

Subject: EASA Operations Rulemaking

Meeting: OPS.001 Rulemaking Group Meeting Mar. 13 & 15, 2007 and Non-Commercial Operations Sub-Group Meeting Mar. 13 & 14, 2007

File: EASA

Reported by: Ray Rohr

Summary:

The OPS.001 Rulemaking Group met on Mar. 13 & 15 review progress in the sub-groups and open issues. The Group was advised that EASA had agreed that the CAT subgroup will be augmented by an expert on small commercial operations. The non-commercial subgroup will not be complemented by the proposed experts. Nevertheless, the expert on fractional ownership could be invited to the applicable meetings of the Non-commercial Complex Aircraft Subgroup. Other experts could also be consulted by group members between meetings. The [draft minutes of that meeting](#) are linked to this report.

At its sixth meeting of the Non-Commercial Operations with Complex Motor-Powered Aircraft Sub-Group reviewed the working papers Conditions and [Procedures Related to Declaration](#) prepared by Ray Rohr and [Certification vs. Declaration](#) prepared by two other Sub-group members. It was agreed that the two papers identified issues that must be addressed with the Authority Sub-group and that a meeting with that Sub-group would be held during the April 24 & 25, 2007 OPS.001 meeting to discuss them. This issue is also currently being reviewed in the EU legislative process to extend the EASA scope and to approve the Essential Requirements. The Working paper on [Cabin Crew](#) was also reviewed and it was accepted in principle. The rules and guidance material will be further addressed at the next meeting.

The following issues that had been addressed at the February meeting were reviewed and finalized.

- General Rules for Operations Manuals,
- Mass and Balance,
- Security Programs, and
- Fatigue Countermeasures.

The Subgroup also reviewed the Part OPS 2 template and identified paragraphs that should be transferred to OPS 0, harmonised with the other subgroups, items that need AMC/GM material and paragraphs that need further drafting.

A copy of the draft [minutes of the Sub-group meeting](#) is linked to this report.

The next OPS.001 and Non-Commercial Operations meetings are on April 24 - 26, 2007.

Implication for Business Aviation:

This is a very important ongoing project with a number of issues that must be resolved. Fortunately progress to date has been positive.

Decisions Required:

Nil at this time.

This report contains material for the sole information of IBAC Members and no guarantee or undertakings are given, or should be assumed, as to their accuracy. The content is under the copyright of the author and IBAC, and may not be distributed to third parties without specific agreement of the IBAC Director General.

European Aviation Safety Agency

TASK OPS.001 RULEMAKING GROUP

MEETING MINUTES OF

13 MARCH 2007, 08.30 H – 10.00 H

15 MARCH 2007, 09.00 H – 14:00 H

HOTEL TIVOLI TEJO, LISBON

13 March 2007 Pre-briefing

Attendees:

Thierry Allain (TAL), DGAC France
Ragnar Boge (RBO), CAA Sweden
Douglas Carr (DCA), GAMA
Michel Gaubert (MGA), Eurocopter
Joel Hencks (JHE), EAS
Pekka Henttu (PHE), AEA
Mario Moura (MMO), INAC Portugal
Jacob T. Pedersen (JTP), IAOPA
Ray Rohr (RRO), EBAA
Mark Wilson (MWI), ECOGAS
Stefan Wolf (SWO), ECA
Matthias Borgmeier (MBO), EASA Rulemaking Officer
Daniela Defossar (DDE), EASA Rulemaking Officer
Luis Cardoso Ribeiro (LCR), EASA Rulemaking Officer
Micaela Verissimo (MVE), EASA Rulemaking Officer
Bas van der Weide (BVW), EASA Rulemaking Officer

Excused:

Inger-Helene Enger (IHE), ETF
Louis Hucher (LHU), Dassault

1. MMO opened the meeting and welcomed all participants. He briefed the group on practical arrangements.
2. BVW was presented as new secretary of the CAT subgroup, replacing Eric Sivel.
3. DDE debriefed the group on developments regarding the EASA extension of scope. The Parliament had its plenary session in the same week to adopt the proposal from the technical committee. The document with its 29 amendments was presented by Eric Sivel at the last core group pre-briefing. There is a good chance that Council and Parliament agree in the first reading as there are only a few issues of disagreement. These issues could be resolved during discussions between Commission, Council and Parliament ("Triologue"). The amended Regulation could therefore be

adopted in July. The group should follow the schedule and milestones of the ToR meaning that NPA publication is planned for September. Subgroups should make use of additional meetings, if necessary. Any delays should be reported to the core group immediately.

4. DDE informed the group about the decisions taken regarding the change of group composition. The CAT subgroup will be complemented by an expert for small commercial operations. The non-commercial subgroup will not be complemented by the proposed experts. Nevertheless, the expert on fractional ownership could be invited to the applicable meetings of the non-commercial complex aircraft subgroup. Experts could also be consulted by group members between meetings.

4. The group discussed the location of AWO requirements and the applicability of EU-OPS Subpart E / NPA-OPS 41 to general aviation using non complex aircraft. BVW was asked to draft AWO requirements for operations of non complex aircraft based on NPA-OPS 41.

5. BVW debriefed the group on the developments regarding OPS 0. The draft proposal is based on ICAO Annex 6 Part II and will be presented to MDM.032 at its meeting Thursday/Friday this week. BVW will present different options to MDM.032 for consideration. BVW will inform the OPS.001 core group on the decisions taken by MDM.032. DDE asked the group to consider a harmonisation meeting of the different parts in June.

6. DDE presented briefly the opinion of the EASA legal service regarding SAR and HEMS operations. Taking into account that these operations are not conducted as State operations or sovereignty tasks in all Member States, the group should draft requirements for these activities. Member States can elect to apply these requirements for the activities within their State. The final decision of applicability can probably only be taken by the court. The group agreed that SAR and HEMS requirements should be drafted by the aerial work subgroup.

7. TAL asked for clarification on the discussion regarding OPS Specs incorporation in the OPS manual from the last core group debriefing. MMO explained that the authority subgroup had discussed the need of a separate OPS Specs document if everything is included in the OPS manual. The discussion addressed the approval of the OPS manual, the need of OPS Specs for foreign operator certificates and ramp checks by authorities. The group agreed that OPS Specs should be kept as a separate document.

15 March 2007 De-briefing

Attendees:

Thierry Allain (TAL), DGAC France
Ragnar Boge (RBO), CAA Sweden
Douglas Carr (DCA), GAMA
Inger-Helene Enger (IHE), ETF
Joel Hencks (JHE), EAS (morning)
Pekka Henttu (PHE), AEA
Mario Moura (MMO), INAC Portugal
Jacob T. Pedersen (JTP), IAOPA
Mark Wilson (MWI), ECOGAS
Stefan Wolf (SWO), ECA
Daniela Defossar (DDE), EASA Rulemaking Officer
Luis Cardoso Ribeiro (LCR), EASA Rulemaking Officer
Micaela Verissimo (MVE), EASA Rulemaking Officer
Margit Markus (MMA), EASA Legal Advisor

Excused:

Michel Gaubert (MGA), Eurocopter
Louis Hucher (LHU), Dassault
Ray Rohr (RRO), EBAA
Matthias Borgmeier (MBO), EASA Rulemaking Officer
Bas van der Weide (BVW), EASA Rulemaking Officer
Arthur Beckand (ABE), EASA Legal Advisor

1. The minutes of the last Pre-/De-briefing meeting of 13/15 February were reviewed and adopted without any changes.

2. Debriefing of subgroups:

Subgroup Aerial Work:

The subgroup finished more or less with the implementing rules and started to review AMC/GM material. It reported difficulties on the classification of text as rule or AMC/GM material.

Following a discussion in the core group the following was decided:

- Level of detail of Subpart S Security: There seem to be attempts on the European level to extend the scope of Regulation (EC) 2320/2002 to "inner" aircraft security such as cockpit doors. For the time being, subgroups should take EU-OPS Subpart S as an orientation as it links very well with other European legislation in the field of security.
- Maximum approved seating configuration: The definition should be harmonised. The operational approval could be given through the ops manual. For non-commercial operations a separate approval may need to be considered. Subgroups should check if specific JAR provisions linked to the seating configuration may be amended in view of the different legal framework and for consistency reasons.

Subgroup Commercial Air Transport:

The subgroup finished its review of EU-OPS/JAR-OPS 1 rule material. Subpart E AWO and N Flight Crew are pending, awaiting developments of OPS 0 (Subpart E) and results of the OPS.001 - FCL.001 Subpart N task force. The review of JAR-OPS 3 rule material was continued.

Regarding AMC/GM material, the subgroup carried on with its review of the airplane text. It will continue at the next meeting as well as starting to review the helicopter AMC/GM material. For the next meeting, it is also planned to discuss the balloon proposal. The airship proposal is still being developed. The subgroup does not consider necessary drafting requirements for tilt-rotor aircraft as there are currently none certified.

TAL and SWO expressed their uncertainty regarding the necessary level of detail rule vs. AMC/guidance material. MVE explained the framework of rule and AMC/GM material as well as the system of EASA standardisation visits. She referred to the FAQ section on the EASA website on the nature of AMC and to task MDM.010 addressing the publication of alternative means of compliance through the Agency. TAL and SWO insisted on the need to have legally binding requirements on the handling of AMC. TAL highlighted his concerns on how to raise findings if operators could develop their own AMC.

Subgroup Authority requirements and management system:

The subgroup is on schedule. It discussed the SMS authority programme and drafted applicable rule and AMC/GM material. It reviewed a working paper on the organisation management system. The subgroup finished the review of authority requirements and will now start drafting the implementing rules.

The subgroup raised the question of carriage of the complete aircraft tail number list on every Air Operator Certificate. It was agreed that the master copies with this list should be kept with the competent authority and in the Operator's office. The documents carried on board each aircraft should refer to the master copy and only certificates applicable to that specific aircraft should be carried on board.

Subgroup Non-commercial operations with complex motor-powered aircraft:

JTP reported on behalf of the chairman.

The subgroup is on schedule. It finalised a discussion paper on the declaration and requests a joint meeting with the authority subgroup at the April meeting. The subgroup discussed furthermore the certification of operations where a management company is involved. This will be discussed with the authority subgroup as well.

The rule material is almost finalised and the subgroup will start working on AMC/GM material and the RIA at its next meeting.

2. MVE debriefed the group on the FCL.001 proposal regarding Subpart N. FCL.001 will start drafting the proposal at its next meeting. The OPS.001 – FCL.001 task force will only address Subpart N of EU-OPS/JAR-OPS 1. Nevertheless, the results of the task force could be a working basis for the other subgroups. The group nominated RBO and PHE for this task force. SWO will liaise with Francisco Hoyas Frontera (ECA) from the FCL.001

core group regarding his participation. TAL and MMO were considered as backup.

Action List

	Task	responsible	timeframe	status
1.	Liaise with MDM.032 on private aerial work	MBO/JHE	asap	o
2.	Inform MDM.032 of amended structure	DDE/BVW	asap	o
3.	Presentation on transfer of AW JARs into IR	ESI	Next core group meeting April	o
4.	NVIS: Transfer regulations material to OPS 0 focal point BVW	RBO	asap	o
5.	Prepare OPS 0 WP with subgroup inputs	BVW	asap	o
6.	Draft AWO requirements for non complex aircraft operations based on NPA-OPS 41	BVW	asap	o
7.	Inform core group on the decisions taken by MDM.032 regarding OPS 0	BVW	asap	o

DDE
22/03/2007

Discussion Paper

Conditions and Procedures Related to Declarations

1. Aim

This paper discusses issues related to operator declarations as prescribed in the **Essential Requirements for Licensing, Operations and Third Country Aircraft** as contained in Regulation (EC) No 1592/2002 revised, and proposed processes and procedure for the filing, processing and management of such declarations.

2. Background

In their submission to the Council the COREPER recommend that **Article 6b - Air Operations** para 2 of the **Essential Requirements for Licensing, Operations and Third Country Aircraft** specifies that:

Unless otherwise determined in the implementing rules, operators engaged in commercial operations shall demonstrate their capability and means to discharge the responsibilities associated with their privileges. These capabilities and means shall be recognised through the issuance of a certificate. The privileges granted to the operator and the scope of the operations shall be specified in the certificate.¹

They also recommend that para 3 of that Article states:

Unless otherwise determined in the implementing rules, operators engaged in the non-commercial operation of complex motor-powered aircraft shall declare their capability and means to discharge the responsibilities associated with the operation of the aircraft.¹

They go on to recommend that paras 5(b) and 5(d) specify:

5(b) the conditions for issuing, maintaining, amending, limiting, suspending or revoking the certificates referred to in paragraph 2 and the conditions under which a certificate shall be replaced by a declaration of the capability and means of the operator to discharge the responsibilities associated with the operation of the aircraft.¹

5(d) the conditions and procedures for the declaration by, and for the oversight of, operators referred to in paragraph 3 and the conditions under which a declaration shall be replaced by a demonstration of capability and means to discharge the responsibilities associated with the privileges of the operator recognised by the issuance of a certificate.¹

The COREPAR also recommend that Paras 1 and 2 of **Article 7 – Oversight and Enforcement** state:

1. The Member States, the Commission and the Agency shall cooperate with the aim to ensure that any product, person or organisation subject to this Regulation complies with its provisions and with its implementing rules.¹
2. For the implementation of paragraph 1, Member States shall, in addition to their oversight of certificates that they have issued, conduct investigations, including ramp inspections, and shall take any measure, including grounding of aircraft, to prevent the continuation of an infringement.¹

¹ Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1592/2002 of the European Parliament and the Council of July 15, 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency of 30 November 2006

Discussion Paper

Conditions and Procedures Related to Declarations

3. Discussion

3.1 Essential Requirements Considerations

From the foregoing provisions it is clear that the COREPAR and the associated agencies see three distinct levels of regulatory oversight for aircraft operations. The higher level is that associated with operators engaged in commercial operations. As indicated in Article 6 b para 2, the norm for commercial operations shall be certification. However, exceptions to the requirement to hold a certificate can be made in the implementing rules. The exception allowed for in para 5(b) of Article 6b is to replace the certification process with a declaration of the capability and means of the operator to discharge the responsibilities associated with the operation of the aircraft.

The lowest level of regulatory oversight for aircraft operations is that associated with the operation of non-complex motor powered aircraft. In those cases there is no requirement for any type of certification or declaration specified.

The mid level of regulatory oversight is the declaration referred to in para 3 of Article 6b, which is required of the operator of complex motor powered aircraft engaged in non-commercial operations. In this case operators must declare their capability and means to discharge the responsibilities associated with the operation of the aircraft.

The difference envisaged between the regulatory oversight associated with certification and a declaration is evident in several provisions. While paras 1 and 2 of Article 7 and Article 15b deal specifically with certification issues, the declaration process is left entirely to be developed in the implementing rules. It is also noteworthy that the Essential Requirements make reference to ICAO standards and recommended practices (SARPS) and manuals.

3.2 ICAO Considerations

ICAO Annexes 6 Part II International General Aviation Operations – Aeroplanes and 6 Part III, Section III International General Aviation Operations – Helicopters, both place responsibility for adherence to the SARPS on the pilot-in-command and have no provisions related to the operator. Consequently, the State's primary regulatory oversight focus to ensure compliance with the rules is through the pilot (licence) and aircraft (airworthiness).

The introduction of the concept of complex motor powered aircraft in the Essential Requirements and the recognition of the reality of the operation of such aircraft, logically introduces the role of the operator in these operations. This reality is also reflected in the modernization of Annex 6 Part II which will soon be distributed by ICAO for State comment. In both cases the role of the operator is to develop and implement systems, programs procedures and documentation to endure the safe operation of the aircraft and the adherence to rules. At this point in time the draft of Annex 6 Part II does not specify any State regulatory oversight requirements related to the operator.

While the ICAO Safety Oversight Manual Doc 9734 does not deal specifically with non-commercial air operations it articulates a number of principles that would appear to be applicable. The manual states that it is the responsibility of individual States to *“ensure that the national aviation industry provides a safety level equal to, or better than, that defined in the SARPs”*². The manual also references Article 12 of the Chicago Convention which states that:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft maybe, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention.³

² ICAO Safety Oversight Manual Doc 9734 (2006) ICAO, Montréal

³ Chicago Convention on International Civil Aviation Doc 7300/9 (2006) ICAO, Montréal

Discussion Paper

Conditions and Procedures Related to Declarations

Article 12 goes on to state that:

Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

The Safety Oversight Manual then articulates a number of principles which are applicable to all oversight activities. These include:

- Adoption of safety management systems by the civil aviation authority in the functional areas of regulation as well as in the operation and service provision,
- Conducting safety oversight in a manner which includes:
 - A systematic approach,
 - Use of risk management strategies,
 - Coordinating with other agencies where jurisdictions overlap or interface, and
 - Requiring and encouraging industry to adopt systematic philosophies as part of an SMS.

The Manual continues on to describe how these principles should be applied to pilots through the licensing requirements and oversight and to aircraft through the airworthiness requirements and oversight. It discussed the use of inspections, analysis of operations, identification of safety deficiencies, granting, suspending or revoking licences, certificates or approvals for all aviation activities as well as air operator certificates.

All of this would appear to indicate that it is expected that all general aviation operations, including pilots, aircraft and non-commercial operators, should be subject to a similar level of safety oversight.

3.3 Declaration Background

When JAR OPS 2 was developed part of the motivation was to ensure an equivalent level of safety for person carried on large and turbojet aircraft engaged in non-commercial operations that were registered in third countries as was being prescribed for those aircraft that were registered in EU countries and subject to the JARs. The concept that was developed to achieve this objective was the requirement for all large and turbojet aircraft based in an EU country to file a registration with the civil aviation authority that included:

1. The official name and business name, address and mailing address of the applicant;
2. A description of the proposed operation, the location of operating bases and, the principal operating base;
3. A description of the management organisation;
4. The name of the accountable manager;

In respect of the aircraft operator's maintenance system only, the following information must be included in the initial application for Registration.

1. The aircraft operator's aircraft maintenance programme(s);
2. The aircraft technical log;
3. Where appropriate, the technical specification(s) of the maintenance contract(s) between the aircraft operator and any approved maintenance organisation; and
4. Type(s) [and class(es)] of aircraft and MAPSC if applicable.⁴

It was the opinion of the AWGAS that these provisions would play an important role in ensuring that all aircraft operators effected by JAR OPS 2 were aware of the associated requirements and the operator's accountabilities. The draft JAR-OPS 2 also included in the general rules for registration the requirements that the aircraft operator must:

1. Have a management organisation capable of exercising operational control and supervision over any flight operated under the terms of its Registration,

⁴ JAR-OPS 2 Subpart C (draft of August 2004) JAA Aerial Work and General Aviation Sub-Group, Hoofddorp

Discussion Paper

Conditions and Procedures Related to Declarations

2. Have appointed an accountable manager who must be advised by competent persons, unless he has competence himself, for ensuring that all operations and maintenance activities can be financed and carried out to an acceptable standard,
3. Ensure that every flight is conducted in accordance with the provisions of the Operations Manual,
4. Ensure that its aircraft are equipped and its crews are qualified, as required for the area and type of operation, and
5. Comply with the maintenance requirements, for all aircraft operated under the terms of its Registration.

The draft also contained the provision that for the Registration to remain valid the operator must:

1. Operated aircraft that have a standard Certificate of Airworthiness issued in accordance with ICAO Annex 8;
2. Maintain the ability to:
 - a. Establish and maintain an adequate organisation,
 - b. Establish and maintain a safety management system,
 - c. Comply with specified training programmes,
 - d. Comply with maintenance requirements, consistent with the nature and extent of the operations specified, and
 - e. Comply with the general rules for Registration, and
3. Communicate to the Authority any changes to the submitted information.

While the implementing material for the draft rule was not developed, it was the opinion of the AWGAS that the Registration would not involve an audit process but that the National Authorities (NAs) would include the requirements of JAR OPS 2 in their general aviation safety oversight program. Also, there was agreement within the AWGAS that if the operator was registered to be in conformance with a recognized industry standard or code of practice, that fact would be recognized in the NA safety oversight program.

In reaching this conclusion the AWGAS were influenced by:

- the very good safety record of the business aviation community,
- the application of risk management strategies,
- the recognition that the operators of large and turbojet aircraft would be required to develop safety management systems. and
- the role that industry standards, such as the IS-BAO – an International Standards for Business Aircraft Operations, could play.

It was also understood that the Registration process would not create any change in the processes and procedures related to operating authorities such as RVSM, RNP and CAT II or CAT approvals.

4. Proposed Declaration Provisions

Based on the foregoing, it is proposed that the provisions in the OPS Implementing Rules related to a declaration by an aircraft operator of their capability and means to discharge the responsibilities associated with the operation of the aircraft, should follow the following principles:

1. The general rules for declarations should include the requirement that the aircraft operator must:
 - a. Have a management organisation capable of exercising operational control and supervision over any flight operated under the terms of its Declaration,
 - b. Have appointed an accountable manager who must be advised by competent persons, unless he has competence himself, for ensuring that all operations and maintenance activities can be financed and carried out to an acceptable standard,
 - c. Ensure that every flight is conducted in accordance with the provisions of the Operations Manual and any operating approval from the NA,

Discussion Paper

Conditions and Procedures Related to Declarations

- d. Ensure that its aircraft are equipped and its crews are qualified, as required for the area and type of operation, and
 - e. Comply with the maintenance requirements, for all aircraft operated under the terms of its Declaration.
2. The declaration should include the requirement for the aircraft operator to:
 - a. Provide the official name and mailing address of the business and the location of the base of operation,
 - b. Provide a description of the nature of the operation and the type, number and registration details of the aircraft involved,
 - c. Provide a description of the management organization and the name of the accountable manager,
 - d. Declare that they have developed and implemented a safety management system that includes procedures for demonstrating compliance with the requirements of the relevant OPS and Maintenance Parts and that they have developed and implemented the required systems, programs, procedures and manuals, and
 - e. If they have implemented and demonstrated conformance to an industry standard, the name of the standards and the date of the last audit of their conformance.
3. The associated rules should contain the requirement that for the declaration to remain valid the aircraft operator must:
 - a. Maintain the ability to:
 - i. Establish and maintain an adequate organisation,
 - ii. Establish and maintain a safety management system,
 - iii. Comply with specified training programmes,
 - iv. Comply with maintenance requirements, consistent with the nature and extent of the operations specified, and
 - v. Comply with the general rules for Declarations, and
 - b. Communicate to the NA any changes to the submitted information.
4. EASA and the NAs should establish a system to record filed declarations that facilitates sharing of the declaration information with ESA and EU member NAs.
5. When declarations are filed, the NA would receive them as information and include the operator in the safety oversight program that they apply to all general aviation operations.
6. The NA safety oversight program should include:
 - a. Systems and procedures to collect safety information including a confidential reporting system for incidents and aviation system hazards and associated investigations,
 - b. The provision of safety information, including accident and incident data, to pilots and aircraft operators,
 - c. Conducting ramp inspections and where indications of safety problems are detected, investigation of the indicated safety problem, and
 - d. Where the aircraft operator **is not** registered to be in conformance with a recognized industry standard, periodic evaluations of the operator's SMS.
7. The NAs **are not** expected to establish programs to audit aircraft operators who are required to file declarations.
8. One issue that must be addressed is the action that may/shall be taken by a NA should it be determined that an operator has filed a false declaration or is found to be unable to comply with the requirements of the relevant OPS and Maintenance Parts and/or have not developed and implemented the required systems, programs, procedures and manuals.

Discussion paper on certification versus declaration for operations with non-commercial complex aircraft

Background

The final council version of the proposal to extend the scope of EC regulation 1592/2002 has slightly modified the wording of the requirement for a declaration for non-commercial operations with complex aircraft. Article 6b paragraph 3 now states:

Unless otherwise determined in the implementing rules, operators engaged in the non-commercial operation of complex motor-powered aircraft shall declare their capability and means to discharge the responsibilities associated with the operation of the aircraft.

The paragraph has been amended by the Council by adding the underlined phrase.

In paragraph 5 it is further stated

The Commission shall adopt, in accordance with the procedure laid down in Article 54(3), the rules for the implementation of this Article. In doing so, it shall specify in particular: [...]

the conditions and procedures for the declaration by, and for the oversight of, operators referred to in paragraph 3 and the conditions under which a declaration shall be replaced by a demonstration of capability and means to discharge the responsibilities associated with the privileges of the operator recognised by the issuance of a certificate;

As such the change suggested by the Council implies that some non-commercial operations with complex aircraft may require the issuance of a certificate, whereas the general case is that a declaration will suffice.

It should further be mentioned that the change to paragraph 3 stems from a concern that fractional ownership operations are considered non-commercial, but should be subject to the higher level of oversight associated with a certification requirement.

Discussion

The concept of fractional ownership is developed in the US and has no direct counterpart in Community regulation. Also it is doubtful if the US definition of a fractional operator can be directly transferred to a European framework. In the US the fractional ownership setup is a system that guarantees the operator that his operation is considered to be non-commercial if he complies a number of items in part 91 subpart k. If he only complies with some of the fractional requirement the operator may face the risk that his operation

is classified as an illegal commercial operation. In the US a fractional-like operator therefore has a strong incentive to comply fully with subpart 91 K, since it serves as his guarantee that his operation will not be classified as commercial. In Europe, the proposed definition of a commercial operation would not give a similar incentive, since any operation which is not available to the public and where the customer DOES have control over the operator by definition is not a commercial operation, according to the proposed article 3 (i):

"commercial operation" means any operation of an aircraft, against remuneration or other valuable consideration, which is available to the public or, when not made available to the public, which is performed under a contract between an operator and a customer, where the latter has no control over the operator;

Even if one were to introduce a concept similar to the US fractional ownership, an operator could choose not to comply with the regulation and still claim to be non-commercial as long as he can prove that the customer has control over the operator and the flight is not available to the public.

One therefore cannot directly copy the US fractional regulation to a European framework.

In order to address the councils concerns that fractional-like operations be subject to certification, the task of the OPS working group is therefore to propose a definition which captures the essence of the US fractional ownership concept, but at the same time will work under the proposed European definition of commercial operation.

Some of the main aspects characterizing fractional operations are

- the use of a management company (program manager)
- the customer owns a fraction of one aircraft but has access to all aircraft under the fractional program and associated programs and therefore in practice will generally not fly on the aircraft in which he has ownership
- the customer accepts a legal responsibility for the operation but in practice has very little direct operational control since that is generally left to the program manager

For a discussion of the last item, see the attached document on “Fractional Ownership Liability” which discusses the very special legal construction that a fractional owner with no aviation expertise accepts legal responsibility for compliance with aviation law.

In contrast to fractional operations, the typical aspects characterizing traditional non-commercial corporate and business aviation are:

- the operator owns an aircraft or fraction thereof and/or employs the pilots who fly the aircraft

- the operator will generally own a larger fraction of the aircraft than is the case for fractional ownership and will generally utilize the aircraft which he actually owns.
- the operator has some form of in-house aviation expertise, is directly involved in the operation and exercises genuine and direct operational control.

Generally speaking the main differences between fractional ownership and traditional business and corporate aviation are therefore related to the degree of the operators involvement in the operation and his ability to exercise direct operation control.

If the operator has no aviation insight and no ability to effectively oversee the operation but is completely relying on another business to provide the aviation expertise it would seem reasonable that this other business was subject to some sort of certification (though not necessarily an AOC). This would offer the company that does not have any aviation expertise the extra level of certainty that operations are undertaken safely.

On the other hand the operator that does have in-house aviation insight will not need the assurance provided by certification, since he is effectively able to oversee the operation himself.

If this distinction is used, we have a well justified certification requirement, which catches the essential difference between fractional operations and traditional business and corporate operations.

Legal Text

The question that remains is how the concept described above could be transformed into a legal text.

One approach would be to make it a part of the requirement of the declaration, since it is already stated that the operators must “*declare their capability and means to discharge the responsibilities associated with the operation of the aircraft*”.

The requirements of the declaration could state:

1) The operator must declare that he accepts full operational responsibility and that he possesses within his organization the aviation expertise to effectively exercise the operational control. The responsible person must be named and a summary of this person's qualifications enclosed with the declaration.

2) If the operator does not have within his organization the aviation expertise to exercise effective operational control the company providing the aviation expertise must be certified.

The intention with this wording is to still allow a corporate operator to outsource certain functions as long as he maintains the overall operational responsibility AND has the in-house expertise to oversee that the operation is conducted safely.

Fractional Ownership Liability

May 24, 2002

Copyright © Phillip J. Kolczynski and Valerie Dunbar Jones (co-author's Bio at end of article)
All rights reserved.

A new FAA rule, already written and waiting to be issued, will have a major impact on business aviation. Part 91 of the Federal Aviation Regulations (FAR) will be amended to add the new "Subpart K." Subpart K will distinguish fractional ownership programs from other traditional business aircraft ownership arrangements. The new rule will not affect the pre-existing requirements under FAR §91.501 et seq. regarding traditional corporate flight departments, flying clubs and various forms of Section 91.501 ownership.

One key element of the new rule for fractional ownership programs is that fractional owners (frac-owners) will be in operational control of any program flight requested by the frac-owner. Of course, the frac-owner will be able to depend on the program manager for aviation expertise. But the frac-owner will be required to sign an agreement promising not only to accept operational control responsibility for the FAA, but also acknowledging that "The owner may be exposed to significant liability risk in the event of a flight-related occurrence that causes personal injury or property damage." FAR 91.1013(a)(1)(iii).

Management, ownership and interchange agreements have customarily contained clauses suggesting some level of operational control on the part of a fractional owner. The new FAA rule clarifies the broad-based responsibilities of frac-owners. The new responsibilities and resultant exposure are significant when compared to traditional forms of aircraft ownership. Normally, passive owners who were not actually piloting the aircraft or performing maintenance on it would have little or no liability exposure compared to the operator or owner-pilot.

This article will explain aircraft-owner liability under state laws. Then, we will compare the new obligations and liability exposure of fractional ownership. We will also discuss the various types of exposure of frac-owners after the new rule, including air crash liability, FAA sanctions, employment issues and insurance. Throughout, we examine ways in which frac-owners and program managers can protect their interests in frac-ownership. Note: federal and state tax considerations associated with fractional ownership are significant and extensive, and we have elected not to address them within the scope of this article. Expert tax advice, in addition to the other counsel we recommend in this paper, should definitely be sought prior to entering into any aircraft ownership obligation.

Aircraft Ownership Liability Laws

Traditionally, there has been an important distinction in liability law between an "owner-operator" and a "non-operator owner." If an owner-operator (owner who pilots his aircraft) is negligent and that negligence causes damage or injury, that owner-operator is liable. This is also true when the owner is the pilot's employer. An employer is normally

vicariously liable for the acts of an employee who negligently operates or maintains airworthiness of the aircraft for the owner.

Where aircraft ownership is purely passive – that is, the entity that holds title to the aircraft is not involved in piloting, maintenance or any form of operational control – there should be no liability. Under the modern laws of most jurisdictions, non-operator owners are not held liable for pilot negligence, or enjoy very limited liability. However, a warning is in order: some states have enacted specific aircraft-owner liability statutes or have old case law on the books purporting to make such passive owners liable for aircraft accidents. These old-fashioned laws are based on the notion that aircraft are hazardous flying contraptions. Some legislatures simply desire to make the owners pay when their aircraft cause damages regardless of control over the wrongdoing.

One example of such a provision is New York's General Business Law § 251, which renders owners vicariously liable for the negligence of an operator where the aircraft is being used or operated for more than 30 days, with the express or implied permission of the owner. Liability attaches even if the operating pilot is not an employee of the owner and the owner has no control over the flight. Other states have limitations of liability, so that a passive owner with no actual control over the pilot or aircraft at the time of the accident will have limited liability exposure. In California, a passive owner can be held liable for the permitted use of its aircraft but damages are limited to \$15,000.00 per injury or death, with a maximum of \$30,000.00, and punitive damages are barred entirely.

Nevertheless, in the majority of jurisdictions and in the absence of a special statute imposing liability on aircraft owners, a passive owner who simply lends, rents or leases an aircraft to another party is usually not held liable for the negligence of that party. Most laws do not usually impute liability to aircraft owners unless they have been personally negligent or are the employers of parties who were personally negligent.

Those folks who spend their Saturday evenings curled up with the FAR may point to a provision in the Federal Aviation Act, 49 U.S. Code § 44112, which seems to suggest that passive owners can be held liable even when they are not operating the aircraft. However, this statute has been interpreted by many courts as not creating a cause of action for vicarious liability on the part of the aircraft owner for air crashes. e.g., *Malone v. Capital Correctional Resources, Inc.* (Supreme Court of Mississippi, 2001).

In many jurisdictions, "non-operator" aircraft owners may usually avoid liability for aircraft accidents as long as:

- *The owner had no knowledge of any dangerous condition or defect in the aircraft when it is transferred to the control of another;*
- *The owner is not the employer of the operator of the aircraft;*
- *The owner was not the employer of the maintenance professional who signed off on the airworthiness of the aircraft;*
- *The owner was not in control of the maintenance or operation of the aircraft at the relevant times when the problem developed which lead to the accident;*
- *The owner did not negligently entrust the aircraft to an incompetent operator;*
- *The applicable state law does not impose vicarious liability on owners who grant permission to others to operate the aircraft;*

- *The owner does not assume liability for the operation of the aircraft by signing a contract accepting joint responsibility for operational control or airworthiness.*

The last item on the list is an issue under the new Subpart K of Part 91. The new rule require frac-owners to sign a contract acknowledging operational control for their flights and accepting responsibility for airworthiness on their flights.

Fractional Ownership Programs

In simplest terms, fractional ownership can be thought of as the aviation industry's answer to time-share condominiums. It is the fastest growing and at the moment, quite possibly the only growing area of general aviation. Although the attack on America through the hijacking of aircraft on September 11 has damaged many sectors of the aviation industry, the fractional ownership programs have prospered. For well under \$1 million, depending on the type of aircraft, a business or person can purchase as little as a 1/16th share of a business class jet aircraft or a 1/32nd share of a personal transport helicopter. The fractional owner can send its employees, clients, and guests for trips on its fractionally owned aircraft or any aircraft in the fractional ownership program. This can be done for a small portion of what it would cost to own the same size corporate aircraft outright. A frac-owner's passengers may avoid many travel delays that are now endemic with airline trips. They enjoy expedited (though still thorough) security checks, and have much greater flexibility with regard to schedule control, itinerary, choice of destination airports, and in-flight amenities.

Fractional flying is conducted under FAR Part 91, the same rule applicable to private and corporate aircraft operations. The safety standards imposed by Part 91 are high, but not as stringent as those of FAR Parts 135 (air taxi and commuters) and 121 (larger scheduled air carriers). Some critics have voiced concern that fractional flying was insufficiently regulated. In reality, most fractional programs have been well run. Proponents of fractional programs can point to excellent safety records, which even some of the airlines may envy. The FAA has simply been trying to catch up with the explosion of business flying in this area, and address its policy mandate to protect the flying public. The new FAA rule will restrict fractional programs above and beyond the existing Part 91 standards to some degree, by introducing management, flight control, training, and operational restrictions. However, the new rule will also amend Part 135 to permit on-demand charter flights to operate under the same airport landing criteria, weather reporting requirements and departure standards as fractional program flights, updating the 1940s-vintage provisions of Part 135 to reflect the improved technological capability of modern business aircraft.

Operational Control

The New Rule on Fractional Ownership

In July 2001, the FAA issued a Notice of Proposed Rule Making (NPRM) proposing to add a new Subpart K to Part 91 to regulate fractional aircraft ownership programs. The comment period was extended to November 16, 2001, and is now closed. FAA sources have not committed on a release date. The rule likely would have been finalized earlier but for security priorities taxing the FAA since September 11. The following sections will

discuss some key areas of exposure for fractional owners under the new rule, and provide suggestions of how these issues can be resolved.

Under the new FAA rule, frac-owners without aviation expertise will have operational control and safety responsibilities that may create liability exposure of which they were not previously aware.

Frac-owners' duties will include:

- *Operational control whenever the frac-owner has requested that any program aircraft (not necessarily the one in which the share is owned) carry passengers or property designated by the owner, regardless of whether the owner is on board. FAR 91.1009.*
- *Operational control whenever the frac-owner's designated passengers are carried aboard an affiliated program aircraft, even though it is neither owned nor part of the same fractional ownership program. Thus, a fractional owner can be in operational control of a non-program aircraft. The FAA must be satisfied there is a sufficient relationship between the owner's program manager and the affiliated program manager. 91.1001(a)(2), 91.1001(e)(8), 91.1001(e)(9). Examples of affiliate programs may include fractional ownership operations created under the regulations of foreign countries.*
- *Responsibility for compliance with the FAA-approved management specifications of the fractional program for any flight carrying the fractional owner's passengers. This duty exists even though the fractional owner clearly depends on the project manager for compliance with the management specifications. NPRM Preamble.*
- *The right/duty to inspect and audit the practices of the program manager concerning the operational safety, record keeping and maintenance of the program aircraft. Arguably, with responsibilities for operational control and airworthiness, and given the wording of the regulation, the right to audit may be considered a duty. 91.1009(a)(1); 91.1003(b).*
- *A non-delegable obligation to comply with every regulation in the new Subpart K for every flight carrying their passengers. 91.1001. Thus, fractional owners are responsible even if they delegate the authority to the program manager to carry out various tasks in the program.*

Air Crash Liability of Fractional Owners

Under Subpart K, frac-owners will soon be responsible for complying with safety rules imposed on them by the FAA. This is unusual, because the FAA normally only imposes operational safety and airworthiness rules on FAA certificate holders who have aviation expertise. Will violations of these safety rules create liability on the part of the fractional owner?

Typically, in an air crash, a plaintiff must prove that a defendant had a safety duty, breached that duty and that the breach caused the accident, resulting in damages. Most crashes involve pilot errors while under operational control, or airworthiness problems. The new Subpart K rules appear to create federal duties on frac-owners in these areas. The new regulations may create a bountiful fishing ground for plaintiffs' attorneys after a fractional aircraft crash.

Attorneys may look to state laws to find a legal claim, on the basis that the frac-owners violated federal safety rules. If defense lawyers suggest that the rules were for regulatory purposes only, the plaintiffs can show that the frac-owner assumed liability risks for any accident when its representatives signed agreements prepared by the program manager. The new FAA rule requires not only that the frac-owner sign agreements to acknowledge that it has operational control, but further requires that frac-owners acknowledge that "[t]he owner may be exposed to significant liability risk in the event of a flight-related occurrence that causes personal injury or property damage." 91.1013(a)(1)(iii).

How Many Fractional Owners Can be Sued?

If a major air crash occurs involving a fractional ownership aircraft after the new rules are implemented, one can expect that the program manager will be sued. The fractional owner in operational control, who has directed that his employees, guests or clients are carried on the flight, will also be sued. What about the other fractional owners who were not using the aircraft on the ill-fated trip?

Some plaintiffs' attorneys use the shotgun approach to litigation by suing all relevant deep pockets after a disaster. The newspapers usually emphasize the deep pocket part "â€" they forget to explain that the parties who had no safety duties related to the cause of the accident are soon dismissed from the lawsuits by lawyer's motions. The FAA rule only places responsibility for operational control and fractional program regulations on the fractional owner for its flight. But, once the fractional owner's flight has ended, has its liability exposure for a subsequent crash abated?

What if a subsequent crash occurs involving a fractional program aircraft that is not due to contemporaneous operational pilot error? For example, what if the subsequent crash results from prior maintenance malpractice, or an airworthiness deficiency? If that deficiency arose at the time when the previous frac-owner was in operational control and had the duty for compliance with all applicable regulations "â€" would it be liable? There is an expression in the naval service that if it happens on your "watch," you may be responsible for the consequences. This may become the template for frac-owner liability exposure.

Is Fractional Aircraft Ownership a Passive Investment?

The new rule clarifies that fractional owners are not simply enjoying a cheap alternative to airline transportation or charter travel. Some advocates who facilitate the sale of fractional shares have recommended that, after owners sign on the dotted line, they should take a hands-off approach and "let the program manager do the managing." While it is never wise to interfere with expert management, frac-owners can no longer, in light of the new rules, be passive investors and business travelers. With the benefits, convenience, economy and flexibility of fractional flying come the burdens of operational control and safety rule compliance. These burdens can be carried by exercising the right "â€" arguably, the duty "â€" of inspecting and auditing the program.

The Right/Duty to Audit Program Management

To date, program managers have an enviable record of safety in the aviation industry. The FAA has recognized that many program managers in the fractional ownership field have been conducting their operations according to the industry's "best practices." The new FAA rule imposes joint compliance and operational control responsibility on both program managers and frac-owners. It is incumbent upon frac-owners to ensure that the best practices are being followed.

Before signing the agreements, upon renewal, and on a spot-check basis, owners may wish to inspect and audit the safety aspects of the program. Owners may use technical consultants, if necessary, to audit the operational and airworthiness matters, but the results may be discoverable in litigation. Attorneys with sufficient aviation experience can do such audits and inspections with confidentiality under the attorney-client privilege. Knowledgeable aviation attorneys should also be able to audit the various clauses in the operating contracts (purchase, management, ownership and interchange agreements) under the governing state law. They can also evaluate the critical insurance coverage upon which frac-owners must rely to protect against liability exposure. Notwithstanding large coverage limits in the fleet policies to cover foreseeable accidents, the risks to the frac-owner include the denial of coverage or the application of an exclusion to the occurrence, particularly where regulations may have been violated.

Even if insurance coverage is provided, there are questions of corporate accountability and adverse business consequences to frac-owners which can result from FAA sanctions, liability litigation, disclosure of court records and adverse publicity that may result if a fractional owner is accused of violating safety rules after a major air crash or even a survivable accident.

When fractional owners audit and inspect their programs, they must focus on flight crew qualifications, staffing, drug education, the initial and recurrent training of pilots and maintenance personnel, aircraft scheduling, passenger briefings, record keeping, vendor standards, and a host of other factors. The FAA stipulates that the new rules do not require any undue invasion of the manager's financial records or those records pertaining to the confidential movements of other owners.

Insurance

A frac-owner has exposure any time it is using its own shared aircraft, whenever it is using another aircraft in its program, and even when it is using an aircraft from some other program that is affiliated with the owner's program. That additional insurance is needed to protect against all foreseeable risks for all these flights is even more evident because of the new rule.

Frac-owners should carefully analyze the terms of their operating agreements and verify that their insurance coverage is consistent with the agreements. While a major accident clearly could create substantial liability exposure, a minor accident or incident could result in diminution in value, loss of use, and other damages not covered by insurance. Under many agreements, program managers may use the aircraft for Part 135 charter operations, significantly increasing the utilization, exposure to damage, and ordinary wear and tear. Will the value of the investment be protected?

Management agreements may contain provisions whereby the manager will procure "combined single-limit liability" coverage in amounts up to \$200 million. Such insurance may be sufficient to cover air crashes unless there is another catastrophe of the magnitude of September 11. The protection from such coverage limits is reassuring as long as the insurance carrier actually provides the expected coverage.

A duly diligent frac-owner will audit the specific requirements for insurance coverage by comparison to the use of aircraft by the other frac-owners and the program manager. Even if there is no violation of the FAA regulations, unauthorized usage, invalidating acts or excluded occurrences could result in a denial of coverage.

Some issues that should be examined when evaluating the strength of coverage include:

- *Does the insurance policy obtained by the program manager provide coverage for "war risk, hijacking and other perils [terrorism]?" Is there a force majeure clause in the agreement or insurance policy? Insurers are concerned about their exposure from a catastrophic occurrence like September 11. The wording of any exclusion for such events must be carefully analyzed. It must be clear that the coverage provided is for both "hull" and "liability" and for all aircraft used for frac-owner flights.*
- *Most frac-owners have previously relied on the program managers to make sure that the fractional program functioned under the umbrella of the insurance. It is critical that the frac-owner is not deprived of coverage if the program manager is negligent and does something that might invalidate coverage. The management agreement might contain a clause that requires the insurance company to designate the manager as a "first named insured." The insurer should promise that the "named insured" coverage or "additional named insured" coverage for the frac-owners will not be invalidated by the negligence of the first named insured. Further, the program manager or its agents (crews, mechanics, etc.) may impair subrogation rights by signing vendors' hold harmless agreements, thereby voiding the coverage; again, the prudent frac-owner should take steps to prevent this eventuality.*
- *Improper use of a fractional program aircraft by one of the frac-owners could result in the denial of coverage by the insurance company. The resulting exposure would be substantial, and the applicable agreements among the owners may be unenforceable due to bankruptcy or other factors. Thus, each frac-owner must insure against breach of the owner agreements to the extent possible, and audit the non-confidential use of program and affiliate aircraft to ensure compliance with the terms of the insurance contract.*

Exclusions in Fractional Program Insurance Policies

Commercial aircraft operators are forbidden by the Department of Transportation to carry less than the minimum required coverage under Federal regulations. Thus, exclusions or warranties providing limitations cannot be implemented for commercial flights without approval by the Department of Transportation. 14 CFR Â§205. A fractional ownership program is a general aviation operation controlled by Part 91. Federal regulations do not prohibit the use of exclusions in general aviation policies. Exclusions can be invoked to deny coverage (indemnification money) and allow the insurer to avoid

its duty to defend (pay for defense lawyers). Depending on the policy, there can be exclusions for not having a valid airworthiness certificate, carrying excessive passengers, intentional misuse of the aircraft, etc. Here are some exclusions to watch out for:

Exclusion - Violations of the FAR

Many policies exclude coverage for certain regulation violations that create enormous risk that the insurance company did not underwrite. If such FAR violations are clear, specific and unambiguous, insurers may deny coverage. Examples may include the failure of any of the pilots to have valid and current medical certificates, or the use of the aircraft outside the specifications required for an airworthiness certificate.

Exclusion - Pilot Warranty Clause

Another exclusion common to aviation insurance policies involves the pilot warranty clause. Pilots are required to have certain certificates, ratings, experience and currency and need to have logged specific types of flight time. Insurers necessarily have strict requirements for the qualifications of the pilots because they are underwriting risks of flight that are largely controlled by pilots. If a pilot has an accident in circumstances in which the pilot was not qualified under the pilot warranty clause, the fractional owners may face a denial of coverage.

Exclusion -Territorial Limits

Policies usually contain limitations or exclusions regarding the geographical limitations on the use of the aircraft. Does the service area in the operating agreements coincide with the territorial limits? Are the program and affiliate aircraft being used outside of insured territorial limits such that an accident in the wrong place will invoke a denial of coverage?

Conflicts of Interest and Dilution Risks

While there may be a sufficient amount of indemnity coverage, the duty to defend each of the various participants can be an insurance issue. Although each party has a right to hire independent counsel, will the insurance company pay for up to 16 frac-owners in an airplane crash, or up to 32 frac-owners in a helicopter crash? Insurance companies usually have the contractual right to choose their insured's defense counsel. There may not be a need for separate counsel for each owner in every crash; but if their interests are in conflict or potential conflict, disputes can arise as to the duty of the insurance company to pay for independent counsel for each owner. The program manager and frac-owner using the aircraft will usually have more exposure, as may frac-owners who had the "watch" when the problem began. The larger share owners may not be similarly situated to the smaller share owners. Sometimes program managers are also share owners. Some frac-owners provide their own pilots; others use pilots from the program manager. There may also be issues arising from affiliated program aircraft and pilots.

If a fractional program air crash occurs, the damages are likely to be enormous, especially considering the affluence of the typical passengers. The indemnification costs of multi-defendant, multiple-victim litigation can be staggering. Add in demands for

defense counsel for each frac-owner, where a conflict or potential conflict exists, and even the most stalwart insurer will be tempted to have its coverage lawyers weighing its duty to indemnify and duty to defend. Certainly, coverage dollars may be consumed by multiple defenses, and frac-owners would be liable for damages in excess of the coverage limits.

Special Issues in Fractional Ownership After the New Rule

FAA Sanctions Against Owners

Even though a fractional owner does not hold a license or certificate from the FAA, the new rules allow enforcement actions seeking monetary sanctions against fractional owners. 91.1001; 91.1013(1)(iii). Fractional ownership programs are general aviation operations and not commercial aircraft operations.

The FAA's monetary clout against frac-owners is limited; in most cases it is \$1,000.00 per violation up to a limit of \$50,000.00. Thus, notwithstanding corporate or reputation problems in the event of a sanction by the FAA, the monetary stake is not that great.

The real threat to the fractional owner is that the FAA will take action against the program manager. The FAA can suspend or revoke the program manager's certificates. The FAA can revoke the management specifications for the fractional program. Either action would have the effect of grounding the aircraft in the program. The FAA has promulgated an amendment to Part 13 of the Federal Aviation Regulations, which states that the administrator of the FAA may revoke all or part of the management specifications issued to the program manager under Subpart K of Part 91. If the FAA grounded the aircraft in the program, who would compensate the fractional owners for the loss of use of their aircraft? Arguably, owners would have to charter aircraft at substantial expense and could suffer various consequential damages. Often, management agreements have a limitation of liability clause, disclaiming responsibility for loss of use, etc. It is unlikely that the program manager's insurance would cover such damages?

Non-Aviation Lawsuits

The new FAA rules do not address the employment relationship between the pilots and the program manager or the fractional owners. This is a matter of state contract law. Typically, the program manager employs the pilots, but independent contractors are also used. Frac-owners may also provide their own pilots for their flights. What if a flight crewmember does something other than cause a crash, such as commit a crime or some form of discrimination? Will the program manager be the only defendant? Will the fractional owner, in operational control of its flight, be exposed to liability for the misdeeds the air crew who are arguably the owner's agents on its trip? Will the program manager's insurance policy provide coverage for such an occurrence?

Employment Lawsuits

The escalation of wrongful discharge or discrimination lawsuits has been a plague for many businesses. Normally, the program manager is the employer of the crew and provides crew services for the flight. The new Subpart K rules require that whenever the

fractional owner has directed the program manager to carry its passengers, the fractional owner is in operational control. In fact, the FAA has recognized in its Notice of Proposed Rule Making that a fractional owners "can initiate, conduct, redirect and terminate a flight." In order to do any of these things, a fractional owner must necessarily be able to direct the pilot to initiate, conduct, redirect or terminate a flight. If the frac-owner is dissatisfied with the crew on its flight can the frac-owner cause them to be terminated?

If the fractional owner has such power, does he have the "right to control" the crew sufficiently to be adjudicated an "employer" under the liberal employee protection laws of some states? In many jurisdictions, the employer is determined by the "right to control," not necessarily the party who issues the paycheck and W-2 form. There are some management agreements that contain pilot-selection clauses purporting to give the owner the right to select the pilots for his flights — a potential minefield for employer liability. We doubt that this issue has been tested in the courts because the control imposed on frac-owners by the FAA is unique. If a frac-owner in operational control gets sued for wrongful discharge or discrimination from an occurrence on a frac-owner's flight, will the program manager's insurance cover the lawsuit?

Drug Testing

The FAA proclaims that the new Subpart K embodies the "best practices" in the industry. Yet the FAA does not require random drug testing for fractional programs. Drug testing is required for Part 135 and Part 121 operations. The new rule only requires that program managers provide drug education. The owner is entitled to disclosure as to the nature of the education, be it of the "just say no" variety or better. The FAA allows drug testing in fractional programs and some programs use it. If the "best practices" are to be employed, then perhaps proper random drug testing should be the standard of care for all programs, even if not required by the FAA.

Conclusion

There may be something inherently illogical about imposing operational control responsibilities on time-share owners who do not have aviation expertise. Program rules designed to impose aviation duties on parties who are not in a position to really do anything to improve aviation safety may give rise to unintended consequences. However, from a business perspective, frac-ownership may be an efficient way to own a piece of a business' air travel requirements and may be good for some. Others may be better off with co-ownership arrangements under Part 91.501 et seq. Traditional corporate flight departments may be the answer for some high-volume users; the use of management companies with aviation expertise may suffice for others. Some businesspersons may prefer to simply pay a charter operator and take a trip without the burdens of ownership and now, FAA regulation. In any case, careful, professional evaluation of the options and their attendant benefits and risks is essential.

NOTE: *The issues discussed in this article do not constitute legal advice. The objective is to alert you to some common issues so that you can avoid or minimize legal trouble. Anyone with an aviation law problem should be guided by the advice of his or her lawyer, under applicable federal and state laws, after a full and confidential disclosure of all relevant facts.*

Co-author - Valerie Dunbar Jones Esq.

Ms. Valerie Dunbar Jones is an attorney with Juris Doctor degree from the University of Chicago and an undergraduate degree from Purdue University. Ms. Dunbar Jones began her career in aviation in 1980 at Purdue University. As a flight instructor and member of the Purdue aviation faculty, she trained professional pilots, served as a flight crewmember in the University's KingAir, and participated in ground-breaking work on pilot decision-making training.

Ms. Dunbar Jones currently holds an Airline Transport Pilot certificate with Single and Multi-Engine Land class ratings, and type ratings in the Learjet, BAe 800, Falcon 50, Citation III and Boeing 737. She also holds a Flight Instructor-Turbojet Certificate and a Ground Instructor-Advanced certificate, and held a Flight Instructor certificate in Airplanes with an Instrument Rating from 1982 to 1996.

As a professional pilot, Ms. Dunbar Jones flew as copilot and captain for air taxi operators and for major corporations. She developed policy and procedure manuals, training materials and emergency response plans. She assisted in the coordination of flight and maintenance and represented the field of corporate aviation in career fairs and school lectures. During her professional flying career, which has encompassed more than 3,800 hours of flight time to date, Ms. Dunbar Jones has completed training in crew resource management, survival, international operations, airborne weather radar, aerospace physiology, and in-flight medical emergency procedures.

Ms. Dunbar Jones has worked as an aviation safety analyst for Phaneuf Associates Incorporated as an aviation safety analyst and has participated in air carrier flight and maintenance audits, has performed safety studies and has developed regulatory analysis projects For PAI, Ms. Dunbar Jones prepared the 1987 Interagency Working Group Report on Near-Midair Collisions (NMAC) and the 1994 Air Taxi Safety Study, and worked on the regulatory revision of federal aviation regulations dealing with the certification of pilots, instructors and flight schools, and with the certification and operation of foreign repair stations.

OPS 2A6 - Cabin Crew**OPS 2A6.075 Cabin Crew General**

(a) An operator shall ensure that all crew members, other than flight crew members, assigned by the aircraft operator to duties in the passenger compartment of an aircraft comply with the requirements of this Subpart, except for additional crew members solely assigned to other than passenger safety related specialist duties.

(b) An operator shall ensure that:

- (i) the role and responsibilities of cabin crew members are clearly identified to the passengers, and
- (ii) the roles and responsibilities of additional crew members are clearly identified to the passengers.

OPS 2A6.080 Number and Composition of Cabin Crew

(a) An operator shall not operate an aircraft carrying more than 19 passengers unless at least one cabin crew member is carried for the purposes of performing duties specified in the Operations Manual or assigned by the aircraft operator or the pilot-in-command, in the interests of the safety of passengers.

(b) An operator shall ensure that not less than one cabin crew member for every 50, or fraction of 50, passenger seats installed on the same deck of the aircraft is carried on any flight where sub-paragraph (a) above applies. In any event, the minimum number of crew members must not be less than the number of crew who actually participated in the aircraft cabin during the relevant emergency evacuation demonstration or were assumed to have taken part in the relevant analysis.

(c) In unforeseen circumstances the required minimum number of cabin crew may be reduced provided that:

- (i) the number of passengers has been reduced in accordance with procedures specified in the Operations Manual, and
- (ii) the number of passengers does not exceed 50 for each assigned cabin crew member.

OPS 2A6.085 Minimum Requirements

An operator shall ensure that each cabin crew member:

- (a) is at least 18 years of age,
- (b) has been assessed by a competent person as being fit to perform assigned duties,
- (c) has successfully completed initial training that meets the requirements specified in *Appendix 1 to OPS 1.1005*,
- (d) has completed the appropriate conversion and/or differences training as prescribed in OPS 2A6.095 covering at least the subjects specified in *Appendix 1 to OPS 1.1010* for each aircraft or variant, to which he/she is assigned,
- (e) has within the previous 12 months either completed initial training or recurrent training that meets the requirements of OPS 2A6.100, and been assessed as proficient to perform his/her duties. If recurrent training and the proficiency assessment is completed within the final three months of the validity period of previous training and proficiency assessment, the validity period shall be extended to 12 months from the original expiry date, and

OPS 2A6 - Cabin Crew

- (f) has within the previous 24 months completed surface contamination training.

OPS 2A6.090 Senior Cabin Crew Members

(a) An operator shall nominate a senior cabin crew member whenever more than one cabin crew member is assigned.

(b) The senior cabin crew member shall be responsible to the pilot-in-command for the conduct and co-ordination of normal and emergency procedures as specified in the Operations Manual.

OPS 2A6.095 Conversion and Differences Training

(a) An operator shall ensure that each cabin crew member has completed appropriate conversion and differences training that meets the requirements of *Appendix 1 to OPS 1.1010*.

- (i) **Conversion training:** A conversion course must be completed before being:
 - (1) first assigned by the operator to operate as a cabin crew member; or
 - (2) assigned to operate another aeroplane type; and
- (ii) **Differences training:** Differences training must be completed before operating:
 - (1) on a variant of an aeroplane type currently operated; or
 - (2) with different safety equipment, safety equipment location, or normal and emergency safety procedures on currently operated aeroplane types or variants.

(b) An operator shall determine the content of the conversion and differences training taking account of the cabin crew member's previous training and experience.

(c) Both initial training and conversion and differences training may be combined.

(d) An operator shall ensure that conversion training is conducted in a structured manner and with sufficient realism to ensure that the cabin crew member can effectively carry out assigned duties.

(e) An operator shall ensure that each cabin crew member before being first assigned to duties completes training in the operator's standard operating procedures.

(f) An operator shall ensure that each cabin crew member before being first assigned to duties completes CRM training.

OPS 2A6.100 Recurrent Training

(a) An operator shall ensure that each cabin crew member undergoes recurrent training, covering the actions assigned to each crew member in normal and emergency procedures relevant to the type(s) and/or variant(s) of aircraft on which they operate.

(b) An operator shall ensure that the recurrent training programme includes theoretical and practical instruction, together with individual practice.

(c) Upon completion of recurrent training the cabin crew member shall undergo an assessment by a person appointed by the operator, to confirm that the cabin crew member is proficient to carry out assigned duties.

OPS 2A6 - Cabin Crew

OPS 2A6.105 Refresher training

An operator shall ensure that each cabin crew member who has not flown on this type of aircraft for more than six months and still remains within the validity period of the previous training and proficiency assessment prescribed by OPS 2A6.085(e) completes refresher training in:

- (a) emergency procedures,
- (b) aircraft evacuation procedures,
- (c) operation of aircraft exit doors and emergency exits, and
- (d) location and handling of emergency equipment.

OPS 2A6.110 Training Records

An operator shall maintain records of all training and proficiency and fitness assessments required by this sub-part.

European Aviation Safety Agency

TASK OPS.001 RULEMAKING GROUP**SUBGROUP NON-COMMERCIAL OPERATIONS
WITH COMPLEX MOTOR-POWERED AIRCRAFT**

MEETING MINUTES OF

13 MARCH 2007, 10.30 H – 17.00 H

14 MARCH 2007, 08.30 H – 14:00 H

HOTEL TIVOLI TEJO, LISBON

Attendees:

Karl Brady (KBR), ECA
Douglas Carr (DCA), GAMA
Dick Nederlof (DNE), CAA Netherlands
Geoff Parker (GPA), UK CAA
Jacob T. Pedersen (JTP), IAOPA
Ray Rohr (RRO), EBAA
Daniela Defossar (DDE), EASA Rulemaking Officer
Arthur Beckand (ABE), EASA Legal Advisor

Excused:

Mike Hamlin (MHA), ECOGAS
Josef Maurer (JMA), ETF

1. RRO opened the meeting and welcomed all participants.
2. The subgroup reviewed the proposed agenda. DDE asked to postpone the item dangerous goods until next meeting as she needs to check possible links with existing European legislation. The agenda was adopted without further changes.
3. The subgroup was de-briefed on the last core group meetings.
4. The minutes of the last meeting and action item list were reviewed. The EU Directive on cosmic radiation covers the subject completely and applicable ops text can therefore be deleted. GPA informed the group on a CAA UK research project addressing the issue of crash axes and crowbars. He will report on details at the next meeting. Means of emergency evacuation are sufficiently covered by CS 23. The minutes were adopted without further changes.
5. The subgroup continued its review of the WP on the declaration. It discussed the value of the declaration, authority oversight and use of industry standards and alternative means of compliance. Some subgroup

members raised concerns on the mechanisms and approval process for application of industry standards that have independent external audit procedures and the links to authority oversight. It was agreed that the presented WP could serve as a first discussion basis with the authority subgroup and further details be reviewed at this stage. A joint meeting with the authority subgroup will be requested for April.

6. The subgroup reviewed the working paper on operations involving management companies. It discussed the "expertise" of owners/operators to operate an aircraft, whether such owners should be viewed as "innocent passengers", the possible extent of oversight for certificated operations and operations requiring a declaration and enforcement issues. It was agreed to forward the working paper to the authority subgroup for an exchange of views and further input. This paper will also be discussed at the April meeting with the authority subgroup

7. The subgroup reviewed the working paper on cabin crew. It addressed the identification of cabin crew and additional crew members. DDE will insert the text into the OPS 2 template for final review at the next meeting.

8. Regarding the SMS working paper of the authority subgroup, it was agreed to await discussions and presentation of the authority subgroup to give further input.

9. The subgroup reviewed the Part OPS 2 template and identified paragraphs that should be transferred to OPS 0, harmonised with the other subgroups, items that need AMC/GM material and paragraphs that need further drafting. DDE will check the requirements against the essential requirements and prepare a cross reference with ICAO Annex 6 III helicopter general aviation.

10. The group will start discussing AMC/GM material at the next meeting. Group members are asked to review/prepare AMC/GM material for the next meeting:

- RRO: CAR and IS-BAO
- DCA: FAR
- GPA/KBR: CAA UK material
- JTP: material from Denmark
- DNE: paragraphs 2A1.005, 2A1.030, 2A1.075
- DDE: paragraphs 2A1.020, 2A1.025, performance chapter

11. The subgroup reviewed the work plan and noted that it is on schedule. At its next meeting, the subgroup plans to continue discussions on the declaration. In this respect, Mr. Marco Pereira, Netjets, should be invited for the next 2 meetings, April/May. The subgroup will look at the Member State responses to its questions and will start drafting the RIA.

ACTION LIST

No.	Meeting No. / Date	Task	Resp.	Timeframe	Status
1.	1 09/11/06	Presentation on IS-BAO	RRO	Meeting 23 28-29/11/06 12-13/12/06	c
2.	1 09/11/06	Circulate meeting documentation of last meeting of the ECAC Task Force on fractional ownership	DDE	asap	c
3.	1 09/11/06	Put link to FAR 91 Subpart K on circa website	DDE	asap	c
4.	1 09/11/06	Prepare WP on the basis of JAR-OPS 0 and 2	RRO+ DDE	Meeting 2 28-29/11/2006	c
5.	2 28-29/11/06	Distribute copy of ICAO Annex 6 Part II proposal	RRO	asap	c
6.	2 28-29/11/06	NBAA Management Guide to be put on circa	DDE	asap	c
7.	2 28-29/11/06	Presentation on FAR 91K and on ICAO discussions when drafting the proposal Annex 6 II regarding fractional ownership	DCA	Meeting 4 9-10/01/2007	c
8.	2 28-29/11/06	Check ICAO SARPs for approval requirements	DDE	asap	c
9.	2 28-29/11/06	Conduct RIA on requirements regarding determination of mass	Group	Meeting 3 12-13/12/2006 See action item 11.	c
10.	2 28-29/11/06	Review JAR-OPS 1 Subparts	GPA, DCA, DDE, JTP, JMA	Meeting 3 12-13/12/2006	c
11.	3 12-13/12/06	Review draft JAR-OPS 2 Subpart J and draft a proposal for the OPS 2 rule	RRO	Meeting 4 09-10/01/2007	c

No.	Meeting No. / Date	Task	Resp.	Timeframe	Status
12	3 12-13/12/06	Clarify "equivalent standard" to FCL	DDE	Meeting 4 09-10/01/2007	c
13	3 12-13/12/06	Redraft OPS 2 requirements regarding the content and structure of an OM	RRO	Meeting 4 09-10/01/2007	c
14	3 12-13/12/06	Review EU-OPS Subpart Q and draft proposal for OPS 2; present FTL schemes	RRO	Meeting 4 09-10/01/2007	c
15	3 12-13/12/06	Circulate IS-BAO checklist for guidance material	RRO	asap	c
16.	3 12-13/12/06	ICAO cross reference list	DDE	Meeting 45 09-10/01/2007 13-14/02/2007	c
17.	4 09-10/01/07	Forward request on additional membership to core group	RRO	asap	c
18.	4 09-10/01/07	Address the issue of legal charter within the non-commercial rules to core group	RRO	asap	c
19.	4 09-10/01/07	Draft requirements on fractional ownership based on FAR 91 K	DCA/ DDE	Meeting 5 13-14/02/2007	c
20.	4 09-10/01/07	Cosmic radiation detection equipment: check EU Directive	DDE	Meeting 56 13-14/02/2007 13-14/03/2007	c
21.	4 09-10/01/07	Internal doors and curtains: check against CS	KBA	Meeting 5 13-14/02/2007	c
22.	4 09-10/01/07	1.795 Crash axes and crowbars: source	All	Meeting 57 13-14/02/2007 24-25/04/2007	o
23.	4 09-10/01/07	M&B WP: incorporate comments for next meeting	RRO/ DDE	Meeting 5 13-14/02/2007	c
24.	4 09-10/01/07	OM WP: incorporate comments for next	RRO/ DDE	Meeting 5 13-14/02/2007	c

No.	Meeting No. / Date	Task	Resp.	Timeframe	Status
		meeting			
25.	4 09-10/01/07	FTL WP: incorporate comments for next meeting	RRO/ DDE	Meeting 5 13-14/02/2007	c
26.	4 09-10/01/07	Security WP: incorporate comments for next meeting	RRO/ DDE	Meeting 5 13-14/02/2007	c
27.	5 13-14/02/2007	Draft WP on cabin crew	RRO	Meeting 6 13-14/03/2007	c
28.	5 13-14/02/2007	Check CS 23 regarding the means for emergency evacuation	KBA	Meeting 6 13-14/03/2007	c
29.	5 13-14/02/2007	Review Declaration WP for next meeting	All	Meeting 6 13-14/03/2007	c
30.	5 13-14/02/2007	Forward paragraph on SOP to authority subgroup to consider for SMS	DDE	asap	c
31.	5 13-14/02/2007	Draft requirements for OPS 2 according to discussion on ICAO cross reference list	DDE	Meeting 6 13-14/03/2007	c
32.	5 13-14/02/2007	Draft WP on operations with involvement of management companies	GPA/ JTP	Meeting 6 13-14/03/2007	c
33.	5 13-14/02/2007	Draft WP on DG	DDE	Meeting 67 13-14/03/2007 24-25/04/2007	o
34.	6 13-14/03/2007	Forward Declaration WP and WP on operations involving management companies to Authority Subgroup and request joint meeting for April	DDE	asap	o

No.	Meeting No. / Date	Task	Resp.	Timeframe	Status
35.	6 13-14/03/2007	Insert cabin crew WP into OPS 2 template	DDE	Meeting 7 24-25/04/2007	o
36.	6 13-14/03/2007	Part OPS 2 template: reflect subgroup discussions; check requirements against ER; prepare a cross reference with ICAO Annex 6 III helicopter general aviation	DDE	Meeting 7 24-25/04/2007	o
37.	6 13-14/03/2007	Preview and prepare AMC/GM material	RRO/ DCA/ GPA/ KBR/ JTP/ DNE/ DDE	Meeting 7 24-25/04/2007	o
38.	6 13-14/03/2007	Invite Mr. Marco Pereira, Netjets for April/May meeting	DDE	Meeting 7 24-25/04/2007	o

DDE
21/03/2007