



## INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

### AMENDMENT TO ARTICLE 10 OF THE TOKYO CONVENTION 1963

(Presented by the United Arab Emirates (UAE), the International Air Transport Association (IATA), the International Federation of Air Line Pilots' Associations (IFALPA) and the International Union of Aerospace Insurers (IUAI))

#### 1. INTRODUCTION

1.1 This Working Paper proposes an amendment to the draft Protocol set out in DCTC Doc No. 3 to introduce an additional paragraph to article 10 of the Tokyo Convention 1963 (“the Convention”).

#### 2. DISCUSSION

2.1 Article 6 of the Convention provides that “*the aircraft commander may impose ... reasonable measures including restraint which are necessary*” to deal with an unruly passenger incident, upon condition that “*he has reasonable grounds to believe that a person has committed, or is about to commit ... an offence or act*” which jeopardises the safety of the aircraft or of persons or property therein or good order and discipline on board.

2.2 In this scenario, the Convention provides that:

*“Neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceedings on account of the treatment undergone by the person against whom the actions were taken.”*<sup>1</sup>

2.3 The original drafting of article 6 was the subject of much discussion at the Tokyo Diplomatic Conference and, in particular, the standard to be adopted in order to assess reasonableness. Whether “*reasonable*” and “*necessary*” provide an element of objectivity and subjectivity respectively when determining the aircraft commander’s conduct has remained open to the interpretation of national courts. Therefore, one must consider the extent to which it was truly intended to avoid second-guessing the actions of the aircraft commander under article 6 when he or she deals with emergency situations in a controlled environment, without necessarily having complete information.

---

<sup>1</sup> Article 10.

2.4 That the text that was finally adopted represents something of a compromise would appear to be evidenced by a lack of uniformity in the approach taken around the world.<sup>2</sup>

2.5 The case of *Eid v. Alaska Airlines*<sup>3</sup> is the leading authority from a superior court in any jurisdiction on the interpretation of articles 6 and 10 of the Convention. In that case, the plaintiffs filed suit against the airline for damages for defamation and loss of opportunity. The defendant airline applied for summary judgment on the basis of article 10 of the Convention. The plaintiffs claimed that the actions of the aircraft commander were not reasonable and that if he did not have “reasonable grounds” then the provisions of article 10 of the Convention could not apply. The defendant argued that the aircraft commander, in exercising his powers under article 6, was entitled to protection from proceedings unless his actions were arbitrary or capricious. The court of first instance granted the defendant's motion for summary judgment and the plaintiffs appealed.

2.6 In a 2-1 decision, the Court of Appeals reversed the first instance decision. The Court held that the Convention had adopted a reasonableness standard as argued by the plaintiffs. This standard is objective, in that an aircraft commander should not simply accept, at a face value, the reports of his crew. Rather, he should be expected to make some sort of evaluative enquiry about the behaviour of the passengers in question to determine whether reasonable grounds exist to use the powers conferred by the Convention. It was open, the Court observed, for a jury to find that the aircraft commander, in immediately diverting the aircraft without further enquiry, had acted unreasonably.<sup>4</sup>

2.7 If the Diplomatic Conference, aware of the decision in that case, considers the question of protection from legal proceedings and chooses not to make any amendments to these provisions, it is likely that this informed choice will be taken as an affirmation that the objective standard is the preferred standard under which the actions of an aircraft commander are to be judged.<sup>5</sup>

2.8 The Appendix sets out some further analysis of the actual or likely interpretation of article 6 in a number of different jurisdictions around the world. The divergence in the case law on this issue clearly demonstrates the difficulty that courts have had in applying this key provision of the Convention.

2.9 In the view of the co-signatories of this Working Paper, the often stated justification for the deployment of in-flight security officers (IFSOs), that is, the tactical necessity for quick judgments and responsive action, in reality supports the proposition that the aircraft commander is in an imperfect position to assess conditions in the passenger cabin from behind the cockpit door.

2.10 We consider that protection from legal proceedings for the airline and its employees under article 10 of the Convention is critical if crews are to have the confidence to deal with any challenge to safety and security on board an aircraft. The legal standard to be applied under articles 6 and 10 of the Convention must be clarified.

---

<sup>2</sup> See Appendix.

<sup>3</sup> *Eid & Ors v Alaska Airlines Inc* 621 F.3d 858 (9th Cir. 2010); 2010 US App LEXIS 15777.

<sup>4</sup> The defendant's petition to the Supreme Court of the United States was refused. 131 S. Ct. 2874 (2011). We understand that the defendant airline was ultimately successful before a jury at a trial of the facts. See further *Ginena v. Alaska Airlines, Inc.*, 04-CV-1304-MMD-CWH (Mar. 4, 2013). The jury found that, as a matter of fact, the aircraft commander's actions were reasonable.

<sup>5</sup> Under principles of national law in some jurisdictions, the decision of a legislative body to leave a particular precedent ‘undisturbed’ will raise a presumption that the body in question considered the case law principle to be correct.

2.11 We believe that article 10 should be amended to more clearly reflect the highly deferential standard evidenced in the 1963 drafting materials for the Convention.<sup>6</sup>

2.12 It is proposed that the Diplomatic Conference adopt an additional paragraph to article 10 of the Convention as follows:

“Article 10*bis*

*The aircraft commander will be accorded a high degree of deference in any review of actions taken by him or her in accordance with this Convention and any actions taken shall be assessed in light of the facts and circumstances actually known to him or her at the time that those actions were taken.”*

### 3. CONCLUSION

3.1 The co-signatories of this Working Paper consider that the aircraft commander should be given a wide degree of subjective deference in any review of his decisions after the fact. This is particularly so, given the special constraints involved in judging a factual situation from behind a secure cockpit door and the limitations, for security reasons, on the aircraft commander’s ability to leave the cockpit to intervene in such incidents.

3.2 We urge the Diplomatic Conference to adopt a Protocol which reflects the proposed amendment to article 10 of the Convention set out above.

-----

---

<sup>6</sup> International Civil Aviation Organisation, Minutes, International Conference on Air Law, Tokyo, Aug.-Sept. 1963, Doc 8565-LC.152-1 at 155.

APPENDIX

FURTHER ANALYSIS OF ARTICLES 6 AND 10<sup>1</sup>

Argentina	<p>While there are no decisions directly on point, when an unruly passenger arrives in Argentina, generally the Aeronautical Police at the airport will immediately report the case to the Criminal Federal Court at Lomas de Zamora. We are unaware of any cases in which a judge imposed liability upon the air carrier for delivering an unruly passenger and it appears that deference would be afforded.</p>
Brazil	<p>There are many examples of where Brazilian courts have favoured domestic legislation over international conventions. Moreover, there is a widely held view that Brazilian courts will tend to favour the interests of consumers over those of service providers.</p> <p>In a Brazilian case that mentioned the Tokyo Convention but was not ultimately decided on that ground, the court noted that the Tokyo Convention "<i>endorses and supports</i>" the authority of the flight crew, who under Brazilian national law have powers akin to police officers while dealing with certain issues on board an aircraft. However, the court ultimately found for the consumer (the passenger), to the detriment of the airline, even though it involved issues of security and safety on board an international flight. Accordingly, it is likely that an air carrier in Brazil would be held to a high duty of care and afforded limited deference in such situations, in line with the judgment in <i>Eid v. Alaska Airlines</i>.</p> <p>Also, it should be noted that the Brazilian Aeronautical Code (BAC), which governs domestic carriage, contains similar provisions to the Tokyo Convention (Articles 167, 168). The BAC authorises the aircraft commander to, <i>inter alia</i>, disembark unruly passengers and take steps necessary to protect the aircraft and other passengers. In another case, this power was held to have been properly exercised when a passenger was disembarked after acting aggressively towards the flight crew.</p>
Belgium	<p>A Belgian court will infer a subjective reasonableness standard under Article 6 of the Convention in order to determine whether or not an aircraft commander may benefit from the protection of Article 10 of the Convention.</p> <p>Furthermore, Article 27 <i>bis</i> of the Law of 27 June 1937<sup>2</sup> provides that, without prejudice to the provisions of the Tokyo Convention, "<i>the commander may take, during the flight, every reasonable measure including potential restraint measures, which <b>he deems</b> [emphasis added] appropriate to prevent or to avoid the committing of an act prohibited pursuant to Article 27 from being continued.</i>"</p>

<sup>1</sup> Source: This appendix has been compiled on the basis of informal legal opinions obtained from external counsel held on file with IATA and IUAI.

<sup>2</sup> Amending the 16 November 1919 Act.

Colombia	<p>In fields of law other than aviation, it has been asserted that "reasonableness" and "necessity" are vague terms that may be open to interpretation dependant on the facts. One can therefore assume that a judicial review of the pilot's conduct would take place.</p> <p>A recent Constitutional Court decision suggests that the reasonableness standard in Article 6 is likely to be interpreted objectively. The Court considered the actions taken by an airline against a passenger who was involved in an altercation whilst boarding the aircraft. The Court considered that the essential public utility of air services was subject to constitutional fundamental rights of the passenger which could not be usurped by the discretion afforded to the aircraft commander under the Tokyo Convention. In brief, the aircraft commander did not have unlimited authority to act in the event of an unruly passenger.<sup>3</sup></p>
Ecuador	<p>Article 10 does not appear to provide for absolute immunity under the general rules pertaining to contract interpretation in Ecuadorian law because it requires that measures be taken where well-founded reasons exist “<i>subject to the provisions of the Convention</i>”.<sup>4</sup></p> <p>However, the aircraft commander may benefit from the principles governing the proportionality test in the Ecuadorian Constitution that will, in effect, reverse the burden of proof for justifying the well-founded reasons in favour of the aircraft commander.</p>
France	<p>While there are no French decisions interpreting the aircraft commander's powers under the Tokyo Convention, there is a decision from the Paris Court of Appeal (though not published nor confirmed by other decisions) which interpreted the aircraft commander's powers based on the former “<i>Code de l'aviation civile</i>”. The decision can be read as giving deference to the aircraft commander, as long as he or she does not abuse his or her powers, especially as the Court pointed out that “<i>the powers of assessment and decision belonged to the aircraft commander specifically</i>”. Since the wording of the former French rule resembles Article 1§1 of the Tokyo Convention, it is reasonable to suggest that a court would look to this decision when interpreting the Convention.</p> <p>However, the subject matter of this decision involved powers of the aircraft commander with regard to general security on board the aircraft and not disruptive passengers in particular. Moreover, this decision is quite isolated, has not been published and has been neither confirmed nor overruled by other decisions.</p>
Germany	<p>To date, German courts do not appear to have interpreted article 6 of the Convention but it is likely that they would afford a wide degree of subjective deference to the aircraft commander in his or her decision.</p> <p>The Convention itself calls for “reasonable” grounds. The aircraft commander</p>

<sup>3</sup> T-987 of 2012.

<sup>4</sup> Article 10.

	<p>has the authority to maintain safety and order on board. Consequently he or she has powers akin to those of a police officer. Police officers are allowed to impose reasonable measures, including restraint, which are necessary to prevent a current danger, whether real or apparent. Where a more capable and more prudent police officer would not reach the same conclusion under the same circumstances, an ‘apparent danger’ will be treated as a ‘real danger’. Therefore a wide margin of appreciation must be afforded to the aircraft commander’s consideration of what constitutes a current danger.</p> <p>In Germany this issue has to be deducted <i>ex-ante</i> from the view of the aircraft commander in that situation. If it turns out that the aircraft commander, in fact, lacked reasonable grounds to believe that a person has committed or was about to commit an offence on board, it has to be assessed whether he could have avoided this mistaken apprehension.</p> <p>It is therefore not certain that German courts would have interpreted Articles 6 and 10 in the same manner as the US court in <i>Eid v. Alaska Airlines</i>. Of course, one could say that the aircraft commander did not have “<i>reasonable grounds to believe</i>” that there was a serious problem in First Class as he was not aware of all of the facts. However, it has to be taken into account that the aircraft commander’s assessment of the conditions in the passenger cabin is conducted from behind the cockpit door. Taking the intent and purpose of the Convention into consideration, namely, to ensure safety and order on board, it can be assumed that the aircraft commander would not be expected to make some sort of evaluative enquiry about the behaviour of the passengers to determine whether reasonable grounds did exist to use the powers conferred by the Convention. It appears inconceivable that a court would have denied the “<i>reasonable grounds</i>” without having clarified what really happened on board. If there was a real danger, the court would likely not dispute the existence of reasonable grounds; if it turned out to be an apparent danger, it is unlikely that this finding would differ substantially.</p>
Indonesia	<p>There is no overarching principle of "<i>reasonable grounds to believe</i>" in Indonesian law. As such, it is difficult to determine how an Indonesian court would interpret "<i>reasonable grounds to believe</i>" in the context of the Tokyo Convention.</p>
Japan	<p>As with other jurisdictions, it is difficult to predict which standard a Japanese court would apply in assessing whether the commander had "<i>reasonable grounds to believe</i>" because there is no precedent case law dealing with this issue in Japan.</p> <p>There is a certain degree of likelihood that a Japanese court would apply a standard akin to fault/negligence because Japanese judges, especially those in the lower courts, are generally reluctant to apply a different standard.</p> <p>However, there also is a possibility that a court would review the captain's exercise of authority under the Tokyo Convention with a certain degree of deference. The Japanese Civil Aeronautics Act provides in Articles 73 and 74 that the pilot in command, when he or she has reasonable grounds to believe that a person on board the aircraft has committed or is about to commit any safety impeding act, may impose upon such a person restraint or take other necessary measures to deter the act, or disembark the offending person, within the limit necessary for the preservation of safety of the aircraft, protection of any other person or property therein, or maintenance of order or discipline on board.</p>

Malaysia	There is limited relevant case law but it generally suggests that a reasonable ground of belief would be underpinned by " <i>good and cogent reasons</i> ". In such a case, it would appear that the court would afford the aircraft commander some deference, so long as there were good and cogent reasons for his or her decision.
Middle Eastern jurisdictions	There are no cases in the Middle East in which the courts have interpreted the Tokyo Convention. However, Middle Eastern courts tend to adopt a basic approach. Courts would likely use a fault or negligence standard in interpreting "reasonable grounds" but would give deference to the commander.
People's Republic of China	<p>Because China has a civil law legal system, it does not follow the principle of binding case precedents. Moreover, China has adopted a method of "transformation" with respect to the interpretation of international conventions. This means that a party cannot directly quote from the Convention and instead, must use the domestic law to support their position.</p> <p>The Civil Aviation Law of the People's Republic of China ("CAL") adopts certain principles of the Tokyo Convention. Clause 46 of the CAL provides that "<i>on the premise of ensuring flight safety, the captain of the aircraft in flight has the right to take necessary and appropriate steps against any acts which would damage the aircraft, disturb the order in the aircraft or endanger the safety of the people and property on board</i>". There is no definition of "<i>necessary and appropriate steps</i>" in the law.</p> <p>Given the lack of reported case law, it is difficult to determine how a Chinese court would interpret "<i>reasonable grounds to believe</i>". However, Clause 46 of the CAL also states "<i>for the safety of the aircraft and the people on board, the captain has the right to make special arrangements in related to the aircraft in case of emergency</i>". Accordingly, a court may give deference to the aircraft commander in assessing whether the aircraft commander had "<i>reasonable grounds to believe</i>" action was required.</p>
Singapore	<p>While there are no cases interpreting the Tokyo Convention and "<i>reasonable grounds to believe</i>", Section 26 of the Singapore Penal Code provides: "<i>A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise.</i>"</p> <p>In reviewing how courts in Singapore interpret "<i>reason to believe</i>" as guidance on the Tokyo Convention issues, the Singapore High Court has held that "<i>reason to believe</i>" involved:</p> <p style="padding-left: 40px;"><i>"a lesser degree of conviction than certainty but a higher one than speculation. The test is whether a reasonable person, in the position of the [accused] (i.e. including his knowledge and experience), would have thought it probable that the property he retains is stolen property... The test of 'reason to believe' is hence objective but conducted from the vantage point of someone with the [accused]'s knowledge and experience."</i> [original emphasis]</p> <p>This decision was referred to with approval in another decision of the Singapore High Court which held:</p> <p style="padding-left: 40px;"><i>"In applying the test [the 'reason to believe' test], the court must</i></p>

	<p><i>assume the position of the actual individual involved (i.e. including his knowledge and experience), but must reason (i.e. infer from the facts known to such individual) from that position like an objective reasonable man.”</i></p> <p>Based on case law, it appears that Singapore would evaluate a person's actions from the perspective of a reasonable person, albeit a reasonable person with the subject person's knowledge and experience. Moreover, it would also appear that if an aircraft commander undertook some investigations before making the decision to divert or delay a flight, those investigations would be taken into account by a court and the commander may therefore be afforded some deference.</p>
Spain	<p>When on board an aircraft, the aircraft commander is deemed to be an enforcement officer of the public authority and may act as any member of the police department.<sup>5</sup> He or she may adopt restraining and repressive measures against a passenger in the event that any infringement of a statute or law is committed on board the aircraft.</p> <p>In determining whether an aircraft commander has acted in an <i>ultra vires</i> manner, Spanish courts are likely to be mindful of safety and security concerns and, as such, deferential to an aircraft commander's actions where he or she has acted to avert actual and clear danger.</p>
Thailand	<p>Thai Courts are likely to be deferential to the actions of an aircraft commander, owing to the following national regulations:</p> <ul style="list-style-type: none"> <li>• Regulation No. 54 of the Air Navigation Act prohibits passengers from insulting or causing fear to the aircraft commander and the crew. Passengers are also required to refrain from smoking, getting drunk, quarrelling or making other loud noises and must comply with the reasoned orders of the aircraft commander.</li> <li>• Section 422 of the Thai Civil and Commercial Code attributes a presumption of fault to a perpetrator whose infringement of a statutory provision intended for the protection of others results in damage.</li> <li>• The Penal Code of Thailand provides immunity for any person who acts to prevent imminent danger to him or others, provided that the act is not carried out in excess of what is necessary under the circumstances.<sup>6</sup> Furthermore, section 232 of the Penal Code, specifically provides that endangering any person on an aircraft is an offence liable for imprisonment.</li> </ul>
The Netherlands	<p>The Dutch Supreme Court has not yet adopted a position on the immunity for actions of the crew when dealing with an unruly passenger, but indications in lower courts suggest that the conduct of crew would be subject to a test of unreasonableness and that the aircraft commander could only be held liable for damages if the measures taken were “disproportionate”. Dutch Courts generally apply a broad standard to the concept of reasonableness.</p>

<sup>5</sup> Sections 60, 142 and 143 of the Air Navigation Act, 1960.

<sup>6</sup> Sections 67 and 68.



United Kingdom	<p>Case law suggests that UK courts would look at various factors in order to determine how to decide "<i>reasonable grounds to believe</i>" including the Act itself: the Civil Aviation Act 1982, and how that would be interpreted under English law; the Tokyo Convention and the intention behind the Articles; foreign decisions interpreting the relevant provisions; and the academic commentary of such cases. The decision in <i>Eid v Alaska</i> has received a lot of commentary by academics, most of it negative, while the dissenting judgment by Judge Otero has been well received by academics.</p> <p>It is unclear what the courts would decide, but looking at all the information which is available, including ICAO resolutions, it is likely that the courts would take the view that the standard to be applied is not based on an objectively reasonable standard akin to negligence, but one that affords deference provided a commander's actions are not "<i>arbitrary or capricious</i>".</p> <p>Although the Act does not deal with immunity from prosecution in the same way as in Article 10 of the Tokyo Convention, S.94 of the Civil Aviation Act states in 94(1) that "<i>The provisions of subsections (2) to (5) below shall have effect for the purposes of any proceedings before any court in the United Kingdom</i>". It is clear from this section that the Act was designed to give some deference to the aircraft commander in assessing whether the commander had "<i>reasonable grounds to believe</i>" action was required.</p>
Venezuela	<p>We note that while the English version of Article 6 of the Tokyo Convention refers to "<i>reasonable grounds to believe</i>", Article 6 of the Spanish version of the Tokyo Convention refers to "<i>razones fundadas para creer</i>", which means that the Captain must have "grounded reasons" before proceeding to impose any measure (medidas razonables) upon an unruly passenger.</p> <p>The Spanish wording of Article 6 seems to require that in order for an aircraft commander to receive immunity, he must have "grounded reasons" prior to imposing any measure upon a disruptive/unruly passenger. If the term "reasonable grounds" reflected in the English version of the convention seems to give the impression that the aircraft commander needs to have substantial basis for his belief before acting, that would be even more the case with the term used in Article 6 of the Spanish version where the requirement of substantial basis is explicitly contained in the language of Article 6 when it refers to "grounded reasons".</p> <p>Based on the above, unless the circumstances clearly prove that the reasons under which the aircraft commander applied the powers granted by the Tokyo Convention were clearly grounded, in which case deference may be given, a Venezuelan court would likely interpret "<i>grounded reasons to believe</i>" using a standard akin to fault or negligence.</p>