Problems in Collaboration between a Judiciary and an ICAO Annex 13 Safety Investigations

**Introduction**

International civil aviation is an extremely dynamic sector, whether from the technological, operational or political perspective. In light of its historical record for rapid adaptation of innovations, not to mention the new challenges that regularly arise, ICAO must respond quickly and effectively. The organisation cannot execute this alone but should work in conjunction with the judiciaries of the various member states. The International Civil Aviation Organization (ICAO) has an established tradition of carrying out investigations into aircraft accidents and incidents with the aim of enhancing the safety of aviation as a means of transport. The responsibility to investigate is spelt out in the Chicago Convention of 1944, which recognises the significance of aviation accident and incident investigation. In its quest to safeguard air transport security, the European Union adopted ICAO's principles in governing all investigations of civil aviation accidents within its boundaries. Consequently, the European Union rules on investigating air accidents and incidents have a lot of similarities with those of ICAO. At the same time, there exist some differences that distinguish the European Union rules from those of ICAO (Valdés, Arnaldo, and Fernando, 2011, p. 1397). The authorities in charge of each means of transport try to ensure that the safety of the system is protected and that the stakeholders' confidence in the mode of transport is protected. Airs transport is of the quickest means of transport that connect people and countries. The safety of the industry is critical because accidents are often fatal. Compromising the safety of air transport can have detrimental effects on its users, especially given the facts that most plane crashes leave many dead (Ziomek, 2018, p. 123). Aircraft accidents and incidents are not a new feature in the aviation industry; they are as old as the sector itself. In the quest to make the air transport safer, International Civil Aviation Organization (ICAO) came up with the International Standards and Recommended Practices (SARPS), which has nineteen annexes that are universally addressed to technical issues that affect the aviation transport with the aim of attaining a high degree of safety in the industry (Challinor & Chloe, 2016, p. 53). Annex 13 to ICAO explains the guidelines linked to Aircraft Accident and Incident Investigations, the globalised guidelines. Over the last two decades, the aviation industry has been plagued by accidents and incidents that have underpinned the need for collaboration between a judiciary and the Civil Aviation Organization (ICAO) Annex safety investigation to enhance safety standards in the industry. Without cooperation, the judiciary may impede investigations into accidents or incidents involving aircraft. ICAO offers guidelines on how parties involved in investigations ought to conduct their business to ensure that they do not violate the organisation's rules and regulations of the aviation industry. It is upon the member states to observe the rules set out in ICAO Annex 13 for their good and that of the international aviation industry. ICAO does not have its own space from where to enforce its rules. Hence, it has to rely on countries' willingness to attain its objectives. For many years that ICAO Annex 13 has been in existence, the cooperation between the courts and investigators have been subject to concerns over the hurdles that cooperation face (Emery, 2011, p. 210). The courts have to administer justice to those who come before them in search of it, but to achieve this; they require that impeccable evidence to be adduced before cases are determined. Aircraft accidents or incidents are an area that requires experts in investigations and operation of aircraft to make valid findings that can support court decisions. The judiciary interest in issues affecting the aviation industry, such as accident arises when matters related to apportioning blame for the sake of punishing the party responsible for the accident or incident. Issues such as who is to compensate the victim and who is to be imprisoned in case of manslaughter or murder require support by competent investigation reports. The collaboration between ICAO annex investigation and the judiciary has several problems that affect the performance of the aviation industry. Annex 13 recommends that any court or administrative action designed to apportion blame or impose liability should be autonomous from the accident or incident investigation (Jakhu, Sgobba & Dempsey, 2011). However, the state conducting the investigation shall recognise the need for coordination between the investigator-in-charge and the judicial authorities. In general, most of the evidence gathered should remain confidential unless the judicial authorities determine that their disclosure out-weighs the adverse domestic and international impact. Such provisions may have positive or negative implications depending on how the judicial systems opt to use them (Mackenzie, 2010, p.342).

**Purpose of the study**

The research study is tailored towards establishing the existing problems in the collaboration between the judiciary and ICAO Annex 13 in matters involving safety and investigations. The study will also seek to find a solution to the identified challenges as part of the contribution to the improvement of the sector. The interaction between ICAO Annex 13 and the judiciary is marred with some challenges that have negatively impacted the aviation industry's safety. Understanding the relationship between the judiciary and investigators is important in trying to improve aviation safety.

**Problem Statement**

The collaboration between a judiciary and an ICAO annex 13 safety investigation is affected by a myriad of challenges that negatively affect the work of incident or accident investigation team. Lawsuits that have adverse effects on investigations are signs of problems in collaborative efforts between the courts and ICAO Annex 13 safety investigations. Recognising these challenges and their solutions is necessary is an issue that has to be addressed to guarantee quality collaboration between ICAO annex 13 safety investigation with the judiciary to enhance aviation safety.

**Research Methodology**

The research will utilise the qualitative methodology to analyse data gathered and draw conclusions on the challenges and possible solutions. The research study shall rely on secondary data and primary data to investigate the problems in collaboration between a judiciary and an ICAO Annex 13 Safety Investigations. The research entails a qualitative design. This implies that the study will be done in various settings in which the researcher plays an important role when it comes to data collection. Primary and secondary approaches will be used, allowing multiple sources of data collection, including documentation, face-to-face interviews, and questionnaires. The primary data shall entail gathering first-hand information and identifying issues that may not be identified through secondary data while also gathering first-hand information from front line personnel in different entities. The secondary data shall be used to ground the research as well as illuminating critical elements of the study.

The secondary data shall be used for grounding of the research as well as illuminating the key elements of the study. For this research, random sampling shall be employed to gather data from various sources that will include online journal articles, books, reports, and ICAO website. The material sampled shall be selected on the strength of their relevance to aviation incident and accident investigations and collaboration with the judiciary. A systematic literature review shall be carried out to identify issues in collaboration between the judiciary and ICAO Annex 13 investigations. Apart from the systematic literature review, interviews and questionnaires will be administered on the important aspects of the respective organisations/stakeholders concerned with the investigations and safety of airlines. These include investigators in the air safety investigative bureau, investigators in the judiciary air accident field, airline safety officers, current and retired judges, chief air accident investigators and other persons that may be identified during the course of the study.

The data collection methods that will be used for the study will entail documentations, interviews, and archival records, among others. Here, the interview questions will be based on the questionnaire topics and will be adopted to explore factors regarding the problems that emerges between the judiciary and ICAO Annex 13 investigations. Questionnaires will help in providing basic demographic information and give more insights about the reasons for some of these problems.

There will be a need to use random sampling to gather data from various sources that will include interviews with individuals working in the judicial part, safety investigations, investigative bodies and authorities, key aviation workers, online journal articles, books, reports, EASA and ICAO websites. The material sampled shall be selected on the strength of their relevance to aviation incident and accident investigations and collaboration with the judiciary. A systematic literature review shall be carried out to identify issues in collaboration between t the Judiciary and ICAO Annex 13 investigations. A thematic analysis will follow to unveil the substantive categories or problems that surface from the study.

After secondary and primary data has been collected more thoughtfully, there will be a need to analyse the data. One of the most appropriate ways to do a thematic analysis is to garner an in-depth understanding of the major problems as highlighted from the interviews and questionnaires and the information from the secondary sources. Thematic analysis is used in qualitative research and focuses on examining themes or patterns of meaning within data. The method is supposed to emphasise both organisation and rich descriptions of data set and theoretically informed interpretation of meaning. As such, the process of data analysis should follow the following steps:

1. Cover as many responses as possible. The codes/identifications should be generic enough to apply to the multiple comments, but specific enough to be used in the analysis.
2. Avoid commonalities - However, there is a possibility of having similar codes that serve different purposes.
3. Capture predominantly negative aspects because the study is about the challenges that interplay between the Judiciary and ICAO; there is a need to identify information that contrasts with each other to track predominantly negative elements of a study.
4. The data obtained should be crunched into clear themes/challenges/findings. The end result of the analysis should be substantive categories of challenges.

Considering the instruments that will be used, questionnaires will be used on the various groups. The following is a sample questionnaire that will be used on the various participants.

Questionnaire for investigation officers

|  |
| --- |
| To what extent is your investigative body independent when it comes to discharging of its duties?  What guidelines are you supposed to conform to when there is a need to share information (which may violate privacy)? How do you settle such dilemmas with the judiciary?  Have your investigations conflicted with the judiciary?  What nature of information do you always collect in case of an accident?  To what extent have the various states been able to corporate with you in executing your mandate?  Have your investigations been successful in a situation where few stakeholders are involved as compared to many? What are some of the challenges you have experienced in this case?  Have you come across litigation in the course of your duties? How have these ligations affected your mandate?  How have the provisions of ICAO Annex 13 helped/hampered your cooperation with the judiciaries? |

Questionnaire for the judicial officers

|  |
| --- |
| How does the manner in which the state approaches incidents and accidents occurring in air transports affects how the judiciary collaborates with safety investigations?  What could be some of the major causes of conflicts of interest between ICAO Annex 13 investigations and the Judiciary?  How have the provisions of ICAO Annex 13 helped/hampered your cooperation with the other investigative bodies?  How important are the provisions of Annex 13 of ICAO when it comes to the protection of evidence?  What are some of the factors that may interfere with the credibility of the evidence?  How have you been able to handle access to the wreckage and other components forming part the scene of incident or accident? What has been any challenges experienced in collaboration with the other bodies you are supposed to work with regard to access to wreckage?  How do the delays in the courts' interpretation affect hamper the delivery of justice and the subsequent cooperation of the other parties? |

The section below unveils some of the emerging issues from the systematic literature review. The information is presented in tandem with emerging themes.

**Disclosure of Information**

ICAO Annex 13 and judiciary have had differences on what information to disclose and what to protect. The intention by which records of investigation are requested can create problems, especially where the investigation team believes the interests and rights of parties involved are at risk (Daniels, 2016, p. 120-121). In its wisdom, the court can compel the investigators to share information they have gathered during investigations. Nevertheless, this might not be granted if the investigators believe that giving out such information would breach the ICAO rules and violate the parties' rights and interests. The question of which information can be shared with other players such as courts is an issue that is not demarcated especially on the ground that the ICAO Annex 13 rules leave open to circumstances and understanding of the players involved.

Moreover, each country has national laws that affect how courts and aircraft accident or incident investigators relate. In France, the court's interests are given an upper hand, leaving the investigators subject to courts' powers where the two clash (Chittum, 2018, p.32). The courts can request disclosure of information at any given time, and the investigators ought to comply. However, this does not mean that the judiciary acts in total disregard of ICAO annex 13 and E.U. Regulation No 996/2010 Information disclosure remains a grey area, where the clash between ICAO annex 13 and the judiciary can emerge at any given time, based on prevailing national legal position on the matter at hand.

**Administration of the Balancing Test**

The disclosure of information requires that there ought to be verifiable records of information that qualify for a material fact. The factors that affect the decision-making process are put into account through listing for the sake of administering the balancing test, by which the final decision on whether to disclose or not disclose information can be arrived at. It is imperative to note that some of the listed factors favour disclosure, whereas others do not. The courts are players who determine what meets the threshold for the disclosure and the investigation team. The investigators have to operate within the provision of ICAO Annex 13, which requires them not to disclose sensitive information unless when the circumstances allow (Daniels, 2016, p. 67). In a nutshell, they must have a clue of what entails sensitive and confidential information and what is not. Internal mechanism of administering a balancing test to decide what can be shared with the courts is handy in guiding the investigation team in how to relate with the judiciary.

The methodology of administering a balancing test is not uniform across the E.U. countries, which leaves a loophole for variances in how disclosure of information can be done. Each state is at liberty to come up with its own rules of engagement between the judiciary and investigation team but under the guidelines of ICAO Annex 13 and E.U. laws (Geisle and Marius, 2009, p.11). States are bound to stick to what works best for them. In essence, even when it is assumed that the safety of the aviation transport should be given priority, other interests within the state can push for sensitive information that has negative implications on future investigations to be released. The release of information held is subject to pull and push, especially if it involves very sensitive data. In normal circumstances, courts are supposed to carry out their independent investigations rather than rely on the works of the investigating team that is constituted to serve the purposes of ICAO annex 13. However, for one reason or another, they sometimes look upon reports by technical investigators to support them in dispensing with justice. Prosecutors find reports from investigation to be more reliable and compelling in pursuing their legal interests, which brings about the need for collaboration between courts and investigators (Griffioen, 2013, p.79).

The variance in the application of the balancing test among European nations creates a difference in how each of the local legal systems approaches the relationship between courts and ICAO investigators. The question of how the two should relate with one another is handled within the nation's understanding and application of balancing test when courts seek information from investigators. The decision on whether to share the whole or part of the information gathered is evidence in a court of law has to be logically arrived at (Campbell, 2004, p. 40). The administering of the balancing test has to be clear and uniform across the board to establish a common culture on how states approach the relationship between the judiciary and ICAO investigation teams.

**Judicial Inquiry**

Judicial inquiries are inevitable where a court case has been lodged following an aircraft accident or incident**.** Courts are allowed to set up independent tribunals or investigations into an accident or incident in the aviation industry for the sake of aiding them to determine where to place liability. Michaelides-Mateou and Mateou (2016, p. 76) asserted that judicial inquiries have often conflicted with the investigating teams, particularly in terms of interest in the same information and custody. Judicial inquiries collect evidence on incidents, and accidents often come with convergence of interest in similar information. As a result, sensitive information is put at the risk of disclosure to unwarranted parties, which is in the bridge of the safety of the aviation industry.

Parallel investigations by the judicial inquiry team and the investigators can also be used. In the Concorde accident investigation, the urgency of the judicial inquest team investigations gave it more authority and priority over the wreckage and documents about the plane (Geisle and Marius, 2009, p. 43). Parallel investigations can clash, especially concerning access to the scene of the accident and the wreckage. The fact that each country has diverse legal system and approach to the relationship between courts and accident or incident investigators creates a lacuna in law that can hamper the application of ICAO annex 13 (Bartsch, 2018, pp. 154-155). Consequently, the investigators complained that their work was hampered, which affected their capacity to carry out their investigations and make final reports effectively. Lack of proper collaboration created conflicts of interest between the two teams.

The courts operate using the local laws, which vary from one state to another. In an incident where there is a conflict between the ICAO Annex 13 investigation and the local laws, challenges in how the two can strike a balance are bound to happen. Annex 13 of ICAO requires that states put in place the requisite measures to ensure that the investigation team is accorded maximum and standard cooperation. Nevertheless, this is not always the case in instances where the local legal systems have not been attuned fully to meet the ICAO Annex 13 requirements. In the United Kingdom, the role of investigation of incidents or accident involving aircraft is a preserve of the Air Accidents Investigation Branch (Aircraft Accident Investigation Branch (U.K.) (AAIB)), which has to carry out its mandate per the rule of ICAO Annex 13 (Korovin, 2011, p. 157). However, the English laws allow courts to prosecute minor incidences involving aircraft, which may include but not limited to the breach of rules or regulations. The determination of minor and serious incidents can be problematic, especially where the court's opinion and that of the ICAO investigation team are at clash. Before consultations and understanding, it is critical to avert fallout between the two.

The judiciary has to balance local and international laws when prosecuting matters touching on air transport safety. The demarcation between the two laws is not clear, which leaves a cry area that is often a point of contention between the courts and ICAO Annex 13 investigation team (Griffioen, 2013, pp. 70-71). Looking at their jurisprudence, the courts can choose to prosecute the matters at hand whether they affect the investigation or not. The weight of the matter before the court is what guides the judiciary authorities on how to handle the conflicts between the courts and ICAO Annex 13 investigation, how the disclosure of the information is determined impacts on the relationship between courts and the investigation team. In an event where information by ICAO Annex 13 investigators is used in a court of law to apportion blame to either of the parties involved in the accident, future investigations are bound to be affected. Potential witnesses will shy off from giving information when they know it can be used against them of other people. The aviation industry is a very sensitive sector; the players, more so the designers, manufacturers, and operators of the aircraft are keen on protecting their reputation to remain competitive (Korovin, 2011, pp. 211-213). Consequently, they are more likely to avoid contributing to a course that incriminates them, especially about giving evidence that they believe can be used against them in a court of law.

**Many Players**

ICAO does not have the authority to enforce its provisions or laws; it relies on states' willingness to come with laws that support its objectives. ICAO regulations recommend that each member state must come up with a national investigation agency or authority that will be responsible for handling aircraft accidents and incidents. The agencies' operations are to align with ICAO's objectives in promoting safety in the aviation sector. Kozłowski asserted that the protection of information gathered on accidents within the industry is critical. Although states are required to act under ICAO rule and regulation, this is not always the case (Kozlowski, 2017, p. 34). Investigation team can draw its membership from more than one country or authorities, hence the complexity of the probability of a clash in their legal grounding. In essence, investigations that bring together more than one state, lack of uniformity on their approach to collaboration between the investigation team and the judiciary bring about challenges in settling the misunderstandings.

Reference list

Bartsch, R., 2018. *International aviation law: a practical guide*. Routledge.

Campbell, S., 2004. *Chinook Crash*. Pen and Sword.

Chittum, S., 2018. Last days of the Concorde: the crash of Flight 4590 and the end supersonic passenger travel.

Daniels, S., 2016. *Corporate Manslaughter in the Maritime and Aviation Industries*. Taylor & Francis.

Emery, H., Roberts, A., Goodman, R., & Harrison, L. 2008. *Aviation English: for ICAO compliance*. Oxford: Macmillan.

Geisler, M., and Marius B., 2009. *The German Civil Aviation Act*. Utrecht, the Netherlands.

Griffioen, H. 2013. *Air Crash Investigations: Eye of the Needle: the Crash of British Airways Flight 38*. Lexington, KY: Mabuhay Publishing.

Jakhu, R. S., Sgobba, T., & Dempsey, P. S. (Eds.). 2011. *The Need for an Integrated Regulatory Regime for Aviation and Space: ICAO for Space?* (Vol. 7). Springer Science & Business Media.

Korovin, I. 2011. *Air Crash Investigations: Polish President Dies in Air Crash the Crash of Polish Air Force Flight 10 1*. Place of publication not identified: Lulu Com.

Kozłowski, M., 2017. Integrated airport safety audit. *LogForum*, *13*(1), pp.39-49.

Mackenzie, D. 2010. *ICAO: a history of the international civil aviation organisation*. University of Toronto Press.

Michaelides-Mateou, S. and Mateou, A., 2016. *Flying in the face of criminalisation: the safety implications of prosecuting aviation professionals for accidents*. Routledge.