

Pitfalls and highlights of participating in an Annex 13 Investigation

History

Because of the international nature of aviation travel, and the increasingly complex arrangements around aircraft chartering, code sharing and registration, and even design and manufacturing, the ICAO convention sets out to standardize the procedures governing aircraft and aerodrome operations, and the investigation of accidents when they occur.

Annex 13 Aircraft Accident and Incident Investigation, has been adopted pursuant to Article 37 of the Convention, but aircraft accident inquiry is itself a subject of Article 26 of the Convention. Article 37 refers to adoption of international standards and procedures for the sake of uniformity between States, including aircraft in distress and investigation of accidents. Article 26 imposes an obligation on the State in which the aircraft accident occurs to open an inquiry into certain occurrences, and where the laws of that State permit, to do so in accordance with ICAO procedure.

Article 26 requires that a State in which an air accident involving death or serious injury occurs, or which indicates a serious technical defect in the aircraft or air navigation facilities, should open an inquiry into that event., and that if the state of occurrence is not the state of registry, then the state of registry should be given the opportunity to appoint **observers** to the inquiry.

The principle of the relationship between Article 26 and Annex 13 is that nothing in the Annex must contravene the express terms of Article 26

Article 26 does not however preclude taking further action in the field of accident investigation, so the procedures set forth in the Annex are not limited solely to an inquiry opened under the requirements of Article 26, but apply to other occurrences defined under the Annex as well.

Nor does Article 26 preclude a greater level of participation in an inquiry, thus Annex 13 sets out in more detail the procedures for notification and participation in an inquiry.

Similarly, Article 26 does not set out the privileges accorded to observers entitled by Article 26 to be present at the enquiry, so these are defined in Annex 13 as well. As mentioned above observer status is applicable **only** to the State of Registry under Article 26. Observer status is a much misused term to describe someone's participation in an investigation. Annex 13 refers to all participants only as **Accredited Representatives** or their **Advisors**. The term Observer does not feature in Annex 13, other than in the Foreword when explaining the association with Article 26.

The point of all this is to show what we have all understood, Annex 13 is the definitive reference to the conduct of the an air accident investigation

Participation

When an accident involving an aircraft over a maximum mass of 2250 kg occurs in a contracting (to ICAO) State's territory, that State must either investigate or by mutual agreement have another State investigate on its behalf.

There are 4 other main players when it comes to participation in an accident investigation:

- The State of Registry
- The State of Operator
- The State of Design
- State of Manufacture

Any one or more of these participants could be one and the same; for example, the accident could occur in the state of manufacture. All of these potentially four different States have the right to appoint an accredited representative to participate in the investigation. The level of participation is defined in the Annex.

If the state of occurrence requests one or more of the other four states to participate, then they are each obligated to appoint an accredited representative to participate.

An accredited representative is defined in Annex 13 as "A person designated by the state, on the basis of his or her qualifications, for the purpose of participating in an investigation conducted by another State" This means the appointment is made State to State, not just by an organization within a State. In New Zealand, the organization with responsibility for administering ICAO matters on behalf of the State is the New Zealand Civil Aviation Authority, although TAIC is the entity mandated to undertake and liaise with other States conducting safety investigations. Thus it is the CAA that designates the appointment of a TAIC investigator as accredited representative. This process is documented in an memorandum of understanding between the CAA and TAIC

The role of accredited representative is not clearly laid out in the Annex, but by inference and reference to the ICAO manual of aircraft accident investigation, they are as follows:

- To have meaningful input into the investigation (by virtue of "his or her qualifications")
- Have the powers to require information relevant to the inquiry from any source within their own State and pass that information on to the State conducting the inquiry
- To report back to their State on facts as they are released by the State conducting the investigation
- To have access to the highest levels of administration within their State to facilitate appropriate safety actions where a need is identified
- To facilitate the State making submissions on any draft final report on the accident

The ICAO Manual of Aircraft Accident and Incident Investigation states the primary function of the accredited representative is to be able to communicate to the appropriate authorities in his or her state all necessary information concerning the accident, and to provide the liaison and legal authority for the acquisition of information which is only obtainable within the jurisdiction of his or her government. It is

therefore a position in which there are responsibilities towards the inquiry as well as rights of information from the inquiry.

The ICAO manual goes on to say that during the later stages of the inquiry when the significance of the established facts are under examination, it is desirable that the accredited representative is kept fully informed and invited to express his or her State's views, particularly when conclusions are being developed which bear upon persons, organizations, or activities within his or her State.

A State who appoints an accredited representative is entitled to appoint one or more advisors (technical experts) to assist the accredited representative in the investigation. Those advisors remain under the supervision of the accredited representative and are permitted to participate to the extent necessary to enable the accredited representative to make their participation in the inquiry effective.

Other Participants

The following other States are either **entitled** or can be **invited** to appoint an accredited representative to participate in the investigation:

- Any State which on request provides information, facilities or experts to the State conducting the investigation (by **entitlement**)
- Any State that provides an operational base for field investigations or is involved in search and rescue or wreckage recovery (by **invitation**)
- Any State that is involved as a state of a code share or alliance partner of the operator (by **invitation**)

A State that has suffered fatalities or serious injuries to its citizens shall upon request be permitted to appoint an expert who will be permitted a lesser form of participation.

There are 2 *Notes* in Chapter 5 of Annex 13 that are very important, but are often overlooked by States in the heat of the moment following a major accident. They are:

- Nothing in this standard precludes the State conducting the investigation from extending participation beyond the entitlement enumerated, and
- It is recognized that the form of participation would be subject to the procedures of the State in which the investigation, or part thereof, is being conducted

Annex 13 has been written to give States as much flexibility in conducting an investigation as is practicable, while maintaining some uniformity in standards and procedures to allow for the multi-national nature of accidents and serious incidents involving international civil aviation.

It is a fact that when an accident happens in a State's territory, the reaction to that accident will be in accord with that State's law. Not all States, in fact hardly any, have the same law. There are always differences; sometimes minor, sometimes significant. How a State's domestic law differs from the standards laid out in Annex 13 should be notified as "Differences" listed in the Supplement to Annex 13.

It is very important that accredited representatives appointed to participate in an investigation have knowledge of and understand the ramifications of the differences that have been lodged by the State conducting the investigation; but even more importantly, an understanding of the often complex laws that the State conducting the investigation is working to. The various Acts, Rules, and Regulations of that State governing accident investigation are useful. States making that information readily accessible to other states is even more so.

Another role of the accredited representative, not mentioned above, is to explain to the various entities and factions within his or her own State the appropriate processes to follow and what those processes will likely be in the State conducting the investigation. This will not always be easy as competing interests, politics and public perception driven by media can often get in the way, which leads me on to an interesting case in point.

Loss of control accident, XL Airways Airbus A320-232, off the coast of Canet Plage (France), 27 November 2008

The aircraft was owned by Air New Zealand Aircraft Holdings Limited and was leased to XL Airways Germany GmbH. The aircraft was on the German register as D-AXLA. The aircraft lease was coming to an end and the lease agreement specified a program of in-flight checks to ensure the aircraft was fit-for-purpose. The aircraft had already been painted in the Air New Zealand livery. The flight departed Perpignan in the South of France, and was scheduled to return to Perpignan and then on to Frankfurt, where the Air New Zealand flight crew would take delivery of the aircraft. The flight crew lost control of the aircraft on approach to Perpignan and the aircraft crashed into the sea with the loss of all seven persons on board. The French Bureau d'Enquetes et d' Analysis (BEA) launched a technical investigation in accordance with Annex 13.

The French judiciary also launched an inquiry into the circumstances of the accident.

For the accident flight the aircraft was still registered in Germany, it was still being operated by XL, and XL flight crew had command of the aircraft. There were 2 Air New Zealand staff on the flight deck and another 2 plus a representative from the New Zealand Civil Aviation Authority in the cabin of the aircraft.

New Zealand was neither:

- The State of occurrence (France)
- The State of Registry (Germany)
- The State of the Operator (Germany)
- The State of design (France)
- The State of manufacture aircraft(France)
- The State of design for engines (United States)

Nonetheless, TAIC through the CAA requested accredited representative status to the investigation on the grounds that New Zealand had suffered five fatalities in the accident, and because of the special

circumstances around the flight, whereby the purpose of the flight was to fulfill the requirements of the lease agreement between XL and Air New Zealand.

The BEA accepted New Zealand's request and **invited** New Zealand's participation as an accredited representative, following which a TAIC investigator was appointed. TAIC assigned the accident with a sequential accident number to activate its powers of entry and investigation under Section 12 of the TAIC Act 1990, and to enable it to fulfill its function under Section 8(e) of the Act:

“To co-operate and co-ordinate with other accident investigation organizations overseas, including taking evidence on their behalf”

Having been granted accredited representative status, New Zealand then appointed Advisors from, the Royal New Zealand Air Force Safety Office, the Air Accidents Investigation Branch of UK (AAIB), and later, Air New Zealand and New Zealand ALPA.

The reason for appointing advisors from AAIB was 3-fold:

- The AAIB could provide investigators with specific knowledge on Airbus A320s, and
- It was knowledgeable in the French law and procedures around air accident investigation, in particular the understanding of relationships with the French judiciary, and
- given the likely time for the investigation to be completed, it was geographically well placed to travel to France at short notice as and when there were significant developments.

The reason for appointing an investigator from the Air Force Safety Office was 2-fold:

- The Air Force has experienced investigators to support TAIC's investigator during those crucial and usually hectic first weeks after an accident happens, and
- to give staff exposure to a international major air accident site so that it would be better placed to provide support to TAIC in the unfortunate event of a major accident in New Zealand. This cooperation is provided for in a memorandum of understanding between TAIC and the New Zealand Defence Force.

The advisor from NZ ALPA was appointed because he was an Air New Zealand pilot current on the A320, he understood Air New Zealand cockpit procedures, and he was familiar with the New Zealand the New Zealand dialect. He participated in the CVR group interpreting the content and finalizing the transcript of the CVR.

The advisor from Air New Zealand was not appointed until sometime later, although he was present in France for a short period soon after the accident occurred. Aside from the lessons for aviation safety already beginning to emerge from the investigation, here was one of the biggest lessons to emerge for the safety investigator.

When an event such as this happens, emotions run high. The media want answers, as do the public. The stakes are high. Politicians feel they must respond, and so often they do. State reputations are

often on the line, as are those of the various organizations within the States that might later be implicated.

It is these very pressures that Annex 13 was designed to alleviate, by providing agreed protocols for the investigator to follow. The pressures on the organization leading the investigation can be enormous. The BEA strictly adhered to the principles of Annex 13 to alleviate that pressure, and it did this well. Its focus was to progress its investigation in line with its own domestic law, and to preserve the independence of the investigation to ensure its integrity.

Air New Zealand's status as far as the investigation was concerned was uncertain in the early stages. It wasn't the operator, nor were its pilots flying the aircraft, yet one was present in the cockpit, although that was not confirmed until after recovery of the CVR. It owned the aircraft, which was painted in the Air New Zealand Livery, and the world media displayed the aerial photograph showing the Koru on the tail section as it floated in the sea. The airline's response was understandably to send a team to France to deal with public relations and to support the families of the deceased.

Unfortunately, and this should not be taken as a criticism, but a learning, the company imposed itself upon the BEA asking to be included in the BEA investigation, while at the same time aligning itself with the French Judicial investigation. The perception that Air New Zealand had not respected or clearly understood the politics of the French system, together with the potential for a perceived conflict of interest by letting Air New Zealand participate, put TAIC in a difficult position. As mentioned earlier, New Zealand did not have automatic right to appoint an accredited representative; it only had the rights of a State that had suffered fatalities, and the lesser level of participation that went with that. New Zealand risked compromising its accredited representative status if it appointed an advisor from Air New Zealand.

Eventually, through a not insubstantial amount of high-level communication, the situation was resolved, misunderstandings cleared up and New Zealand did appoint an Air New Zealand expert as another Advisor. Since then TAIC, Air New Zealand and the New Zealand CAA have completed some good work in addressing safety issues arising out of this tragic accident, and this work has been fed into the BEA investigation.

The earlier misunderstandings did not necessarily hinder progress of the BEA investigation, but they were an unwelcome distraction. The BEA came under some criticism for the apparent slowness of the investigation in its early stages and there were the usual suggestions that appear in the wake of most major air accidents of collusion. What the critics did not understand was the relationship between the BEA and the Judiciary. That relationship was set in French law. The BEA was simply balancing compliance with that law and progressing its own independent investigation as best it could. While things might happen differently under our own domestic law, this accident happened in France, not New Zealand.

A key learning that should come from this paper is for investigators who take part in an investigation of an international accident to fully understand the laws and protocols of the States you are dealing with,

because those laws and protocols are bound to be different to what you are used to. Respect their law and work with it rather than against it.