with, the international airport or any designated airport;
- c* to collect such dues and charges as the company may be authorised by an enactment to collect; and
- d* to use, develop and manage, on a commercial basis, all lands vested in, transferred or leased to the company.

The relevant European Aviation Safety Agency (EASA) approvals and Overseas Territories Aviation Requirements (OTARs) under the UK Air Navigation (Overseas Territories) Order 2013 apply to air carrier operations.

II LEGAL FRAMEWORK FOR LIABILITY

The principal domestic legislation is the Air Navigation (Overseas Territories) Order 2013, as amended, and the Mortgaging of Aircraft and Aircraft Engines Act 2011.

¹ Audrey M Robertson is a counsel at Conyers.

i International carriage

The BVI is not a signatory (or a party by extension from the UK) to the Rome Convention, the Geneva Convention, the Chicago Convention or the Cape Town Convention.

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including the BVI) comply are reflected in the Air Navigation (Overseas Territories) Order 2013.

The BVI is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

ii Internal and other non-convention carriage

There is no national or regional legislation governing liability in respect of non-convention carriage.

iii General aviation regulation

The relevant EASA approvals and OTARs under the UK Air Navigation (Overseas Territories) Order 2013 govern the liability in operation of civil aviation aircraft, including helicopters and microlights.

iv Passenger rights

There is no consumer rights legislation governing compensation for delay, cancellation of flights and carriage of disabled passengers.

v Other legislation

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to environmental obligations.

III LICENSING OF OPERATIONS

i Licensed activities

Members of the flight crew are required to be licensed under the UK Navigation (Overseas Territories) Order 2013.

ii Ownership rules

Aircraft can be registered in the British Virgin Islands. There are currently only five aircraft registered in the British Virgin Islands all in the names of locally registered corporations. Requirements for registration of aircraft are fully set out in the Air Navigation (Overseas Territories) Order 2013. This includes who is considered to be a qualified person for registration. Such qualified persons are:

- a* the Crown in right of Her Majesty's Government in the United Kingdom or in right of the government of the British Virgin Islands;
- b* United Kingdom nationals;
- c* Commonwealth citizens;
- d* nationals of any European Economic Area state;
- e* bodies incorporated in any part of the Commonwealth and which have their registered office or principal place of business in any part of the Commonwealth; or

f undertakings formed in accordance with the law of a European Economic Area state and which have their registered office, central administration or principal place of business within the European Economic Area

iii Foreign carriers

As a territory regulated by EASA, EASA requires a Third Country Operator approval before a foreign aircraft may operate in the territory.

IV SAFETY

The relevant EASA approvals and Overseas Territories Aviation Requirements (OTARs) under the UK Air Navigation (Overseas Territories) Order 2013 apply to air carrier operations.

V INSURANCE

There is no mandatory level of insurance.

VI COMPETITION

There are no competition provisions in the BVI.

VII WRONGFUL DEATH

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to wrongful death. There have been no cases in the BVI.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to wrongful death. There have been no cases in the BVI.

The limitation period is six years.

ii Carriers' liability towards passengers and third parties

With respect to an owner, Section 76(4) of the UK Civil Aviation Act 1982 is extended to the BVI to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crewmember is employed by the owner.

The owner of the aircraft would be subject to strict liability by virtue of Section 40(2) of the UK Civil Aviation Act 1949, extended to the BVI.

iii Product liability

There is no regime governing manufacturers' and owners' liability to passengers and operators.

iv Compensation

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply. This is not an area that has been tested in the BVI.

IX DRONES

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply.

X VOLUNTARY REPORTING

There are no voluntary reporting initiatives.

XI THE YEAR IN REVIEW

The British Virgin Islands has many attractive features, including political stability, tax neutrality and the absence of exchange control and currency restrictions, which make it an ideal jurisdiction for aircraft and other international financing transactions. From a legal perspective, it has a well-developed, English-based legal system, a bespoke commercial court and flexible, highly commercially friendly legislation. On top of this, it adheres to international standards of compliance. These are all factors that have led to the BVI becoming a popular jurisdiction in which to establish special purpose vehicles for owning and leasing aircraft.

XII OUTLOOK

There are currently no forthcoming developments in aviation policy, legislation, regulation or the sector in the BVI.

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Audrey M Robertson is a counsel in the corporate department of Conyers in the British Virgin Islands.

Audrey's practice covers general corporate and commercial matters with particular focus on public offerings and joint ventures. She has extensive experience in a wide variety of international asset finance and corporate transactions. Audrey has particular expertise in financings involving aircraft, including aircraft acquisitions and dispositions, sale and leasebacks and pre-delivery payment and warehouse facilities. Audrey advises leading financial institutions, leasing companies, development agencies and companies.

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