City Research Online

City, University of London Institutional Repository

Citation: Chuah, J. C. T. (2023). Admissibility of Air and Marine Accident Investigation Records in Arbitration and Litigation. In: Basu Bal, A., Rajput, T., Argüello, G. & Langlet, D. (Eds.), Regulation of Risk Transport, Trade and Environment in Perspective. (pp. 185-210). Brill. ISBN 9004518681 doi: 10.1163/9789004518681_007

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/29513/

Link to published version: https://doi.org/10.1163/9789004518681_007

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online: http://openaccess.city.ac.uk/ publications@city.ac.uk

Regulation of Risk

Transport, Trade and Environment in Perspective

Edited by

Abhinayan Basu Bal, Trisha Rajput,
Gabriela Argüello, David Langlet

BRILL
NIJHOFF

LEIDEN | BOSTON

Contents

List of Figures and Tables xi
Table of Cases xii
Table of Legislation xix
Notes on Contributors xxix

Introduction to Regulation of Risk 1
Gabriela Argüello, Abhinayan Basu Bal, David Langlet and Trisha Rajput

The UN Arms Trade Treaty: A Multilateral Trade and Security Treaty Not Regulated by International Trade Law? 28
Abdulmalik M. Altamimi

Ice Management Research and the Arctic Marine Environment 63
Gabriela Argüello and Julia Johansson

Divide and Conquer or Unite to Trade: Trade Facilitation along the China-Europe Railway Corridors 98
Abhinayan Basu Bal, Trisha Rajput and Yongmei Chen

The Meaning of "Accident" under the Montreal Convention in Light of CJEU Jurisprudence 157
Olena Bokareva

Admissibility of Air and Marine Accident Investigation Records in Arbitration and Litigation 185
Jason Chuah

When Economic Sanctions Lead to Conflict of Laws and Real Risks for Businesses 211
Carolina Dackö

Risks Posed by the COVID-19 Pandemic regarding the Carriage of Goods and Passengers by Sea: Considerations on Seafarers' Rights and Health Protection 236
Jonatan Echebarria Fernández

International Shipping: Who Levels the Playing Field? 282
Ellen J. Eftestøl and Emilie Yliheljo

Risk in Transporting Dangerous Goods via RoRo and RoPax Shipping 315
Jonas Flodén and Johan Woxenius

Scrubber Technology: Bad News for the Marine Environment 353
Ida-Maja Hassellöv

Autonomous Wrecks 369
Jhonnie Mikael Kern

High Seas Marine Protected Areas: Impact on Shipping and the IMO 392
Niels Krabbe

Shipping and the Ecosystem Approach 418
David Langlet

Autonomous Shipping: Some Reflections on Navigational Rights and Rescue at Sea 451
Martin R. Leopardi

Maritime and Aviation Law: A Relational Retrospect and Prospect on Unmanned Ships and Aircraft 471
Huiru Liu

Some Perils of Turning Small Ships into Big Boats: On the Relevance of Addressing the Real Issues in Law 500
Claes Martinson

The International Regulatory Framework of MASS Disruption 522
Maximo Q. Mejia Jr.

Salvage Agreement and Contract Salvage: Risk Dynamics in Salvage Law 551
Proshanto K. Mukherjee

(Smart) Contractual Networks in the Carriage of Goods by Sea 573
Livashnee Naidoo

Restricting International Trade through Export Control Laws: National Security in Perspective 603
Trisha Rajput

Legal Tools for Overcoming Perceived Risks in Green Shipping 646
Pia Rebelo

Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions 685
Rhidian Thomas

Index 719

Admissibility of Air and Marine Accident Investigation Records in Arbitration and Litigation

Jason Chuah

1 Introduction

Transport accident investigations are a matter for administrative law, generally speaking. It is largely for the state to regulate the purposes, powers and procedures for transport accident investigation agencies. These agencies or entities require state empowerment because of their potentially interventionist and intrusive powers. Although discretionary powers are a needful attribute of the investigative process, these powers need to be properly and legitimately provided for. That is however not a purely domestic law matter, it is argued. The provisions of the relevant international transport conventions and the workings of the international transport organisations (such as the International Maritime Organisation and the International Civil Aviation Organisation) are necessarily part and parcel of in the legal framework for the operations of these investigation bodies. It follows thus that the findings and reports of these investigative bodies, given their role in the safety of international transport, tend to carry much weight and imprimatur.

The focus of the chapter is largely on the purpose/s laid down in law for these bodies – involving air and marine casualties. The scope of the research is on air and maritime transportation as the international dimension is clearly more pronounced. The research problem is this. It seems incontrovertible that one of the more important aspects of an independent marine accident investigatory process is the production of an accident or casualty report at the conclusion because it enables lessons to be learnt and mistakes avoided in the future.[1] However, there has been a growing call to use these reports or findings[2] in judicial and arbitral proceedings to prove liability or fault, or, at the very least, causation. Indeed, it is quite understandable why litigants would wish to use the records – the evidence was produced by neutral, independent publicly appointed experts whose reputation was unimpeachable. Moreover, and especially, in an adversarial litigation system as is an inalienable feature of

1 See Malmberg, Lars-Göran, *Haveriutredningar – En rättslig studie över undersökningar i samband med olyckor i luften och till sjöss*, (2000) at 30.

2 Note that these findings are both of fact and opinion.

© JASON CHUAH, 2023 | DOI:10.1163/9789004518681_007
This is an open access chapter distributed under the terms of the CC BY-NC 4.0 license.

the common law system, being able to rely on evidence produced using public funds is exceedingly cost efficient.

A distinction perhaps might be made between the report and the records and documents in the possession of the respective investigation bodies in question. Broadly speaking the final reports are usually published and as they are in the public domain, a court or tribunal could take judicial notice of them.[3] However, where they are sought to be used to prove fault or liability, special considerations might apply – after all, there is the exhortation from the IMO and ICAO that the accidents and incidents investigations are intended to apportion blame or liability.[4] Other records, on the other hand, are not as a rule published. Although the policy objectives might be similar, different legal considerations might apply when deciding whether they could be compelled or admitted in arbitral and judicial proceedings. Thus, other than the issue of the evidence having the propensity to apportion blame or liability the court may, depending on the domestic systems, need to consider issues of data protection, privacy and prejudice.[5]

This chapter begins with an evaluation of the workings of these air and marine investigation bodies with a view of establishing what might constitute the general international consensus as to the purposes and processes of these bodies. This is followed up with a focus on legal provisions, drawing from different common law jurisdictions, dealing with the powers of the marine accident investigation and the air accident investigation bodies. As regards the methodology, cases where legal challenges have been made demanding production of accident investigation records (as against reports which are public) from

3 For instance, for the purposes of explaining the timeline, or values involved, or seamanship standards, or technical data etc. See for example the following recent UK cases concerning MAIB reports – *Warner v. Scapa Flow Charters* [2016] ScotCS CSOH101; *Keynvor Morlift Ltd v. The Vessel "Kuzma Minin"* [2019] EWHC 3557 (Admlty); *Margolle & Anor v. Delta Maritime Company Ltd. & Ors* [2002] EWHC 2452 (Admlty); *Davis v. Stena Line Ltd.* [2005] EWHC 420 (QB); *Lacey v. Palmer Marine Services Ltd & Anor* [2019] EWHC 112 (Admlty); *Nautical Challenge Ltd v. Evergreen Marine (UK) Ltd.* [2017] EWHC 453 (Admlty). Note though that in the UK, prior to 2005, MAIB reports were generally treated as entirely admissible. Most of the decisions do not concern the use of the reports or records to prove liability or apportion blame. As to AAIB reports, see for example *A v. B* [2019] EWHC 275 (Comm); *Rogers v. Hoyle* [2014] ewca Civ 257; GKN *Westland Helicopters Ltd & Anor v. Korean Air* [2003] EWHC 1120 (Comm); *Bristow Helicopters Ltd. & Anor v. Sikorsky Aircraft Corporation & Ors* [2004] EWHC 401 (Comm).

4 Infra, at pp 188, 190-191.

5 Infra, at pp 200-201.

key common law jurisdictions – notably the UK, Australia and Canada[6] – have been scrutinised. It questions how these domestic systems which have a primarily *adversarial system* of procedural law deal with the issue of admissibility of the findings and reports of these bodies in judicial and arbitral proceedings. These three jurisdictions are also relevant as they have specifically not exercised an opt-out to any of the relevant ICAO rules on records and reports.[7]

The final substantive part of the chapter argues for better consistency and offers suggestions for improvement.

2 Transport Investigations Bodies – Purposes and Procedures

International conventions relating to air and maritime transport place a legal obligation on signatory states to facilitate the investigations of air or maritime accidents. As regards air transport, art 26 of the Convention on International Civil Aviation (Chicago Convention) provides expressly that, "in the event of an accident to an aircraft of a Contracting State occurring in another Contracting State, and involving either death, serious injury, or serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, *so far as its laws permit*, with the procedure which may be recommended by the International Civil Aviation Organization".[8] It is noteworthy thus that the investigation to be undertaken is to be consistent with the state's own laws but the procedures should ideally be consistent with those recommended, from time to time, by the ICAO.[9] This is an important provision as the international convention alone does not sufficiently provide for the actual workings and powers of the air accident investigation body. It is not novel that where carriers or other parties attempt to hamper the investigative process, national law can play a powerful role in ensuring that there is proper transparency and

6 Note of course that Quebec has a legal system which applies civil law notions to civil matters but uses the common law approaches in regards to public law, criminal law and federal law matters. Transportation safety investigation is a federal matter.

7 Notably Annex 13 of the Chicago Convention. The USA for example has opted out of parts of Annex 13.

8 emphasis added.

9 Annex 13 (Aircraft Accident and Incident Investigation) to the Convention provides further international requirements for the investigation of aircraft accidents and incidents. It spells out which States may participate in an investigation, such as the States of Occurrence, Registry, Operator, Design and Manufacture. It also defines the rights and responsibilities of such States.

disclosure. Likewise, the investigation body will rely on national law to perform its duties expeditiously. That may include the provision of judicial discretion and statutory conditions to protect the workings of the accident investigation bodies.

Although the Chicago Convention and its attendant supportive documents do not expressly state so, the purpose of the air accident investigation body is to ascertain the circumstances and causes of the air accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribe blame to any person.[10] This is important as it is oft presumed that witnesses and parties are more likely to be open and cooperative in the investigative process if blame or liability is removed from the equation. Indeed, as regards UK law, the *sole* objective of the investigation of an accident or incident, under the *Civil Aviation* (*Investigation of Air Accidents and Incidents*) *Regulations 1996*[11] which set up the Air Accident Investigation Branch, is the prevention of accidents. It is not the purpose of the investigation to apportion blame or liability (reg 4), which reflects paragraph 3.1 of Annex 13 to the Chicago Convention[12] and *art 4(3)* of *Council Directive 94/56/EC of 21 November 1994* establishing the fundamental principles governing the investigation of civil aviation accidents and incidents.

As far as marine accident investigations are concerned, international law relating to accident investigations are prescribed in a number of international instruments. In brief, they are:

– SOLAS, Chapter I – General Provisions: Regulation 21 dealing with Casualties[13]

10 <www.icao.int/Newsroom/Documents/ICAO-Fact-Sheet_Accident-Investigation_2018-05.pdf> accessed 28 October 2022.

11 SI 1996/2798.

12 See too art 1.1.1 of the Manual of Aircraft Accident and Incident Investigation 2015 (ICAO, 2nd edn). The manual is intended to "to encourage the uniform application of the Standards and Recommended Practices contained in Annex 13 and to provide information and guidance to States on the procedures, practices and techniques that can be used in aircraft accident investigations". (see p I–v of the Manual).

13 Reg 21 reads: "(a) Each Administration undertakes to conduct an investigation of any casualty occurring to any of its ships subject to the provisions of the present Convention when it judges that such an investigation may assist in determining what changes in the present regulations might be desirable.

(b) Each Contracting Government undertakes to supply the Organization with pertinent information concerning the findings of such investigations. No reports or recommendations of the Organization based upon such information shall disclose the identity or nationality of the ships concerned or in any manner fix or imply responsibility upon any ship or person". [nb. This reg should be read alongside the IMO Maritime Safety Committee's Resolution 255(84)].

– SOLAS, Chapter XI-1 – Special measures to enhance maritime safety: Regulation 6 dealing with additional requirements for the investigation of marine casualties and incidents[14]
– MARPOL, Article 8 dealing with reports on incidents involving harmful substances[15]
– MARPOL, Article 12 on casualties to ships[16]
– Load Lines Convention, Article 23 on casualties[17]

14 It reads: "Taking into account regulation I/21, each Administration shall conduct investigations of marine casualties and incidents, in accordance with the provisions of the present Convention, as supplemented by the provisions of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code) adopted by resolution MSC.255(84), and: (1) the provisions of parts I and II of the Casualty Investigation Code shall be fully complied with; (2) the related guidance and explanatory material contained in part III of the Casualty Investigation Code should be taken into account to the greatest possible extent in order to achieve a more uniform implementation of the Casualty Investigation Code; (3) amendments to parts I and II of the Casualty Investigation Code shall be adopted, brought into force and take effect in accordance with the provisions of article VIII of the present Convention concerning the amendment procedures applicable to the annex other than chapter I; and (4) part III of the Casualty Investigation Code shall be amended by the Maritime Safety Committee in accordance with its rules of procedure".

15 It reads: "(1) A report of an incident shall be made without delay to the fullest extent possible in accordance with the provisions of Protocol I to the present Convention.

(2) Each party to the Convention shall: (a) make all arrangements necessary for an appropriate officer or agency to receive and process all reports on incidents; and (b) notify the Organization with complete details of such arrangements for circulation to other Parties and Member States of the Organization.

(3) Whenever a Party receives a report under the provisions of the present article that Party shall relay the report without delay to: (a) the Administration of the ship involved; and (b) any other State which may be affected.

(4) Each Party to the Convention undertakes to issue instructions to its maritime inspection vessels and aircraft and to other appropriate services, to report to its authorities any incident referred to in Protocol I to the present Convention. That Party shall, if it considers it appropriate, report accordingly to the Organization and to any other Party concerned".

16 It states: "(1) Each Administration undertakes to conduct an investigation of any casualty occurring to any of its ships subject to the provisions of the regulations if such casualty has produced a major deleterious effect upon the marine environment.

(2) Each Party to the Convention undertakes to supply the Organization with information concerning the findings of such investigation, when it judges that such information may assist in determining what changes in the present Convention might be desirable".

17 It prescribes: "(1) Each Administration undertakes to conduct an investigation of any casualty occurring to ships for which it is responsible and which are subject to the provisions of the present Convention when it judges that such an investigation may assist in determining what changes in the Convention might be desirable.

All these provisions call for investigations to be undertaken by the administration of the flag state. This general duty of the flag state is provided for in the Law of the Sea Convention.[18] In 2008, the IMO adopted a new Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code).[19] In conjunction with this important event, amendments were also made to SOLAS Chapter XI-1. The net effect was to make Parts I and II of the Code mandatory;[20] under the previous unamended SOLAS reg I/21, state administrations were only dutybound to conduct an investigation of any casualty occurring to any of its ships *"when it judges that such an investigation may assist in determining what changes in the present regulations might be desirable"*.[21] This new Code now makes investigations compulsory in the event of a "very serious marine casualty".[22] The investigation must be consistent with the standards and ideals set out in the Code.[23] The Code also recommends an investigation into other marine casualties and incidents, by the flag state of a ship involved, if it is considered likely that it would provide information that could be used to prevent future accidents.[24]

Chapter 1 of the Casualty Investigation Code is particularly explicit about the purpose of marine accident investigations. It states, inter alia,:

> Marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation, as defined in this Code, is an investigation conducted with the objective of preventing marine casualties and marine incidents in the future.

---

(2) Each contracting Government undertakes to supply the Organization with the pertinent information concerning the findings of such investigations. No reports or recommendations of the Organization based upon such information shall disclose the identity or nationality of the ships concerned or in any manner fix or imply responsibility upon any ship or person".

18 Art 94 UNCLOS: "Each State shall cause an inquiry to be held by or before a suitably qualified person into every casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations or another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by other State into any such marine casualty or incident of navigation".

19 Resolution MSC.255(84) (adopted on 16 May 2008).

20 Part III of the Code contains related guidance and explanatory material.

21 See n. 13.

22 Chapter 6.1 Casualty Investigation Code.

23 Chapter 6.2 Casualty Investigation Code.

24 Chapter 17 Casualty Investigation Code.

Article 1.1.1 of the Manual of Aircraft Accident and Incident Investigation[25] is more peremptory. It states:

> The *sole* objective of an investigation into an aircraft accident or incident conducted under the provisions of Annex 13 shall be the prevention of accidents and incidents. Annex 13 also states that it is not the purpose of an investigation to apportion blame or liability. Any judicial or administrative proceedings to apportion blame or liability shall be separate from any investigation conducted under the provisions of Annex 13. [italics mine]

It is thus starkly patent that in both international aviation and maritime transport law, the purpose of the investigation is to better understand the hazards and risks[26] of accident, and to learn from errors so that future accidents could be averted. It is not for apportioning blame or liability, whether civil or criminal.

In the case of marine accidents, chapter 1.2 of the Casualty Investigation Code goes on to state:

> A marine safety investigation should be separate from, and independent of, any other form of investigation. However, it is not the purpose of this Code to preclude any other form of investigation, including investigations for action in civil, criminal and administrative proceedings. Further, it is not the intent of the Code for a State or States conducting a marine safety investigation to refrain from fully reporting on the causal factors of a marine casualty or marine incident because blame or liability, may be inferred from the findings.

At first blush the policy objectives are clear. The investigation reports envisaged by the Code (and the IMO system) should be autonomous but does not preclude other legal processes used to apportion blame and liability. However, it is that separateness and independence principle referred to the in chapter which has, at times, been tested to breaking point in domestic courts and arbitral tribunals.

---

25 Document 9756 (ICAO, 2nd edn) 2015.

26 NB. the Manual of Aircraft Accident and Incident Investigation requires investigators to look to "all immediate and underlying systemic causes and/or contributing factors" as there may be other hazards in the aviation system not directly connected with the causes of the accident needing attention.

3 Admissibility of Investigation Findings

An object of this chapter is to delineate the argument building strategy in litigation and to draw particular lessons from the judicial reasoning process. The research is particularly acute in systems of procedural law which are adversarial in nature. It has been said that the adversarial system is characterized by an impartial decision maker who evaluates contrasting presentations by adversaries to a dispute, evaluates the merits of those presentations, and renders a decision that distributes a positive outcome to one party and a corresponding negative outcome to the other.[27] In contrast, the inquisitorial system is characterized by a decision maker who retains substantial power to elicit evidence in an inquiry aimed at discovering the true facts underlying a dispute.[28] The inquisitorial system, at least in theory, allows for arguably better production of evidence as that process is by and large directed by the neutral arbiter or judge. In adversarial systems, again in theory, the challenges made by one against the other in respect of the production of evidence could have an adverse impact on the truth. The pursuit of truth of course may not always be necessarily "fair".[29]

Returning the matter at hand, from a private litigation standpoint, there are many benefits to be gained by being able to rely on not only the published report but also the statements, data and evidence collected by the investigators. It might even be argued that in the interest of transparency and truth, such materials should not be privileged. It is difficult to generalise how the safety boards or investigation bodies would respond. Clearly, some might refuse or object on the basis that compelled production of information might lead to future lack of cooperation from witnesses. On the other hand, some might acquiesce deciding that the risk is manageable. In the latter situation, it is vital to stress that production might not necessarily be permitted simply on the say so of the safety boards or investigation bodies. It is also argued that

27 See Sevier, J, 'The truth-justice tradeoff: Perceptions of decisional accuracy and procedural justice in adversarial and inquisitorial legal systems' (2014) 20(2) Psychology, Public Policy, and Law 212 citing Thibaut, J, & Walker, L 'A theory of procedure' (1978) *California Law Review 66*.

28 ibid, citing Crombag, HFM, 'Adversarial or inquisitorial: Do we have a choice?' in Van Koppen, PJ & Penrod, SD (Eds.), *Adversarial versus Inquisitorial Justice: Psychological perspectives on criminal justice systems* (2003) at pp. 21–25.

29 ibid; note too that researchers have found that cultural differences also influence the public's perception of procedural fairness in either the adversarial or inquisitorial systems. See Anderson, RA & Otto, AL, 'Perceptions of fairness in the justice system: A cross-cultural comparison' (2003) 31 *Social Behavior and Personality,* 557.

such an important matter should not be within an unfettered and unguided discretion of the safety boards.

3.1 *Investigation Bodies – Powers and Judgment*

Indeed, as in some jurisdictions, like Australia, the investigation body has the power to issue a certificate attesting that public disclosure would not hamper investigations and thus records could be made available at civil proceedings,[30] their power is not unfettered. Judicial approval is nevertheless required. In exercising this residual power, the courts could prevent disclosure. In Australia, under the Transport Safety Investigation Act 2003 (Cth), before sanctioning production, the court must be satisfied that "any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, …".[31]

In the UK, as regards marine accident investigations[32] the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012[33] provide that the final say is with the court although the views of the Chief Inspector[34] would be taken into consideration. The court needs to balance the interests of justice in disclosure against any prejudice or likely prejudice to:

a. the safety investigation into the accident to which the document or record relates:
b. any future accident safety investigation undertaken in the United Kingdom; or
c. relations between the United Kingdom and any other State, or international organisation.[35]

30 Though not criminal proceedings.

31 s 60(6).

32 It is important to stress that in the UK, there is a dual system of investigative powers – namely that the air transport incidents are governed by a set of constitutional and substantive rules different from those applicable to marine incidents. In Australia, on the other hand, a single empowerment Act governs both air and marine although the technical matters will differ. See below at pp. 205-206.

33 These regulations were made by the UK Secretary of State pursuant to powers conferred by s 267 of the Merchant Shipping Act 1995.

34 As to technical analysis commissioned by the Chief Inspector, such analysis and opinions expressed in the analysis may be made publicly available if the Chief Inspector considers it appropriate to do so. (reg 13(4)).

35 Reg 13(5).

The court would also be dutybound to consider the wider public interest.[36] Similar provisions apply to air incidents *records*[37] as provided for by reg 18 Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.

Despite the fact that the ultimate decision lies with the court, it is sensible to join the investigation bodies to any litigation or suit brought by one party against another for the use or quoting of the contents of reports and records produced by the investigation bodies. That would allow the investigation bodies properly to make clear their views and reasons.

3.2 *Blame and Liability – Policy and Evidentiary Presumptions*

It is trite that the purpose of the investigations is not to seek to lay blame or apportion legal liability for the accident or incident under investigation. However, although this spirit is expressed in most transport safety investigation legislations, the precise manifestations of this principle are not always explicit or fully fleshed out. This lack of boundary has allowed the courts to exercise considerable discretion in in sanctioning the production of records in judicial or arbitral proceedings.

In the UK, it is of much interest to note that specifically for marine investigations, the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 provide in reg 14(14) that:

> If any part of any document or analysis it contains … is based on information obtained in accordance with an inspector's powers …, that part is inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame unless a Court, …, determines otherwise.

The precise scope of this provision has not always been very clear although it is trite to say that the terms are essentially borrowed from the international provisions. A literal reading of the provision might suggest that such records would not generally be admissible in civil or criminal proceedings where liability or blameworthiness would be proved but whilst it is difficult to see any circumstance where the court would "determine otherwise", that proviso could conceivably be given an expansive reading.

36 Reg 13(6).

37 As against the report which is published (reg 13).

A recent English case, *Ocean Prefect Shipping v. Dampskibsselskabet Norden AS* [2019] EWHC 3368 (Comm),[38] brings this matter into sharp focus. First, the facts. The *Ocean Prefect*, a British flagged vessel, ran aground when entering the port of Umm Al Quwain in the United Arab Emirates. As the ship was registered in the UK, the Marine Accident Investigation Branch (MAIB) undertook the investigations and the report was issued consequently in 2018.

As to the commercial background to the case, the ship was under charter and the owners claimed damages from the charterer alleging that the port nominated by the charterer was unsafe. Arbitration was then commenced in London as provided for by the arbitration clause. The owners sought to rely on the MAIB report in the proceedings. That was objected to by the charterer and the MAIB. The judge held that to allow admission of the report or even expert witnesses quoting from the report would be a breach of reg 14(14). The judge made clear that reg 14(14) applied to arbitral proceedings as well as judicial proceedings, despite the absence of an express reference to arbitration in the text of the regulation. That was because, according to the judge, the definition of "judicial proceedings" in the regulations is not exhaustive.[39] Moreover, the judge took pains to stress that arbitral proceedings are distinctly judicial in character. Any difference of legal treatment as regards the admissibility of such accident reports could not be justified. If reg 14(14) applies only to judicial proceedings strictly defined, then no permission would be necessary for the admission of such records and findings in arbitral tribunals. That would create an unacceptable imbalance in civil dispute resolution.

A salient aspect of the judgment in the English case was that the court confirmed that the requirement in the regulations (reg 13(5)) that the court should consider the views of the MAIB Chief Inspector would apply when deciding on whether discretion should be exercised in pursuant to reg 14(14). As to the test in reg 13(5),[40] it is clear that the threshold would be high given the privilege conferred on such records and reports by reg 14(14). It is important to stress that in *Ocean Prefect Shipping*, much was made of reg 14(14) by the judge – that is to say, *the refusal to order admission was based on the direct application of that regulation and not on some general presumptive principle*. Indeed, it needs to be

38 For a critical commentary of the case, see Chuah, J, 'The Admissibility of Marine Accident Investigation Branch Reports in Arbitral Proceedings' (2019) 25 Journal of International Maritime Law 365.

39 Reg 14(17) states that "judicial proceedings" "*includes* any civil or criminal proceedings before any Court, or person having by law the power to hear, receive and examine evidence on oath". (emphasis added)

40 See above at p. 193.

pointed out that in the air accident investigation system there is no equivalent to reg 14(14).

The general presumptive principle conferring privilege on these records or reports, on the other hand, was relied on in the Australian case of in *Elbe Shipping SA v. Giant Marine Shipping SA.*[41] There, the plaintiffs had tried to subpoena the Australian Transport Safety Bureau for the production of documents and statements obtained by the Bureau in the course of its investigations.[42] The plaintiffs were the owners of two other vessels whose hulls, it was alleged, were damaged by the oil spill caused. They had wanted the documents to support their legal claims against the owners of the Global Peace and others for compensation. The Australian Federal Court refused their application, stating that although the court had the jurisdictional power to order disclosure in the public interest, that power was restricted by statute. The information sought was "restricted information" under the Transport Safety Investigation Act 2003 (Cth) which could not be disclosed to any person, and even, a court of law.[43] The only exception is where "the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure".[44] That is a very high threshold for any judicial tribunal, in the common law tradition. It was a threshold the Australian court was not prepared to cross.

In *Elbe Shipping*, the Australian court also reminded us that there is at the common law a tradition of not compelling witnesses who exercised judicial functions, including judicial inquiries and investigations.[45] Historically therefore the power or discretion of the court to compel witnesses of this ilk is not as wide as might be argued. This historical limitation on judicial discretion should continue to be reflected in cases where Parliament has clearly made a general presumption against compellability or admissibility of certain evidence. Judicial discretion is therefore to be exercised in a measured and disciplined manner.

41 [2007] FCA 1000.

42 The casualty in question was a collision between a tug and a bulk carrier, The Global Peace, at Gladstone Harbour, in 2006. The plaintiffs were seeking the production of witness statements, VTS records, survey results of the oil spill etc.

43 S. 60(2) Transport Safety Investigation Act 2003 (Cth).

44 S. 60(6) ibid.

45 The case referred to by the Australian Federal Court was the English decision in *Warren v. Warren* [1997] QB 488 (see also Duchess of Kingston's case (1776) 2 Sm L.C.); as to the current Australian position, see s 16 Evidence Act 1995 (Cth).

Following on with the theme of presuming against disclosure is an Irish decision – premised on the EU Council Directive 194/56/EEC. In *Stokes v. Minister for Public Enterprise*[46] the Irish High Court held that s 24 of the Irish Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations SI. 205/1997 implementing the EU directive into Irish law is framed in a negative way meaning that no *general* right to disclosure of the report or records is created or established by the provision.[47] That section provides that the authorities shall not make the relevant records available *unless* the Court is of the view that the benefits resulting from disclosure outweigh the adverse domestic and international impact that disclosure may have on the instant or any future investigation.[48] On the language in the judgment, it is thus arguable that the Irish decision supported the finding of a rebuttable presumption against disclosure or admission.

In Canada, the test for disclosure, at least on paper, was set relatively high. The Canadian legislation in question is the Transportation Accident Investigation and Safety Board Act, S.C. 1989 (c. 3). Section 28 of the Act is structured and worded in a very similar manner to its cousins in Australia, Ireland and the UK. Hence, the recording or data is privileged, is to be used by the safety board for the purposes of its investigation, and is not to be released for use in litigation unless a court, having examined the recording *in camera*, and having heard submissions of the safety board, has concluded that "the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording …".[49] Section 28 clearly places much importance too on evaluating the potential adverse domestic or international effects on investigations that might result from access to reports and records (including cockpit voice recordings).[50]

In an oft-cited case, *Moore v. Reddy,*[51] Master Donkin concluded that Parliament intended that statements would remain privileged except in

46 [2000] IEHC 191.

47 At [23].

48 In that case, the Chief Inspector had released to the applicant an interim report and issued her, as a person likely to be adversely affected by the report (see s 18(1)), with a notice giving her the opportunity to respond to the report. Her application to have access to other records and data was rejected by the court on the basis that s 24 did not apply to such applications. It seems to follow from the Irish decision that s 24 would only apply to application for disclosure of or access to documents for judicial proceedings.

49 Quoting in part the judge at [4].

50 Given the provision's deference to Annex 13 of the Chicago Convention.

51 (1990), 44 C.P.C. (2d) 61, [1990] O.J. No. 308.

"exceptional cases" and articulated a test that would only order production when the evidence could not be otherwise obtained. The Master stated:

> It seems to me that Parliament having decreed that there is a privilege subject to it being removed if there is a supervening public interest "in the circumstances of the case", Parliament meant the privilege to remain unless some feature of the case required revelation of the statement. That is, in general in most cases the statements would remain privileged but in exceptional cases they might be disclosed.[52]

In that case, the judge had applied a test which concentrated on whether production of the statement was necessary because the information could not be obtained for one reason or another; where failure to produce the evidence would cause a miscarriage of justice. That test was applied in a number of subsequent decisions with various but minor adjustments.[53]

In *Wappen-Reederei GmbH & Co. K.G. v. Hyde Park* (*The*) (*"The Hyde Park"*),[54] a shipowner had applied to compel the Transportation Safety Board to release copies of "bridge recordings".[55] The court held that the following are questions that should be asked in considering the public interest:

(I) the nature and subject matter of the litigation;

(II) the nature and probative value of the evidence in the particular case and how necessary this evidence is for the proper determination of a core issue before the Court;

(III) whether there are other ways of getting this information before the Court;

(IV) the possibility of a miscarriage of justice.[56]

---

52 At pp 63–64.

53 See *Braun v. Zenair Ltd.* (1993), 13 O.R. (3d) 319, [1993] O.J. No. 917 (Gen. Div.); *Wappen-Reederei GmbH & Co. K.G. v. Hyde Park* (*The*), [2006] 4 F.C.R. 272, [2006] F.C.J. No. 193; *Webber v. Canadian Aviation Insurance Managers. Ltd.,* 2002 BCSC 1414, [2002] B.C.J. No. 2270 (B.C.S.C.); *Desrochers Estate v. Simpson Air* (1981) Ltd. (1995), 36 C.P.C. (3d) 150, [1995] N.W.T. J. No. 46 (N.W.T. S.C.); *Chernetz v. Eagle Copters Ltd.,* [2004] 9 W.W.R. 325, [2003] A.J. No. 521, (Q.B.); also *R. v. C.W.W.* (2002), 204 N.S.R. (2d) 144, [2002] N.S.J. No. 191 (N.S. Youth Ct.) where the youth court, in relation to a criminal charge of a minor who had caused a derailment, held that the public interest would only be met in "rare cases".

54 [2006] 4 F.C.R. 272, [2006] F.C.J. No. 193.

55 The so-called ship's "voyage data recorder".

56 See also *White Estate v. E & B Helicopters Ltd.* (2008), 78 B.C.L.R. (4th) 131, [2008] B.C.J. No. 31 (Sup. Ct.).

In that case, the court concluded that as the recordings were such poor quality that their evidentiary value would not justify disclosure.

On the other hand, there is a trail of cases where the courts have applied a lower threshold for admissibility and disclosure, preferring almost a presumption that *openness, transparency and litigation cost* are in the public interest.

In the UK, the notable case in point is *Hoyle v. Rogers*[57] where the Court of Appeal admitted into evidence a report of the Air Accident Investigation Branch (AAIB) stating that it could not be assumed that allowing the report to be tendered in court proceedings would necessarily damage the role of the AAIB. The court said, perhaps somewhat controversially,

> the exercise of the discretion is to be carried out in accordance with the overriding objective of dealing with cases justly and at proportionate cost. Whilst every case must depend on its own facts, that objective does not appear to me to be inherently likely to call for, or justify, the exclusion of evidence of this kind. On the contrary it would tend to favour its inclusion.[58]

The reference to proportionate cost seems to place squarely an importance on cost effectiveness, so that if it will bring costs down because the litigants do not have to seek out alternative sources of information or evidence, that should tilt the exercise of discretion towards admission.

The court was also clear in moving away from any general normative acceptance that only exceptional and rare cases should there be a departure from the privilege rule. It should be observed that in *Ocean Prefect Shipping*, the court declined to follow *Hoyle v. Rogers* in refusing to order admission of the documents reasoning that in air casualty investigations, there is no equivalent in the law to reg 14(14) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012. So, it could not thus be concluded that *Ocean Prefect Shipping* was affirming some kind of general presumptive principle. The court was quite clear that it was merely applying the 2012 Regulations as are.

What is clear though about *Hoyle v. Rogers* is a demonstrable assertion of a more general openness and transparency principle in supporting the administration of civil and criminal justice. This line of thinking is gradually gaining traction too in Canada and Australia.

57 [2014] EWCA Civ 257.
58 At [81].

In *Société Air France v. NAV Canada; Greater Toronto Airports Authority & Ors*[59] the court in Ontario was asked to allow the production of cockpit voice recorder recordings in an action taken by passengers injured in a runway incident in Toronto Pearson Airport. The application was objected to by the air accidents investigators and the pilots trade union. They argued that it was not in the interests of aviation safety and would encroach illegitimately on the personal privacy of the pilots.

The judge, Strathy J, held stating quite explicitly that the test referring the miscarriage of justice or likely to cause serious injustice was "virtually impossible to apply on a prospective basis"[60] and asked rhetorically, "How can a party possibly know whether the CVR contains relevant, reliable and necessary evidence when access to it is prohibited?"[61] The judge also felt the need to extend the question beyond the four corners of the case in question and ask if a refusal would actually damage the integrity of the judicial factfinding process and the reliability of the evidence before the court more generally. Furthermore, the judge was persuaded by the fact that in the case in point where class action was being pursued, an omission to support the class action would be to damage the public utility that class actions serve.

The court was also not prepared to let any argument of privacy or data protection trump the now more capacious notion of administration of justice or the public interest. In *Société Air France*, the court did not think that any infringement on privacy could not be serious, as communications of a purely personal nature would not be included in the disclosure. Moreover, the court concluded that:

> the privacy concern Is generally illusory because, in at least some jurisdictions, the CVR transcript is included in the report of the investigating authority and in others it is routinely published. Thus, in both the particular sense and the general sense, the pilots' privacy has already been infringed.[62]

That said, it should be pointed out that in many jurisdictions privacy or indeed data protection are not enshrined in law. Nevertheless, it must be said that simply because a failure to respect privacy or data might occur elsewhere does not make it right.

---

59 (2009) CanLII 69321 (ON S.C.); decision affirmed on appeal, (2010) ONCA 598.

60 At para 125.

61 At para 124.

62 At para 133.

The second strand to the privacy argument is that allowing disclosure could have a "chilling" effect on pilot communications during flight. The judge rejected this argument made by the pilots' union outright stating that they had serious doubt as to whether "pilots would curtain critical communications, endangering their own safety and the safety of their passengers, simply because those communications might be disclosed in some future legal proceedings in the event of an accident".[63] The *Société Air France* decision has been approved on all counts on appeal.

It is of some note to see this more capacious reading of the public interest is being applied by a Quebec court – although the Quebec court was required to apply common law approaches to a matter of federal law, such as transportation safety investigations, its cultural reference point is that closely reflective of the French civil law traditions. *Perhaps* that is why the judge in *Propair Inc. et a. v. Goodrich Corporation*[64] allowed the admission of cockpit voice recordings on the grounds that the proper administration of justice required for the evidence to admitted. The judge, Viau J, also dismissed the pilots' unions argument on privacy.[65] Permission to appeal was not granted on the basis that the judge was acting within the scope of their discretion.

In these important Canadian decisions, we see a confluence of thinking around the public interest and privacy.

As regards Australian case law, the High Court[66] decision in *Australian National Airlines Commission v. The Commonwealth*[67] is, what might be arguably called, the landmark decision. That decision predated the Transport Safety Investigation Act 2003 (Cth). What is particularly instructive in that case is the reliance by the court on general principles to order production or admission of the cockpit voice recorder. The application was objected to by the pilots' union in the strongest terms – including a threat to withdraw from an agreement the union made with the Government to cooperate with air casualty investigations.

---

63 At para 136.

64 [2003] J.Q. No. 243, J.E. 2003–67 (S.C.).

65 The judge said: *"Les deux pilotes décédés dans l'écrasement n'étaient membres ni d'ALPA ni D'ACPA. Et, à l'examen, force est de constater que le seul intérêt de ces associations est de bloquer tout accès à l'enregistrement. Invoquant un vague droit à la vie privée, elles s'objectent partout où elles peuvent le faire, tentant de transformer en une sorte de débat public des causes d'intérêt privé. Elles n'ont aucun autre intérêt dans les présentes affaires et les éléments de preuve qu'elles présentent sont loin d'être convaincants. Elles renforcent plutôt cette attitude d'opposition radicale et systématique qui n'a été, semble-t-il, retenue nulle part ailleurs, en Amérique du Nord du moins".* (at para 13).

66 The High Court is the highest court in Australia (s 71 Constitution of Australia).

67 (1975) 132 CLR 582.

That agreement had made it plain that the purpose of a casualty investigation was not to apportion fault or liability, but merely to learn from the casualty to improve air safety. This dispute clearly shows the sensitivities involved. The High Court however ruled that CVR is not a document falling within what is termed "Crown privilege".[68] The court considered that the detriment to the public interest in the proper administration of justice which would have been occasioned by a refusal of inspection was considerable. Without the evidence the litigants could not prove their case for negligence. An inspection of this judgment shows that the court considered the exceptions to disclosure are very limited and there should always be an addressal of the public confidence aspect in the general administration of justice. The judge said:

> The withholding from parties of relevant and material documents, unless justified by the *strongest* considerations of public interest, is apt to undermine public confidence in the judicial process. [emphasis added]

Indeed, in at least one decision, *Cifuentes v. Fugro Spatial Solutions Pty Ltd*[69] Murray J stated quite simply that "it is sufficient to say that in this case I was so satisfied [that s 60(6), Transport Safety Investigation Act 2003 is met], and ordered the disclosure of all relevant restricted information".[70] There was no deliberation or evaluation or testing of the criteria at all.

The net conclusions from these jurisdictions are that there has been a gradual shift away from a strict test of the public interest; the English court in *Rogers v. Hoyle* has probably gone further than the Australian and Canadian cases by referring specifically to the cost element in litigation as forming the wider public interest in the administration of justice. That pragmatic consideration of

68 The court drew on a range of authorities from the UK; Mason J said, "It has always been recognized that the cases in which production will be refused on the ground of Crown privilege are "exceptional cases", to use the words of Viscount Simon L.C. in *Duncan v. Cammell, Laird & Co. Ltd.* [1942] UKHL 3; (1942) AC 624, at p 643. Thus to sustain the claim of privilege it must appear that the public interest will be prejudiced because (1) the contents of the document are such that disclosure will have this effect, as for example, information the publication of which would injure national defence or diplomatic relations with other countries, e.g. information of the kind involved in the Asiatic Petroleum Case (1916) 1 KB 822; or (2) the document is of a class that should be kept secret in the public interest, as for example, Cabinet minutes, communications passing between departmental heads or a departmental head and his minister, notwithstanding that the contents are not such that their publication would injure the public interest (see *Conway v. Rimmer* [1968] UKHL 2; (1968) AC 910; *Rogers v. Home* Secretary (1973) AC 388). (at p591)".

69 [2019] WASC 316.

70 At para 149.

the notion of administration of justice is pronounced. The Canadian position, for better or worse, also takes into account the type of litigation involved – paying regard to the public good or utility served by class actions. The Australian jurisprudence, although resonating similar tendencies, focuses on the public perception of the fair administration of justice to justify informational transparency.

Another relevant observation is how all these common law courts, despite any tendencies toward a more principle-based decision-making process, take pains to stress that they are in fact interpreting the legislative texts and not making new legal principles or rules. This is not the occasion to discourse the ideologies of judicial law making but it suffices to state that as these domestic regulations are based on international laws, reference to the international policy perspectives is important. And, that has not always been the case as we saw in a number of these decisions. Of course, it might be argued that the international policy on the matter is ambiguous and open to interpretations or if it is clear about the presumption of privilege, that presumption is antithetical to how the legal values in the jurisdictions under study have evolved. The question is thus whether the IMO and ICAO might wish to revisit the empirical link between documentary privilege and impediments to investigative processes, and agree to a clearer policy position.

3.3 *The International Policy Dimension*

In closing it is worthwhile to return to the considerations of the position in international law. Both the IMO and ICAO, as we have seen, anticipate judicial bodies to take into account the *potential adverse effects* on investigations that might result from any access to records or reports which they might decide to allow. It is questionable whether this new trend in judicial thinking in the three jurisdictions we have considered sufficiently takes this matter into account in their pursuit of the "fair administration of justice" – especially as regards the cooperation and involvement of foreign witnesses in any cross border investigations. Naturally without empirical evidence either way it is impossible to say whether a trend to allow access (as against the trend to refuse access without compelling reasons) would lead to deterring witnesses, especially foreign nationals, in cooperating constructively in the investigation. It is argued that in all the cases pushing for greater admissibility of the investigation records and reports there is no proper rumination of this angle of the effect on the investigation which is often cross national by nature.

Indeed, the EU Directive goes even further by stating in its Preamble:

> Member States, acting in the framework of their legal systems, should protect witness statements following an accident and prevent them from being used for purposes other than safety investigations, with the objective of avoiding any discriminatory or retaliatory measures being taken against witnesses because of their participation in the investigations.[71]

There is a positive duty to "protect" the witness statements. That said, in art 4 of the directive merely states that the marine accident investigation should be "independent of criminal or other parallel investigations held to determine liability or apportion blame". That allows each Member State to provide for what they consider to be an effective enough legal framework to support the objectives of EU (and IMO) sanctioned marine casualty investigations.

As regards the Chicago Convention, like any international treaty, its provisions might be opted out of by States. Some countries, such as the US,[72] have exercised their right to make exceptions or differences to Annex 13 of the Convention and have enacted domestic law that does not expressly follow Annex 13. However, for states which have not exercised that opt out, it is submitted that their national legislation should thus take into account the criteria[73] for disclosure provided in the Convention.

The international criteria are also important given the perceived need for international cooperation between States. For example, Annex 13 provides that the State of Occurrence may delegate all or part of the investigation to another State or a regional accident and incident investigation organization,

---

71 Recital 10.

72 In the United States, take the example of cockpit voice recording. The disclosure of the CVR is regulated by the United States Code, Title 49, "Transportation", Ch. 11, National Transportation Safety Board, sections 1114 and 1154. Section 1114 provides that the recording itself and the transcript of the recording are not to be produced in their entirety, but that the National Transportation Safety Board shall make public any part of a transcript of a CVR recording that the board decides is relevant to the accident or incident. Further, section 1154 provides that a court may allow discovery by a party of a CVR recording if, after an *in camera* review of the recording, the court decides that the parts of the transcript previously made public under section 114 do not provide the party with sufficient information to receive a fair trial. The test as to whether disclosure should be ordered vests principally on whether a fair trial would be adversely impacted. Hence, the test to be applied in the US is not mandated to take into account the potential adverse domestic or international effects on investigations that might result from such access. The practice in the US is that extracts from CVR transcripts are regularly disclosed in the NTSB's reports.

73 Notably that the disclosure order must consider the potential adverse domestic or international effects on investigations and the purpose of the investigation which is not to apportion blame or liability.

and may call on the best technical expertise available from any source to assist with the investigation. States of Registry, Operator, Design and Manufacture who participate in an investigation are entitled to appoint an accredited representative (with or without associated advisers) to take part in the investigation. A State which has a special interest in an accident, by virtue of fatalities or serious injuries to its citizens for instance, is entitled to appoint an expert entitled to: visit the scene of the accident; have access to the relevant factual information which is approved for public release by the State conducting the investigation, and information on the progress of the investigation; receive a copy of the accident investigation Final Report. Similarly, the IMO Casualty Investigation Code[74] anticipates that investigations could involve the flag state as well as other substantially interested States.[75]

This level of cooperation needs to be bolstered by the same principle of evidence protection or privilege. It is quite conceivable that in the conduct of different strands of the investigation of the same casualty, a particular witness statement is given privilege in one jurisdiction but not another.

3.4 *National Regulatory Structures*

As to legislative rights and constraints, it is important to note that different countries adopt different regulatory frameworks despite the general mandate from the IMO and ICAO. The three selected for our analysis (Australia, Canada and the UK) are no different in this regard. How the regulatory system is set up could have important implications for the use and production of accident records and data in court and arbitrations.

First, some jurisdictions like the UK have a separate regulatory system for air transport accident investigations and marine accident investigations. Others have a conjoined transport accident investigation system but with transport mode specific provisions in the general regulatory system.

---

74 Supra (n 19).

75 Defined in Chapter 2.20 of the Code as: " ... .2 which is the coastal State involved in a marine casualty or marine incident; or .3 whose environment was severely or significantly damaged by a marine casualty (including the environment of its waters and territories recognised under international law); or .4 where the consequences of a marine casualty or marine incident caused, or threatened, serious harm to that State or to artificial islands, installations, or structures over which it is entitled to exercise jurisdiction; or .5 where, as a result of a marine casualty, nationals of that State lost their lives or received serious injuries; or .6 that has important information at its disposal that the marine safety investigating State(s) consider useful to the investigation; or .7 that for some other reason establishes an interest that is considered significant by the marine safety investigating State(s)".

Jurisdictions like Canada and Australia have a system for accident investigations which is more unified although providing for functional differences between marine and air. In Canada, Transportation Accident Investigation and Safety Board Act 1989 provides for the establishment of the Safety Board.[76] The Board is empowered to investigate any transportation occurrence[77] (within Canadian territorial jurisdiction) whilst s. 2 defines "transportation occurrence" as an aviation occurrence, a railway occurrence, a marine occurrence or a pipeline occurrence. Section 10(1) consequently puts in place a Director of Investigations (Air), a Director of Investigations (Marine) and a Director of Investigations (Rail and Pipelines). In Australia, the Transport Safety Bureau is set up under the Transport Safety Investigation Act 2003[78] which provides for conjoined power to investigate and make safety recommendations in respect of air, marine and rail transportation. Section 4(1) defines "transport vehicle" as "an aircraft, ship or rail vehicle" and s. 11 places certain constitutional restrictions on the ATSB's territorial powers.

In contrast, the UK has two distinct regimes – one in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 for air transport and the other in the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 which governs marine accidents and incidents.

The disadvantage having a dual system is the potential for legislation misalignment as we see in *Ocean Prefect Shipping v. Dampskibsselskabet Norden AS* [*2019*] *EWHC 3368* (*Comm*). It was quite clear that the regulations providing for use of records are different. It might be recalled that in Ocean Prefect, the regulation in question, reg 14(14), states that if any part of any document produced as a result of a safety investigation is based on information obtained in accordance with an inspector's powers as above, that part is inadmissible in any judicial proceedings whose purpose is to attribute or apportion liability, unless a court determines otherwise. However, there is no comparable equivalent provision in the *Civil Aviation* (*Investigation of Air Accidents and Incidents*) *Regulations 1996 or indeed, EU* Directive 94/56/EC[79] to which the Regulations relate. It surely is not satisfactory for a civilian transportation occurrence investigation not be aligned to the same extent.

76 S. 4.

77 Ss 7(1), 14(1).

78 S. 12.

79 Council Directive establishing the fundamental principles governing the investigation of civil aviation accidents and incidents (21 November 1994).

4 Conclusion

This chapter had set forth the international position on disclosure or privilege of evidence gathered in the course of an international transportation casualty investigation. It demonstrates that for reasons of values and, occasionally, pragmatism and cost, courts in the adversarial systems have been moving further away from a general presumption against disclosure. In some jurisdictions, such as the UK, there is also the misalignment of legislation and institutions concerning air and marine casualty investigations which has led to further confusion. These disparate treatments of a very important aspect of accident investigations could have an even more adverse impact where cross country cooperation is needed. The nub of the chapter is to argue for an international position which is grounded on empirical evidence – the tension between the pro and anti privilege camps is largely driven by an unproved opinion or belief as to the impact of the loss of privilege on the efficacy of investigations. Last but certainly not least, the modus operandi of the common law courts, as is natural, is to rely on the statutory provisions but, the author hopes, it is equally important to pay heed to the international policy dimension.

Table of Authorities

International Treaties

International Civil Aviation Organization (ICAO), Convention on Civil Aviation, (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.

International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 32 UST 47; 1184 UNTS 278.

International Convention for the Prevention of Pollution from Ships as amended by Protocol of 1978 (MARPOL 73/78),(adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 184.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396; 21 ILM 1261 (UNCLOS).

EU Legislation

Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents [1994] OJ L319/14, repealed.

National Legislation

Australia

Constitution of Australia 1901.

Evidence Act 1995 (Cth).

Transport Safety Investigation Act 2003 (Cth).

Canada

Transportation Accident Investigation and Safety Board Act, S.C. 1989 (c. 3).

Republic of Ireland

Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations SI. 205/1997.

UK

Merchant Shipping Act 1995.

Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.

Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.

USA

United States Code, Title 49, "Transportation", Ch. 11, National Transportation Safety Board.

National Case Law

Australia

Australian National Airlines Commission v. The Commonwealth (1975) 132 CLR 582.

Cifuentes v. Fugro Spatial Solutions Pty Ltd. [2019] WASC 316.

Elbe Shipping SA v. Giant Marine Shipping SA [2007] FCA 1000.

Canada

Braun v. Zenair Ltd. (1993), 13 O.R. (3d) 319, [1993] O.J. No. 917 (Gen. Div.).

Chernetz v. Eagle Copters Ltd., [2004] 9 W.W.R. 325, [2003] A.J. No. 521, (Q.B.)

Desrochers Estate v. Simpson Air (1981) Ltd. (1995), 36 C.P.C. (3d) 150, [1995] N.W.T. J. No. 46 (N.W.T. S.C.).

Moore v. Reddy (1990), 44 C.P.C. (2d) 61, [1990] O.J. No. 308.

Propair Inc. et a. v. Goodrich Corporation [2003] J.Q. No. 243, J.E. 2003–67 (S.C.).

R v. C.W.W. (2002), 204 N.S.R. (2d) 144, [2002] N.S.J. No. 191 (N.S. Youth Ct.).

Société Air France v. NAV Canada; Greater Toronto Airports Authority & Ors (2009) CanLII 69321 (ON S.C.); decision affirmed on appeal, (2010) ONCA 598.

Wappen-Reederei GmbH & Co. K.G. v. Hyde Park (The), [2006] 4 F.C.R. 272, [2006] F.C.J. No. 193

Webber v. Canadian Aviation Insurance Managers. Ltd., 2002 BCSC 1414, [2002] B.C.J. No. 2270 (B.C.S.C.).

White Estate v. E & B Helicopters Ltd. (2008), 78 B.C.L.R. (4th) 131, [2008] B.C.J. No. 31 (Sup. Ct.).

Republic of Ireland

Stokes v. Minister for Public Enterprise [2000] *IEHC 191.*

United Kingdom

A v. B [2019] EWHC 275 (Comm).

Bristow Helicopters Ltd & Anor v. Sikorsky Aircraft Corporation & Ors [2004] EWHC 401 (Comm).

Conway v. Rimmer [1968] UKHL 2; (1968) AC 910.

Davis v. Stena Line Ltd. [2005] EWHC 420 (QB).

Duchess of Kingston's case (1776) 2 Sm L.C.

Duncan v. Cammell, Laird & Co. Ltd. [1942] UKHL 3; (1942) AC 624.

GKN Westland Helicopters Ltd & Anor v. Korean Air [2003] EWHC 1120 (Comm).

Keynvor Morlift Ltd v. The Vessel "Kuzma Minin" [2019] EWHC 3557 (Admlty).

Lacey v. Palmer Marine Services Ltd & Anor [2019] EWHC 112 (Admlty).

Margolle & Anor v. Delta Maritime Company Ltd. & Ors [2002] EWHC 2452 (Admlty).

Nautical Challenge Ltd v. Evergreen Marine (UK) Ltd. [2017] EWHC 453 (Admlty).

Ocean Prefect Shipping v. Dampskibsselskabet Norden AS [2019] EWHC 3368 (Comm).

Rogers v. Home Secretary (1973) AC 388.

Rogers v. Hoyle [2014] EWCA Civ 257.

Warner v. Scapa Flow Charters [2016] ScotCS CSOH101.

Warren v. Warren [1997] QB 488.

Bibliography

Books and Book Chapters

Crombag, HFM, (2003). Adversarial or inquisitorial: Do we have a choice? In Van Koppen PJ & Penrod SD (Eds.), *Adversarial versus Inquisitorial Justice: Psychological perspectives on criminal justice systems* (pp. 21–25).

Malmberg LG, Haveriutredningar – *En rättslig studie över undersökningar i samband med olyckor i luften och till sjöss*, (2000).

Official Documentation

Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (2008).

Manual of Aircraft Accident and Incident Investigation 2015 (ICAO, 2nd edn).

Journal Articles

Anderson RA, & Otto, AL (2003). Perceptions of fairness in the justice system: A cross-cultural comparison. Social Behavior and Personality, 31, 557.

Chuah J, The Admissibility of Marine Accident Investigation Branch Reports in Arbitral Proceedings (2019) 25 Journal of International Maritime Law 365.

Sevier J, "The truth-justice tradeoff: Perceptions of decisional accuracy and procedural justice in adversarial and inquisitorial legal systems" (2014) 20(2) Psychology, public policy, and law 212.

Thibaut J, and Walker L. (1978). A theory of procedure. California Law Review, 66.

Others

ICAO Fact Sheet on Air Accident Investigation (2018–05) <www.icao.int/Newsroom/Documents/ICAO-Fact-Sheet_Accident-Investigation_2018-05.pdf>. accessed 28 October 2022.