International Civil Aviation Organization

WORKING PAPER

LC/35-WP/2-2
30/4/13
English only

LEGAL COMMITTEE – 35TH SESSION

(Montreal, 6 – 15 May 2013)

Agenda Item 2: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

COMMENTS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) ON LC/35-WP/2-1 AND THE LEGAL ASPECTS OF THE ISSUE OF UNRULY PASSENGERS

(Presented by IATA)

1. INTRODUCTION

1.1 IATA considers that the draft protocol to amend the Tokyo Convention 1963 ("the Convention") which is set out in the Appendix to LC/35-WP/2-1 contains a number of features that would go some way to addressing the concerns of the airline industry. We would like to set out our comments on those and other aspects of the issue of unruly passengers.

2. JURISDICTION

2.1 Jurisdiction over offences and other acts committed on board aircraft is given to the State of registration of the aircraft.[1]

2.2 The identity of an unruly passenger can usually be easily ascertained, which should, in theory, facilitate the job of law enforcement authorities. However, this does not automatically mean that the passenger can be prosecuted. In many cases, following an incident, the State where the passenger is disembarked does not have jurisdiction (as the State of landing) when the aircraft is registered in another State. Many incidents are simply left unpunished.

2.3 The jurisdictional lacuna for certain types of passenger conduct has been expressly recognised by the Courts. Because State of landing jurisdiction does not exist, the hope has been expressed that:

> "signatories to the Tokyo Convention will be astute in seeking the extradition for prosecution of those who commit offences aboard their registered or controlled aircraft. Failing this, "crime" committed aboard aircraft may go unchecked."[2]

2.4 Expanding the scope of the jurisdiction provision would obviate the need for a proactive approach to extradition.

[1] See article 3(1) of the Convention.
[2] *The Queen v Duggam* 1995, No, 96 Hong Kong Court of Appeal (Criminal), 5 (per Justice Mortimer).

2.5 Some States already exercise such jurisdiction and have amended their laws to permit national courts to exercise jurisdiction over events that occur on board foreign aircraft which land in their territory. Nevertheless, many States are reluctant to unilaterally extend jurisdiction to events occurring outside their territory in the absence of an international agreement. A number of States have indicated, for instance, that their legislatures would not enact such a law without a basis grounded in treaty law.[3] Moreover, in the absence of a mandatory State of landing jurisdiction provision, it may be difficult to convince national legislators of the importance of modifying their applicable domestic law.

2.6 A mandatory State of landing jurisdiction provision, as proposed in the Appendix to LC/35-WP/2-1 would promote certainty in the international community and remove concerns associated with the extraterritorial extension of national law. It would create a treaty nexus for the application of domestic law to unruly passenger events.

2.7 IATA also supports mandatory jurisdiction for the State of the operator.

2.8 Modern leasing practices mean that it is quite common for an aircraft to be registered in one State but for the operator to be domiciled in another State. This is made possible by article 83*bis* of the Chicago Convention.[4]

2.9 In 1980 airlines leased 3 per cent of all aircraft and owned 97 per cent. Yet in 2012, airlines leased approximately 40 per cent of all aircraft and owned approximately 60 per cent of their fleets. This number is projected to increase to 50 per cent leased and 50 per cent owned by 2015.[5] Thus, it will become less and less likely over time that the State of registration is the same as the State of the operator.

2.10 When the Convention was adopted in 1963, however, leasing was not common and article 83*bis* did not exist. A new State of operator jurisdiction, again like that proposed in the Appendix to LC/35-WP/2-1, would prevent the erosion of the State of registration principle over time by sensibly conferring jurisdiction upon the State most closely connected to the airline in question. It is possible, for example, that a leased aircraft may seldom or never visit the State of registration.

2.11 IATA therefore supports mandatory jurisdiction for both the State of landing and the State of the operator, as provided by Option 1 in the Appendix to LC/35-WP/2-1.[6]

2.12 IATA also supports additional, voluntary bases of jurisdiction on grounds of nationality and habitual residence, as provided for in Option 1. These provisions give States greater choice in tackling the unruly passenger problem.

3. LACK OF CLEAR DEFINITION OF WHAT CONSTITUTES AN OFFENCE

3.1 The Convention does not provide for a definition of what constitutes a criminal offence, leaving this issue to be determined by the law of the State having jurisdiction. Further clarity in respect of

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[3] While ICAO Circular 288 (*Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*), is a positive step forward in this area, it is IATA's view that treaty-level rules are necessary if meaningful international uniformity is to be achieved.

[4] See Protocol relating to an Amendment to the Convention on International Civil Aviation, signed at Montreal on 6 October 1980.

[5] See further, ASCEND Online Fleets (2013), available at: http://www.ascendworldwide.com/what-we-do/ascend-data/aircraft-airline-data/ascend-online-fleets.html

[6] See article III (proposed article 3, paragraphs 2*bis* and 2*ter*).

the offences and other acts which are unacceptable on board aircraft and subject to sanction would be beneficial.

3.2 Conduct that may constitute a criminal offence in the State of embarkation, the State of registration of the aircraft, the State of the operator or the State of the perpetrator or victim may not be a criminal offence in the country where an unruly passenger is disembarked.

3.3 Police or prosecution authorities, in practice, will often not pursue an unruly passenger at all because they are not certain how the conduct complained of fits into the scope of their domestic criminal law. In many cases, authorities simply prefer to release the passenger to his or her onward journey.

3.4 There was much debate at the Sub-Committee meetings on the merits of a list of offences. In IATA's view, some elaboration of the types of conduct prohibited would improve certainty for passengers, law enforcement authorities and airlines.

3.5 While IATA supports the spirit of the language proposed in the Appendix to LC/35-WP/2-1,[7] we consider that further particularity could be achieved. Many of the concerns expressed about criminalising minor offences might be answered by, as the draft language allows, giving States latitude to sanction certain behaviour by administrative or civil law means.

4. TEMPORAL SCOPE

4.1 The Convention only applies when the aircraft is "in flight", which is considered to be "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends."[8]

4.2 This is at odds with the Warsaw Convention 1929 and Montreal Convention 1999 regimes on air carrier liability. Under those Conventions, the carrier is potentially liable to its passengers for an accident which occurs from the point of initial embarkation up until the point of disembarkation.[9] Thus, an unruly passenger could cause injury to another passenger during embarkation and for which the airline would be liable under the Warsaw/Montreal regime. However, that same unruly passenger would not be capable of committing an offence or other unlawful act under the Convention.

4.3 The recent Beijing Convention adopts a broader scope to that of the Tokyo Convention.[10] Under the Beijing Convention, "an aircraft is considered to be in-flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation".[11]

4.4 In IATA's view, the temporal scope of the Convention should reflect the period during which the aircraft commander's powers apply.

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[7] See article VI (proposed article 15*bis*).
[8] See article 1(3).
[9] See Convention for the Unification of Certain Rules to International Carriage by Air, signed at Warsaw on 12 October 1929, article 17; Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Montreal on 28 May 1999, article 17.
[10] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, signed at Beijing on 10 September 2010.
[11] See article 2(a) of the Beijing Convention.

4.5 This problem is effectively addressed by the language of the Appendix to LC/35-WP/2-1, which adopts the Beijing formulation.[12] IATA supports the adoption of that proposed text.

5. **RIGHT OF RECOURSE**

5.1 Unscheduled landings to disembark or deliver unruly passengers to State authorities have a significant impact on carriers' operating costs. A single diversion can cost anything from USD 6,000 to 200,000. Large aircraft will often be required to dump fuel before landing for safety reasons. Other costs, such as landing fees, accommodation, ground handling charges, passenger compensation and new fuel for the onward journey are also often incurred. In many cases, too, crew will 'time out' meaning that a new crew will have to be flown in to operate the onward journey.

5.2 Carriers may seek to recover these expenses from unruly and disruptive passengers through civil proceedings or some form of judicial restitution order. However, if the passenger in question leaves the jurisdiction, it will often be difficult or impossible to recover these losses. The Convention is silent on a right to recourse and carriers are usually left to bear the significant cost of these events themselves.

5.3 IATA believes that in order to allow carriers the prospect of recovering the operational and post-incident costs arising from an unruly passenger incident, the Convention should expressly recognise a right of recourse against the passenger concerned.

5.4 IATA is supportive of the language proposed in the Appendix to LC/35-WP/2-1. Proposed article 18*bis* (1) provides that, when "*the aircraft commander disembarks or delivers a person pursuant to the provisions of Articles 8 or 9 respectively, the Operator shall not be precluded from recovering from such person any damages incurred by the Operator as a result of such disembarkation or delivery.*"[13]

5.5 IATA is also supportive of proposed sub article 18*bis* (2) which provides that the contract of carriage terminates in accordance with national law when a passenger is delivered or disembarked pursuant to the Convention.

5.6 Under this proposal, a carrier is automatically released from any contractual obligation to carry the passenger at a later time, after delivery or disembarkation. While articles 6 and 10 of the Convention (see below) protect carriers for "reasonable measures" taken on board the aircraft, proposed sub article 18*bis* (2) would ensure that carriers do not face subsequent denied boarding claims for onward flight segments under the same contract of carriage. This, in IATA's view, is a sensible approach and a necessary corollary to the existing immunity provisions of the Convention.

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[12] See article II(1) (proposed article 1(3)(a)). It provides that "*an aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until the competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board*".

[13] See article VII (proposed article 18*bis*).

6. IMMUNITY FROM SUIT

6.1 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 jeopardizes the safety of the aircraft (or of persons or property therein) or good order and discipline on board.*

6.2 In such a scenario, the aircraft commander and the airline are given immunity from suit, in the following terms:

> *"Neither the aircraft commander … [nor] the operator … shall be held responsible in any proceedings on account of the treatment undergone by the person against whom the actions were taken."*[14]

6.3 The original drafting of article 6 was subject to much discussion at the Tokyo Diplomatic Conference, in particular, the standard to be adopted in order to assess reasonableness. It has been argued that "reasonable" and "necessary" provide an element of objectivity and subjectivity respectively when determining the commander's conduct. Therefore, one must consider the extent to which the Convention was intended to avoid second-guessing the actions of the commander under article 6 when dealing with emergency situations in a controlled environment without necessarily having complete information.

6.4 That the text that was finally adopted represents something of a compromise is evidenced by the clear lack of uniformity in the case law in different jurisdictions around the world.

6.5 For example, in *Zikry v Air Canada*,[15] an Israeli court of first instance held that the commander only needed to have reasonable, subjective grounds to believe that the plaintiff presented a risk to the safety of the flight. Therefore, the Court would not second-guess the commander and crew's actions with the benefit of hindsight.[16] In other words, the immunity provision is not affected if, after the fact, the commander's actions turn out to be based on a false appreciation of the facts.

6.6 The US courts in the case of *Eid v Alaska Airlines*,[17] however, have taken a different view. In that case, the plaintiffs filed suit against the airline for damages for defamation and loss of opportunity. The defendant applied for summary judgment on the basis of article 10 of the Convention.

6.7 The plaintiffs claimed that the actions of aircraft commander were not reasonable and that if he did not have "reasonable grounds" then the immunity conferred by article 10 of the Convention could not apply.

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[14] See article 10 of the Convention.

[15] Civil File no. 1716/05 A (Magis. Ct. Haifa, Nov 9, 2006).

[16] The Court observed that:

"In order to enjoy the immunity, there must be an examination whether there were reasonable grounds to believe that an act has been committed which jeopardises the safety of the flight and its passengers, or an act has been committed which under the captain's discretion constitutes an offence under the law existing in the State of registry of the aircraft and whether the steps taken were reasonable. It has to be emphasised that one should not examine whether it has been proved that the plaintiff actually [committed such an act or offence]. All that the defendant had to prove was that those acting on its behalf had reasonable grounds to believe that there was a danger to the safety of the flight considering the current conditions, or there were reasonable grounds to believe that an act has been committed, which under the captain's discretion constituted offence, even if post factum it was a false apprehension."

[17] Eid & Ors v Alaska Airlines Inc 621 F.3d 858; 2010 US App LEXIS 15777.

6.8 The defendant airline argued that the aircraft commander, in exercising his powers under article 6, was entitled to immunity unless his actions were arbitrary or capricious.

6.9 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 or her 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.[18]

6.10 The divergence in the case law on this important issue clearly demonstrates the difficulty that Courts have had in applying this provision of the Convention.

6.11 In IATA's view, 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 commander is in an imperfect position to assess conditions in the passenger cabin from behind the cockpit door.

6.12 IATA considers that immunity for the airline and its employees is critical if crews are to have the confidence to deal with any challenge to safety and security aboard an aircraft and the legal standard to be applied under articles 6 and 10 of the Convention must be clarified.

6.13 If the Legal Committee and any subsequent Diplomatic Conference, aware of the *Eid* decision, considers the immunity question and chooses not to make any amendments to these provisions, it is likely that this informed choice will be taken as affirmative evidence that *Eid* was correctly decided. This may mean that, in future cases, *Eid* is preferred as the standard under which the actions of an aircraft commander are judged.[19]

6.14 IATA believes that the immunity provisions should be amended to more clearly reflect the highly deferential standard evidenced in the 1963 drafting materials for the Convention.[20]

6.15 It is proposed that the Legal Committee consider an additional paragraph to article 10 of the Convention as follows:

> "*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."*

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[18] The defendant's petition to the Supreme Court of the United States was refused. IATA understands that the defendant airline was ultimately successful before a jury at a trial of the facts. The jury found that, as a matter of fact, the aircraft commander's actions were reasonable.

[19] 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. This, for example, is a principle of statutory interpretation in the United States.

[20] International Civil Aviation Organisation, Minutes, International Conference on Air Law, Tokyo, Aug.-Sept. 1963, Doc 8565-LC.152-1 at 155.

7. CONCLUSION

7.1 IATA feels certain that the adoption of a Protocol to amend the Convention will produce tangible and uniform solutions to the issues which have emerged since the Convention was adopted in 1963.

7.2 IATA therefore requests the Legal Committee to note and take into consideration in its deliberations:

a) the concerns identified in this Working Paper; and

b) IATA's general support for the draft protocol which is set out in the Appendix to LC/35-WP/2-1, subject to the comments made above.

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