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Safety and security: The influence of 9/11 to the EU framework for air carriers and aircraft operators

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ABSTRACT

Safety and security have always been two key objectives behind policies and innovation within the air transport industry, at international, European and individual government levels. The management of risk is important in aviation and has always been a challenge to the industry. The events of 9/11 revealed that new policy measures and initiatives were needed, both to deal with the short-term market effects and also for the long-term development inline with the European Union Treaty. A key objective behind the establishment of the European Union has always been the objective to create an internal market, where barriers are removed and existing rules simplified, yet the air transport industry in Europe lacked the mechanisms to protect it from exposure to the events and effects of 9/11.

This paper provides a unique view and understanding of the EU framework concerning safety and security in the aftermath of the terrorist attack. The paper considers commercial air operations and the insurance requirements for air carriers and aircraft operators, focusing on the development of the respective aviation liability and compensation framework. It analyses the insurance requirements for air carriers operating in the EU, as a result of Regulation 785/2004. An outline of the International dimension is also undertaken so as to contextualise the position of the European Union and the aspect of EU competence.

The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a legal qualitative review.

1. Introduction

Airline services involving the movement of scheduled passengers has become one of the safest modes of transport (Oster, Strong, & Zorn, 2013),[1] but that acknowledged, there is no such thing as "zero risk." Data from the International Air Transport Association (IATA) reported that in 2012 there were fifteen fatal accidents[2] and 414 fatalities.[3] Preliminary data released by the International Civil Aviation Organization in January 2014, confirmed that 2013 had seen the number of fatalities reduce from the previous year to 173, a consistent reduction over a period of three years. Using 2010 as a baseline this translates to a fall of 76 per cent.[4] The 2013 figures show that there were in total nine fatal accidents worldwide and further geographical break down shows that the Americas had five fatal accidents, Europe had two, the Asia/Pacific each had one and the Middle East had none.[5] Seven of the nine accidents occurred during the go-around or approach of a flight.

Not withstanding this achievement in airline safety, one incident leading to loss of life, remains one too many.

Security associated with air travel remains a high-profile area, particularly, in the wake of the terrorist attacks on 11 September 2001 in the US (9/11) as aviation continues to be subject to terrorist attacks and hi-jacking/sky-jackings attempts. Civil aviation security

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[1] Citing data from the FAA (http://www.faa.gov/data_research/safety) the National Transportation Safety Board (http://www.ntsb.gov) the International Civil Aviation Organization (http://www.icao.int/safety/Pages/default.aspx) amongst others. Also see EASA (easa.europa.eu/safety-and-research/safety-analysis-and-research.php).

[2] See ICAO's definition of an *accident* within Annex 13 – To the Convention on International Civil Aviation, Chicago, 1944.

[3] Fatalities include deaths due to injuries sustained in an accident up to 30 days later (ICAO/IATA definition). www.iata.org/pressroom/facts_figures/facts_sheets/Pages/Safety.aspx.

[4] Data provided from the ICAO press release (January 2014). http://www.icao.int/Newsroom/NewsDoc2014/COM.1.14.EN.pdf.

[5] Based upon ICAO Regional Aviation Safety Group areas.

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has been a matter of concern even before Lockerbie[6] in 1988.[7] At an international level ICAO has laid down Standards and Recommended Practices and operational procedures in respect to both security and safety practises. However, the events of 9/11 were instrumental in leading to revisions both in terms of preventative measures and related legislation. From a European Union perspective, the events of 9/11 led to the Commission making a legislative proposal to bring aviation security under the EU's regulatory area of competence. This saw a framework Regulation (Regulation EC 2320/2002) being adopted as well as sweeping revisions to the insurance protection and compensation mechanism.

This paper provides a unique view and understanding of the EU framework concerning aviation insurance. The paper considers commercial air operations and the insurance requirements for air carriers and aircraft operators, focusing on the development of the respective aviation liability and compensation framework within the European Union (EU). It analyses the insurance requirements for air carriers operating in the EU, as a result of Regulation 785/2004. The Regulation having established minimum insurance requirements in respect of passengers, baggage, cargo as well as third party liability in the aftermath of 9/11.

The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a legal qualitative review, which presents the factual, chronological background, prior to explaining the present compensatory framework in Europe. An outline of the International dimension is undertaken so as to contextualise the position of the European Union; and, the very principles of the European Union regarding market integration are also considered.

2. Safety and security

Safety and security remain a constant challenge to the airline industry in what is an ever evolving and developing globalised environment.

2.1. Safety

Research into aviation safety has been all encompassing, and has included investigating the technological development, training of personnel, accident investigation and analysis, maintenance etc.

Research carried out to determine whether there is a direct correlation between airline safety and profitability has produced mixed results. In 1986 Golbe reported no significant link between the two, whilst four year later, Rose (1990) contradicted this by showing a significant linkage between the two in particular in relation to small and medium airlines. Noronha and Singal (2004) questioned whether the financial situation of airlines impacted upon the respective safety record. The research being, to determine whether investment in safety is reduced to increase profitability. In 2008, the then Executive Chairman of Southwest Airlines, Herb Kelleher answered critics from an industry perspective when he reported to the US House Committee on Transportation and Infrastructure[8] that"[b]eing unsafe would be the worst business strategy any airline could have." In the same year Southwest Airlines were fined to the tune of $10.2 million for safety violations having flown numerous flights without performing the required maintenance inspections (Madsen, 2013).

From a common-sense perspective safety in transport, whatever the mode, remains of paramount importance, and from an industry perspective, "*safety is good business*" (Osborn & Jackson, 1988). The same is equally true in respect to prevention of security breaches.

2.2. Security

Attacks on aviation, both aircraft and airports have occurred for over 80 years, and regardless of the definition applied to acts of 'terrorism,' it is by no means new phenomena (Sinclair, 2003). A review of criminal and terrorist acts show the origins clearly traceable to the 1930s (Gero, 1997). There are however, distinct periods that show the advancement and sophistication of criminals and terrorists from the 1930s to the present time, which have subsequently led to parallel responsive and preventative policies and practices.

Price and Forrest (2013) reflecting on research carried out before 2000, make reference to the hard-hitting comments of Wilkinson (1999) which considered analysis undertaken by the University of Tel Aviv (Merari) that determined that a hijacker had an 81% chance of seizing control as compared to the success of bombing an aircraft which remained at 76%. This research also levied criticism at the intelligence service and aviation administration for failing to liaise in an effective way to prevent attacks. It should be recalled that this was also to be one of the findings of the 9/11 Commission.

However, the tragedy of 9/11 was to highlight the full implications of an organised terrorist attack, not only in terms of the loss of life, but the catastrophic consequences which saw the grounding of aircraft in the United States for a period of three days, the plummeting of airline stock values and the release of government emergency funding to cope with the devastating aftermath.

Gladwell (2001) commented that this evolution of both attacks and defences had led to the situation whereby '[a]irport-security measures have simply chased out the amateurs and left the clever and the audacious.' Even with increased investment into improving air safety and security and with continuous research into making the industry safer for travellers, the question remains whether it will ever be possible to achieve zero accidents and incidents despite the continued concerted efforts to achieve this. Reflecting on the statement of Kelleher (above) it is perhaps not a question of being '*unsafe*' but it a question of being the safest it is possible to be and recognising, whether through regulation or otherwise, when this is not achievable (or until such a time when it is) mechanisms need to be in place to compensate for losses associated with air travel.

3. Assessing and accepting risk

Risk remains part of our everyday lives, and travel continues to involve risk.

Sage and White (1980) classified societal risk into four main types:

- Individual 'real' risk, as determined on the basis of the circumstances and as considered after their full development;
- Statistical risk, which is determined by available data relating to incidents and accidents concerning the issue being analysed;
- Predicted risk, which may be based upon relevant historical studies and analytical modelling;
- Perceived risk, which is the perception of a risk to an individual whether said to be intuitive or otherwise.

Civil aviation is recognised to involve all four areas of risk. Risk has been defined in various ways. Based upon the definition offered by Janic (2000) risk is to be viewed as the probability of an

[6] The 1988 bombing of PanAm flight 103 over Lockerbie, UK.

[7] For further commentary on the current liability regime in respect to third party surface damage and loss of life, refer to the 4th Quarter publication in the International Journal of Public Law and Policy and the paper, Sarah Fox (2014) *'To practice justice and right'* International Aviation Liability: Have lessons been learnt? (Pending publication) Vol. 4 Number 4/2014.

[8] 3, April, 2008.