

THE AVIATION LAW  
REVIEW

SEVENTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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REVIEW

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This article was first published in September 2019  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-83862-048-6

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SGB STORLØKKEN AS

ANJARWALLA & KHANNA LLP

ASBZ ADVOGADOS

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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

# BRITISH VIRGIN ISLANDS

*Audrey M Robertson*<sup>1</sup>

## 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.

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<sup>1</sup> 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.



# ABOUT THE AUTHORS

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### *Conyers*

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.

Audrey is recognised in a number of international legal directories, including *Chambers Global*, *The Legal 500*, *Who's Who Legal* and *Expert Guides: Women in Business Law* for her corporate and commercial and aviation law expertise.

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ISBN 978-1-83862-048-6