

Air Transport: What are the Legal and Financial Risks for Clubs?

The death of football player Emiliano SALA and the pilot of the plane that was taking him to his new club in Cardiff on 21 January 2019 reminds us that the third dimension is not without risk, which also knows his tragedies. And which always raises questions. While it will be up to the investigators to clarify the technical and operational issues of this accident, a more general question that anyone can legitimately ask today is why such a talented player with a high value on the transfer market could have been embarked on a single-engine piston aircraft, for a private flight by sight, at night, in difficult weather conditions and over an icy ocean?

In this article, Philippe RENZ (picture), a Swiss lawyer specializing in aviation law, outlines the bases of air transport and the rules that apply to it, and notes some precautionary measures that passengers and clubs could take to minimise their risks.



The circumstances of the accident of *Emiliano Sala* are not exempt from questioning, abundantly relayed by the press these last weeks: was the crash due to a technical problem or to a human factor? Could frost have played a role? Was it really a private flight, or an illegal commercial flight? Was the pilot sufficiently qualified? If the investigators are in charge of clarifying these technical and operational uncertainties, a more general question that may be legitimately asked is why such a talented player, with a high value on the transfer market, could have been embarked on a single-engine piston aircraft, for a private flight by sight, at night, in difficult weather conditions and over an icy ocean? While traveling to the end of the world aboard an airliner is statistically much safer than going to buy bread at the corner of the street by car, any passenger whatsoever should take some precautions before embarking on a non-commercial (private) flight with a pilot whose aeronautical skills and experience he does not know, aboard an aircraft whose technical status he does not know.

Even if non-commercial aviation also remains generally safe, it is not uncommon for pilots and aircraft operators to negligently, or even knowingly, expose their passengers to risks they are not able to apprehend but are unacceptable in terms of safety. The accident of *Emiliano Sala* seems to be a case study.

However, the Argentine player is not alone, as too few passengers are aware of these risks, the control of which also escapes the civil aviation authorities. Hence the interest for the average citizen, and for any high-level footballer and their clubs who are known to frequently charter aircraft for their private and professional travel, in measuring these risks, before climbing on board. The purpose of the following overview is to outline the basics of air transport and the rules that apply to it, and to identify some precautionary measures that passengers and clubs may take to minimise their risks.

I. Commercial or private flights

The number of airspace occupants is, from year to year, increasing. From birds of prey to airliners, drones, gliders and business jets, not everyone is in the same boat when it comes to ensuring complete safety. While some occupants are hunted or captured to ward off the danger they represent, air passenger transport has been regulated for decades by civil aviation authorities according to separate standards, some for commercial flights and others for private flights. This distinction is justified to take into account both the diversity of the needs of all categories of airspace users and the risks they pose for themselves, for the passengers they carry or for others on the ground.

International civil aviation regulations have their origin in the standards and recommended practices issued by the International Civil Aviation Organization, a UN organization based in Montreal. These define **minimum standards** that are taken up by each country in national legislation, by the European Union in Europe, which has made them concrete since the beginning of the century in a regulation that is among the most dense and strict in the matter. Aviation regulations deal with many facets of air transport, from the point of view of aircraft certification and maintenance to flight safety, whose standards distinguish commercial flights, which are subject to the strictest rules, from private flights, subject to more flexible rules whose rigour depends on the risk that the aircraft is likely to incur and the risk that is accepted by the passenger.

Because aside from the protection of crew members and people and goods on the ground, the purpose of the law, with regard to the protection of passengers, is simple: the citizen who pays for his flight and has no control over the aircraft's operator is a commercial passenger who must be protected by the strictest rules. This is typically the case for the passengers of airliners. On the other hand, **a passenger boarding an aircraft without paying cannot expect or claim to be offered the same level of safety by the aircraft's operator than that offered by an airline. The law also protects this non-commercial passenger, but through less stringent rules.**

The application of this general principle – whereby whoever pays for a service must have the guarantee of its quality, while the one who receives it for free should not expect it to be perfect – to aviation is not simple. Indeed, the remuneration criterion chosen by the legislator to distinguish commercial flights (paying) from private flights (free) raises, in Europe alone, to a number of different interpretations and exceptions. As a result, in recreational aviation and business aviation, it will often be difficult for a passenger to know whether the operator of the aircraft that will be carrying it has the right to ask him for compensation for the flight, and if so, how much, and what the level of safety that the passenger will get at this price is. Some explanations and concrete examples of this problem are needed.

II. Remuneration, a variable criterion

European regulations define commercial air transport as *«an aircraft operation to transport passengers, cargo or mail for remuneration or other valuable consideration.»* However, it does not define in more detail what is meant by the term *«remuneration»* or the notion of *«other valuable consideration»*. This uncertainty has led the 32 European states subject to this legislation to give it, over time, various interpretations. Thus, while some countries estimate that EUR 1 is worth remuneration, other countries take it to mean the profit generated by the pilot or the operator, once all the actual costs of the flight (aircraft rental, fuel, landing fees, etc.) are covered. Moreover, while some countries consider that a meal at the restaurant paid to the pilot by the passenger during a stopover is worth *«remuneration»*, others consider that the accommodation fees paid to pilots at destination do not have an onerous character within the meaning of the legislation. Similarly, while some countries believe that in so-called *«club»* structures, club members can pay non-commercial operators without restriction, without the flight being considered commercial, other countries oppose such an interpretation of the law. Last but not least, the European legislation itself derogates from its prohibition of remuneration for private flights by allowing the passengers and the pilot of any airplane, of a weight of 5700 kg or less

and which is not equipped with a turbine, to share the costs of a non-commercial flight, meaning that the pilot receives a fee to cover the cost of the flight.

If this last exception is used by recreational pilots to lighten the bill of their passion at the end of the month, or by pilots who offer aircraft ridesharing, the problem of this exception, as well as of the differing above-mentioned interpretations and practices in remuneration, is that the passenger will most often be deceived by the vagueness left by the regulations. Indeed, while the civil aviation authorities themselves have difficulties in interpreting the law, it cannot reasonably be expected of the average passengers that they know that paying for their flight does not automatically guarantee maximum safety; that the criteria of the tolerated remuneration for a private flight are different if they go on board a Pilatus PC-12 or a Piper Malibu for instance, or in a private jet; that the admissibility or otherwise of the remuneration should not be analysed solely from the point of view of the law applicable in the country of departure or arrival of the flight, but also from the point of view of the law applicable to the country of registration of the aircraft. In such a confusing legal landscape, passengers cannot find their way around and today they are efficiently protected neither by regulation nor by the civil aviation authorities, which only react to a safety problem by depending on the size of the hole and the number of deaths that an accident leaves on the ground.

In the meantime, it is up to the passengers themselves to take the necessary precautions when, against remuneration, they board the aircraft of an operator whose authorisation to carry out commercial flights is not obvious. Great caution is therefore needed, not only to prevent passengers from being embarked on illegal operations, but also and above all for safety reasons.

III. Technical and operational safety

The rate of aircraft accidents, when calculated on the basis of the distance travelled per passenger, continues to decline one decade after another.

One of the important factors in this decline is a proven technical certification and aircraft maintenance system. An aircraft admitted by a civil aviation authority to travel is indeed technically very safe, and accidents caused by a purely technical problem are increasingly rare. Conversely, human factors are the cause of more than 70% of accidents, with the influence of particular weather conditions and air traffic control errors representing the rest of the accidents.

From the technical safety perspective, every aircraft, once certified and out of the factory, is subject to a maintenance program whose rigor and regularity depends on the complexity and use of the aircraft. Under international regulations, it is the responsibility of the civil aviation authority of the country in which the aircraft is registered to ensure that the aircraft operator maintains its aircraft through specialised maintenance companies, respecting the intervals required by the aircraft manufacturer. For example, it is the French Directorate General for Civil Aviation that is responsible for the technical surveillance of aircraft registered in France (with the prefix «F»).

Among the exceptions to this principle, European regulations have provided in recent years that complex motor-powered aircraft, including all business jets, which are not registered in a European country but are operated most of their time in Europe - there are several thousand on the mainland, mainly US-registered aircraft (with the prefix «N») - must also be subject to European rules on the subject, which are often stricter than elsewhere. Thus, the operator of a Bombardier business jet registered in the United States but based in Germany will not only have to respect the maintenance program imposed by the Canadian manufacturer and the maintenance rules enacted by the Federal Aviation Administration - the US civil aviation authority - but will also need to hire a specialised company in Europe which will have to ensure that the aircraft is maintained in accordance with the rules applicable to it, and that it is therefore at all times able to fly safely: a system of continuing airworthiness management that is unique to Europe and does not exist in the United States. This double technical surveillance, which is not imposed on smaller aircraft of the type in which *Emiliano Sala* embarked, is justified by the

fact that it is the country's rules (or for Europe, the continent) above which the aircraft creates a risk that should apply with priority. The famous blacklists, which ban, above European territories, a number of airlines considered to be dangerous or coming from countries whose oversight authorities are non-existent or not very reliable, are also an application of this principle of precaution.

From the perspective of air operations, flight safety is provided by a combination of rules which, on the one hand, impose on aircraft operators organisational and operational requirements, and on the other hand, define the qualifications, training and experience that pilots must possess in order to perform their duties safely. The rigour or the greater flexibility of these rules varies according to the activity (commercial or private) of the operator. For example, an airline, a commercial business jet or helicopter operator, or a regional flying club operating small commercial airplanes, must first have an operating license issued by the competent civil aviation authority. Without this holy grail, no commercial flight may be carried out for remuneration. These commercial operators must then, and above all, possess an Air Operator Certificate (AOC), which is issued by the same authority after a lengthy certification process, and which certifies that the internal organisation of the operator - which includes the appointment of personnel qualified to positions of responsibility - and operational procedures applied by the operator - which include a risk management system - are conducive to ensure safe flights. Pilots operating these operators' commercial flights must have professional flight licenses, must engage in regular training - such as a simulator when flying commercial airliners or business jets - and must follow the orders and operational procedures of their operator. Establishing and maintaining such a commercial organisation, meeting the strictest standards and subject to the permanent oversight of the authorities, is extremely expensive. This is the reason why only commercial operators are allowed to be remunerated for carrying out flights, allowing them to generate revenue to finance their commercial activity and, if possible, to make profits.

For their part, non-commercial (private) operators are not required to meet such stringent regulatory requirements for their air operations and are subject to more flexible oversight, or even no oversight, from the authorities. Thus, at the top of the pyramid of safety, the private operator of a business jet has the obligation to adopt operational procedures and to appoint at least one responsible person to ensure that these procedures are followed by their pilots- pilots who may be content with non-professional flight licenses, but who must have the necessary qualifications and experience for the aircraft they operate. Here too and for the above-mentioned reasons, the private operator of a business jet registered in a non-European country is subject to dual operational oversight if it operates mainly in Europe. At the bottom of the pyramid are recreational pilots who take their family and friends for a helicopter ride in the Alps or for plane rides abroad, or businessmen who fly themselves in their propeller plane as part of their business travel. The law does not subject these private operators, who are mostly the pilots themselves, to any obligation in terms of authorization, organization and operational procedures. The only requirements are that these pilots have a non-commercial flight license, that they can justify the necessary qualifications for the type of aircraft and flights that they operate (for example, a single-engine or multi-engine aircraft, a night flight, an instrument flight, etc.), and that they perform at regular intervals a flight assessing their skills in the company of an examiner.

All of these private operators, which represent, all types of aircraft combined, more than 100 times the number of commercial operators, have no right to ask their passengers to pay them in any way, except in the above-mentioned limits, according to the various practices of European countries in this area. If they violate this prohibition, they are guilty of operating illegal commercial flights, which is common in both business aviation and recreational aviation, but against which the civil aviation authorities have too few ways to fight. This lack of capability benefits a number of private operators who finance their passion or business illegally, to the detriment of their passengers whose confidence they place in them.

IV. An acceptable risk?

A passenger who wants to make a mid-distance trip to Europe, as *Emiliano Sala* did between Cardiff and Nantes, has several options. He can fly a scheduled flight, charter a commercial jet, opt for aircraft ridesharing on a small plane while sharing the cost of the flight with the other occupants, or find a pilot who agrees take him to his destination for free and without any other form of compensation. A latter case that seems rather rare. Let's say you are this passenger: which option would you choose? Are you the kind to say «*I'm afraid of the plane*», in which case you would only board an airliner where you will be served coffee and wine so you can survive your anxiety about traveling? Or rather the adventurer type, who is not afraid of turbulence and who is willing to put on a lifejacket for the duration of the trip to anticipate any risk of a water landing in case the single-engine plane fails? In the face of risk, its apprehension and acceptance, each passenger is different, and the important thing is that you, as a passenger, understand it and that you can make your own choice, to accept it or to refuse it. By yourself, knowingly, and without any external influence whatsoever. Because if this risk is materialized by an accident or an incident, it is you, your integrity and your financial interests that will be affected.

Once again, even non-commercial aviation remains safe. And the occurrence of an accident is only rarely linked to a single risk factor, but often to an accumulation of several factors. **You therefore have an interest in limiting the number of risk factors before choosing one or another means of transport.** For these purposes and following common sense, you can consider the fact that flying in an airliner with two pilots is by far the safest means of transportation while also considering; the fact that, supported by statistics, that it is much safer to fly aboard business jets than small propeller airplanes; the fact that having two pilots on board is an additional guarantee of safety; the fact that a pilot with a professional license has much more extensive training than a privately licensed pilot; the fact that a professional pilot flying 400 hours a year has much more confidence in the cockpit than a private pilot who flies only in good weather, a few hours a year, in order to be able to keep his license; the fact that

flying on a two-engine aircraft is often safer than having one; the fact that a turbine is more reliable than a piston engine; the fact that being able to fly with instruments in the clouds gives the pilot more flexibility and safety than flying at sight; the fact that visual flight is more dangerous at night than during the day; the fact that flying above the ground gives more chance of survival in the event of an engine failure than when flying over the water.

In addition to the risk factors for safety, you must add a **financial risk** if you board an aircraft for a free flight, when the aircraft is operated by an operator who does not hold a commercial operating license. In such a case, you should know that if you suffer damages during this flight, the insurer who insures the operator on a mandatory basis will refuse to cover your damage until you, or your family in the event of death, could not demonstrate, if necessary by judicial means, that the damage was caused by the fault of the operator, by that of his pilot respectively. The legal regime for aviation insurance provides that only paying passengers, or passengers transported free of charge by commercial operators, may benefit from automatic cover up to a base amount of 113,000 Special Drawing Rights (to date, approximately EUR 140,000), regardless of any fault of the air carrier. A free flight is not without risk.

V. Professional players, special passengers

If the average citizen is master of the risks he takes in his daily leisure or profession, some sports professionals are not alone in deciding the risks they are allowed to take out of their professional setting. This is mainly the case for players in collective sports whose clubs generally prohibit players, in their employment contracts, to engage in “*at risk*” activities such as parachuting, climbing, motorcycling or snowboarding. High-level football players are particularly concerned by these prohibition clauses because of their high salaries and transfer value, which constitute both a financial risk and a potential source of revenue for clubs, which have a primary interest in protecting the physical integrity of their high-value employees. However, many football players

are known to be fond of air travel in their spare time and the question that is legitimate to ask in view of the tragedy of *Emiliano Sala*, is whether certain types of air transport should be banned by clubs because of their increased risk.

Indeed, and without being too emotional after such an event which fortunately remains rather rare, it seems difficult to justify that the risky activities prohibited to players, such as those mentioned above, are an objectively higher risk than the one to embark on a single-engine piston aircraft for a night flight under harsh conditions over an icy ocean leaving little chances of survival in the event of a forced landing on water. This is the case regardless of the qualifications and experience of the pilot of the aircraft. Certainly, a player does not travel as often by plane as he would motorcycle or snowboard if these activities were allowed, but the risk exists and **clubs could wonder whether their prohibition clauses should not extend to the private air travel of their players, where that risk exceeds the bounds of reasonableness-**limits of which appear to be clearly exceeded in certain flight conditions during non-commercial operations.

Football clubs also travel a lot for the needs of their teams or their managers. Some of them, however, do not seem to be very vigilant about the safety conditions, and the legality or otherwise, of the paid flights that they charter when they would have every interest in taking their precautions for obvious questions of liability. **The club that does not take the minimum precautions that can be expected of it when chartering a flight as an employer will not be able to easily clear its liability towards the victims or their families where the flight, illegal or operated in precarious safety conditions, would turn out badly.** The club also exposes itself, in such a case, to experience the same difficulties with the insurers covering the risks related to injuries and accidents of its players who present the biggest financial risks of the club.

Clubs should, therefore, set a clear framework for their air operations and charter exclusively small and large aircraft operated by licensed commercial operators holding a valid AOC. They will usually find a list of these commercial operators on the website of the civil aviation authority of the

country in which the operator has its headquarters. Moreover, **when clubs use small commercial aircraft operators such as Pilatus PC-12 or others, they should ensure that the maximum amount of insurance in the air carrier's insurance policy is sufficient to cover the damage that could be sustained in the event of an accident, since the market value of a single player could in some cases easily exceed it.**

A trip in the 3rd dimension definitely requires some precautions.

About the author:

Philippe Renz is a lawyer specialising in aviation and sports law. Before founding Renz & Partners, he worked for several years as a lawyer and investigator at the Swiss Federal Office of Civil Aviation, then in law firms in London and Geneva.

In aviation, Philippe Renz advises his clients on all matters relating to national and international aviation regulations and assists them with respect to civil, administrative and criminal matters relating to aviation. He also advises them in all matters relating to the sale, purchase, lease, holding, operation and maintenance of aircraft, and assists them in the negotiation of their contracts.

In the field of sports, Philippe assists his clients on all contractual and regulatory matters and in their contentious proceedings, in particular in doping cases. As an intermediary, he represents players in the negotiation and conclusion of their employment agreements with clubs.