



INTERNATIONAL CONFERENCE ON AIR LAW

(Beijing, 30 August – 10 September 2010)

ICAO LEGAL COMMITTEE¹

OPTIONS PAPER FOR AMENDMENT OF ARTICLE 4 OF THE MONTREAL CONVENTION

(Presented by the Rapporteur of the Legal Committee)

1. BACKGROUND

1.1 During consideration of the consequential amendments to Article 4 resulting from the inclusion of additional principal offences in the Montreal Convention, the issue concerning the application of the Convention to leased aircraft was discussed at the Legal Committee meeting in September 2009. It was brought to the Committee's attention that in the case of purely domestic flights the Convention applied where the aircraft was leased to a State other than the State of Registration whereas the Convention did not apply to such flights in the State of Registration. It was agreed that this issue should be further considered at the Diplomatic Conference.

2. PURPOSE OF ARTICLE 4

2.1 Article 4 of the Montreal Convention determines the situations as to when the Convention applies. The Article provides that the Convention applies not only to international flights but also to domestic flights under certain circumstances. The intention is to cover the field where there is a possibility of an international factor. This includes flights which exercise own stop over rights² in another State; that is, where an international flight departs from State A and stops at two destinations within State B. The Convention would apply whether or not the offence was committed on the leg of the flight from State A to State B or on the leg between the two points in State B. Article 4 of the Montreal Convention was based on Article 3 of the Hague Convention where it was clearly intended that the Convention cover not only international flights but also domestic flights where such flights had been hijacked and the actual place of landing was in another State.

¹ In these Rules of Procedure, the use of the male gender should be understood to include both male and female persons.

² The right of a carrier from one country to carry its own international passengers between two points within another country.

2.2 As a result of the current provisions in Article 4, where an airline of one State has leased a foreign registered aircraft to operate purely domestic flights within that State both Montreal and Hague Conventions apply where the State of registration is a State party. The Convention would not apply to aircraft operating purely domestic flights in the State of Registration. This paper considers options to exclude the application of the Convention to dry-leased aircraft operating purely domestic flights to ensure that where there is no international factor, the domestic law of the State where the aircraft operates would apply and not the Convention.

3. APPLICATION OF THE CONVENTION TO DOMESTIC FLIGHTS

3.1 Article 4 of the Montreal Convention provides that the Convention covers not only international flights but also applies to domestic flights if:

- a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft, or
- b) the offence is committed in the territory of a State other than the State of registration of the aircraft.

3.2 Article 3 of the Hague Convention adopts the same approach and similar wording to the Montreal Convention in establishing application of the Convention to domestic flights.

3.3 The following is an example of how these provisions would operate in relation to the situation of foreign leased aircraft operating domestic flights. Qantas (an Australia airline) leases an aircraft which is registered in New Zealand to run a domestic flight in Australia between Canberra and Sydney. The Montreal Convention would apply to this domestic flight. Pursuant to Article 5 of the Montreal Convention, New Zealand as the State of Registration is able to exercise jurisdiction over an incident occurring in relation to that flight. This is despite the fact that the incident occurred on Australian territory, the aircraft was operated by an Australian airline and the incident involves Australian nationals. It should be noted that the Convention would not preclude Australia from exercising jurisdiction but that the application of the Convention itself means that Australia would be also subject to the Convention in relation to such an incident rather than the exclusive application of its domestic law.

3.4 On the other hand if Australia was the State of Registration and the same incident occurred on the same flight between Canberra and Sydney, the Convention would not apply. Australian domestic law only would apply.

3.5 The Convention also applies in relation to domestic flights where the offender is found outside of the territory of the State of Registration. This provision is found in Article 4(3) of the Montreal Convention and in Article 3(5) of the Hague Convention. The practical effect of these provisions is to ensure that the Convention applies to purely domestic flights where there is no other international element other than that the offender is located in a territory other than the territory of the State of Registration.

4. DEVELOPMENT OF THE CONVENTIONS

4.1 During development of the Conventions, the Diplomatic Conference for the Hague Convention first considered this issue in the context of hijacking of aircraft. It was considered that where aircraft are hijacked it is impossible to determine where they might land and that the Convention should apply where the aircraft lands in another State even though the flight was scheduled as a domestic flight at the point of take-off.

4.2 Even at that time it was brought to the attention of the Diplomatic Conference there was an increasing practice in civil aviation to lease aircraft which were registered in States other than the State of operation. It was therefore proposed that paragraph 3 of Article 3 of the Hague Convention should be reworded to "ensure that the Convention would apply only if the place of take-off and the place of landing of the aircraft on board which the offence was committed were not situated within the territory of the same Contracting State."³ This proposal was rejected by States which whilst concerned that the Convention was not intended to cover a purely domestic situation were also very concerned that there should be no loopholes in the Convention that offenders might escape from being brought to justice. For example if the proposal had been accepted the Convention would not apply in the event of an aircraft being hijacked between two stops in a country other than that of its registration if the hijackers were apprehended in the country of the offence.

4.3 Furthermore an example was given where an offence committed by a hijacker of nationality A against an aircraft whose State of Registry was A which took off in the State of B and landed in A would be covered by the Convention; but an offence committed by a hijacker of nationality B against an aircraft whose State of Registry was A and which took off and landed in that State would not be covered, although its connotations were more international.⁴

4.4 This issue was also considered in the context of the development of the Montreal Convention where States debated a proposal to include a provision regarding the non-applicability of the Convention to cases where all the elements were confined to the same State. This proposal was also rejected. It was considered unacceptable that an offender against an aircraft engaged in a purely domestic operation who managed to escape to another State with which no extradition treaty existed, could be completely safe because the offence was not considered to have an international element.⁵ It was also considered that if the Convention were to be applied in the case of certain domestic flights and it was concluded that the Convention added nothing to national legislation in such instances it was unnecessary to say that the Convention should not apply where all the elements were confined to the same State.⁶

4.5 The debate at the Diplomatic Conference for the Montreal Convention also considered the inclusion of the 'international element' and why it needed to differ from that in the Hague Convention. It was considered that the language in the Hague Convention could not be transposed to the Montreal Convention because the Convention dealt with offences not always committed on board an aircraft in flight. For example, the Convention dealt with offences such as the destruction of an aircraft or the placing of a bomb on the aircraft, in which case the aircraft involved might not take off at all.

³ See debate during the Fifth Meeting of the Commission of the Whole, Saturday 5 December 1970 in particular the proposal made by the Delegate of Barbados.

⁴ See comments by the Delegate of Korea, Fifth Meeting of the Commission of the Whole, Saturday 5 December 1970.

⁵ See debate at the Twentieth meeting of the Legal Committee, Monday 12 October 1970.

⁶ See comments by the Delegate of Spain, Twentieth meeting of the Legal Committee, Monday 12 October 1970.

Although States were fully aware that in some circumstances, the Convention would apply to offences concerning purely domestic flights, including in the case of leased aircraft operating on domestic flights outside the State of registration of the aircraft they agreed the text in Article 4 of the Montreal Convention that the Convention should apply in those circumstances.⁷

4.6 The application of the Convention as set out in Article 4 of the Montreal Convention needs to be considered in conjunction with the provisions on jurisdiction in Article 5 of the Convention.

5. APPROACHES TO JURISDICTION

5.1 Article 5 of the Montreal Convention requires States Parties to establish jurisdiction over the offences established under the Convention in the following cases:

- a) when the offence is committed in the territory of that State;
- b) when the offence is committed against or on board an aircraft registered in that State;
- c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; and
- d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his or her principal place of business or, if the lessee has no such place of business, his or her permanent residence, in that State.

5.2 It is also proposed to add an additional mandatory jurisdiction ground of when the offence is committed by a national of that State as well as two optional jurisdiction grounds of when the offence is committed against a national of that State and when the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.

5.3 Where the Conventions applies, both Conventions require States Parties to exercise jurisdiction over the offences created under the Convention in the situations articulated under Article 5 of the Montreal Convention and Article 4 of the Hague Convention.

5.4 During development of the Conventions a number of States raised the issue concerning the application of the Conventions and exercise of jurisdiction of the Conventions in the case where the aircraft was leased to provide services in a State which was not the State of Registration. A paper was prepared and it was agreed that both Conventions should ensure that jurisdiction can be exercised by a State, which is not the State of registration of the aircraft, where an offence is committed against an aircraft leased without crew to a lessee who has his or her principal place of business or permanent residence in that State. The Article recognises that the State of registration is not in all circumstances the appropriate State to exercise jurisdiction. To rely solely on registration as the basis for jurisdiction, would exclude the jurisdiction of those States which in reality have a closer nexus to the offence. However, the Convention would apply where the aircraft was leased including to purely domestic flights within the State where the aircraft was leased.

5.5 It should also be noted that Article 4 expressly provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

⁷ See discussion at Fourteenth Meeting of the Commission of the Whole, Saturday 18 September 1971.

5.6 Where a State is party to the Convention its domestic legislation will include the Convention offences. The State where the aircraft is operating will have jurisdiction over the offence in relation to its domestic criminal jurisdiction as well as under the Convention either in circumstances where the offence has occurred in its territory or where the aircraft on board which the offence has been committed lands in the territory with the alleged offender still on board. Although the State of Registration will also have jurisdiction under the Convention the priority of jurisdiction is likely to be accorded to the State where the offender is found and where the bulk of the evidence is located which in these circumstances would be the state where the aircraft was operating rather than the State of Registration.

5.7 In this respect it is important to note that the State where the leased aircraft operates has jurisdiction over the offender. That jurisdiction however is not exclusive as the State of Registration would also have jurisdiction over the offender. In practice the State where the aircraft operates would be the State that exercises its jurisdiction where an offence occurred. The State of Registration is only likely to exercise jurisdiction in circumstances where the State where the aircraft operated did not submit the offender for prosecution and would be required to extradite the offender to the State of Registration.

5.8 The key issue to be resolved in relation to leased aircraft is not so much whether or not the State where the leased aircraft operates has jurisdiction but the application of the Convention itself. The issue is whether or not the Convention should apply to a leased aircraft operated for domestic flights simply because the leased aircraft is registered in another State instead of the State in which it is operated.

5.9 In considering this issue it is also necessary to examine the term ‘State of registration’ and the role that State plays given modern commercial practices.

6. CONCEPT OF ‘STATE OF REGISTRATION’ FOR AIRCRAFT LEASED FOR DOMESTIC AIR SERVICES

6.1 Article 17 of the 1944 *Convention on International Civil Aviation*, signed in Chicago (the Chicago Convention), provides that an aircraft will have the nationality of the State in which it is registered. The Convention entails certain rights and responsibilities to the State of registration to ensure the development of international civil aviation in a safe and orderly manner.⁸ In the late 1970s, early 1980s, it became apparent that the State of registration did not necessarily have effective regulatory control over its registered aircraft. Leasing arrangements, charters, interchange of aircraft and other commercial arrangements, made the term ‘State of registration’ inadequate in identifying the State which effectively exercised regulatory control over the aircraft. For instance, there exist a range of commercial arrangements under which aircraft registered in one State can be wet or dry leased⁹ to an airline operating in another State. Depending on the commercial arrangements in place, the airline selling the tickets may not be operating the aircraft. Additionally, regulatory oversight could be split between the regulatory bodies of two different States.

6.2 To reflect these commercial realities, the Chicago Convention was amended in 1980 to include Article 83 *bis*. Article 83 *bis* allows certain functions and duties of the State of registration to be transferred by agreement to the State of the operator of the aircraft.¹⁰ These include obligations under Articles 12, 30, 31 and 32 of the Chicago Convention. Under such circumstances there is little connection

⁸ Preamble to the Chicago Convention.

⁹ Wet leasing involves the lease of an aircraft with crew. Dry leasing involves the lease of an aircraft without crew.

¹⁰ See Article 83 *bis* of the Chicago Convention, which was included pursuant to an amendment to the Convention by the 23rd Session of the Assembly on 6 October 1980. The amendment came into force on 20 June 1997.

with the State of Registration which does not exercise either administrative or operational control over the aircraft. In light of these developments and the frequency with which this type of arrangement takes place the application of the Convention in relation to purely domestic flights should be reassessed.

6.3 Where an offence takes place in relation to an aircraft carrying out air services between two points in one State, with no connection to an international flight, and the offender is found in the territory of that State the offence is not of an international nature but rather a purely domestic criminal offence and should be regarded as such. In those circumstances there is no policy imperative justifying the application of the Convention. In fact, it could be argued that the application of the Convention in those circumstances is a case of international law infringing upon domestic sovereignty.

6.4 Where an offence is committed on board a dry leased aircraft engaged in a purely domestic flight in a State that is not the State of Registration, the offence is likely to relate to the operational activities of that dry-leased aircraft in the State where it operates or aimed at the nationals or interests of that State. The State where the aircraft operates will thus have the greater interest in exercising jurisdiction over such an offence compared with the State of registration. This is in contrast to the case of a wet-leased aircraft where the flight crew on board would have to be licensed by the State of Registration. An offence committed on a wet-leased aircraft is also likely to be committed not only against nationals of the operating State but also against the nationals of the State of Registration. In this case, there is likely to be stronger justification for the Convention to apply.

7. DRAFTING OPTIONS

7.1 The following proposes two drafting options to amend the Conventions. These options would ensure that where a foreign registered aircraft is dry-leased to operate purely domestic routes within a State and the offender is found within the State where the aircraft operates the Convention would not apply.

7.2 To ensure that the Convention continues to apply in the same way to any circumstance other than a purely domestic flight operated in a State other than the State of Registration it is necessary to ensure that the following factors are taken into account:

- a) the aircraft is a dry-leased aircraft;
- b) the aircraft is operating a domestic flight in a State that is not the State of Registration;
- c) the take-off and landing actual and intended are all in that same State; and
- d) the domestic flight is not part of an international flight (ie not utilising an own stop over right).

8. OPTION 1

8.1 Article 4, new paragraph 3bis

8.1.1. 3bis. Notwithstanding paragraph 2 of this Article, in the cases contemplated in subparagraphs (a), (b), (c), ~~and (e)~~, (f), (g) and (h) of paragraph 1 of Article 1, this Convention shall not apply to a dry-leased aircraft engaged in a domestic flight where:

- a) the flight that aircraft operates is within the territory of a single State; and

- b) the places of take-off and landing, actual and intended of the aircraft are situated within the territory of that State and that State is not the State of registration.

Unless the offender or the alleged offender is found in the territory of a State other than that State.

8.2 This option makes it clear that the carve-out from paragraph 2 only applies to a dry-leased aircraft engaged in a domestic flight and that the aircraft is only providing services within the territory of a single State. This ensures that leased aircraft providing an international flight with a domestic leg do not come within the exception of paragraph 3*bis*. Sub-paragraph (b) makes it clear that a domestic flight is where the places of take-off and landing, actual and intended of the aircraft are situated within the territory of the same State. This exception only applies when the domestic flight is in a State which is not the State of Registration. Paragraph 2 of Article 4 continues to apply to the State of Registration.

8.3 The draft text does not include 'the offence was committed in or' as does paragraphs 3 and 4 of Article 4 of the Montreal Convention because the text of the exception in the new paragraph 3*bis* makes it clear that the principal offence could only occur in the territory of the State where the leased aircraft was providing air services.

8.4 Paragraph 6 of Article 4 should remain as drafted and should not refer to paragraph 3*bis* if this option is agreed. That paragraph has no application to a carve-out of the application of the Convention but rather refers to the fact that where the Convention does apply in relation to principal offences it also applies in relation to the ancillary and inchoate offences.

8.5 The effect of this option is to carve-out from the application of the Convention purely domestic flights. Hence, it would not apply to aircraft leased to an operator which provides an international service with a domestic leg, for example, an aircraft leased to an Australian operator from a New Zealand operator. The Convention would still apply to each of the legs where the flight was from Beijing to Brisbane and then to Sydney. If the aircraft was registered in Australia the Convention would apply if the offence were committed on the Beijing to Brisbane leg but would not apply where the offence was committed between Brisbane and Sydney.

9. OPTION 2

9.1 Leave Article 4 as it is currently drafted and add the following text to Article 9:

Article 9*bis*

Where an aircraft registered in a State is dry-leased and that aircraft operates a flight only within the territory of another State and the intended and actual places of take-off and landing of the aircraft are situated within the territory of the latter State, the latter State shall be considered the State of Registration for the purposes of the Convention and, in such cases, the State in which the aircraft is registered shall not be considered the State of Registration.

9.2 This option operates as a deeming provision, that is, the State where the aircraft operates purely domestic services is deemed for the purposes of this Convention to be the State of Registration. This option makes it clear that it only applies to aircraft that operate in the same State so that an international flight departing from State A and stopping at two destinations within State B would still be

covered by the Convention even where the offence was committed between the two points within State B provided that State B was not the State where the aircraft was leased. The provision also makes it clear that it only applies to flights where the actual and intended places of take-off and landing are within the same State. The deeming provision only operates in these limited circumstances in relation to the application of this Convention. It has no effect outside of these limited circumstances or in relation to any other Convention.

9.3 This option operates on the principle that the state of the operator of dry-leased aircraft providing purely domestic air services should ‘stand in the shoes’ of the State of Registration for the purposes of the application of the Convention. The effect of the deeming option is therefore slightly broader than Option 1 as the Convention would apply exactly in the same way as it does as if the State where the aircraft was leased was the State of Registration.

10. SUMMARY

10.1 The issues considered during the development of the Montreal and Hague Conventions should be carefully considered as against current commercial realities and in light of the proposed options. Although the above options have been drafted specifically in relation to Article 4 of the Montreal Convention they could both be adapted to apply for the purposes of the Hague Convention. Any amendment to the Conventions needs to ensure that it does not result in unintended consequences both in relation to practical commercial realities, the impact on the operation of the Hague and Montreal Conventions as well as other international civil aviation instruments and ensuring consistency between such instruments.