

International aircraft accidents: the international legal framework

In this and future editions of *The Legal Lounge* I turn my focus from domestic to international civil aviation law, focusing in particular, on the legal framework that applies to investigations into serious incidents and accidents in international/foreign airspace. I begin in this article with a broad overview of the international legal framework for the conduct of civil aviation, and explain how this underpins and influences the basis upon which international aircraft search operations and air accident investigations are conducted. In future articles, I will discuss the specific application of these legal frameworks to some recent international aircraft accidents and incidents, outlining the legal and investigative processes followed and the outcome of those inquiries.

International Civil Aviation System – a broad legal context

The conduct of international civil aviation is governed by a series of international conventions and treaties. The foundation and corner stone of these is the “Convention on International Civil Aviation” (otherwise known as ‘The Chicago Convention’). The Chicago Convention was signed in December 1944 by 52 states, and after its formal ratification by 26 states, the International Civil Aviation Organisation (ICAO) came into being in April 1947 as a permanent organisation. In the same year it was granted special agency status to the United Nations, linked to the UN Economic and Social Council. There are now 191 member states of ICAO.

The Chicago Convention is currently in its ninth edition and comprises 95 short Articles that provide a broad overarching framework for the conduct of civil aviation, including rules of the air and the movement of aircraft through international airspace, air traffic management, aircraft certification and airworthiness standards, and licensing of operators and individuals involved in the civil aviation system. ICAO is tasked with working with its member states and international aviation organisations to develop the more detailed “Standards and Recommended Practices” (SARPs) that support the articles to the Convention. There are currently over 10,000 SARPs, which are reflected in 19 Annexes to the Chicago Convention, and which form the basis on which member states, including New Zealand, enact their own domestic and legally enforceable civil aviation regulations. To the extent that a member state does not adopt an ICAO standard detailed in a SARP, this is recorded and filed in an ICAO international registry as a “difference” of the member state. Members are audited against the Convention and its Annexes, and may be asked to explain why it has not adopted or has departed in some way from a standard, or to report on the intended timeframe within which it intends to adopt a standard into domestic law. Although recommended practices are not mandatory, these are also monitored, and some recommendations may later become standards. The frequency of audits of member states may vary depending on the level of adoption and compliance with the SARPs, and the level of assessed risk of the member state’s civil aviation system. New Zealand is considered to be a generally compliant and low risk state, although it has (along with other member states) filed a number of differences with ICAO standards.

The “exclusive sovereignty” principle

Article 1 of the Chicago Convention affirms the “complete and exclusive sovereignty” of each member state over its territory. Article 2 defines the territory as “the land and territorial waters” over which each state is recognised internationally as having sovereignty and/or a protective mandate.

This “exclusive sovereignty” principle underpins the entire Convention, and governs the basis upon which each state grants permission to foreign member states to fly within their territory and airspace. It also underpins the legal basis of the rules governing who should take responsibility for coordinating a search following an aircraft crash in foreign airspace, and who should lead the air safety investigation process.

International responsibilities for aircraft search and rescue and recovery operations

Article 25: Control of sovereign state over aircraft search and rescue or recovery phase

Pursuant to Article 25 of the Chicago Convention each member state undertakes to take “such measures as are practicable to assist aircraft in its territory that are in distress”; and to permit, subject to control by its own authorities, the owners of the aircraft or the state of registry of the aircraft to provide such assistance as is necessitated by the circumstances.

In practice, a number of other states or interested parties may also be involved in any search or recovery operation. Article 83 of the Convention states that where an aircraft is leased by an owner to an operator in another territory, the lessor may assign its rights and obligations under the Convention to the operator. Thus, where an aircraft is being leased, it may be the lessee that is represented in a search or recovery operation, or both the lessee and lessor may in some cases become involved. If a significant number of foreign nationals of a member state are missing or killed following an aircraft incident or accident, that member state is also likely to be granted permission to assist in the search or recovery operation; and neighbouring states to an aircraft crash may also offer their assistance. Each member state involved in a search for a missing aircraft is required to collaborate in accordance with ICAO recommended practices. However, the convention is clear that the ultimate responsibility and control over any search operation, is vested to the sovereign territory in which the aircraft is, or was, being flown.

Annex 12: Rules governing multiple state involvement in SAR operations

Annex 12 to the convention sets out more detailed SARPs that govern the detailed processes to be followed in international SAR operations. There is strong emphasis on the need for cooperation and effective SAR management between participating states and interested parties.

The establishment, organisation and management of a member state’s SAR processes in general terms are detailed, as well as procedures to deal with SAR operations involving two or more Rescue Coordination Centres; for authorities in the field; and for terminating or suspending SAR operations. Planning requirements for SAR operations, which are categorized depending on the level of emergency, and requirements of member states to publish and disseminate information to other affected states are also detailed; as are the preparatory and training requirements for SAR units, and protocols for removal of aircraft wreckage. It is also recommended that aircraft accident investigators be permitted to accompany rescue units in order to facilitate any subsequent aircraft accident investigation process.

The apparent conflict between these Annex 12 SARPs, and the “exclusive sovereignty” principal otherwise recognised in the Convention, were highlighted following the accidental shooting down of a Malaysian Airlines civilian aircraft over Ukraine in 2014. This will be discussed in a future article.

International air accident/incident investigation & inquiry protocols and procedures

Article 26: Primary control and responsibility for air safety investigations

Article 26 of the Chicago Convention vests primary responsibility for the conduct and control over an air safety investigation, to the state with sovereignty over the territory where an accident or serious incident occurred. That state is required to institute an inquiry into the circumstances of the accident or incident in accordance with the recommended practices of ICAO, but subject to any limitations in its own domestic laws.

The state of registry of the aircraft is to be given the opportunity to appoint observers to be present during the inquiry, and the state holding the inquiry is required to report the findings of its inquiry to that State. Beyond this, Article 26 of the Convention is silent as to any right of any other states or interested parties to participate. However, this is dealt with further in Annex 13 to the Convention.

Annex 13: Aircraft accident investigation protocols

Annex 13 sets out the protocols for notifying other states and interested parties following an accident or incident, and the responsibilities for conducting an air investigation, depending on the location of the occurrence and whether it is within or outside of the territory of an ICAO member state. While the state in which the accident occurs is envisaged under Article 26 to be responsible to conduct the investigation, Annex 13 permits that state to delegate all or part of its investigation to another state. If the accident happens outside the territory of any ICAO state, the State of Registry of the aircraft is required to conduct the investigation.

In addition, Annex 13 may extend rights to participate or appoint observers, to the operator of the aircraft, the manufacturer of the aircraft or engine, and in some cases, the design manufacturer of the aircraft or other significant aircraft components. States which have suffered loss through fatalities of its citizens are also entitled to appoint an expert to participate in the investigation. The Annex spells out in detail, the rights and responsibilities of such parties when participating in an air accident investigation.

A safety investigation once initiated will broadly follow the International Civil Aviation Organisation (ICAO) Annex 13 mandate, which is not to apportion blame, but to establish the causes of an accident or incident to try and identify safety improvements so as to prevent the same thing happening again. However, a number of states deviate to a greater or lesser extent from the “no-blame” principle. In such cases, criminal charges or other litigation could therefore be pursued either as a direct result of an air safety investigation, or as a result of a concurrent state or privately initiated investigation. I have discussed in previous articles, the extent to which New Zealand departs from the “no blame” principal in investigating or permitting prosecution action to follow from a serious aircraft incident or accident.

The investigation process includes the gathering, recording and analysis of all relevant information; the determination of the causes; formulating appropriate safety recommendations; and completion of the final report. The recommended format of the final report is contained in an Appendix to the Annex.

Annex 13 also includes protocols and requirements for dealing with evidence and seizing records, autopsy examinations, and dealing with local judicial authorities in the course of an investigation or inquiry process.

Annex 13 also deals with the post-accident information sharing and accident prevention process, which is designed to ensure international sharing of safety information to eliminate or reduce hazards and improve aviation safety standards worldwide. It also emphasises the need for states to establish non-punitive environments for the voluntary reporting of incidents and accidents and safety hazards, and the promotion by states of safety information sharing networks to facilitate the free exchange of information on actual and potential safety deficiencies.

As noted above, I have discussed in previous articles (which can be viewed and downloaded from my website) the extent to which New Zealand complies with or deviates from these Annex 13 principles in the domestic regulatory context.

In the next edition of *The Legal Lounge*, I will outline the processes followed during an international SAR operation, and the subsequent air safety investigation, following the crash of an Air New Zealand Airbus A320 into the sea off the Coast of Perpignan, France, on 28 November 2008, and the outcome of that inquiry.

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