



# ICLG

The International Comparative Legal Guide to:

## **Aviation Law 2013**

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A practical cross-border insight into aviation law

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# Switzerland

ThomannFischer

Stephan Erbe



## 1 General

### 1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in Switzerland.

There are two sources of aviation legislation in Switzerland: Swiss national law; and EU legislation according to the Agreement between the European Community and the Swiss Confederation on Air Transport.

Swiss national law: The Federal Parliament draws up and decides on amendments to federal acts (e.g. the Federal Civil Aviation Act) and ratifies international treaties. The Federal Council (Government) is in charge of more detailed Ordinances (e.g. the Federal Civil Aviation Ordinance) based on the federal acts.

EU legislation: The Joint European Union/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport formally adopts those pieces of EU legislation which shall become binding for Switzerland. Any such adoption is subject to national ratification.

The Swiss Federal Office of Civil Aviation (FOCA) is the supervision authority responsible for safety (aircraft, flight operations and infrastructure) and for aviation policy and strategy issues.

### 1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

1. Hold an AOC from the competent national Civil Aviation Authority (Regulation (EC) No. 1008/2008).
2. File the Application for an Operating Permit (Form 49.05; which takes at least 60 days), including:
  - list of aircraft;
  - leasing or management agreements for aircraft;
  - evidence of own crew;
  - evidence of right to use a specific airport;
  - rental agreement for office of Post Holder Flight Operations;
  - business plan for two years; and
  - financials of the company (certified).
3. Confirmation regarding the Swiss or European character of the entity (Form 54.045).
4. Corporate documents (articles, an extract from the commercial register, certified copy of the shareholders'

register, and the organisational chart with information on the Board and Management).

5. Extract from the register of the debt collection and bankruptcy office (*Betriebsregisterauszug*) regarding the CEO, the CFO and the Accountable Manager.

Carriers with an EU/EFTA operating licence do not need an additional Swiss operating licence (*cf.* form 49.10). Besides the AOC and the EU/EFTA operating licence, they have to file information on:

- insurance (third party liability and passenger/cargo/baggage liability);
- their security programme;
- list of aircraft used from and to Switzerland;
- handling agent in Switzerland;
- contact within the airline regarding compensation and assistance to passengers;
- schedules and tariffs for scheduled flights; and
- Declaration of Reciprocity for services in 5th or 7th freedom to destinations outside the EU/EFTA and respective Route Licence.

Non-EU/EFTA carriers (*cf.* form 49.07) are subject to further disclosure duties as set out in form 49.12.

### 1.3 What are the principal pieces of legislation in Switzerland which govern air safety, and who administers air safety?

Switzerland has adopted Regulation (EC) 216/2008, which is therefore the principal piece of Swiss aviation safety legislation. EASA OPS and IR will be applicable in Switzerland.

Furthermore, Switzerland has implemented Safety Management Systems as provided for in ICAO Annexes 6, 11 and 14.

The Swiss FOCA administers air safety in Switzerland.

### 1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No. However, the Safety Management Systems as provided for in ICAO Annex 6 are only applicable to commercial operations (passenger or cargo).

### 1.5 Are air charters regulated separately for commercial, cargo and private carriers?

No, they are not.

**1.6 As regard to international air carriers operating in Switzerland, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.**

No. Airport concession holders are obliged to grant access to all national and international airlines entitled to fly to Switzerland (Art. 36a Federal Civil Aviation Act). Any restrictions must be detailed in the operational regulation of the airport and shall not be discriminatory. The operational regulation is subject to FOCA approval.

**1.7 Are airports state or privately owned?**

Both models exist. E.g. Zurich Airport is owned by a private limited company (of which the canton of Zurich holds 1/3 of the shares), whereas Euroairport Basel-Mulhouse-Freiburg and Geneva Airport are owned by public corporations.

**1.8 Do the airports impose requirements on carriers flying to and from the airports in Switzerland?**

Yes. Every airport has its own operational regulation which can contain certain requirements regarding safety, environmental issues, noise protection, etc. These restrictions do relate to aircraft types, not carriers as such.

**1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?**

Air accidents are governed by the Ordinance on Aviation Accidents and Severe Incidents (as defined in the Ordinance). Any accident or severe incident has to be reported to the Swiss Accident Investigation Board (SAIB) immediately. The scene of the accident must not be altered (except for rescue actions) until the head of the investigation arrives at the scene.

## 2 Aircraft Trading, Finance and Leasing

**2.1 Does registration of ownership in the aircraft register constitute proof of ownership?**

No. The Aircraft Register deals with the administrative registration of the aircraft (permit to fly, airworthiness certificate, noise type certificate, nationality of ownership, call sign, etc.). Although the owner is registered in the Aircraft Register, the certificate of registration is no proof of ownership.

Aircraft can be additionally registered in the Aircraft Record (*Luftfahrzeugbuch*). Such registration constitutes proof of ownership.

**2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?**

Yes, there is a Swiss Aircraft Record (*Luftfahrzeugbuch*) in which ownership and mortgages can be registered. In regard to ownership, the registration is voluntary.

Registration of any right will only be made upon application by the owner and is only permissible for aircraft already registered in the Aircraft Register. Mortgages can only be set up and will only become effective with registration in the Aircraft Record. Any entry will first be published in the Swiss Official Gazette (SHAB) and is subject to an objection period of 30 days. This 30-day period has to be borne in mind in any aircraft financing project. The Swiss FOCA who runs the Aircraft Record is rather swift in handling the applications. Apart from the 30-day period, any request should be handled within a few days.

Once a right is registered in the Aircraft Record it can only be altered or deleted by amending the respective registration, i.e. once it has been registered in the Aircraft Record, ownership can only be transferred by respective amendment of the registration.

**2.3 Are there any particular regulatory requirements which a lessor or a financier need to be aware of as regards aircraft operation?**

Mortgages: Certain claims are granted priority over a registered mortgage, although Swiss legislation is more restrictive than other legislation when it comes to accepting preferred security rights: Only claims:

1. related to actions taken in order to save or rescue an aircraft; and
2. for extraordinary expenditures incurred in the course of actions taken to maintain the value of the aircraft or to protect claims against third parties who are obliged to pay restitution in the case of damage to or confiscation or destruction of the aircraft,

take priority. There are no maintenance or mechanic's priority rights.

Leases: The lessee of an aircraft can be registered in the Aircraft Register, as long as all the other requirements for a registration in the Aircraft Register, i.e. apart from legal ownership, are fulfilled. In the case of long-term lease agreements under which a Swiss lessee operates the aircraft, a non-Swiss owner may also be registered in the Aircraft Register. Furthermore lease agreements with a duration of more than 6 months can be registered in the Aircraft Record. Such recordation gives the lessor and the lessee priority over every right or agreement recorded later in time (except for statutory liens). However, the lessor may unilaterally allow the recordation of a mortgage, unless this is explicitly excluded in the lease agreement.

**2.4 Is Switzerland a signatory to the main international conventions (Montreal, Geneva and Cape Town)?**

Yes. However, the Cape Town Convention has so far not been ratified by Switzerland.

**2.5 How are the Conventions applied in Switzerland?**

International Treaties are applied directly in Switzerland, i.e. the implementation of national legislation is not required.

## 3 Litigation and Dispute Resolution

**3.1 What rights of detention are available in relation to aircraft and unpaid debts?**

A creditor, a mortgagee or the owner (e.g. the lessor) of an aircraft

can apply for seizure of the aircraft even if the claimant cannot produce an enforceable title. However, the following aircraft shall not be subject to seizure:

1. government aircraft;
2. aircraft actually in service on scheduled flights of a public carrier (and its reserve aircraft); and
3. any other passenger or cargo aircraft ready to depart in such transportation, unless the debt, for which the seizure is requested, was incurred for that specific trip or has become due in the course of that specific trip.

The debtor will be granted relief from the seizure if he provides sufficient guarantee, covering the debt and related costs (or at least the value of the aircraft, if lower).

Provisions in a mortgage providing for a possibility of the mortgagee automatically becoming the owner in an event of default or providing for a possibility to sell the aircraft in a private auction are null and void.

There is no right of self-help, see question 3.2.

### 3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

No, this is, other than under the Cape Town Convention, not admissible under Swiss law.

### 3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in Switzerland regarding the courts in which civil and criminal cases are brought?

The ordinary civil courts are competent for aviation disputes. However, four cantons (Bern, Aargau, Zürich and St. Gallen) have specialised commercial courts, which will be competent as far as the dispute is to be considered a commercial dispute and as far as the value threshold of CHF 30,000 is exceeded, which will mostly be the case.

Criminal charges will be judged by the competent criminal courts.

Enforcement of mortgages are carried out by the competent Debt Enforcement and Bankruptcy Office. The same applies to the enforcement of financial claims, if the creditor is in possession of an enforceable title. If he does not hold such title, he may still initiate the enforcement procedure; however, in such cases the debtor may raise objection against the enforcement and the creditor will then have to obtain a court order before being able to proceed with the enforcement procedure.

### 3.4 What type of remedies are available from the courts or arbitral tribunals in Switzerland, both on an i) interim and a ii) final basis?

#### Interim basis:

- Seizure of aircraft according to Art. 80ss of the Civil Aviation Act (see question 3.1). Even if the court is *ex officio* held to take all the necessary precautions to make sure that the seizure will have effect, it may still be advisable to explicitly request the court to deliver a notice of seizure to the Aircraft Register (FOCA), to Skyguide, to the airport at which the aircraft is currently positioned and to the owner of the aircraft (if the seizure was not directed against him, but e.g. against a lessee).
- In the rare occasion that the rules on the seizure of aircrafts

are not applicable, a freezing injunction as provided for in the Debt Enforcement and Bankruptcy Act may be obtainable.

Arbitral Tribunals: If a dispute is subject to an arbitration clause, the creditor may theoretically choose whether he applies for seizure at the state court or at the arbitral tribunal. However, the arbitral tribunal is only competent to grant injunctions like a seizure once it has been constituted. Since time is mostly of the essence, the creditor will often not want to wait and will therefore choose to apply for the seizure at the competent state court.

Both remedies then need to be validated. This is either done by a court procedure or by initiating a Debt Enforcement Procedure (this procedure may, if e.g. the existence of a claim is contested, also include a court procedure, see question 3.3).

#### Final basis:

- A court or arbitral order can award compensation for damages, can aim at enforcement of contractual or other rights or can be a declaratory judgment.

### 3.5 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

Decisions of state courts can be challenged by appeal (if the value is over CHF 10,000) or by request for setting-aside (if the value is under CHF 10,000 or regarding issues which are explicitly exempt from appeal). For both remedies there is a non-expandable deadline of 30 days calculated from receipt of the decision together with the written reasoning. If the court only decided on the prayers for relief without giving a written reasoning, then a request for written reasoning has to be filed within 10 days.

Within the 30-day deadline not only the prayers for relief, but also the complete writ of summons, has to be filed. This is a very tight deadline which needs to be considered in any planning of a possible appeal or request for setting-aside.

The appeal has to be filed with the higher cantonal court, the decision of which can then be appealed at the Swiss Federal Supreme Court. However, decisions of commercial courts (see question 3.3) are not subject to appeal at a higher cantonal court but can be appealed against directly at the Swiss Federal Supreme Court.

Arbitral Awards cannot be appealed, except if certain procedural rights, the right to equal treatment and the right to be heard or the Swiss *ordre public* have been violated.

## 4 Commercial and Regulatory

### 4.1 How does Switzerland approach and regulate joint ventures between airline competitors?

All agreements between undertakings, decisions by associations of undertakings and concerted practices, i.e. including joint ventures, which may affect trade between Switzerland and the EC and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the Agreement between the European Community and the Swiss Confederation on Air Transport, are prohibited. Contravening decisions or agreements are null and void.

This wording, as provided for in the Agreement between the European Community and the Swiss Confederation on Air Transport, corresponds to the applicable EC Regulation (Art. 81 and 82 of the EC Treaty). Switzerland has therefore in fact adopted the EC competition regulations.

#### 4.2 How do the competition authorities in Switzerland determine the "relevant market" for the purposes of mergers and acquisitions?

According to the Agreement between the European Community and the Swiss Confederation on Air Transport, the European Community institutions and not the Swiss competition authorities are competent. The Swiss authorities only remain competent if the thresholds as defined in the EC Merger Regulation are not reached (i.e. combined turnover of EUR 5 billion and two undertakings with at least EUR 250 million turnover each).

The determination of the relevant market is, therefore, in most cases not made by Swiss authorities but by the EC institutions.

In the rare cases that remain within the Swiss competence, the relevant market is determined based upon the O&D-approach as applied by the EU commission. This approach is applied both to charter and scheduled airlines.

#### 4.3 Does Switzerland have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

Again, in most cases the EC Merger Regulation will apply (see above, question 4.2). However, if Swiss law applies, the answer is yes, the Swiss Cartel Act provides for a notification system.

#### 4.4 How does Switzerland approach mergers, acquisition mergers and full function joint ventures?

See above, question 4.1.

#### 4.5 Please give an outline of the procedure, including time frames for clearance and details of any costs of notifications.

Notifications must be made to the Swiss Competition Commission. The commission then has to decide within one month whether an examination is to be initiated. During that month the transaction shall not be implemented. After expiration of the one-month period, the applicant will receive either a clearance (lack of a decision is to be considered as clearance) or the information that an investigation will be initiated.

In the event of an investigation being initiated, the Competition Commission must decide within a four-month period whether the transaction will be cleared.

In the worst case, an applicant is therefore facing a total of five months. If you add another month for the preparation of the notification, the total time frame is approx. six months.

#### 4.6 Are there any sector specific rules which govern the aviation sector in relation to financial support for air operators, including (without limitation) state aid?

Yes. The Agreement between the European Community and the Swiss Confederation on Air Transport prohibits - save as otherwise provided for in the Agreement - any aid granted by Switzerland or by an EC Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Switzerland and the EC countries. Again, this rule corresponds to the state aid regulation as provided for in the EC Treaty (Art. 87 EC Treaty).

However, there is a backdoor: in the event of natural disasters or exceptional occurrences, state aid may be permissible. It is not clear to this day, what this entails.

The decision whether state aid is permissible under the aforementioned regulations lies with the Swiss authorities, who are obliged to inform the EC authorities on such aides.

#### 4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

The criteria are set out in Regulation (EC) No 1008/2008, which is also applicable in Switzerland.

Subsidies for particular routes may be granted to an undertaking which runs a particular route under a public service obligation as provided for in Art. 16 ss. of the Regulation. Before deciding on such a public service obligation, the other Member States, the Commission, the airports concerned and air carriers operating on that particular route must be consulted.

#### 4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

According to the Schengen and Dublin Association Agreements, the Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data is applicable in Switzerland.

The Directive was implemented in the Federal Act on Foreign Nationals (FNA). According to Art. 104 FNA, the Federal Office of Migration decides which countries are to be considered as countries with a migration risk. Carriers flying from these countries to Switzerland are obliged to transmit the API-information of all passengers to the Swiss authorities. Unfortunately, the list of countries is not publicly available and every carrier therefore has to get in touch with the Federal Office of Migration to get clarity on the status of a certain country.

Any retained data is to be deleted within 24 hours.

Details on how and where the data is to be delivered can be found under <http://www.bfm.admin.ch/content/dam/data/migration/schengen-dublin/api-schnittstellenspezi-e.pdf>.

#### 4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

The Swiss Data Protection Act imposes the obligation on any entity which collects data to put adequate security measures against data loss in place. If the loss of data is caused by insufficient security measures, the carrier may be liable for damages caused or for reparation payments.

#### 4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

Intellectual property rights are enforced by court action. In every canton there is one specialised court in charge of intellectual property issues.

In such courts, preliminary awards based on a *prima facie* evidence and final awards can be obtained. The reliefs available are injunctions to cease the use of the intellectual property right,

confiscation and destruction of infringing goods, damages and reparation and publication of the court decision.

Furthermore, intellectual property infringements may constitute a criminal offence.

#### 4.11 Is there any legislation governing the denial of boarding rights?

Switzerland has adopted Regulation (EC) No 261/2004 regarding passenger rights in the event of denied boarding and of cancellation or long delay of flights.

In the event of overbooking, the carrier may first determine whether passengers are willing to offer their seat against an indemnification to be agreed upon. If no such volunteers can be found, the carrier must compensate those passengers denied on board with a payment of up to EUR 600, depending on the distance of the flight. The Regulation requires airlines to offer you meals, refreshments and hotel accommodation as appropriate whilst waiting for a rearranged flight. They should also cover any transport costs between the hotel and the airport.

#### 4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

Of course, slots have to be respected but otherwise the authorities do not have any powers regarding late departures or arrivals.

#### 4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

Airports can only be run based on a concession by the federal government. Such concessions are dealt with in the Federal Civil Aviation Act and the Ordinance on the Aviation Infrastructure. The airport operators are licenced either for 50 years in the case of national airports or 30 years in the case of regional airports.

The concession entails the right to commercially run an airport and to raise fees. On the other hand, the airport operator is obliged to open the airport to all aircraft as provided for in the operational regulation of the airport (see above, question 1.6) and to maintain an infrastructure which guarantees safe operations.

The concession is subject to the condition that the operation of the airport has to be in line with the Sectoral Aviation Infrastructure Plan (SAIP) and that the applicant has to have the management skills, technical knowledge and funds necessary for the operation of the airport as provided for in the operational regulation.

All details regarding the operation of the airport are then to be specified in the operational regulation which is subject to FOCA-approval. Typical contents of the operational regulation are the organisation of the airport, operational hours, departure/arrival procedures, ground handling, further commercial and non-commercial use of the airport, environmental issues, an aerodrome design and operational manual according to ICAO-standards and a Safety Management System.

#### 4.14 What global distribution suppliers (GDS) operate in Switzerland?

The Galileo System by Travelport, Amadeus and Worldspan operate in Switzerland (not taking into account the many suppliers of Front-End-Tools).

#### 4.15 Are there any ownership requirements pertaining to GDS's operating in Switzerland?

No, there are not.



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