

# **Fact-finding in Aviation Claims under the Revised Aircraft Accident Investigation Regulations**

Aviation Law Afternoon Workshop

Dr Laurent Chassot

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# Synopsis

- The new legal framework of aircraft accident investigation
- Changes relevant to fact-finding in aviation claims
- Alternative ways of fact-finding under the new legal framework

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# Legal rules applicable to aircraft accident investigation in Switzerland



## 3 levels:

- International law: ICAO Annex 13
- European law: EC **2012: replaced by new Reg 996/2010**
- Domestic law: Aviation Act and Aircraft Accident Investigation Ordinance **2011: revised**

# 2011: Revision of the Swiss Aircraft Accident Investigation Ordinance (AAIO)

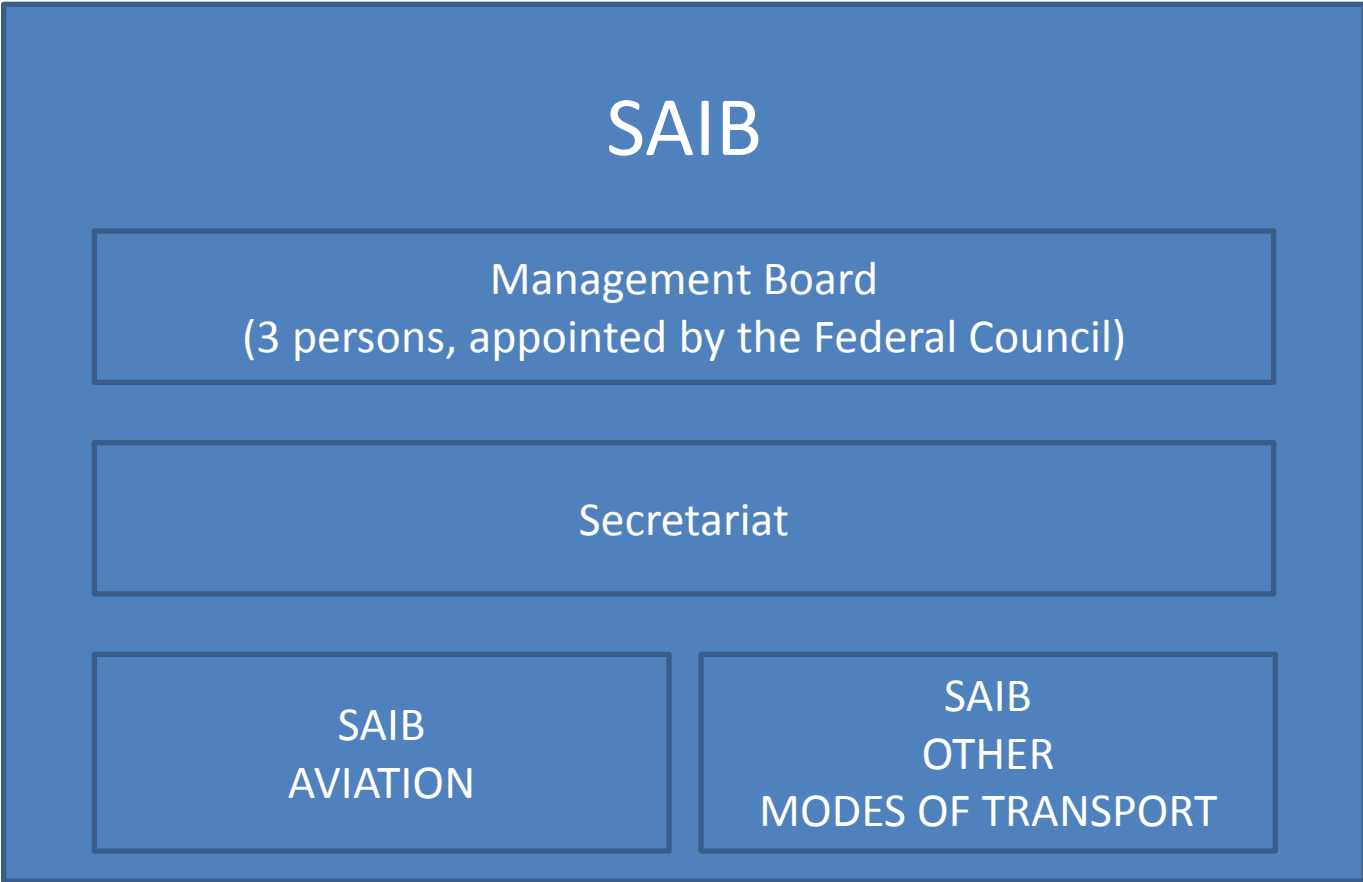
- 2003: National Aerospace Laboratory (NLR) report; with respect to accident investigations, NLR recommended *inter alia*:
  - to discontinue the recourse process through the “Eidgenössische Flugunfallkommission” EFUK;
  - that the Aircraft Accident Investigation Bureau (AAIB) should report to the minister of transport instead of FOCA; and
  - to re-organise AAIB to incorporate a Board, which would in particular review and approve the investigation reports (quality assurance).
- The AAIO (SR 748.126.3) and the Aviation Act (SR 748.0) were revised at the end of 2011, so as to implement the recommendations made by NLR report; entry into force of the revisions on 01/11/2011.

# The revised AAIO – essential features



- AAIB and Investigation Bureau for Railway, Funicular and Boat Accidents (IRFBA) merged => **Swiss Accident Investigation Board (SAIB; DE = SUST; FR = SESA)**. Organisation of the new entity dealt with in a separate ordinance (SR 172.217.3).
- Removal of EFUK and of the possibility to apply for the review of the investigation report.
- Adoption of express provisions on consultation of authorities, crew, manufacturers and ATC on the draft investigation report. Previously, those parties were already consulted, however on an informal basis.

# Organisation of SAIB



# 2012: Adoption by Switzerland of the EU Regulation Nr 996/2010



- Repeals the Directive 94/56
- Regulation vs directive
- In force in Switzerland since 01/02/2012



# Objectives and main features of Regulation 996/2010



- Creates a European Network of Civil Aviation Safety Investigation Authorities, so as to strengthen the capacity of safety investigation authorities and the cooperation between them (Art 7).
- Takes into account the establishment and role of EASA -> participation of EASA in safety investigation (Art 8).
- Reinforces the position and independence of safety investigation authorities towards other authorities, in particular judicial authorities (Art 11).
- Protects sensitive safety information -> non-disclosure and monopoly of safety investigation (Art 14).
- Improves implementation and diffusion of safety recommendations -> follow-up on implementation and recommendations database (Art 18).
- Improves assistance to victims of air accidents and their relatives, e.g. by the obligation for airlines to produce passenger lists and to establish emergency plans (Art 20-21).

# Pending: Revision of the AAIIO (alignment with EU Reg 996/2010)



- 2013?
- Should be considered in particular:
  - the protection of sensitive safety information (Art 14 Reg 996/2010) vs the right of courts to access evidence.

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# What changes do the revised OAAI and Reg 996/2010 bring about for fact-finding in aviation claims?



- Previously, parties in aviation liability claims used to rely almost exclusively on the findings and conclusions of the investigation report to support their submissions.
- Some of the changes brought by the revision of Swiss accident investigation regulations in 2011 and the adoption of EU Reg 996/2010 in 2012 will probably affect the use of investigation reports in aviation claims:
  - limited involvement of interested parties in the safety investigation;
  - investigation report no longer subject to review; and
  - protection of sensitive safety information.

# Involvement of interested parties in the safety investigation: before



“**Art 16 OAAI** – Request for investigation measures [**before revision**]

<sup>1</sup> Whoever is directly affected by the investigation, FOCA, the competent federal and cantonal authorities, the accredited representative of a foreign State and any person which can demonstrate *prima facie* a legal interest in the outcome of the investigation, may request the Bureau to make supplementary investigations. The Bureau may refuse, namely when the requested investigations:

- a. would likely not contribute to reach the goal of the investigation;
- b. would presumably cause disproportionate costs, that the requesting party would not bear.

<sup>2</sup> The Bureau’s decision may be challenged before the Commission [ie EFUK] within ten days from its notification.”

# Involvement of interested parties in the safety investigation: under revised OAAI



“**Art 16 OAAI** – Handling of requests from individuals and authorities [**current version**]

<sup>1</sup> SAIB takes into account requests from individuals and authorities for specific investigation measures and materialises them if need be.

<sup>2</sup> There is no right to claim specific investigation measures.”

# Challenge of investigation report: before



## “Art 26 Aviation Act [before revision in 2011]

<sup>1</sup> The Federal Council appoints a federal commission on aircraft accidents (Commission [EFUK]).

<sup>2</sup> Whoever can demonstrate an interest in the outcome of the investigation, as well as the authorities designated by the Federal Council, may apply, within a 30-day period from the delivery of the investigation report of the Bureau, for the Commission to review the completeness and conclusiveness of the investigation report; in such cases, the Commission shall establish a final report.”

# Challenge of investigation report: after the revision



## “Art 26 (1) Aviation Act [current version]

<sup>1</sup> For every investigation SAIB shall establish an investigation report. This report does not constitute a decision and it cannot be challenged. [...]”

**-> No legal challenge available against an investigation report.**



# Protection of sensitive safety information: ICAO



- According to ICAO Annex 13:
  - “5.12 The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:
    - a) all statements taken from persons by the investigation authorities in the course of their investigation;
    - b) all communications between persons having been involved in the operation of the aircraft;
    - c) medical or private information regarding persons involved in the accident or incident;
    - d) cockpit voice recordings and transcripts from such recordings;
    - e) recordings and transcriptions of recordings from air traffic control units;
    - f) cockpit airborne image recordings and any part or transcripts from such recordings; and
    - g) opinions expressed in the analysis of information, including flight recorder information.”
- Switzerland has notified a difference in respect of that provision, which is therefore not applicable in Switzerland:
  - “Swiss legislation requires that all documents be made available to judicial authorities and aviation authorities.”

# Protection of sensitive safety information: EU Reg 996/2010 (1/4)



Art 14 (1) and (2) Reg 996/2010 (shortened and simplified)

The following records **shall not be made available or used for purposes other than safety investigation or improvement of safety** :

- all statements taken from persons by the safety investigation authority;
- records revealing the identity of persons who have given evidence in the context of the safety investigation;
- information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals;
- cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units;
- written or electronic recordings and transcriptions of recordings from air traffic control units;
- flight data recorder recordings.

# Protection of sensitive safety information: EU Reg 996/2010 (2/4)



**However, disclosure of the above mentioned records may exceptionally be authorised.**

According to Art 14(3), “the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation”.

# Protection of sensitive safety information: EU Reg 996/2010 (3/4)



## Which authority is competent to authorise disclosure in Switzerland?

- No specific provision so far in Swiss law.
- The Criminal Procedure Code (CrimPC) contains provisions on the taking of evidence which would enable a court or the public prosecutor to request documents from SAIB (Art 194 CrimPC) or to seize documents or recordings of the investigation (Art 246 ff CrimPC). Could the courts competent to rule on the taking of evidence pursuant to those provisions be deemed the “competent authority” for the purpose of Reg 996/2010?
- The Civil Procedure Code does not enable civil courts to *order* the production of documents by administrative bodies. No “competent authority”?

**-> Clarifications by the legislator are required.**

# Protection of sensitive safety information: EU Reg 996/2010 (4/4)



## **Sensitive safety information and investigation report:**

according to Art 16 (5) Reg 996/2010, “[t]he information covered by Article 14 shall be included in a report only when relevant to the analysis of the accident or serious incident. Information or parts of the information not relevant to the analysis shall not be disclosed.”

# Pros & cons of relying on safety investigation for fact-finding in aviation claims



## Pros:

- Cost effective
- High level of technical expertise
- Investigation report highly authoritative

## Cons:

- “Sole objective is the prevention of future accidents and incidents without apportioning blame or liability”
- Limited interaction of parties with the investigation
- Investigation report definitive
- Investigation report highly authoritative, taken “as Gospel” by courts!
- Possible restriction to the access and use of investigation findings (protection of sensitive safety information)

# Synopsis

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## 2 suggested approaches

- Appointment of an expert witness by way of precautionary taking of evidence
- “Arbitrator’s opinion” = *Schiedsgutachten, expertise-arbitrage*



# Appointment of an expert witness by way of precautionary taking of evidence



- = *vorsorgliche Beweisführung in der Form eines gerichtlichen Gutachtens / expertise judiciaire par voie de preuve à futur*
- Art 158 + 183 ff of the Civil Procedure Code (CPC)
- In a nutshell: pre-trial appointment of an expert by a court to investigate the cause of the accident/incident and establish a report.
- “Official” investigation, more compelling than a private expert investigation, which is considered as a mere submission by a party (BGE 135 III 670, N 3.3.1: “*Nach konstanter Rechtsprechung des Bundesgerichts ist Parteigutachten nicht die Qualität von Beweismitteln, sondern von blossen Parteibehauptungen beizumessen*”).
- Contradictory character: *et audiatur altera pars*.

# Conditions for the precautionary taking of evidence (PTE) (1/2)



“**Art. 158 CPC** – Precautionary taking of evidence

- <sup>1</sup> The court shall take evidence **at any time** if:
  - a. the law grants the right to do so;
  - b. the applicant shows credibly that the **evidence is at risk** or that it has a **legitimate interest**.
- <sup>2</sup> The provisions regarding interim measures apply.”

# Conditions for the precautionary taking of evidence (PTE) (2/2)



A court orders the PTE on the following conditions:

- **evidence is at risk**, e.g. a witness is about to die (BG 4A\_118/2012), or, in our context, an aircraft is about to be dismantled in the course of the safety investigation;
- or the applicant has a **legitimate interest**, by which the law means the interest in establishing facts so as to **assess the prospects of a claim** (Message of the Federal Council, BBI 2006 7221, p 7315);
- and the applicant can show the **likely existence of a claim** (a claim for damages in our context) (BGE 138 III 76, N 2.4.2).

# PTE: jurisdiction issues

- Venue:
  - PTE = interim measures (Art 158 [2] CPC; BGE 138 III 46, N 1.1);
  - hence, venue determined
    - for international matters by Art 10 of Private International Law Act;
    - for domestic matters by Art 13 CPC.
  - Therefore, the application for PTE may be lodged in either cases:
    - either in the court at the place where the requested measure shall be enforced, ie, in the case of an expert witness investigation, at the place where the object of the investigation (generally the wreckage) is located; hence likely to be Payerne, seat of SAIB-AV;
    - or in the court at the place where the main law suit (claim for damages) may be lodged (ie the place of the accident or the defendant's domicile).
- Subject matter jurisdiction: depends on the canton; in VD (Payerne), Justice of peace ("*Friedensrichter*").

# Procedural steps of an expert witness investigation by way of PTE



- Filing of the application (application shall be directed at a counterparty) (Art 252 CPC).
- Counterparty's submission (Art 253 CPC).
- Hearing.
- NB: parties's submissions shall cover the following aspects: conditions of PTE, proposed expert witness, task to be performed by him (Art 183 [1] and 185 [2] CPC).
- Decision on the merits of the application for PTE (Art 256).
- If granted, appointment of and instructions to the expert witness.
- Investigations by the expert witness (Art 186 CPC).
- Submission of the expert witness's report – parties are consulted and may request explanations or additional investigations – possible hearing (Art 187 CPC).

# Coordination of expert witness's investigation and safety investigation



Art 12 (3) Reg 996/2010

Coordination of investigations by way of **advance arrangements** between the concerned authorities covering the following aspects:

- (a) access to the site of the accident;
- (b) preservation of and access to evidence;
- (c) initial and ongoing debriefings of the status of each process;
- (d) exchange of information;
- (e) appropriate use of safety information;
- (f) resolution of conflicts.

# The expert witness's investigation report



- Not binding upon the court (the court freely appraises the evidential character of the report).
- However, in practice, strong authority due to the impartial and contradictory character of the investigation.

# Pros & cons of an investigation by a court-appointed expert witness



## Pros

- More specific than safety investigation (focus on liability)
- Stimulating competition to safety investigation
- Involvement of counterparties -> debate -> negotiations -> settlement

## Cons

- Costs
- Lack of experience by judges, experts, SAIB, ...
- Lack of experts



## Costs

- The applicant shall pay an advance on court costs and on the expert witness's fees (Art 98 CPC).
- The applicant shall also in principle bear the aforementioned costs.
- However, in respect of a possible main trial (claim for damages), the judge may reserve the allocation of costs for the main trial (Art 104 [3] and 111 CPC).

# “Arbitrator’s opinion” = *Schiedsgutachten, expertise-arbitrage*



“Art. 189 CPC – Arbitrator’s opinion

<sup>1</sup> The parties may **agree** to obtain an arbitrator’s opinion on the matters in dispute.

[...]

<sup>3</sup> **The court is bound by the arbitrator’s opinion** with regard to the facts established therein provided:

- a. the parties are free to dispose of the legal relationship;
- b. no grounds for recusal existed against the expert arbitrator; and
- c. the opinion has been stated in an impartial manner and is not manifestly incorrect.”

**In a nutshell:** Private investigation, whose findings are however binding upon courts.

# Pros & cons of the arbitrator's opinion vs the expert witness investigation



## Pros

- Flexible and informal -> no proceedings
- Binding upon courts

## Cons

- Requires both parties' agreement
- Binding upon courts!
- Investigation has no official status, which might be an inconvenient towards SAIB

Thank you for your attention!

**Dr Laurent Chassot**

Avocat, LL.M. air & space law (McGill)

[chassot@gbf-legal.ch](mailto:chassot@gbf-legal.ch)

**gbf**  
Attorneys-at-law

P.O. Box 1661  
Hegibachstrasse 47  
8032 Zurich  
Switzerland

T +41 43 500 48 50  
F +41 43 500 48 60  
[contact@gbf-legal.ch](mailto:contact@gbf-legal.ch)  
[www.gbf-legal.ch](http://www.gbf-legal.ch)

11, rue du  
Conseil-Général  
1205 Genève  
Suisse

T +41 22 321 34 32  
F +41 22 318 00 88