

Sinai Plane Crash: The Legal and Regulatory Investigations to follow

Vincent Coppinger - Senior Associate
- Dubai International Financial Centre

November 2015

This article will consider their roles and how they work to establish the facts and apply international law to resolve the complex issues that arise when such disasters occur.

The Disaster

On 31 October 2015, 224 passengers died where a Metrojet plane operated by Kogalnavia, and flying from Sharm El Sheikh in Egypt to St. Petersburg in Russia, came down over the Sinai peninsula without broadcasting a mayday warning.

Speculation has raged about the cause of the tragedy, and aviation hull liability and war risk insurers have been quick to act on behalf of the Russian carrier, as is the norm when dealing with such an incident. The official investigation committee has been formed from representatives from Ireland (where the plane is registered), Russia (where its operations are based and the majority of passengers were born), France (where the plane was designed) and Germany (where the aircraft was made). At the time of writing the UK has intervened, despite playing no part in the official incident investigation, and a temporary moratorium on flights to and from Sharm El Sheikh has been imposed on UK carriers whilst security assessments are carried out following specific intelligence that sabotage may have caused the destruction of the aircraft, with the possibility of an explosive device on board. Russia, whilst initially criticizing the UK moratorium, has followed suit in suspending flights to Egypt whilst investigations continue.

In all aviation loss incidences, there is speculation in the early days of the investigation and the Metrojet loss is no different. Reasons put forward have ranged from the age of the Airbus A329 (built 1997), a catastrophic mechanical failure, possible structural damage to the aircraft's tail from a previous incident in 2001, a bomb planted by terrorists (such as Chechen separatists or Islamic State) and a missile attack from armed groups on Sinai peninsula.

The Ukraine Comparison

It is likely that an interim report revealing some of the facts contained in the aircraft "black box" will be published within the next few weeks (perhaps at the time of publication of this article), and then there will be a further interim report. The final report into the incident will take much longer.

We can obtain some clarity as to how the aviation regulatory authorities will investigate these issues, as just two weeks before the Metrojet incident, the formal report into the incident last year of Malaysian Airlines ("MAS") MH17, which was shot down over an area of armed conflict in Eastern Ukraine, was released.

MAS Flight MH17 crashed on the 17 July 2014 over Eastern Ukraine in airspace that had not been closed to commercial airline traffic even though there was heavy military action in the area between the Ukraine military and pro-Russian rebels fighting for autonomy from the Ukraine. The Boeing 777 aircraft was en-route from Amsterdam to Kuala Lumpur and flying at 33,000 ft, 1,000 ft above a no-fly zone which the Ukraine authorities had imposed. It was believed to have been shot down by pro-Russian rebels with the

loss of all 298 passengers.

Like Metrojet, there was enormous speculation in the immediate aftermath of the crash. The EU imposed sanctions on Russia and reciprocally Russia threatened an outright ban on European airlines using trans-Siberian airspace. Much of the world's media blamed pro-Russian rebels fighting in Eastern Ukraine and it was alleged that they used a Russian surface-to-air missile launched from a separatist held area in Eastern Ukraine. The alternative view from Russian separatist forces was that the aircraft was shot down by the Ukrainian military, which has similar missiles, in order to blame the disaster on Russia and the pro-Russian rebels fighting for autonomy from the Ukraine.

In the immediate aftermath the situation on the ground was particularly complex: rescue teams and crash investigators were prevented from getting access to the crash site by armed rebels and Dutch, Australian and Malaysian forensic experts had access to this crash site for less than a week before being pulled out of the area of fighting for their own safety, returning some four months later to carry out their duties in a safe environment.

Ukraine perhaps realized that it would not be seen as a neutral party in the crash investigation and also acknowledged that the majority of the passengers who perished were Dutch nationals. In accordance with the Chicago Convention on International Civil Aviation (1944) ("Chicago Convention"), Ukraine was the country in which the aviation incident occurred and was responsible for the investigation. However under the Convention it could delegate the investigation to another state, and consequently Ukraine handed over the leadership of the investigation to the Dutch Safety Board ("DSB"). It will be noted that in the Metrojet incident, Egypt has handed over the formal investigation to the committee formed by representatives from Ireland, Russia, France and Germany.

Two parallel MH17 investigations are being led by the Dutch: the first investigation is in accordance with the International Civil Aviation Organization (ICAO) rules set out in Annex 13 to the Chicago Convention to establish the cause of the crash (without allocating blame) and to prevent future such occurrences. The second investigation is a criminal enquiry led by the Dutch and consisting of a Joint Investigation Team consisting of police officers and public prosecutors from Australia, Belgium, Malaysia, Netherlands and the Ukraine, all co-ordinated by a public prosecutor from the Netherlands. This investigation should be completed next year and its intention is to establish and prosecute the perpetrators.

On the 9 Sept 2014, the DSB issued its preliminary report which stopped short of saying that a surface-to-air missile brought down MH17, but that the damage was consistent with a surface-to-air missile exploding alongside the aircraft. Now, on the 13 Oct 2015, the DSB has published its final 279 page report with its definitive conclusions.

The report concludes that the plane was brought down by a warhead that detonated outside the front of the aircraft causing structural damage to the cockpit and contributing to a later mid-air break-up of the plane. The warhead was carried on a type of missile known to be used in Russian-built BUK systems, a 9N314M model warhead carried on a 9M38 series of missiles fired from a BUK surface to air missile system, and all other scenarios for the break-up of the aircraft have been rejected. The impact killed all four of the cockpit crew and there was no evidence of any conscious action of any passenger on the plane recorded after impact. A large area of some 320 sq km in Eastern Ukraine was identified from which the missile could have been fired.

Given the number of aircraft which had been shot down in the area during the conflict prior to the incident, and in particular, the shooting down of a Ukrainian Antonov on the 16 July 2014 and a Sukhoi SU25 on the 17 of July 2014, the report states that the risk assessment by all involved parties was inadequate and the DSB has concluded that the Ukrainian Air Traffic Control should have closed the airspace, MAS possibly should have chosen an alternative route, and other parties such as the ICAO did not sufficiently account for the risks of flying over conflict areas.

In the Metrojet incident there is speculation that a Thompson airliner had to take evasive action to avoid a

missile in the weeks before the Russian crash and the DSB conclusion on MH17 is worryingly prescient.

The two main themes of the DSB Report were firstly, there was a “blind spot” in the risk assessment undertaken and secondly there should be new guidelines. Conflicts in the modern world are less predictable than traditional wars between States, and weapons can hit targets at great distances and altitudes. The DSB called for urgent measures to assess and manage risks associated with flying over conflict zones. Secondly, the DSB concluded that there is no conclusive system of responsibility for the management of air space in conflict zones: States have sovereignty over an airspace and are responsible for operators being able to safely fly through that airspace, but “unrestricted airspace” cannot be simply relied on as an indicator of safety. There should be a second barrier drawn up by operators, other States and international organizations such as ICAO and IATA to improve decision making on flight routes.

The choice of flight route by MAS and other airlines was not deemed to be unsafe, and it is pointed out that no airline changed its route on the day of the crash and indeed 160 flights took place on the day of the incident alone all over Eastern Ukraine up and until the airspace was closed. Also, there were three other aeroplanes flying through the same sector, all in relatively close proximity to MH17. Again, this is very similar to the airline traffic situation in Sharm El Sheikh before the Metrojet incident.

Impact on Industry and Insurers

The DSB report goes some way to establishing the cause of the crash and may have consequences for MAS specifically, and other airlines routed to fly over conflict zones in the future. ICAO and IATA may have to redraft its rules in respect of risks of flying over conflict areas and that is more likely now after Metrojet. Aviation insurers will also need to reconsider their position in terms of policy cover and liability.

We can assume that MAS will have had aviation hull and liability risk coverage and within that coverage there would normally be a “wartime exclusion” clause to ensure that insurers underwriting the risk of the aircraft are not liable if the aircraft is destroyed through either an act of terrorism or war. In this case it is possible that there may be issues as to whether the wartime exclusion clause would be triggered given that there has been no formal declaration of war between Russia and Ukraine. In all probability, MAS will have had coverage within the niche aviation war market should the wartime exclusion clause apply, and that underwriters would have attended to the collection of funds and preparation of settlement documents shortly after the incident. In any event, the DSB report of 13 October 2015 will be looked at closely by both hull and liability underwriters and war risk insurers.

For MAS, there may be questions asked as to why MH17 was flying just 1,000 ft above airspace restricted by the Ukrainian Government as a no-fly zone, albeit that DSB report strongly points out that not one airline changed its route and some 160 flights took place on the day of the crash alone over Eastern Ukraine.

MAS will also look at the detail of the report. Even though the Dutch Safety Board’s remit is not to apportion blame, its conclusion is that the missile was fired from a system in Russian separatist controlled Eastern Ukraine and if the culpability of the Russian government can be proven by the Malaysian government (the State which owns MAS) it is possible that Malaysia may attempt to seek damages in compensation in the International Court. There is a precedent for this, being the Vincennes incident of July 1998 where an Iran Air Airbus was brought down by a US navy ship missile after it mistook the civilian aircraft for an Iranian fighter plane. Although the U.S Government did not admit legal liability for Vincennes, compensation was paid to the families of the Iranian victims.

It is certain that, following on from the Metrojet loss and the MH17 report, aviation professionals, insurers, airlines, regulatory bodies and governments will be looking at all the issues arising, and will be awaiting the interim and final reports from the ICAO Annex 13 investigation by the Irish/Russian/French/German team in the same way as we have now received definitive conclusions from the DSB report into the cause of the MH17 disaster.