

Do lawyers keep you safe?

Sean Gates, ERA's Legal Counsel, looks at how the legal profession can help guide airlines to analyse risk and develop a legal survival plan in case of an accident

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Every operator, every organisation, every regulator repeats the mantra that safety is the main priority in aviation. While this is a comforting code for customers, it is a proposition which can be in dynamic tension with the survival instinct of every business. Absolute safety in aviation can only be achieved by staying on the ground and however quietly it should be whispered, every compromise between flying and not flying carries with it some element of risk.

If one can, therefore, define safety as including the steps taken to ensure the survivability of the operator, it becomes clear that there is a need for the active participation of the legal profession. As one CEO once told me, “now that I see you, I know we must have had a disaster” – but I am sure he meant it in a good way!

Contract conundrums

Aviation contracts are multi-jurisdictional and frequently employ language the meaning of which varies from one country to another.

A prime example is the IATA Ground Handling Agreement which means handlers have an absolute indemnity for everything in Portugal but are wide open to liability in Belgium. Your insurance contract will employ terms of art and centuries of hallowed jurisprudence which may make the difference between coverage and the absence of coverage; for example, in the event of deliberate wrongful acts by employees. Your policy will probably permit insurers to manage the liability claims against your company but those lawyers must liaise closely with yours to ensure that their activities do not affect your brand. Your choice of lessor, MRO or training organisation may drag you into litigation in the US which you had neither planned for nor for which had you secured adequate insurance coverage. All of these relationships are governed by contracts. A good lawyer will be able to guide you through contracts, and identify exposures which can otherwise threaten the very existence of the organisation as well as assist in their mitigation. Your lawyers will also be making sure that potential claims for uninsured losses will be identified and prosecuted with the necessary diligence.

Conflicts and their resolution

There are many sorts of potential legal conflicts to be prepared for, both before an accident and once an accident has occurred. Your MRO contract may well include indemnities and warranties which are severely



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prejudicial to the health of the organisation after an accident. For a smaller company, the loss of use of one of its aircraft during a protracted period of repair can be existential. Loss of use cover, if available at all, is expensive and is normally limited to a period of a few weeks of grounding. The obligation to make lease payments goes beyond the accident until the lease is paid off. The manufacturer of the aircraft or failed part may well (in fact usually does) seek to limit its liability for losses to replacement of the failed part, and will probably also seek to exclude all responsibility for loss of use of the aircraft. Risk analysis by your lawyer will identify this exposure in advance so that you can incorporate it in your risk register and take whatever steps are necessary to preserve the wellbeing of the company.

Pre-incident planning for investigations

Aircraft accidents routinely give rise to investigations – not only by those of the state through its accident investigation organisation and public enquiries, but also by the courts in connection with inquests, civil litigation and criminal prosecution. All of these carry serious, potentially life-threatening risks to the existence of the company, either through its financial resources or the liberty of its directors, officers and employees and, in some ways most importantly, to its brand. These are matters where pre-accident legal planning is vital on many levels. You will need advice on the extent to which you can participate in the accident investigation and the extent to which information derived from the investigation can and should be used in self-defence. The direction of travel of an investigation is routinely



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affected by those who participate, and studies have shown clearly that the investigation is not merely a tool for the improvement of safety in aviation but also a device whereby parties can seek to focus criticism onto others and away from themselves. The management of that activity must involve pre-planning and management, amongst others, by your lawyers.

Investigation response

Criminal proceedings are, in many jurisdictions, automatic following accidents that cause widespread death or injury. Some organisations in the aviation industry have criminal lawyers on retainer throughout the world. Identifying the most suited lawyers for the purpose can be time consuming but the early stages of a response to investigation of this sort will shape the conduct and likely targets of prosecution. There are numerous examples of lobbying of prosecutors in advance of prosecution following major accidents whose experience of aviation industry operations can never be taken for granted and who are susceptible to "education". Regardless of your size, you need to develop a system whereby you can identify the best available criminal legal support and the best and most appropriate methods for making representations to actual or potential prosecutors.

Lawyers are essential to the safety and survival of your organisation and need to be supported and encouraged to develop a corporate legal survival plan for the benefit of the company, its shareholders and, most importantly, its directors, officers and employees. ■

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