

THE CHANGING ROLE OF GOVERNMENT IN CIVIL AVIATION

IOSA, THE REVOLUTION IN AIRLINE SAFETY AUDITS AND THE DEVELOPMENT OF STATE AIRLINE SAFETY STANDARDS

David Hodgkinson¹

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¹ Principal, The Hodgkinson Group, Aviation Advisors (www.hodgkinsongroup.com; email address: d.hodgkinson@hodgkinsongroup.com). Formerly Director, Legal Services, International Air Transport Association, Montreal, and chairman, IOSA legal taskforce. This paper is based on the author's earlier article on IOSA published in *Air & Space Law*, vol. xxx/4-5 (September 2005), 302-329. The author would like to thank Mike O'Brien for provision of information with regard to the development and operation of IOSA.

1. Introduction: The revolution in aviation safety

A revolution took place in aviation safety, in a short two year period, from 2001 to 2003. Under the stewardship of the International Air Transport Association (IATA), the organisation of the world's airlines, an advisory group made up of airlines and airline industry organizations, together with 12 taskforces (including a legal taskforce), was formed. This advisory group also included some State regulatory authorities. It produced a set of operational audit standards to form part of a new unique safety audit programme, the IATA Operational Safety Audit (IOSA); an international operational audit standard was established. IOSA is an evaluation system designed to assess the operational management and control systems of an airline. Its aim is twofold: to reduce the costs of airline audits through audit 'sharing', and to improve airline safety by conducting IOSA audits in a standardized and consistent manner using internationally recognized quality audit principles.

Under the IOSA programme IATA accredits Audit Organizations (AOs) to provide audit services under IOSA pursuant to an accreditation agreement. AOs and their teams of auditors then conduct audits to determine the level of conformity with IOSA standards and recommended practices (ISARPs). Such audits are conducted pursuant to a tripartite audit agreement made between the relevant AO, the auditee airline, and IATA. After audit closure,² the AO submits the audit report to IATA. The audit report is entered in an IOSA database so that an interested party can utilize the audit of the relevant airline, conducted by a third party under IOSA, to satisfy its own requirement for an audit of that same airline. IATA then enters the name of the airline on the IOSA registry; the IOSA registry displays the airline as an 'IOSA Operator'. Registration as an IOSA Operator is valid for a period of 24 months.

Aims and objectives of the paper

This paper provides an outline of the scheme of the IOSA programme. It discusses the contractual framework of the IOSA programme, and analyses the accreditation and audit agreements (including those provisions of the audit agreement which clearly identify the contract relationships in that agreement so that the parties can, to the extent possible, be regarded as beneficiaries of the Warsaw Convention liability protections). It also analyses those central provisions of the IOSA documentation - the IOSA Programme Manual and the IOSA Standards Manual - which are incorporated into the accreditation and audit agreements. It also provides for the first time the background to and an analysis of the drafting and negotiation of the IOSA programme and the IOSA documentation. In this way, it is hoped, the paper can contribute to an understanding of this new international operational safety audit standard, specifically its legal aspects.

² The closure by an auditee of all findings that the auditee is not in conformity with an IOSA standard as verified by the relevant AO: International Air Transport Association, *IATA Operational Safety Audit Programme Manual* (2nd ed., International Air Transport Association, Montreal, 2004), p. xv.

Importantly, the IOSA programme consists of standardized, consistent ISARPs which meet or exceed the minimum standards required by the most demanding aviation safety programmes. It becomes clear through the analysis of this universal programme as presented here that it has *the potential to ultimately affect the development of State airline safety standards*. As a result, as represented by the IOSA agreements, IOSA - a private law solution to the airline safety audit problem - has the ability to influence effectively the development of public law in this area.³ Put another way, IOSA's standards and recommended practices can be used by States to further develop and, in some instances, improve their airline safety standards.

Finally, the IOSA programme demonstrates in a small but important way the changing role of government in civil aviation – the theme of this 25th annual conference of the Aviation Law Association of Australia and New Zealand (ALAANZ). Increasingly, important initiatives and reforms in civil aviation are being instigated and driven by non-government groups and organisations. IOSA is one example of this; its advisory group and taskforces primarily consisted not of government or government bodies but of airlines and airline industry organisations. Together they established a new, unique international operational audit standard. And, again, its ISARPS may result in the development and improvement of State airline safety standards – that is, IOSA may drive higher safety standards. In this instance, the role of government becomes a reactive and a responsive one.

The paper also examines briefly some other civil aviation initiatives and reforms that have been initiated not by government but by non-government actors.

Organisation of the paper

Part One of the paper sets out the IOSA programme, its rationale, development and framework. Part Two analyses the IOSA manuals and Part Three, the IOSA agreements.

2. The IOSA programme

2.1 Background

Proliferation of safety audits

The impetus for development of the IOSA programme came from an increase in the number and cost of safety audit requirements. In 2001 it was noted that 'over 70,000 audits are performed, costing in excess of \$3 billion worldwide ... these often overlap, both in content and intent'.⁴

This proliferation, in part, flows from the US Department of Transportation (DOT) and Federal Aviation Administration (FAA) code-share audit guidelines that call for US

³ See further discussion of this argument in part 2, *infra*.

⁴ D. Learmount, 'New IATA audit system will improve safety and cut cost', (2001) 159 *Flight International*, No. 4783, p. 14.

carriers to undertake periodic safety audits of their foreign code-share partners.⁵ Under a plan announced in 1999 ‘for assuring that U.S. code-share service on the foreign-carrier partners of U.S. airlines meets international standards for safety and security,’ US carriers must establish programmes approved by the DOT for auditing the safety of their code-share service on such partners on a periodic basis.⁶ And,

in the context of specific code-share applications, the FAA will review whether the U.S. airline applicant is carrying out audits of its foreign airline partner in accordance with its program ... Only upon successful completion of this FAA review will the department be in a position to consider approving the code-share application.⁷

The DOT published its *Code-share Safety Program Guidelines* in early 2000.⁸

The FAA impliedly recognized such proliferation when it announced, in July 2004, that it recognized IOSA as an audit program that could be used by US airlines to meet their obligation to undertake safety audits of their code-share partners. It stated, in part, that ‘US carriers will not have to undertake separate audits of prospective code-share partners if those partner airlines have been audited [under the IOSA programme within the relevant timeframe] ...’⁹

At the same time as the FAA announced its code-share audit plan, the Air Transport Association (ATA) and the US Department of Defence (DOD) announced that they had signed an agreement under which ATA member airlines would conduct safety and operational reviews, using ATA standards that included DOD quality and safety requirements, of those foreign airlines that were code-share partners of US carriers and that carried DOD personnel.¹⁰ Airlines would ‘pay for the entire cost of the program’.¹¹

In addition to the number and cost of audits, other problems attended airline audits prior to the development of the IOSA programme. These included redundant and overlapping

⁵ Although many other governments also require their national airlines to audit foreign code-share partners.

⁶ US Department of Transportation, ‘Secretary Slater Outlines Steps To Assure Safety of Code-Share Flight’, *News*, 6 December 1999. On code-sharing generally see ICAO Circular 269-AT/110, *Implications of Airline Codesharing* (International Civil Aviation Organization, Montreal, 1997). On liability arising from code-share flights see M. Franklin, ‘Code-Sharing and Passenger Liability’, (1999) 24 *Air & Space Law*, No. 3, p. 128 and C. Conti, ‘Code-Sharing and Air Carrier Liability’, (2001) 26 *Air & Space Law*, No. 1, p. 4.

⁷ US Department of Transportation, *supra*.

⁸ Department of Transportation, *Code-share Safety Program Guidelines* (Department of Transportation, Washington, D.C, 2000).

⁹ Federal Aviation Administration, ‘FAA Recognizes International Safety Audit Program’, *Press Release*, 2 July 2004. See also ‘Safety audit wins FAA codeshare check approval’, (2004) 166 *Flight International*, No. 4943, p. 23 and International Air Transport Association, ‘FAA Approves IATA’s Airline Safety Audit Programme’, *Press Release*, 5 July 2004.

¹⁰ Air Transport Association, ‘Airlines/DoD Announce Safety Reviews of Some Foreign Airlines’, *News Room*, 30 December 1999. The DOD was a member of the IOSA Advisory Group (IAG); see part 1.2 *infra*.

¹¹ *Supra*.

audits, no common audit standards, no defined auditor qualifications, uneven audit results, no sharing of audits and an inefficient use of resources.¹² Members of the IOSA Advisory Group (IAG), the body set up to provide oversight of the development and implementation of the IOSA programme, viewed benefits to industry as a result of the implementation of the IOSA programme as being the establishment of an international operational audit standard, accredited and certified auditors, standardized auditor checklists and auditor performance, elimination of audit redundancy, a reduction of audit costs and the resources needed to be deployed so that an audit can be conducted, and an improvement in safety through performance standards.¹³ In 2001 it was noted that, when fully developed, IOSA ‘should eliminate the duplication of cost and effort caused by existing multiple, nationally diverse safety audit requirements’.¹⁴

Beginning in 2001, then, with a May 2000 mandate from the IATA Board of Governors to ‘identify opportunities to standardise, harmonise and rationalise existing airline audits and auditing standards,’¹⁵ IATA, its advisory group of airlines, regulatory authorities, industry organizations and taskforces commenced a work schedule which involved drafting a set of audit standards and recommended practices, drawing upon internationally recognised quality audit principles, with the aim of ensuring that audits conducted with reference to those standards and recommended practices be so conducted in a standardized and consistent manner. At IATA’s 57th Annual General Meeting in Madrid in 2001, IOSA was endorsed as a means to standardize, harmonize and rationalise existing airline audits and auditing standards.¹⁶

IOSA and ICAO

Although IOSA was designed to complement the International Civil Aviation Organization’s Universal Safety Oversight Audit Programme (USOAP)¹⁷ - and, indeed, ICAO was an observer at the IAG - it should be noted that the two programmes are quite different, with different objectives. The Chicago Convention,¹⁸ which includes the constitution of ICAO, provides that contracting States undertake ‘to collaborate in

¹² J. Anderson, *IATA Operational Safety Audit (IOSA)*, Presentation to IOSA Legal Task Force, 24 June 2002, London.

¹³ *Supra*.

¹⁴ Learmount, *supra*, note 4. It should be noted, however, that the IOSA programme is moving away from purely code-share audits as its primary focus as other foci emerge.

¹⁵ International Air Transport Association, *Terms of Reference: IATA Operational Safety Audit (IOSA) Advisory Group (IAG)* (International Air Transport Association, Montreal, 2001), p. 1.

¹⁶ Anderson, *supra*, note 12.

¹⁷ The president of the ICAO Council, Dr. Assad Kotaite, has said that the IOSA programme is ‘complementary to ICAO’s Universal Safety Oversight Audit Programme’ and that ‘IOSA can evolve into an integral component of States’ overall efforts towards optimum aviation safety’: International Air Transport Association, ‘IATA Rolls Out Worldwide Safety Audit Programme – Qatar Airways is First Participant’, *Press Release*, 29 September 2003.

¹⁸ Or, more properly, the *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc. 7300/6. It deals with the regulation of air navigation, ICAO and international air transport; Margo refers to the Convention as the ‘basic code’ or ‘charter’ of public international aviation: See R.D. Margo, ‘Kicking and Screaming into the Twenty-First Century: A Practitioner’s Prescription for Updating the Chicago Convention’, (1995) 20 *Air & Space Law*, No. 1, p. 49.

securing the highest practicable degree of uniformity in regulations, standards, procedures ... in all matters in which such uniformity will facilitate and improve air navigation'.¹⁹ To this end, ICAO 'shall adopt and amend from time to time ... international standards and recommended practices and procedures ...'.²⁰ However, contracting States are not obliged to adhere to or implement such standards and recommended practices; any contracting State which finds it *impracticable* to fully comply with them must simply notify ICAO of the differences between that State's practice and the practice established by the ICAO standard.²¹ Standards and recommended practices are set out in Annexes to the Chicago Convention.²² The non-mandatory nature of the Chicago Convention's standards has been criticized by a number of writers;²³ Milde in particular notes the variable nature of observance of the standards.²⁴

In order to deal with the issue of implementation of the standards and recommended practices contained in the Annexes to the Chicago Convention by Contracting States, and in part as a result of calls for ICAO to audit adherence to such standards and recommended practices,²⁵ ICAO in 1999 established the USOAP, the objective of which is to 'help [Contracting States] ... in the area of safety [and] ... to promote global aviation safety by determining the status of implementation of relevant ICAO SARPs,²⁶ associated procedures and safety-related practices'.²⁷ It should be noted that ICAO has no ability to enforce compliance with the standards, and any audit conducted by ICAO can only be conducted with the agreement of the relevant State.²⁸

The ICAO Assembly during its 35th Session in 2004 resolved²⁹ that the USOAP

¹⁹ Article 37, 'Adoption of international standards and procedures'.

²⁰ *Supra*.

²¹ Article 38, 'Departures from international standards and procedures'.

²² Article 54, 'Mandatory functions of Council', provides that the ICAO council shall '(l) Adopt, in accordance with the provisions of Chapter VI [Articles 37 to 42] of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken ...'.

²³ See, for example, Margo, *supra*, note 18, pp. 54 and 60: 'Another factor which impairs the enforceability of the Chicago Convention is the opt-out provision relative to the compliance by States with international standards ... The Convention should ... be amended to ensure that international standards are mandatory and will be complied with by contracting States regardless of circumstance'.

²⁴ M. Milde, 'Problems of Safety Oversight: Enforcement of ICAO Standards', in Cheng (ed.), *The Use of Air Space and Outer Space: Cooperation and Competition*, Proceedings of the International Symposium on the Use of the Air and Outer Space at the Service of World Peace and Prosperity (Beijing, 1995), pp. 252-272 and M. Milde, 'Future Perspectives of Air Law', in Bockstiegel (ed.), *Perspectives of Air Law: Space Law and International Business Law for the Next Century* (Cologne, 1995), pp. 13-18.

²⁵ Shawcross & Beaumont, *Air Law* (4th ed., LexisNexis UK, London, 2004), p. II 21.

²⁶ Standards and recommended practices.

²⁷ See International Civil Aviation Organization, 'Making an ICAO Standard: Implementation of SARPs/Universal Safety Oversight Audit Programme', <http://www.icao.org/icao/en/anb/>.

²⁸ Shawcross & Beaumont, *supra*, note 25, pp. II 21-22: Audits 'can only be performed where a bilateral memorandum of understanding has been signed by the contracting state with ICAO'.

²⁹ Resolution A35-6.

be further expanded to include the safety-related provisions contained in all safety related Annexes to the Convention on International Civil Aviation as of 2005. The Assembly further requested that USOAP be restructured to adopt a comprehensive systems approach in conducting safety oversight audits in all Contracting States.³⁰

Under such comprehensive systems approach, audits are now conducted under the USOAP 'in consideration of the safety related provisions of 16 of the 18 ICAO Annexes', and final audit reports are made available to all Contracting States.³¹ Thus,

the aviation safety failings of states that do not adhere to International Civil Aviation Organisation standards and recommended practices (SARPs) will be publicised to all other states ... This will be done by presenting to all 188 ICAO contracting states the results of its safety audits on every country inspected, including ICAO's recommendations.³²

While the ICAO standards and recommended practices were used as a basis for those of IOSA, an awareness of some of the issues attending the ICAO standards and recommended practices informed the development of the IOSA programme, particularly in terms of consistency and standardization.

2.2 IOSA Advisory Group, taskforces and work schedule

IOSA Advisory Group

The IAG, operating under IATA terms of reference,³³ provided oversight of the initial development and implementation of the IOSA programme. It created taskforces as

³⁰ International Civil Aviation Organization, "Update of the Universal Safety Oversight Audit Programme (USAOP)," ATM/AIS/SAR/SG/15-WP/25 (25/7/05)(http://www.icao.int/icao/en/ro/apac/2005/ATM_AIS_SAR_SG15/wp25.pdf). Resolution A35-6 provides for, amongst other things, States to submit all information and documentation associated with the preparation and conduct of an audit; and "States to cooperate with ICAO and, as much as possible, accept audit missions as scheduled by ICAO."

³¹ *Supra*. 'If significant compliance shortfalls persist within a State and all other avenues to resolve the safety concerns have been exhausted, the matter would be brought to the attention of the [ICAO] Council, which may wish to make a recommendation or determination as appropriate. Should a State fail to carry out such recommendations or determinations, there is a requirement for all Contracting States to be informed, in accordance with Article 54j) of the [Chicago] Convention ...': International Civil Aviation Organization, Working Paper NACC/DCA/2-WP/24 (05/09/05) (http://www.icao.int/icao/en/ro/nacc/meetings/2005/NACC_DCA2/nacc02wp24.pdf). Article 54j) provides that "The Council shall: ... j) [r]eport to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council'.

³² D. Learmount, 'ICAO to get tough over audit data', (2005) *Flight International*, 6-12 September, p. 4.

³³ International Air Transport Association, *supra*, note 15. The establishment of the IAG (and associated IOSA taskforces) was authorized by the Operations Committee (OPC), one of four permanent standing committees of IATA, at OPC/3, and by the Strategy and Policy Committee

necessary and provided overall project management and supervision, including written direction and guidance of the work of the taskforces. The IAG ‘integrated the collective output of the ITFs [IOSA taskforces] into a comprehensive IOSA Manual³⁴ ... for subsequent endorsement by the OPC [IATA Operations Committee]’.³⁵

IATA member airlines primarily made up the composition of the IAG. Such composition was geographically balanced, with no airline or airline alliance dominant, either regionally or otherwise.³⁶ Membership of the IAG also comprised individuals from IATA management and the IOSA project manager, as well as ICAO and regulatory authorities such as the FAA, CASA³⁷ and Transport Canada.³⁸ The US DOD was also a member. Non-member participants included the JAA³⁹ Certain invited industry groups participated,⁴⁰ such as the Flight Safety Foundation, with which IATA consulted prior to the development of the IOSA programme, together with ICAO and major safety regulators.⁴¹ IATA member airlines and regulatory authorities could also request attendance, as observers, at IAG meetings.⁴² A total of eight quarterly IAG meetings were held,⁴³ the first in 2001 and the last in Chicago in June 2003.

An IOSA Steering Committee was established to represent the full IAG, and it coordinated closely with IATA management and the IOSA project manager ‘to provide guidance, counsel, and advice, either as necessary or when requested, regarding decisions relating to the development and implementation of the IOSA program’.⁴⁴ It met on the day before each IAG meeting.

(SPC) at SPC/53. The OPC reports to the IATA Board of Governors through the SPC; see <http://www.I.iata.org/workgroups/ioc.htm>.

³⁴ Subsequently the IOSA Standards Manual.

³⁵ International Air Transport Association, *supra*, note 15, p. 1.

³⁶ The IAG terms of reference provided that IAG membership ‘should reflect, as far as practicable, a good geographic representation of those airlines and Regulatory Authorities with substantial auditing experience’: International Air Transport Association, *supra*, note 15, p. 2.

³⁷ The Australian Civil Aviation Safety Authority.

³⁸ On membership generally see International Air Transport Association, *supra*, note 15, pp. 2 and 5-6.

³⁹ The Joint Aviation Authorities; it hosted the IAG/5 meeting in Amsterdam in June 2002. The JAA will be superseded by the European Aviation Safety Agency (EASA). In this regard see http://www.jaa.nl/jaa_easa/jaa_easa.html and <http://www.easa.eu.int/home/index.html>.

⁴⁰ The IAG terms of reference provided that, in addition to IATA member airline membership, membership of the IAG should ‘involve all main airline Global Alliance Groups, the main national and regional Airline Associations, representative international and national regulatory authorities and include a wide range of Safety Management, Quality Assurance and other specialist auditing skills’: International Air Transport Association, *supra*, note 15, p. 2.

⁴¹ Learmount, *supra*, note 4.

⁴² International Air Transport Association, *supra*, note 15, p. 3.

⁴³ IAG/8, the penultimate IAG meeting which was to have been held in Sydney, Australia, was cancelled.

⁴⁴ International Air Transport Association, *supra*, note 15, pp. 3-4.

IOSA task forces

12 IOSA task forces were also created, again operating under IATA terms of reference, directed and supervised by the IAG. Each task force consisted primarily of suitable qualified representatives of IATA member airlines and regulatory authorities.⁴⁵ The goal of each task force was

to produce, within its defined scope and work programme, mutually agreed to deliverables that will be incorporated into IOSA, and will thus enable Airlines to share audit results in order to achieve maximum efficiency, whilst maintaining high safety standards ... Each ITF [IOSA taskforce] will develop their respective contribution towards IOSA. Each ITF will pool their relevant auditing practices and experience, in order to produce an integrated document ... The IAG will provide quality oversight ...⁴⁶

Appendix B to the task force terms of reference set out certain working principles and guidance material for the task forces as established by the IAG.⁴⁷ The task forces were to contribute to the establishment of the IOSA standards, associated auditor checklists, auditor guidance material and a pre-visit questionnaire with the goal, mirroring in part that of the IAG, of establishing ‘a mutually accepted uniform audit Standard, which will enable Airlines to share audit results in order to achieve maximum efficiency, whilst maintaining high safety standards’.⁴⁸ While ICAO standards and recommended practices, principally those in Annexes 1, 6, 8, 13, 17 and 18 to the Chicago Convention, were to be used as a basis for those of IOSA,⁴⁹ with the starting point being the Air Transport Association’s *Codeshare Operational Review Standards*,⁵⁰ other ‘relevant Government and more demanding’ regulatory authority or agency requirements were considered.⁵¹ And, although it was acknowledged by the IAG and task force participants that IOSA standards would not incorporate all ‘best practices’ from those few airlines which pursued the highest safety standards in the industry - on the basis that such standards would not be achievable by a majority of airlines - those airline ‘best practices’ and

⁴⁵ International Air Transport Association, *Terms of Reference: IATA Operational Safety Audit (IOSA) Task Force (ITF)* (International Air Transport Association, Montreal, 2001). When the membership of the IOSA task forces was established, ‘IATA selected industry safety and quality experts from organizations around the world, including airlines, regulatory agencies, and various other entities possessing operational audit expertise. Special care was taken to ensure equal participation from all areas of the world such that no single region, alliance or organization would predominate’: International Air Transport Association, *supra*, note 2, p. vii.

⁴⁶ International Air Transport Association, *supra*, note 45, pp. 1-2.

⁴⁷ *Supra*, pp. 6-8.

⁴⁸ *Supra*, p. 6.

⁴⁹ Annexes 1, 6, 8, 13, 17 and 18 provide for, respectively, personnel licensing, operation of aircraft, airworthiness of aircraft, aircraft accident and incident investigation, security and safe transport of dangerous goods by air.

⁵⁰ Air Transport Association of America, *Codeshare Operational Review Standards* (Air Transport Association of America, Washington D.C., 2000); International Air Transport Association, *supra*, note 45, p. 7.

⁵¹ International Air Transport Association, *supra*, pp. 6-7. Permission to reproduce material, where required, was obtained from relevant copyright holders.

ICAO standards which were in widespread use would be adopted so as to promote improved safety standards for all airlines; if no ‘best practices’ were adopted, the ‘resultant level of safety performance would be too low to be of any real value’.⁵²

As mentioned earlier, a total of eight IAG meetings were held between 2001 and the inauguration of the IOSA programme in 2003. During that same time 8 ‘operations’ task forces met at dates determined by each task force, and each task force duly reported progress at each IAG meeting. Much of the work of the IAG and of the task forces was undertaken electronically. In the order in which the work product of the task forces appears in the IOSA Standards Manual (ISM)⁵³ as IOSA standards and recommended practices, the task forces were as follows (with the ISM work product of the taskforces in brackets):

- (a) Corporate Organization and Management System Task Force (ISM Section 1: Corporate Organization and Management System);
- (b) Flight Operations Task Force (ISM Section 2: Flight Operations);
- (c) Flight Dispatch Task Force (ISM Section 3: Operational Control – Flight Dispatch);
- (d) Engineering and Maintenance Task Force (ISM Section 4: Aircraft Engineering and Maintenance);
- (e) Cabin Operations Task Force (ISM Section 5: Cabin Operations);
- (f) Ground Operations Task Force (ISM Section 6: Aircraft Ground Handling);
- (g) Cargo Operations Task Force (ISM Section 7: Cargo Operations); and
- (g) Operational Security Task Force (ISM Section 8: Operational Security).

Additionally, 4 other task forces convened during the above period; these task forces were the Auditor Standards Task Force, the Accreditation Task Force, the Legal Task Force and the Data Management Task Force. The role of the Accreditation Task Force was to draft criteria against which organizations would be accredited as AOs.⁵⁴ The Legal Task Force reviewed the IOSA documentation and, in particular, the IOSA agreements,⁵⁵

⁵² *Supra*, p. 7. Task force chairpersons, in presenting their respective task force proposals to the IAG, were required to justify their selection and omission of airline ‘best practices’ and ICAO SARPs.

⁵³ International Air Transport Association, *IOSA Standards Manual* (International Air Transport Association, Montreal, 2003).

⁵⁴ Criteria against which organizations would be accredited as AOs was drafted by IATA and the IOSA project manager; no potential AO was involved in the drafting of the criteria or the drafting process. However, the views and input of potential AOs, both airlines and non-airlines, as to accreditation criteria were sought at formal meetings prior to the commencement of the accreditation drafting process.

⁵⁵ See, *infra*, note 134 with regard to the composition of the legal taskforce and its role.

and the Data Management Task Force designed a data management system ‘to support and facilitate audit sharing, and to ensure the security and confidentiality of the information that results from audits conducted under IOSA’. As section 6.0 of the IOSA Programme Manual (IPM) makes clear, ‘[s]haring of audits is a fundamental element of IOSA and effective data management is essential for achieving successful audit sharing’.⁵⁶

IOSA development phases

The development of the IOSA project consisted of four phases: Establishment of standards and recommended practices, together with associated guidance material; development of the IOSA programme and procedures;⁵⁷ transition of the IOSA project to the IOSA programme and trial implementation; and industry recognition and acceptance. With regard to trial implementation, test audits were conducted by the Star and SkyTeam alliances in late 2002 and in the first half of 2003 against the IOSA standards. Feedback was provided by the two alliances with regard to the functionality of the audit methodology and the standards themselves. This feedback was analysed and incorporated into the IOSA programme as appropriate.

The last meeting of the IAG was held in Chicago from 4 to 5 June 2003, by which point trial implementation of IOSA was substantially complete. The IAG after implementation of IOSA was succeeded by the IOSA Oversight Committee (IOC), an entity within the IATA governance structure operating under different terms of reference, and with some membership changes;⁵⁸ its first meeting was held in Montreal in September 2003. The role of the IOC includes ensuring that (a) the IOSA programme team uses processes compliant with internationally recognized quality standards; (b) IATA member airlines control the IOSA programme; and (c) IOSA represents the global aviation industry.⁵⁹

The first AO accredited was Aviation Quality Services GmbH in August 2003.⁶⁰ As at the time of writing, 7 AOs have been accredited by IATA.⁶¹ The first airline to be audited under IOSA was Qatar Airways in September 2003.⁶² Again as at the time of writing, there were 93 IATA Operators⁶³ listed on the IOSA registry.⁶⁴ IATA’s 59th Annual General Meeting in Washington DC in 2003 resolved to launch IOSA; all members

⁵⁶ International Air Transport Association, *supra*, note 2, p. 6-1.

⁵⁷ The phase one and two deliverables included the IOSA project master plan, the ISM, auditor standards, audit programme manuals, accreditation standards, auditor training development and an audit tracking system: J. Anderson, *supra*, note 12.

⁵⁸ The IOC comprises representatives from 25 IATA member airlines and ten regulatory authorities. It reports to the OPC; see, further, <http://www1.iata.org/workgroups/ioc.htm>.

⁵⁹ See http://www1.iata.org/whatwedo/auditing/iosa_role.htm.

⁶⁰ http://www.aviation-quality-services.com/eng/data/contentseite2.php?menu_id=65. See D. Learmount, ‘IATA awards AQS first audit licence’, (2003) 164 *Flight International*, No. 4899, p. 15; and D. Learmount, ‘Taking Control’, (2003) 164 *Flight International*, No. 4901, p. 35.

⁶¹ See <http://iata.org/ps/services/iosa/accreditation>.

⁶² International Air Transport Association, *supra*, note 17; E. Kelly, ‘Qatar Airways first to get IATA operational audit’, (2003) 164 *Flight International*, No. 4903, p. 16.

⁶³ See <http://iata.org/ps/servives/iosa/registry.htm>.

⁶⁴ With regard to the IOSA registry see part 2.1 and note 74, *infra*.

agreed to seek an IOSA audit as early as practicable but no later than 1 January 2006,⁶⁵ such timetable to be reviewed annually by the IATA Board of Governors on the basis of advice from the OPC.

In December 2005, by which time about 40% of IATA members had been audited under the IOSA programme,⁶⁶ IATA's Board of Governors resolved to make an IOSA audit mandatory for current IATA members and a condition for IATA membership.⁶⁷ Thus, by 2007, all current IATA members will need to have successfully undergone an IOSA audit;⁶⁸ '[t]hose not willing to commit to IOSA will no longer be welcome'⁶⁹ and will lose their membership status.⁷⁰ IATA's senior vice president responsible for safety and operations stated that 'IATA airline passengers have a right to expect that its member carriers meet or exceed International Civil Aviation Organisation standards'.⁷¹

Part Two below considers the provisions of the IOSA documentation: the IPM, the ISM and the IOSA Auditor Handbook - that is, IOSA standards and recommended practices (together with associated guidance material) and IOSA procedures. Part Three then analyses and examines the contractual framework of the IOSA programme, specifically the provisions of the Accreditation Agreement and the Audit Agreement.

3 IOSA documentation

3.1 IOSA Programme Manual

The IPM contains standards⁷² that govern all aspects of the IOSA programme for the purpose of ensuring 'that each audit is conducted in a standardized manner to achieve consistent results'.⁷³ The standards contained in the IPM apply to AOs, Operators⁷⁴ and

⁶⁵ 'Worldwide safety audit could save billions, says IATA', (2003) 163 *Flight International*, No. 4886, pp. 6-7.

⁶⁶ J. Flottau, 'Safety Targets', (2006) *Aviation Week & Space Technology*, January 9, p. 37.

⁶⁷ *Supra*; D. Learmount, 'Safety', (2006) *Flight International*, 3-9 January, p. 27; D. Learmount, 'Crash highlights IATA safety drive', (2005) *Flight International*, 20 December 2005 – 2 January 2006, p. 9.

⁶⁸ *Supra*, note 63.

⁶⁹ *Supra*, note 66.

⁷⁰ 'IATA audit: Industry pressure for safety', (2006) *Flight International*, 10-16 January, p. 31; D. Learmount, 'Safety', *supra*, note 67.

⁷¹ *Supra*, 'IATA audit'; see also D. Learmount, 'Crash highlights IATA safety drive', *supra*, note 67.

⁷² The use of 'standards' here in the context of the IOSA programme should not be confused with the 'standards' which form part of IOSA standards and recommended practices (ISARPs). Standards in this latter context are those that are considered an operational necessity and with which a potential Operator will be expected to be in conformity at the end of an Audit in order to be registered as an Operator; see, *infra*, part 2.2.

⁷³ International Air Transport Association, *supra*, note 2, p. vii.

⁷⁴ 'An airline or other organization that engages in all or some of the airline operational disciplines under the scope of IOSA and has met the requirements for IOSA Registration': *Supra*, p. xvii. 'IOSA Registration' is "[t]he formal method used by IATA to determine the operational suitability of and list a qualified organization on the IOSA Registry as an IOSA Operator"; the 'IOSA

IATA. Sections of the IPM provide standards in relation to accreditation of AOs, IOSA registration, auditor qualification, auditor training, the audit programme, data management, audit sharing, IOSA programme administration and dispute resolution.⁷⁵

Section 1, ‘AO Accreditation,’ deals with the processes and criteria for accreditation of organizations as AOs to conduct Audits⁷⁶ under the IOSA programme. It provides ‘the standards applied by IATA, initially and on a continuing basis, to ensure each AO conducts audit operations in a manner that achieves IOSA objectives and produces the requisite level of Programme quality standardization’.⁷⁷

Registration of an airline as an IOSA Operator is provided for in section 2 of the IPM which sets out standards for the IOSA registration process. Under that process, IATA determines the ‘operational fitness’ of an organization to be an IOSA Operator; if successful, such organization is entered on the IOSA Registry. IATA establishes and maintains the Registry so as to provide a listing of IOSA Operators. In order to be registered as an IOSA Operator, an organization must have been audited by an AO and must ‘have demonstrated operational fitness through conformity with IOSA standards’.⁷⁸

In outline, section 2 of the IPM also provides for a limited period of validity of an Audit,⁷⁹ for an IOSA registration period of twenty-four months.⁸⁰ Section 2.4 of the IPM provides for initial registration as an IOSA Operator, and section 2.5 for registration renewal. For initial registration, an auditee will ‘only be added to the IOSA Registry after all Findings, if any, have been closed through full implementation of comprehensive and permanent corrective action in accordance with the accepted CAP [Corrective Action Plan] (Audit Closure), such implementation has been verified by the AO ... and the final IAR has undergone quality control and been amended, as applicable’.⁸¹ For registration renewal, an Operator registered as an IOSA Operator remains on the IOSA Registry and has that registration renewed when all Findings resulting from the new Audit have been closed, such closure to take place before the expiration of the current registration.⁸² The

Registry’ is ‘[t]he official listing of eligible organizations that have achieved and are currently maintaining a status of IOSA Operator’: *Supra*, p. xviii.

⁷⁵ *Supra*, IPM 1-IPM 10, pp. 1-1-10-10.

⁷⁶ ‘The structured and objective assessment of an Operator to determine the level of conformity with ISARPs’: *Supra*, p. xv.

⁷⁷ *Supra*, IPM 1.0, p. 1-1.

⁷⁸ *Supra*, IPM 2.1.3, p. 2-1.

⁷⁹ *Supra*, IPM 2.2, p. 2-1

⁸⁰ *Supra*, IPM 2.3, p. 2-1, but with qualifications for initial registration; see *supra*, IPM 2.4.2, p. 2-1.

⁸¹ *Supra*, IPM 2.4.1, p. 2-1. ‘Findings’ are ‘documented statement[s] based on factual evidence that indicates an Operator is not in conformity with an IOSA Standard’: *Supra*, p. xvi. A ‘Corrective Action Plan’ or CAP is ‘[t]he total plan of an Auditee to close all Findings through implementation of comprehensive and permanent corrective action’, and ‘corrective action’ means ‘[t]he action(s) taken by the Auditee to address and eliminate recurrence of non-conformity to an IOSA Standard’: *Supra*, p. xvi. ‘Audit Closure’ is “[a]n IOSA administrative action performed by the AO at the point in the audit process when all Findings have been closed by the Auditee and verified by the AO”: *Supra*, p. xv. The IAR or IOSA Audit Report is ‘[t]he document that is the official record of an Audit, and that contains information regarding the conduct and results of the Audit, including implementation of corrective action and closure of all Findings’: *Supra*, p. xvii.

⁸² *Supra*, IPM 2.5.1, p. 2-2.

‘period of renewed registration for a current IOSA Operator shall become effective on the date that the current IOSA registration expires and such renewed registration shall expire exactly twenty four (24) consecutive months following the current expiration date’.⁸³

Sections 3 and 4 of the IPM deal with auditor qualification and auditor training. As the quality of the IOSA Auditor⁸⁴ is a ‘critical factor in ensuring that each audit is conducted in a standardized and consistent manner,’ section 3 of the IPM provides ‘qualification standards and guidance to ensure that every IOSA Auditor possesses the requisite level of competence to achieve overall programme standardization’.⁸⁵ IOSA Auditors conduct Audits as part of an AO, either as employees or contractors.⁸⁶ Matters dealt with include categories of IOSA Auditors;⁸⁷ the competence of IOSA Auditors; qualification prerequisites for IOSA Auditor acceptance; personal attributes of, ethical standards and knowledge and skills for IOSA Auditors; additional skills for Lead Auditors; special qualities for Evaluators; the qualification process for Auditors, Lead Auditors and Evaluators, and for auditing an additional operational discipline; and IOSA Auditor training, currency and requalification.⁸⁸

With regard to auditor training, section 4 of the IPM sets out standards and guidance for the content and organization of IOSA training activities on the basis that each IOSA Auditor ‘attains and maintains a requisite level of standardization and competency’.⁸⁹ Each candidate for IOSA Auditor training must first complete IOSA Auditor Training (IAT),⁹⁰ such training to be arranged and scheduled by the relevant AO and conducted by an IATA Endorsed Training Organization (ETO)⁹¹ Other provisions of section 4 deal

⁸³ *Supra*, IPM 2.5.2, p. 2-2.

⁸⁴ ‘An individual that has satisfied IOSA qualification and competence standards, and has been formally approved to conduct an Audit in at least one operational discipline’: *Supra*, p. xv.

⁸⁵ *Supra*, IPM 3.0, p. 3-1.

⁸⁶ With regard to the contractual nature of the relationship between an AO and its Auditors see clause 22 of the Accreditation Agreement: International Air Transport Association, *Accreditation Agreement* (International Air Transport Association, Montreal, 2003).

⁸⁷ There are three categories of approved IOSA Auditors based on experience, knowledge and skill: Auditor, Lead Auditor and Evaluator. An Auditor is ‘[a]n experienced aviation auditor that has completed the process for qualification as an Auditor in accordance with IPM 3.9 [Qualification Process for Auditors], and has been formally approved to conduct Audits under IOSA in at least one operational discipline’; a Lead Auditor is [a]n experienced Auditor that has demonstrated the competence to successfully lead an IOSA Audit Team, and has completed the process for qualification as a Lead Auditor in accordance with IPM 3.10 [Qualification Process for Lead Auditors]’; and an Evaluator is ‘[a]n experienced Lead Auditor that has completed the process for qualification as an Evaluator in accordance with IPM 3.11 [Qualification Process for Evaluators], and has been designated by the AO to assess audit activities and evaluate auditor performance’: International Air Transport Association, *supra*, note 2, IPM 3.1, p. 3-1.

⁸⁸ *Supra*, IPM 3.2-3.16, pp. 3-1-3-12.

⁸⁹ *Supra*, IPM 4.0, p. 4-1.

⁹⁰ ‘IOSA Auditor Training’ means ‘[a]n element of the qualification process for the IOSA Auditor designed to familiarize an experienced aviation operational auditor with IOSA standards, methodology and documentation’: *Supra*, p. xvii.

⁹¹ *Supra*, IPM 4.1.2, p. 4-1. An ETO is ‘[a] company or other entity that has been accredited by IATA as a provider of training services under IOSA’: *Supra*, p. xvi. Accreditation of an ETO is made pursuant to an agreement between IATA and an ETO.

with prerequisite Auditor and Lead Auditor training, Auditor familiarization and recurrent training and flight simulator operations training.⁹²

The purpose of section 5 of the IPM, ‘Audit Programme,’ is to provide guidance to AOs to establish and then maintain an effective Audit Programme.⁹³ The Audit Programme is the documented system, including policies, processes and procedures for implementation of an Audit under IOSA.⁹⁴ The Section 5 Audit standards also provide the basis for procedures to be used by IOSA Auditors in conducting an Audit. The standards consist of those relating to AO organization and management; Audit scheduling and planning; selecting and assembling Audit teams; preparing for Audits; provision of resources and logistical support; utilising the Audit Checklist;⁹⁵ conducting Audits; termination of an Audit; issuing a preliminary⁹⁶ and final IOSA Audit Report; accepting a Corrective Action Plan; conducting Audit follow-up; closing Findings; closing the Audit; completing and issuing the IOSA Audit Report (IAR); maintaining Audit records; control and surveillance of Audit activities and Auditor performance; and achieving continuous improvement.⁹⁷

One of the basic elements of the IOSA programme is Audit sharing. IPM Section 6, ‘Data Management,’ provides for a data management system ‘which supports and facilitates audit sharing and ensures the quality, security and confidentiality of the information that results from audits conducted under IOSA’.⁹⁸ Section 6 sets out the elements of the IAR and details the processes for IAR issuance (by the AO) and receipt (by IATA).⁹⁹ Other provisions deal with IAR retention and custodianship of the IAR by IATA.¹⁰⁰ In this last regard, IATA is the custodian of all IARs; a database maintained by IATA - the IOSA Database - is the system repository for IARs.¹⁰¹ The relevant auditee airline alone determines access to an IAR from the IOSA Database for the purposes of Audit sharing.¹⁰² With regard to access to the IOSA Database, and while provisions dealing with such access and data ownership are analysed in greater detail below where the IOSA agreements are considered, an Interested Party¹⁰³ seeking access to an IAR submits a written request in that regard to IATA, such access only granted by IATA after the owner

⁹² *Supra*, IPM 4.2-4.6, pp. 4-2-4-4.

⁹³ *Supra*. ‘Audit Programme’ means ‘[t]he documented management, organization, strategy, policies, and procedures used by an AO for providing audit services under IOSA’: *Supra*, p. xv.

⁹⁴ *Supra*, IPM 5.0, p. 5-1.

⁹⁵ ‘The working document used by an IOSA Auditor to document Audit conclusions and factual evidence that supports Findings and Observations’: *Supra*, p. xvii. An ‘Observation’ is ‘[t]he documented statement by the IOSA Auditor based on factual evidence gathered during an Audit that indicates an Operator has not fulfilled an IOSA Recommended Practice’: *Supra*, p. xviii.

⁹⁶ A preliminary IOSA Audit Report means ‘[a]n issuance of the IAR [IOSA Audit Report] by an AO prior to Audit Closure’: *Supra*, p. xviii.

⁹⁷ *Supra*, IPM 5.1-5.17, pp. 5-1-5-13.

⁹⁸ *Supra*, IPM 6.0, p. 6-1.

⁹⁹ *Supra*, IPM 6.1-6.3, pp. 6-1-6-2.

¹⁰⁰ *Supra*, IPM 6.5-6.6, p. 6-3.

¹⁰¹ *Supra*, IPM 6.5.1, p. 6-3.

¹⁰² *Supra*, IPM 6.5.2, p. 6-3.

¹⁰³ ‘An organization that has a direct interest in or is sharing the current Audit of an IOSA Operator, and has been provided official access to the IOSA Audit Report (IAR) through the IOSA system’: *Supra*, p. xvi.

of the IAR – the auditee airline – has approved such access.¹⁰⁴ An agreement is also signed between the Interested Party and IATA setting out the conditions under which access is granted.¹⁰⁵ And, in terms of data ownership, the IAR is the property of the Auditee.¹⁰⁶ Section 6 of the IPM sets out provisions with regard to ownership and limited informal viewing and sharing of the IAR outside the confines of the IOSA Database.¹⁰⁷

Section 7 of the IPM, ‘Audit Sharing,’ provides guidance concerning the sharing of Audits, specifically guidance with regard to processes and responsibilities of the relevant parties. ‘Audit Sharing’ is defined in section 7 as the process ‘whereby an Interested Party utilizes the Audit of an Operator conducted by a third party under IOSA to satisfy its own need for an Audit of that same Operator’.¹⁰⁸

The purpose of section 8 of the IPM, ‘IOSA Programme Management’, is to establish IOSA programme management requirements that IATA must meet; to ensure that the programme goals of IOSA are met; and to ensure that the IOSA programme ‘maintains the highest possible level of quality, standardization and consistency’.¹⁰⁹ Provisions in section 8 deal with IATA’s organization and management systems, including the establishment of the IOSA Programme Office (IPO) within IATA;¹¹⁰ quality assurance; customer service; accreditation;¹¹¹ standards, documentation, records and information and data management; and training management.¹¹²

IPM Section 9 deals with dispute resolution.

Finally, IPM Section 10, ‘ETO Accreditation’, provides for standards applicable to any ETO; again, ETOs deliver IAT courses.¹¹³ Standards in relation to, amongst other things, ETO accreditation, conflict of interest, organization and management, quality assurance, instructor qualification and approval, course administration and examinations make up section 10.¹¹⁴ The purpose of this section is to ensure, through the application of standards applicable to ETOs, that the IAT courses are ‘delivered in a manner that achieves IOSA Programme objectives for Auditor standardization and quality’.¹¹⁵

¹⁰⁴ *Supra*, IPM 6.8.1 and 6.8.3, pp. 6-3-6-4.

¹⁰⁵ *Supra*, IPM 6.8.4, p. 6-4.

¹⁰⁶ *Supra*, IPM 6.4.1, p. 6-2.

¹⁰⁷ *Supra*, IPM 6.4, pp. 6-2-6-3.

¹⁰⁸ *Supra*, IPM 7.1, p. 7-1.

¹⁰⁹ *Supra*, IPM 8.0, p. 8-1.

¹¹⁰ *Supra*, IPM 8.1.1, p. 8-1. The IPO manages and controls the IOSA programme.

¹¹¹ *Supra*, IPM 8.4, pp. 8-3-8-4. Note that the accreditation provisions in section 8 of the IPM complement and supplement those accreditation provisions set out at IPM section 1, ‘Accreditation’. In particular, section 8 deals with IPO accreditation processes.

¹¹² *Supra*, IPM 8.1-8.9, pp. 8-1-8-9.

¹¹³ See, *supra*, notes 90 and 91 with regard to IAT and ETOs.

¹¹⁴ *Supra*, IPM 10.1-10.16, pp. 10-1-10-10.

¹¹⁵ *Supra*, IPM 10.0, p. 10-1.

3.2 IOSA Standards Manual

The ISM contains all of the IOSA standards and recommended practices (ISARPs). It provides ‘the operational standards, recommended practices, and supporting information necessary for an Operator to successfully prepare for an Audit’ conducted under IOSA; the ISM can be used ‘as a guide for an Operator when it desires to structure its operational management and control systems in conformity with the latest effective industry operational practices’.¹¹⁶ As the ISM makes clear, during an Audit, an Operator is assessed against the ISARPs as set out in the ISM. Compliance is determined by the extent to which specifications are documented¹¹⁷ and implemented¹¹⁸ by the Operator.

The ISARPs, then, are the operational criteria upon which the Audit is based. IOSA Standards

are specified programmes, systems, policies, processes, procedures, plans, measures, facilities, components, pieces of equipment, or any other aspects of operations under the scope of IOSA that are considered an operational necessity, and with which an Operator will be expected to be in conformity at the conclusion of the audit.¹¹⁹

Standards contain the word ‘shall,’ denoting a requirement¹²⁰

IOSA Recommended Practices are those specified programmes, systems etc. ‘that are considered operationally desirable, but conformity is optional by the Operator’. Recommended Practices contain the word ‘should’ to denote that they are optional.¹²¹

The eight sections of Part One of the ISM which contain the ISARPs were identified above. Again they are (a) Corporate Organization and Management System; (b) Flight Operations; (c) Operational Control - Flight Dispatch; (d) Aircraft Engineering and

¹¹⁶ International Air Transport Association, *supra*, note 53, p xv.

¹¹⁷ ‘Documented’ means ‘published and accurately represented in an operational manual, handbook or other official company medium’: *Supra*.

¹¹⁸ ‘Implemented’ means ‘activated, integrated, incorporated, deployed, installed or made available as part of the operational system, and monitored and evaluated as necessary for continued effectiveness’: *Supra*.

¹¹⁹ *Supra*, pp. xv.

¹²⁰ *Supra*, p. xvi. In the course of an audit under IOSA, ‘a determination that the Operator has not fully documented and/or implemented a Standard will result in a Finding and a Corrective Action Request, in accordance with procedures in the IOSA Programme Manual ... [t]he Operator will be required to respond within a specified time frame with corrective action that is acceptable to the auditor’: *Supra*, p. xvi. A ‘Corrective Action Request’ is defined as a ‘written communication to the [a]uditee that states a Finding, specifies the non-conformity, and identifies the need for Corrective Action’: *Supra* p. xvii. ‘Corrective Action’ is defined as ‘action(s) taken by the [a]uditee to address and eliminate recurrence of non-conformity to an IOSA Standard’: *Supra*

¹²¹ *Supra*, p. xvi. In the course of an audit under IOSA, ‘a determination that the Operator has not fully documented and implemented a Recommended Practice results in an Observation in accordance with procedures in the IOSA Programme Manual ... [t]he Operator is not obliged to respond to an observation with corrective action’; *Supra*.

Maintenance; (e) Cabin Operations; (f) Aircraft Ground Handling; (g) Cargo Operations; and (h) Operational Security.

Part Two of the ISM contains the IOSA Guidance Material (IGM) which is directly related to a corresponding Standard or Recommended Practice, and which follows the same eight sections in Part One. The purpose of the IGM is to promote uniformity in interpretation of the ISARPs for both Operators and Auditors.¹²²

3.3 IOSA Auditor Handbook

The third and final manual which makes up the IOSA documentation system is the IOSA Auditor Handbook (IAH). It provides guidance to auditors carrying out Audits so as to ensure a high level of standardization and consistency during the conduct of such Audits, 'to achieve the highest level of standardization in terms of Auditor competency and the application of IOSA Standards'.¹²³ The 8 sections of the IAH provide guidance in relation to the IOSA Auditor generally, Auditor currency, Audit preparation, Audit conduct, determining conformity with ISARPs, Audit follow-up, Checklist usage and line flight and simulator observation.¹²⁴

It was said earlier that the IOSA programme may affect the development of States' airline safety standards, that the IOSA private law solution to the airline safety audit 'problem' – a solution represented ultimately by the IOSA agreements which incorporate the IOSA standards - may influence the development of public law in this area. The IOSA programme represents a set of standardized and consistent airline safety audit standards, as has been demonstrated in this paper through an analysis of the IPM and the ISM, which draws upon ICAO standards and recommended practices¹²⁵ and ATA standards, together with airline 'best practices' and requirements of regulatory authorities around the world. Taken together, these elements result in a unique set of standards which, because of its scope and effectiveness, may provide a model and substance against which State airline safety standards can be measured, and those standards subsequently amended as a result at the international and State levels.

It appears that, almost three years after its inauguration, the development of State airline safety standards is being affected by the IOSA programme and its standards (and recommended practices), such standards, again, meeting or exceeding those of ICAO.¹²⁶

¹²² *Supra*, p. xvi. Guidance material 'is always directly related to a corresponding Standard or Recommended Practice in Part One of the ISM, and consists of interpretative or explanatory text that serves to clarify the meaning and intent of the specific standard or recommended practice'.

¹²³ International Air Transport Association, *IOSA Auditor Handbook* (International Air Transport Association, Montreal, 2004), p. ix.

¹²⁴ *Supra*.

¹²⁵ Issues such as consistency and State adherence which attend the ICAO standards and recommended practices were discussed, *supra*, at part 1.1.

¹²⁶ *Supra*, note 71.

States and State agencies have approached IATA ‘on using the IOSA as a tool in improving the standards of airlines in their countries’.¹²⁷ Further,

most signs indicate that what state regulators can do to improve safety in developed economies is limited, and higher standards will be driven more by industry self-regulation – like IATA’s IOSA – and technological improvements that have always been a major factor in raising the safety and reliability bar.¹²⁸

Indeed, as previously mentioned, IOSA illustrates the changing role of government in civil aviation. IOSA, a non-government initiative with an advisory group and task forces made up of airlines and airline industry organisations, is in prospect driving change and improvements in airline safety. Increasingly, such civil aviation reforms are the result of action taken not by government but by non-government actors and coalitions (such as the IOSA Advisory Group) to which government responds. For example, the 1992 ‘Japanese initiative’, an initiative whereby Japanese carriers adopted new conditions of carriage – such that a plaintiff ‘can recover the full amount of proven loss, with no arbitrary financial limit’¹²⁹ – led in part to an IATA initiative, the 1995 IATA airline liability conference, and the resulting IATA Intercarrier Agreement on Passenger Liability and the Agreement on Measures to Implement the IATA Intercarrier Agreement.¹³⁰ Such non-government civil aviation reform initiatives, in turn, led (together with other developments) to the 1999 Montreal Convention. That convention consolidates and modernises the rules governing the liability of air carriers for the carriage of passengers, baggage and cargo on international journeys.¹³¹ IOSA, then, is the latest in an increasing number of civil aviation reforms and initiatives led by non-government coalitions and organisations.

The final part of this paper concerns the two IOSA agreements, that is, the contractual framework of the IOSA programme.

¹²⁷ D. Learmount, ‘Safety’, *supra*, note 67.

¹²⁸ *Supra*.

¹²⁹ *Supra*, note 25, p. VII 168.

¹³⁰ Not considered here is an earlier non-government aviation initiative, the 1966 Montreal Intercarrier Agreement.

¹³¹ On the ‘Japanese Initiative’, the IATA airline liability conference, the IATA Intercarrier Agreement on Passenger Liability, the Agreement on Measures to Implement the IATA Intercarrier Agreement and the 1999 Montreal Convention, see Shawcross and Beaumont, *supra*, note 25, pp. VII 168-207 and 226-250; I. H. Ph Diederiks-Verschoor, *An Introduction to Air Law* (7th rev. ed., Kluwer Law International, The Hague, 2001), pp 109-122; and D. Hodgkinson, M. MacKeigan and L. Masse (eds), *Essential Documents on International Air Carrier Liability* (2nd ed, International Air Transport Association, Montreal, 2003), pp. 139-141, 54-62; and 17-30.

4. IOSA agreements

Under the IOSA programme, IATA accredits AOs to perform Audits. Such accreditation is governed by an Accreditation Agreement¹³² made between IATA and the relevant AO. The conduct of an Audit and matters subsequent to an Audit such as Audit sharing and Operator registration are governed by a tripartite Audit Agreement¹³³ made between an AO, an auditee airline (in the IOSA agreements, a ‘Candidate’) and IATA. Parts 3.1 and 3.2 below discuss the contractual framework of the IOSA programme. Part 3.1 analyses the Accreditation Agreement and Part 3.2 the Audit Agreement.

It should be noted that the Accreditation Agreement and the Audit Agreement were drafted by IATA. Periodic drafts of the agreements were reviewed by the IOSA Legal Taskforce which met three times in 2002 and 2003.¹³⁴ Additionally, advice on the IOSA programme as a whole was provided to IATA by two separate external counsel, and the agreements were also reviewed by a third external counsel.

4.1 Accreditation Agreement

The IPM contemplates both IATA and each AO entering into an Accreditation Agreement and such AO undergoing the IOSA accreditation process for accreditation as an AO as set out in the IPM.¹³⁵ Schedules A and B to the Accreditation Agreement attach the IPM and ISM and are incorporated as an integral part of it.¹³⁶

The Accreditation Agreement does not come into effect or have any force or effect until the AO has satisfied all of the conditions for and provided documentation in relation to accreditation as set out in the IPM,¹³⁷ and until all certificates of insurance required to be provided as set out in the Accreditation Agreement have been so provided.¹³⁸ Subject to these provisions, it comes into effect on the date of execution of the Accreditation Agreement and remains in effect for a period of three (3) years (the ‘Agreement Period’).¹³⁹ Each AO is accredited as an Audit Organization under the IOSA programme for a period of three years. The term of accreditation can be renewed, and the Agreement Period consequently amended, on the terms of the Accreditation Agreement and as set out at IPM 1.1.10.¹⁴⁰

¹³² International Air Transport Association, *supra*, note 86.

¹³³ International Air Transport Association, *Audit Agreement* (International Air Transport Association, Montreal, 2003).

¹³⁴ The IOSA legal taskforce comprised the Director of Legal Services, IATA (as chairperson) and airline counsel from North America, South America, Europe and the Asia-Pacific region. Counsel from South America resigned after the first meeting of the Legal Taskforce due to a change in job position. Two of the three meetings were also attended by the IOSA Project Manager.

¹³⁵ International Air Transport Association, *supra*, note 2, IPM 1 and, in particular, IPM 1.1-1.2, pp. 1-1- 1-3.

¹³⁶ International Air Transport Association, *supra*, note 86, clause 3.

¹³⁷ *Supra*, clause 4. The relevant IPM provisions are those contained in IPM 1, ‘AO Accreditation’.

¹³⁸ *Supra*.

¹³⁹ *Supra*, clause 5.

¹⁴⁰ *Supra*, clauses 5 and 6.

Under the Accreditation Agreement, then, IATA accredits an AO as an Audit Organization.¹⁴¹ The AO performs Audits and related matters as set out in the IPM and ISM; pays to IATA an Accreditation Fee and a flat fee per each Audit it conducts in the amounts and in the manner as set out in the Accreditation Agreement;¹⁴² and ensures that it and its IOSA Auditors meet the standards as set out in IPM 3 and are trained in accordance with the standards as set out at IPM 4.¹⁴³ Other provisions deal with IATA review of AO accreditation and renewal of accreditation,¹⁴⁴ and periodic reviews, audits and access by IATA.¹⁴⁵

The Accreditation Agreement provides that the AO will establish and maintain those processes and make those notifications with regard to IOSA Registration and the IOSA Registry set out at IPM 2.9, will establish and maintain an Audit Programme as set out at IPM 5, will support and facilitate Audit sharing and will ensure the security and confidentiality of the information that results from Audits as set out in the relevant provisions of IPM 6.¹⁴⁶

Further, the AO will not conduct an Audit (a) of a Candidate for whom that AO or an affiliated entity has provided consulting services related to operations within the operational scope of IOSA within the previous two years; (b) of its own organization or operations, or those operations of any Group Company;¹⁴⁷ and (c) of a Candidate if that AO has an interest in the outcome of that Audit, the existence of such an interest to be reasonably determined by IATA.¹⁴⁸ The AO will also ensure that an auditor on the list of AO IOSA Auditors does not participate in an Audit (a) of a Candidate for whom he or she has provided consulting services related to operations within the operational scope of IOSA within the past two years; (b) if the auditor or a Family Member of such auditor has direct or indirect financial interest in the Candidate; (c) of the AO's Group Company, if any; and (d) if that auditor or a Family Member¹⁴⁹ of such auditor has an interest in the outcome of that Audit, the existence of such an interest to be reasonably determined by IATA.¹⁵⁰ When there exists or might appear to exist a conflict of interest for any reason, an AO will disclose to and resolve such actual or potential conflict with IATA prior to

¹⁴¹ *Supra*, clause 7.

¹⁴² *Supra*, clauses 8(b), 11, 12 and Schedule C. Clause 1 of the Accreditation Agreement provides that 'Accreditation Fee' means the fee payable by an AO to IATA in relation to Accreditation.

¹⁴³ *Supra*, clause 8(c).

¹⁴⁴ *Supra*, clauses 9 and 10.

¹⁴⁵ *Supra*, clause 16.

¹⁴⁶ *Supra*, clause 13, 14 and 15.

¹⁴⁷ 'Group Company' means 'any Subsidiary or Holding Company of the AO or any Subsidiary of any such Holding Company'; 'Subsidiary' includes 'any company in or over which the AO or such Holding Company has a direct or indirect controlling interest'; and 'Holding Company' includes 'the controlling company of the group in which the AO is part': *Supra*, clause 1.

¹⁴⁸ *Supra*, clause 17.

¹⁴⁹ For the purposes of clause 18, 'Family Member' means a parent, sibling, child, spouse, grandparent, or grandchild: *Supra*, clause 18.

¹⁵⁰ *Supra*, clause 18. The 2nd edition of the IPM contains some amendments to the conflict of interest provisions as they appeared in the 1st edition. Clause 1.4.4 of the 2nd edition provides further that 'An Auditor shall not be allowed to conduct an Audit under IOSA of the operations of an organization for which such auditor is an employee, provides services and/or is on the list of approved IOSA Auditors': International Air Transport Association, *supra*, note 2, p. 1-5.

conducting an Audit.¹⁵¹

The Accreditation Agreement makes clear that IATA and the AO will enter into an Audit Agreement with each Candidate.¹⁵² Pursuant to that agreement, the AO will conduct an Audit on a Candidate under the IOSA programme and IATA will (a) determine the operational suitability of that Candidate to be an Operator, for the purposes of the IOSA Registration process; and (b) recognize and record such accomplishment on the IOSA Registry.¹⁵³ The Accreditation Agreement states that the Audit Agreement will provide for, amongst other things, data management and IOSA Registration matters.¹⁵⁴

The Accreditation Agreement specifies certain provisions which must be included in any AO-IOSA Auditor agreement.¹⁵⁵ The provisions include those dealing with conflict of interest, intellectual property and confidentiality clauses in substantially the same terms as those provided for in the Accreditation Agreement; no assignment of the IOSA Auditor's rights under any AO-IOSA Auditor agreement; no right to subcontract any or all of its obligations to be performed or provided under any AO-IOSA Auditor agreement; and agreement by the IOSA Auditor that it shall act in accordance with and perform Audits as set out in the applicable provisions of the IPM and ISM.¹⁵⁶ In the event that an IOSA Auditor is an employee of an AO, the AO will implement appropriate procedures and safeguards to ensure such employee's compliance with these provisions.¹⁵⁷

With regard to the selection and approval of IOSA Auditors, the AO agrees that only an approved IOSA Auditor will be permitted to function as an auditor during its conduct of an Audit.¹⁵⁸ Further, the AO will select and approve its IOSA Auditors based on (a) meeting qualification prerequisites; (b) possession of the appropriate personal attributes; (c) demonstration of the ability to apply knowledge and skills that are necessary to effectively conduct Audits; and (d) successful completion of all steps in the process for qualification to the appropriate category of IOSA Auditor as set out at IPM 3.¹⁵⁹

The Accreditation Agreement also provides for qualification prerequisites for IOSA Auditor acceptance,¹⁶⁰ Auditor standards,¹⁶¹ Auditor qualification process¹⁶² and Auditor

¹⁵¹ *Supra*, clause 19 (subject to clauses 17 and 18). The 2nd edition of the IPM also provides additional conflict of interest provisions dealing with assessment by an AO of a potential or actual conflict of interest, disclosure of such conflicts to IATA, determination by IATA of a conflict (if any), the conduct and status of an Audit before and after such determination (if any); and related matters: *Supra*, IPM 1.4.7-1.4.10, pp. 1-5-1-6.

¹⁵² *Supra*, clause 20. The form of Audit Agreement is set out at Schedule D to the Accreditation Agreement.

¹⁵³ *Supra*, clause 21.

¹⁵⁴ *Supra*.

¹⁵⁵ *Supra*, clause 22.

¹⁵⁶ *Supra*.

¹⁵⁷ *Supra*.

¹⁵⁸ *Supra*, clause 23.

¹⁵⁹ *Supra*, clause 24.

¹⁶⁰ *Supra*, clauses 25-26.

¹⁶¹ *Supra*, clause 27.

training.¹⁶³

In addition to termination of the Accreditation Agreement for default and in certain other circumstances prior to the expiration of the Agreement Period,¹⁶⁴ IATA can immediately terminate the Accreditation Agreement in the event that the AO ceases to provide aviation audit services.¹⁶⁵ It can also terminate the Accreditation Agreement in the event that (a) the IOSA programme is terminated; or (b) termination of the Agreement is required as a result of direction from or a decision of the IATA Board of Governors.¹⁶⁶ The AO can terminate the Accreditation Agreement - and relinquish its accreditation as an AO - upon written notice to IATA.¹⁶⁷

Under the Accreditation Agreement the AO indemnifies IATA against claims, actions, demands, etc. arising out of or in connection with the Accreditation Agreement and/or the Audit Agreement except to the extent that such claims, actions, demands, etc. resulted from any act or omission done by IATA with intent to cause damage or recklessly and with knowledge that damage would probably result.¹⁶⁸

Further, the AO must maintain insurance policies covering the respective interests of IATA and the AO against all risks including liability for injury or damage caused by or arising out of or in connection with the accreditation, and must maintain aviation third party, passenger, baggage, cargo, mail and general legal liability (including aviation premises legal liability) insurances for a limit not less than a certain amount per occurrence, such amount set out in the Accreditation Agreement, and such cover to include war related legal liability pursuant to AVN 52D (or equivalent).¹⁶⁹

Finally, the Accreditation Agreement is governed by the laws of the province of Quebec, Canada, and of Canada, as applicable, excluding conflict of laws provisions.¹⁷⁰ Settlement of any dispute arising under the Accreditation Agreement is governed by the Rules of Conciliation and Arbitration of the International Chamber of Commerce.¹⁷¹

¹⁶² *Supra*, clauses 28-31.

¹⁶³ *Supra*, clause 32-46. The Accreditation Agreement also makes provision for, amongst other things, such matters as representations and warranties (from the AO to IATA; clause 47), intellectual property rights (clauses 48-52) and confidentiality (clauses 54-59).

¹⁶⁴ *Supra*, clause 60.

¹⁶⁵ *Supra*, clause 61.

¹⁶⁶ *Supra*.

¹⁶⁷ *Supra*, clause 62.

¹⁶⁸ *Supra*, clause 69; see, further, note 219, *infra*. Not all of the indemnity provisions in the Accreditation Agreement are discussed in this paper, and clause 69 is set out only in outline form; it is not complete. Clauses 70-72 also deal with indemnity matters.

¹⁶⁹ *Supra*, clause 73. Given the complexity of the insurance provisions in the Accreditation Agreement, not all such provisions are discussed in this paper. Clause 73 is set out only in outline form, and is not complete. Clauses 74-77 also deal with insurance matters.

¹⁷⁰ *Supra*, clause 85.

¹⁷¹ *Supra*, clause 86.

4.2 Audit Agreement

The Audit Agreement is a tripartite agreement made between an AO, a Candidate and IATA and which governs the conduct of an Audit and matters subsequent to an Audit such as Audit sharing and Operator registration. It is made clear in the Audit Agreement that the AO has undergone the IOSA accreditation process for accreditation as an Audit Organization and provided the necessary information and documentation to IATA as required by the IPM, and that IATA and the AO have executed an Accreditation Agreement pursuant to which AO has been accredited as an Audit Organization.¹⁷² The IPM contemplates a tripartite agreement between IATA, an AO and a Candidate¹⁷³ whereby the AO conducts an Audit of the Candidate under the IOSA programme and the AO and the Candidate support and facilitate Audit sharing, amongst other things.

Warsaw Convention liability protections

It is also made clear in the Audit Agreement that the Candidate is the *principal* party to the agreement that desires to have AO conduct Audit services.¹⁷⁴ Given airline and industry concerns with regard to the liability position, for example, of an airline when conducting safety reviews of code-share carriers,¹⁷⁵ particular care was taken to make the relationship between the Candidate as contract 'principal' and the AO as contract 'servant/agent' very clear in the Audit Agreement. In explicitly establishing the Candidate's role as contract 'principal' receiving and paying for Audit 'services' from an AO,¹⁷⁶ the contract relationships are identified as clearly as possible such that the parties have a greater chance of being regarded as beneficiaries of the Warsaw Convention liability protections,¹⁷⁷ relationships that might otherwise not be apparent from the quite

¹⁷² International Air Transport Association, *supra*, note 133, Recital C. The Recitals to the Audit Agreement are incorporated as an integral part of that agreement: Clause 4.

¹⁷³ International Air Transport Association, *supra*, note 2, IPM 1.1.11, p. 1-2.

¹⁷⁴ International Air Transport Association, *supra*, note 133, Recital D.

¹⁷⁵ See, in this regard, *Re Air Crash at Taipei, Taiwan on October 31, 2000* (CD Cal, 2002 and CD Cal, 2004).

¹⁷⁶ International Air Transport Association, *supra*, note 117, Recital D and clause 7(b).

¹⁷⁷ See *In re Air Crash Disaster near Peggy's Cove, Nova Scotia on September 2, 1998*, 2002 WL 334389 (E.D. Pa. Feb. 27, 2002), pp. 16-17 and 18-19 and *Dazo v Globe Airport Security Servs.*, 268 F.3d 671 (9th Cir. 2001). Reference above to the Warsaw Convention liability protections includes, for example, a reference to the protection against liability for punitive damages: See Article 17, *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 7838, 9201; (1933) 137 LNTS 11 (the Warsaw Convention, 1929); *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 7632; 478 UNTS 371 (the Hague Protocol, 1955); and *Additional Protocol No 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 9148 (Montreal Protocol No 4, 1975). Reference here to the 'Warsaw Convention' is a reference to the unified text of the Warsaw Convention 1929 as amended by the Hague Protocol, 1955 and by the Montreal Protocol No. 4, 1975. The text of Article 17 remains the same throughout all three conventions; it provides that 'The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking' [my emphasis]. On Article 17 and punitive damages see M. Clarke, *Contracts of Carriage by Air* (LLP, London, 2002), pp. 82-83. Article 29 of the *Convention for the Unification of Certain Rules for*

complicated nature of the IOSA scheme as set out in the tripartite Audit Agreement. Further, in addition to identifying the Candidate as contract principal, the Audit Agreement makes clear that the AO conducts Audit services,¹⁷⁸ that it is paid for such services by the Candidate,¹⁷⁹ and that IATA has limited obligations under the Audit Agreement.¹⁸⁰

Agreement provisions

As with the Accreditation Agreement, schedules to the Audit Agreement attach the IPM and ISM and are incorporated as an integral part of the Audit Agreement.¹⁸¹ The Audit Agreement comes into effect on the date of its execution and remains in effect until the expiration of the Audit as an instrument for IOSA Registration as such Audit expiration is set out at IPM 2.2.¹⁸² It can only be renewed by written agreement between the parties.¹⁸³

Under the Audit Agreement, the AO conducts an Audit of the Candidate and maintains an Audit Programme as set out at IPM 5.¹⁸⁴ The Candidate pays to the AO for its Audit services the Audit fee in the amount and in the manner as set out in the Agreement.¹⁸⁵ The AO and the Candidate (a) support and facilitate Audit sharing, and ensure the security and confidentiality of the information that results from Audits, as set out at IPM 6; and (b) fulfil all obligations in relation to IOSA as set out in the IPM and ISM.¹⁸⁶

IATA has limited obligations under the Audit Agreement. Those obligations are confined to (a) determination of the operational suitability of Candidate to be an Operator, for the purposes of the IOSA Registration process and, if applicable, recognition and recording of such status on the IOSA Registry, as set out at IPM 2;¹⁸⁷ (b) support for and facilitation of Audit sharing, and ensuring the security, confidentiality and integrity of the information that results from Audits, as set out at IPM 6;¹⁸⁸ and (c) administration of the IOSA programme as set out in the IPM.¹⁸⁹

International Carriage by Air, ICAO DCW Doc. No. 57 (the Montreal Convention, 1999) provides that ‘punitive, exemplary or other non-compensatory damages shall not be recoverable’; see T. Whalen, ‘The New Warsaw Convention: The Montreal Convention’, (2000) 25 *Air & Space Law*, No. 1, p. 20.

¹⁷⁸ International Air Transport Association, *supra*, note 133, Recital D and clauses 7(a)-7(b).

¹⁷⁹ *Supra*, clause 7(b).

¹⁸⁰ *Supra*, clause 7, ‘Agreement Scope: AO and Candidate’ and clause 8, ‘Agreement Scope: IATA’s Limited Obligations’.

¹⁸¹ *Supra*, clause 4.

¹⁸² *Supra*, clause 6.

¹⁸³ *Supra*.

¹⁸⁴ *Supra*, clause 7(a).

¹⁸⁵ *Supra*, clauses 7(b), 9, 10 and Schedule C.

¹⁸⁶ *Supra*, clause 7.

¹⁸⁷ *Supra*, clause 8(a).

¹⁸⁸ *Supra*, clause 8(b).

¹⁸⁹ *Supra*, clause 8(c).

Central to the Audit Agreement are provisions concerning the Audit programme.¹⁹⁰ Provisions in that regard deal with Audit Teams,¹⁹¹ preparation for the Audit,¹⁹² resources and logistical support;¹⁹³ the Audit Checklist;¹⁹⁴ the conduct of the Audit;¹⁹⁵ the IOSA Audit Report;¹⁹⁶ the Corrective Action Plan;¹⁹⁷ Audit follow-up;¹⁹⁸ closing Findings;¹⁹⁹ the IOSA Audit Report;²⁰⁰ control and surveillance matters;²⁰¹ continuous improvement;²⁰² and observation and monitoring.²⁰³

The Audit Agreement provides that IATA will implement the IOSA Registration process and establish and maintain the IOSA Registry as set out at IPM 2,²⁰⁴ and sets out provisions dealing with the IOSA Registry.²⁰⁵

The Audit has a limited period of validity and expires as an instrument for IOSA Registration 12 consecutive months from the date of the Closing Meeting and, in the event that Corrective Action in accordance with the Corrective Action Plan is not implemented by the Candidate and verified by the AO prior to such expiration date, the Audit becomes invalid as a means for the Candidate to either be added to the IOSA Registry or to renew an existing IOSA Registration.²⁰⁶

The IOSA Registration period is twenty four (24) months as set out at IPM 2.3²⁰⁷ If the Candidate is not currently registered as an Operator, IATA adds the Candidate to the IOSA Registry when all Findings, if any, have been closed through implementation of Corrective Action in accordance with the Corrective Action Plan, and such implementation has been verified by the AO as set out at IPM 5.12.²⁰⁸ The period of IOSA Registration begins on the date of the Closing Meeting and expires 24 consecutive months from the date of that Closing Meeting.²⁰⁹ If the Candidate is currently registered as an Operator, IATA will renew such IOSA Registration when all Findings, if any, have been closed as set out at IPM 5.12 prior to the expiration date of current IOSA Registration²¹⁰

¹⁹⁰ *Supra*, clauses 11-47.

¹⁹¹ *Supra*, clause 14.

¹⁹² *Supra*, clauses 15-19.

¹⁹³ *Supra*, clauses 20-23.

¹⁹⁴ *Supra*, clause 24.

¹⁹⁵ *Supra*, clauses 25-32.

¹⁹⁶ *Supra*, clauses 33-34.

¹⁹⁷ *Supra*, clause 35.

¹⁹⁸ *Supra*, clauses 36-38.

¹⁹⁹ *Supra*, clauses 39-41.

²⁰⁰ *Supra*, clauses 42-44.

²⁰¹ *Supra*, clause 45.

²⁰² *Supra*, clause 46.

²⁰³ *Supra*, clause 47.

²⁰⁴ *Supra*, clause 48.

²⁰⁵ *Supra*, clauses 49-50.

²⁰⁶ *Supra*, clause 51.

²⁰⁷ *Supra*, clause 52.

²⁰⁸ *Supra*, clause 53.

²⁰⁹ *Supra*.

²¹⁰ *Supra*, clause 54.

Under the Audit Agreement the parties support and facilitate Audit sharing and must ensure the security and confidentiality of the information that results from Audits.²¹¹ The Candidate consents to the inclusion of the IAR in the IOSA Database and, once completed and entered into that database, the IAR becomes the sole and exclusive property of the Candidate. But for provision of a copy of the IAR to relevant regulatory or judicial authorities in compliance with the applicable law(s) of its jurisdiction, the Candidate must maintain the confidentiality of the IAR and must not permit a copy of the IAR to be shared formally or informally with any other entity.²¹² However, at the option of the Candidate, the IAR, or information contained in it, may be viewed by or verbally shared by the Candidate with another party on an informal basis under the conditions as set out at IPM 6.4.3.²¹³

IATA will not grant IAR access to an Interested Party or provide access to the IAR in a manner that would put the report at risk of public release or disclosure,²¹⁴ and will provide access to an Interested Party only after the Candidate has granted authorization for such access in writing.²¹⁵ Prior to granting access to an IAR, an Interested Party enters into an agreement setting out the terms of such access.²¹⁶

As with the Accreditation Agreement, and in addition to termination of the Audit Agreement for default and in certain other circumstances prior to the expiration of the Agreement Period,²¹⁷ IATA may immediately terminate the Audit Agreement in the event that the AO ceases to provide aviation audit services.²¹⁸

Under the Audit Agreement the Candidate indemnifies IATA and the AO against claims, actions, demands, etc. arising out of or in connection with third party claims as a result of (a) the performance of Audits under the Audit Agreement by the AO or its IOSA Auditors, employees, independent contractors or subcontractors; or (b) any obligation to be performed under the Audit Agreement by IATA, the AO or its IOSA Auditors, employees, independent contractors or subcontractors except to the extent that such claims, actions, demands, etc. resulted from any act or omission done by IATA or the AO with intent to cause damage or recklessly and with knowledge that damage would probably result.²¹⁹

²¹¹ *Supra*, clause 57.

²¹² *Supra*, clause 66.

²¹³ *Supra*, clause 67.

²¹⁴ *Supra*, clause 73.

²¹⁵ *Supra*, clause 74.

²¹⁶ *Supra*, clause 75. The Audit Agreement also makes provision for, amongst other things, such matters as representations and warranties (from the AO to the Candidate and from the Candidate to the AO; clauses 83-84), intellectual property rights (clauses 85-88) and confidentiality (clauses 90-96).

²¹⁷ *Supra*, clause 97.

²¹⁸ *Supra*, clause 98.

²¹⁹ *Supra*, clause 105. The words 'with intent to cause damage or recklessly and with knowledge that damage would probably result' are taken from Article 25 of the Warsaw Convention (and see Article 22(5) of the Montreal Convention); see, *supra*, note 168. Not all of the indemnity

Further, under the Audit Agreement, the Candidate must maintain insurance policies covering the respective interests of the AO and the Candidate against all risks including liability for injury or damage caused by or arising out of or in connection with the Audit, and shall maintain (a) aviation third party, passenger, baggage, cargo, mail and general legal liability (including aviation premises legal liability) insurances for a limit not less than the limit of the Candidate's existing policy per occurrence, such cover to include war related legal liability pursuant to AVN 52D (or equivalent); and (b) all risks hull insurance (including hull war and allied risks coverage) covering its aircraft.²²⁰

The Audit Agreement's governing law and arbitration clause is also in identical terms to that of the Accreditation Agreement.²²¹

5. Summary and conclusions

This paper has presented an analysis of the background to and the drafting and negotiation of the IOSA standards and discussed the contractual framework of the IOSA programme. It has set out the provisions of the core IOSA documentation, the IPM and the ISM, such provisions incorporated in the Accreditation and Audit Agreements. It has also emphasized that the Audit Agreement clearly identifies the contract relationships in that agreement so that, as far as possible, the parties can be regarded as beneficiaries of the Warsaw Convention liability protections. Through the analysis and discussion presented here it is hoped that the paper can assist in an understanding of the IOSA programme and its legal aspects.

The paper has argued in part that the IOSA programme agreements, which represent a private law solution to the airline safety audit problem, may influence the development of public law in this area through amendment and development of existing airline safety standards at the international and State levels as a result of the unique, standardized and consistent IOSA programme.

It has also been shown here that IOSA's standards can be used by States to develop and improve their own airline safety standards. States and State agencies anticipate using IOSA to improve such standards; it appears that higher safety standards are being achieved not by State regulators but by programmes such as IOSA. In this way IOSA represents, together with other non-government initiatives identified in this paper, the changing role of government in civil aviation: Reform, development and change in airline safety standards can and is being driven increasingly by coalitions and groups of non-State actors (such as IOSA); increasingly, government reacts and responds.

²²⁰ provisions in the Audit Agreement are discussed in this paper, and clause 105 is set out only in outline form; it is not complete. Clauses 106-107 also deal with indemnity matters. *Supra*, clause 108. Given the complexity of the insurance provisions in the Audit Agreement, not all such provisions are discussed in this paper. Clause 108 is set out only in outline form, and is not complete. Clauses 109-110 also deal with insurance matters.

²²¹ *Supra*, clauses 118-119.