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WORKING PAPER

SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE FOR THE MODERNIZATION OF THE TOKYO CONVENTION INCLUDING THE ISSUE OF UNRULY PASSENGERS

(Montreal, 22 – 25 May 2012)

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION'S VIEWS ON THE MODERNISATION OF THE TOKYO CONVENTION 1963 AND THE EMERGING PROBLEM OF UNRULY AND DISRUPTIVE PASSENGERS

(Presented by IATA)

1. INTRODUCTION

1.1 IATA welcomes the formation of the Special Sub-Committee of the Legal Committee on the Tokyo Convention of 1963[1] ("the Convention") and the issue of unruly passengers and is committed to participating in its deliberations.

1.2 The Convention has enjoyed great success and almost universal ratification which is a testament to the work of the Diplomatic Conference at which it was adopted.

1.3 However, we would like to raise three specific areas of growing concern to the airline industry:

1.3.1 Evidence that the Convention does not provide an adequate deterrent to unruly and disruptive behaviour on board aircraft;

1.3.2 Gaps in the current text of the Convention; and

1.3.3 Inconsistent interpretation of certain key provisions of the Convention.

2. DISCUSSION

2.1 The Convention is an inadequate deterrent to unruly and disruptive behaviour on board aircraft

2.1.1 IATA considers that the current international regime does not provide an adequate deterrent to unruly and disruptive behaviour on board aircraft.

2.1.2 It is clear that the instances of unruly and disruptive behaviour on board aircraft are evolving in nature and they are increasing steadily and consistently.

[1] The Convention on Offences and Certain Other Acts Committed On Board Aircraft, signed at Tokyo on 14 September 1963

2.1.3 From January 2007 to June 2010, IATA conducted detailed analysis of unruly passenger incidents and their root causes, based on reports received from Member airlines.[2] That analysis showed the following common types of behaviour:

a) illegal consumption of narcotics or cigarettes;[3]

b) refusal to comply with safety instructions;[4]

c) verbal confrontation with crew members or other passengers;

d) physical confrontation with crew members or other passengers;

e) uncooperative passengers;[5]

f) making threats that could affect the safety of the crew, passengers and aircraft;[6]

g) sexual abuse or harassment; and

h) other types of riotous behaviour that could jeopardise the safety or alter good order and discipline on board the aircraft.[7]

2.1.4 These types of behaviour do not reflect the actual root cause of an incident. IATA's analysis of reports from Member airlines indicates a number of possible root causes:[8]

a) intoxication through alcohol, narcotics or medications, often starting before the passenger boarded the aircraft;

b) irritation with other passengers' actions on board;

c) frustration linked to a passenger's journey;

d) mental breakdowns or episodes, such as acute anxiety, panic disorder or phobias;

e) mental conditions e.g. psychosis, dementia or bi-polar disorder; and

f) environmental factors that surround the act of flying, such as e.g. the gathering of large crowds at airports, having to sit and travel in a confined space, fear of flying or of possible unlawful interference events.

2.1.5 A series of graphs are produced at the Appendix which illustrate the extent of the issue for the industry, focusing on the years 2007 through 2010:

a) Graph 1 - types of unruly passenger incident per year;

b) Graph 2 - unruly passenger incidents per year; and

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[2] Statistics for the year 2011 are not yet available.
[3] The illegal consumption of alcohol from private supply is also a reported problem although not captured as a specific category by the IATA analysis.
[4] e.g. a demand to fasten a seat belt or disrupting a safety announcement.
[5] e.g. interfering unduly with flight crew duties, refusing to follow instructions to board or leave the aircraft.
[6] e.g. threat to kill or injure someone, bomb threat. Attempting to enter the cockpit has also been reported by airlines as a concern.
[7] e.g. screaming, annoying behaviour, kicking and banging heads in seats.
[8] It is acknowledged that these root causes are in large part subjective and it is not possible to assess their relation to an unruly act.

c) Graph 3 - proportion of incidents resulting in ground security intervention.

2.1.6 IATA's statistics on unruly passengers are obtained from the Safety Trend Evaluation, Analysis and Data Exchange System (STEADES), a database owned and managed by IATA; to which Member airlines submit periodic reports, including such types of incidents. Statistics obtained and analysed from STEADES include only unidentified data sent by the 143 airlines who participate.

2.1.7 Crew members typically write a short narrative of events after each flight and classify them according to a number of descriptors for that effect.

2.1.8 These statistics show that the number of incidents per 1000 flights increased from 0.57 in 2009 to almost 0.8 in 2010, a 30% increase. In other words, in 2009, there was 1 unruly passenger incident for every 1,760 flights which increased to 1 unruly passenger incident for every 1,256 flights in 2010. This increase is consistent with earlier statistics, which had noted a 32% increase in incidents between 2007 and 2008.[9]

2.2 Gaps in the current drafting of the Convention

2.2.1 We consider that a certain number of gaps exist in the Convention regime which merit further examination:

a) **Jurisdiction**

2.2.2 In principle, jurisdiction over offences and other acts committed on board aircraft is given to the State of registration of the aircraft.[10]

2.2.3 In most cases, the identity of an unruly passenger can be easily ascertained, which should in principle make the job of the law enforcement authorities much easier. However, this does not automatically mean that the passenger can be prosecuted. In many cases, as a result of an incident, the State where the passenger is disembarked refuses to assert jurisdiction when the aircraft is registered in another State.

2.2.4 Furthermore, the State where the aircraft is registered may not necessarily be the State of the aircraft operator. This situation arises frequently when an aircraft is leased to the operator by a lessor in a different State party. Today, this is a common industry practice that was not necessarily envisaged when the Convention was drafted in 1963.

2.2.5 A number of cases demonstrate the problems that the Courts and prosecutors have faced with respect to the exercise of jurisdiction over unruly passengers.

2.2.6 It is apparent that States have no difficulty, in principle, in exercising jurisdiction over crimes and acts that occur on aircraft registered in their State, where the passengers involved are delivered or disembarked in that same State.

2.2.7 In *Public Prosecutor v Fernando*,[11] a Sri Lankan national was charged in Singapore with theft and misappropriation arising from his conduct on a Singapore Airlines flight from New Zealand to Singapore.

2.2.8 The defendant found a credit card on board the aircraft, apparently misplaced under the seat of a fellow passenger. The defendant kept the card and, upon arrival at Singapore, fraudulently used the credit card to obtain consumer goods to the value of SGD 4,485.82.

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[9] IATA submission to ICAO AVSEC Panel, AVSECP/21-WP/21 (2010)
[10] Article 3.1
[11] *Public Prosecutor v Payagala Waduge Malitha Kumar Ferando* [2006] SGDC 304.

2.2.9 The Court found that the criminal act, that is the discovery and retention of the credit card with intent to use it, occurred on board the aircraft in the course of international operations on a Singapore-registered aircraft. The Court thereby applied article 403 of the local Penal Code and section 3(1) of the Tokyo Convention Act of Singapore and the defendant was sentenced to 2 months and 2 weeks imprisonment.

2.2.10 This point is also demonstrated by the High Court of Brunei case of *Public Prosecutor v Johnston.*[12] The Court held that an accused who committed offences aboard a Royal Brunei Airlines flight over international waters was to be taken, by virtue of the Convention, to have committed those offences in Brunei, being the State of registration of the aircraft.

2.2.11 Difficulties arise, however, when the aircraft in question is registered in a foreign State. The Hong Kong case of *The Queen v Duggam*[13] is instructive. In that case the defendant was charged with various counts of obtaining and attempting to obtain property by deception. The defendant was a passenger on board various Qantas flights from Singapore to Hong Kong and Hong Kong to Singapore over the course of a two month period in late 1994. He was found to have been in possession of two stolen credit cards belonging to another person.

2.2.12 During the course of those flights, the defendant used stolen credit cards to obtain duty free goods worth HKD 25,586 fraudulently. The defendant was neither a Hong Kong resident nor citizen. The Court accepted that the acts complained of took place outside Hong Kong airspace and aboard an aircraft which, in the terms of the relevant implementing legislation, was "not British [i.e. Hong Kong] controlled."

2.2.13 The Court concluded that acts taking place aboard an aircraft outside the jurisdiction were, *prima facie*, not offences against Hong Kong law.

2.2.14 The Court did, however, observe that the same conduct, if it had occurred in Hong Kong or within Hong Kong airspace, would have attracted criminal liability.

2.2.15 As a result, it seems that an extradition to the State of registry is the only avenue open to ensure the prosecution of such offenders. In this area the Convention seems to represent a jurisdictional lacuna for certain types of passenger conduct. This much was recognised by Justice Mortimer of the Court of Appeal in *Duggam*:

> *I express the hope 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.*[14]

2.2.16 It is submitted that this situation will not be uncommon or atypical. The State of registry is unlikely to seek extradition for minor property or conduct offences, especially in cases where the high cost of extradition processes outstrips the perceived seriousness of the conduct in question.

b) **Lack of clear definition of what constitutes a criminal offence**

2.2.17 The Convention does not provide for a definition of what constitutes an international criminal offence, leaving this issue to be determined by the subjective interpretation of the courts in State parties.

2.2.18 Conduct that may be considered to be a criminal offence in the country of embarkation, the State of registration or the State of the operator may not be a criminal offence in the country where an unruly passenger is disembarked.

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[12] *Public Prosecutor v Heny Taye Johnson* [1994] BNHC 32 (2 June 1994).
[13] *The Queen v Remy Martins Duggham* 1995, No, 96 Court of Appeal (Criminal).
[14] *Duggam*, 5.

2.2.19 This often means that police or prosecution authorities will 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. It is left to an airline in those circumstances to deny carriage, if appropriate, under their applicable conditions of carriage.

c) **Scope**

2.2.20 The Convention only applies when the aircraft is "in flight", which is considered "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends."[15]

2.2.21 This is at odds with the provisions of the Warsaw Convention 1929 and Montreal Convention 1999 regimes on air carrier liability. Under those Conventions, the carrier's liability starts on embarkation and finishes at disembarkation.[16]

2.2.22 Thus, an airline may be liable to a passenger for injury caused in the course of embarkation but that same passenger could not be capable of committing a criminal offence or other unlawful act under the Convention regime.

2.2.23 Furthermore, 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 liable in respect of the unlawful act under the Convention.

d) **Lack of harmonised enforcement procedures**

2.2.24 IATA Member airlines report a number of incidents where the cross-border prosecution of criminal and civil offences suffers from severe lack of uniformity.

2.2.25 In some cases, communication and cooperation amongst the various national authorities involved is at best inefficient. In other cases, there is a complete lack of harmonised approach between the different regulatory authorities involved.

2.2.26 In addition, the role of the State where the passenger in question is disembarked or delivered is not clearly set out in the Convention.

2.2.27 The Convention, importantly, does not impose any obligation on the State of disembarkation to prosecute an offender. Neither is there any obligation to assert jurisdiction in relation to offences and crimes committed on board a foreign aircraft. The only duties imposed on the State of disembarkation are to:

a) allow the aircraft commander to disembark any passenger who he has reasonable grounds to believe has committed, or is about to commit an offence; and

b) take delivery of any person whom the aircraft commander has reasonable grounds to believe has committed a serious offence according to the penal law of the State of registration of the aircraft.

2.2.28 These obligations are significantly different from any positive obligation to prosecute acts committed by unruly passengers or, alternatively, to collect evidence in relation to an incident and consider, in good faith, prosecution based on the facts of the case.

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[15] Article 1.3

[16] 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.

2.2.29 The Convention, as a result, fails to directly address a practical reality: the necessity to deal with an unruly passenger appropriately at the nearest convenient stopping place.

e) **Lack of a uniform concept of fines and penalties**

2.2.30 In addition to disharmony in respect of what constitutes a criminal offence and in enforcement procedures, the question of applicable fines and penalties for unruly passenger offences also lacks uniformity.

2.2.31 As a result, the penalties for unruly behaviour in some States, even in cases where a conviction can be achieved, may be too trivial to constitute an adequate deterrent.

2.2.32 In a scenario where a State does not have specific unruly passenger or civil aviation offences in its criminal law, a passenger is typically charged with a common offence (e.g. disorderly conduct) for which penalties are usually very modest.

2.2.33 It is IATA's view that certainty and uniformity in respect of the fines and penalties applicable for unruly behaviour would improve deterrence.

f) **Insufficient encouragement of international cooperation and assistance**

2.2.34 Many prosecuting authorities have encountered difficulties collecting evidence for the purpose of prosecution. These range from logistical problems in obtaining crew to appear as witnesses to the inability to obtain supporting information from the national authorities of States where there is no official procedure in place for such cooperation.

2.2.35 Experience also suggests that extradition is not commonly sought in unruly passenger cases. There is, importantly, no obligation upon any State to seek extradition and no framework by which States commit to consider extradition in serious unruly passenger cases.

2.3 **Inconsistent application of article 6 of the Convention by the Courts**

2.3.1 One of the key provisions of the Convention is contained in article 6:

> *"The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board an aircraft, an offence or act [that jeopardizes safety on board], impose upon such person reasonable measures including restraint which are necessary:*
>
> *(a) to protect the safety of the aircraft, or of persons or property therein; or*
>
> *(b) to maintain good order and discipline on board; or*
>
> *(c) to enable him to deliver such person to competent authorities or to disembark him.*"

2.3.2 In this 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."*[17]

2.3.3 As the Convention is currently drafted, the issue arises as to whether or not an aircraft commander has "reasonable grounds to believe" that a particular offence or act has occurred or is about to occur. The quality or standard to which an aircraft commander's actions or decision making will be held to is particularly important.

[17] Article 10.

2.3.4 The original drafting of article 6 was subject to much discussion at the Tokyo Diplomatic Conference that adopted the Convention, 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. That the text that was finally adopted represents something of a compromise is evidenced by the lack of uniformity in the case law in different jurisdictions dealing with article 6.

2.3.5 For example, in Zikry v Air Canada,[18] 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. 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. The Court observed that:

> *"From the language of these two sections [of the Air Law Act, equivalent to articles 6 and 10 of the Convention] it transpires 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 smoked during the flight. 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."*

2.3.6 The US courts in the case of *Eid v Alaska Airlines*[19] have taken a different view. In that case, a number of Egyptian businessmen and their families were travelling in the first class cabin on an Air Alaska flight from Los Angeles to Las Vegas. One of the plaintiffs and a flight attendant, it transpires, become involved in a verbal altercation and argument. This escalated and the chief flight attendant informed the captain, via the cabin telephone, that she had lost control of the first class cabin. The captain then diverted the aircraft to Reno, Nevada, where the plaintiffs were removed by the local police and questioned by the FBI.

2.3.7 The plaintiffs were refused onward carriage by the defendant airline to Las Vegas and missed an important business meeting there. The police filed no charges, however, and the plaintiffs completed their journey with another airline.

2.3.8 The plaintiffs filed suit against the airline for defamation and loss of opportunity. The defendant applied for summary judgment on the basis of article 10 of the Convention.

2.3.9 The plaintiffs claimed that the actions of aircraft commander were not reasonable. This was supported by the eye witness deposition of an independent passenger, who indicated that the plaintiffs had been behaving normally while, on the other hand, the flight attend in question had been behaving erratically and aggressively. The plaintiffs argued that if the captain did not have "reasonable grounds" then the immunity conferred by article 10 of the Convention could not apply.

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[18] Civil File no. 1716/05 A (Magis. Ct. Haifa, Nov 9, 2006).
[19] *Eid & Ors v Alaska Airlines Inc* 621 F.3d 858; 2010 US App LEXIS 15777.

2.3.10 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.

2.3.11 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.

2.3.12 The defendant's appeal petition in this case, to the Supreme Court of the United States, was refused.

2.3.13 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.

2.3.14 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 must be clarified.

3. CONCLUSION

3.1 IATA requests the Special Sub-Committee to note the concerns identified in this Working Paper.

3.2 In light of the steady and consistent increase in unruly passenger incidents, it is clear that the Convention regime does not provide an adequate deterrent for such behaviour.

3.3 IATA considers that it would be appropriate to conduct a revision of the international regime in order to produce tangible and uniform resolutions to the many problems which have emerged in the application of the Convention.

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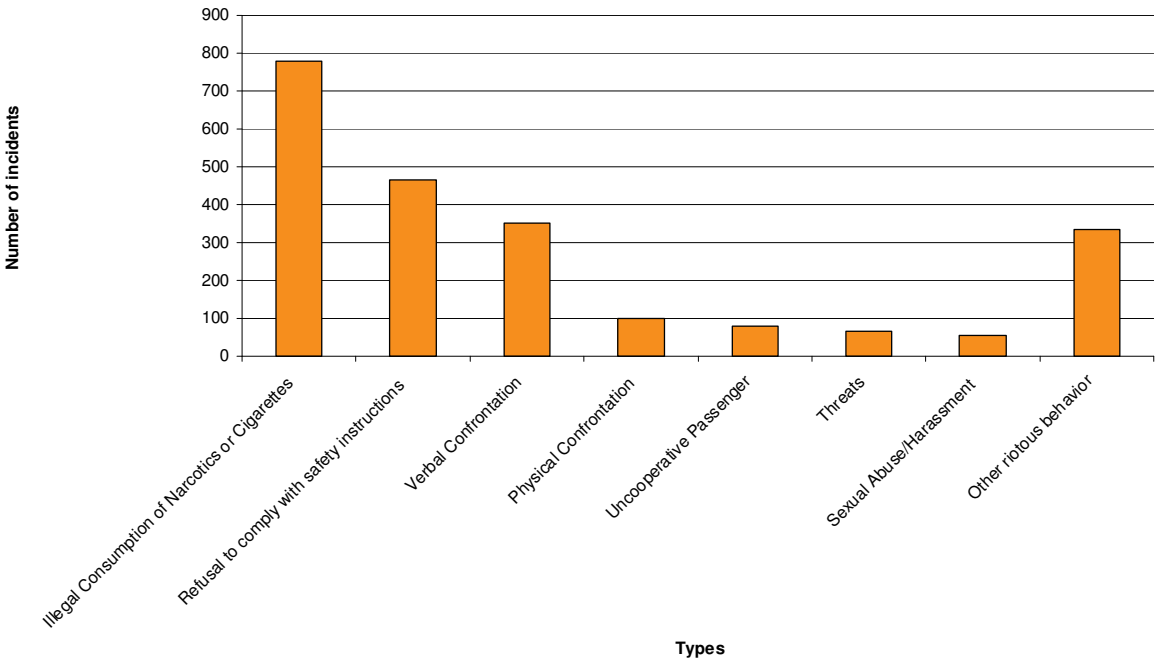
APPENDIX[1]

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION'S VIEWS ON THE MODERNISATION OF THE TOKYO CONVENTION 1963 AND THE EMERGING PROBLEM OF UNRULY AND DISRUPTIVE PASSENGERS

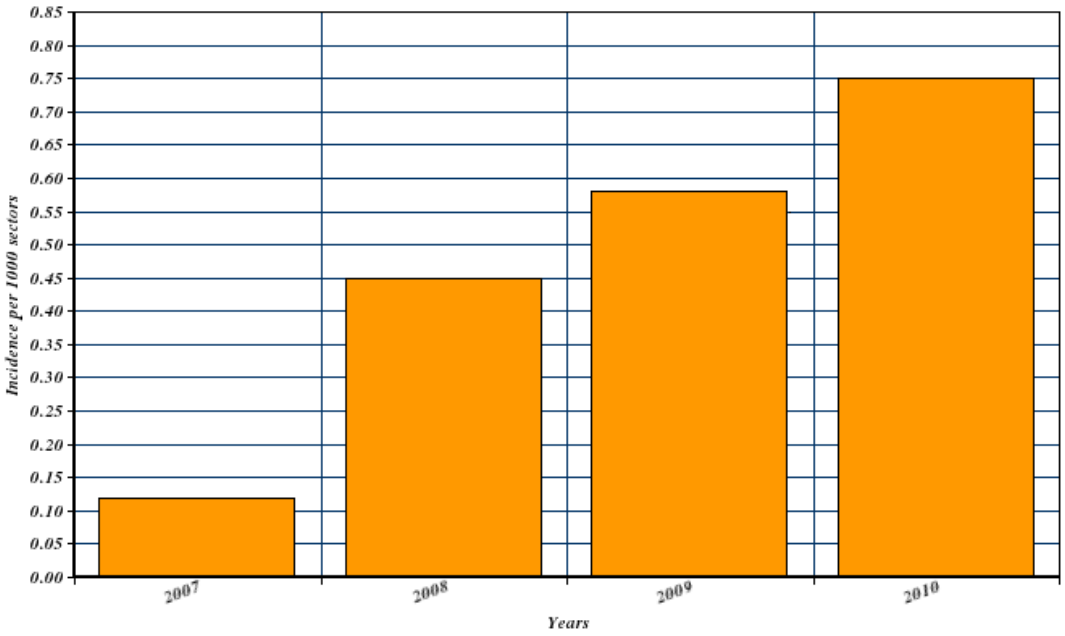
Graph No. 1: UNRULY TYPES PER YEAR (JAN 2007- JUNE 2009)



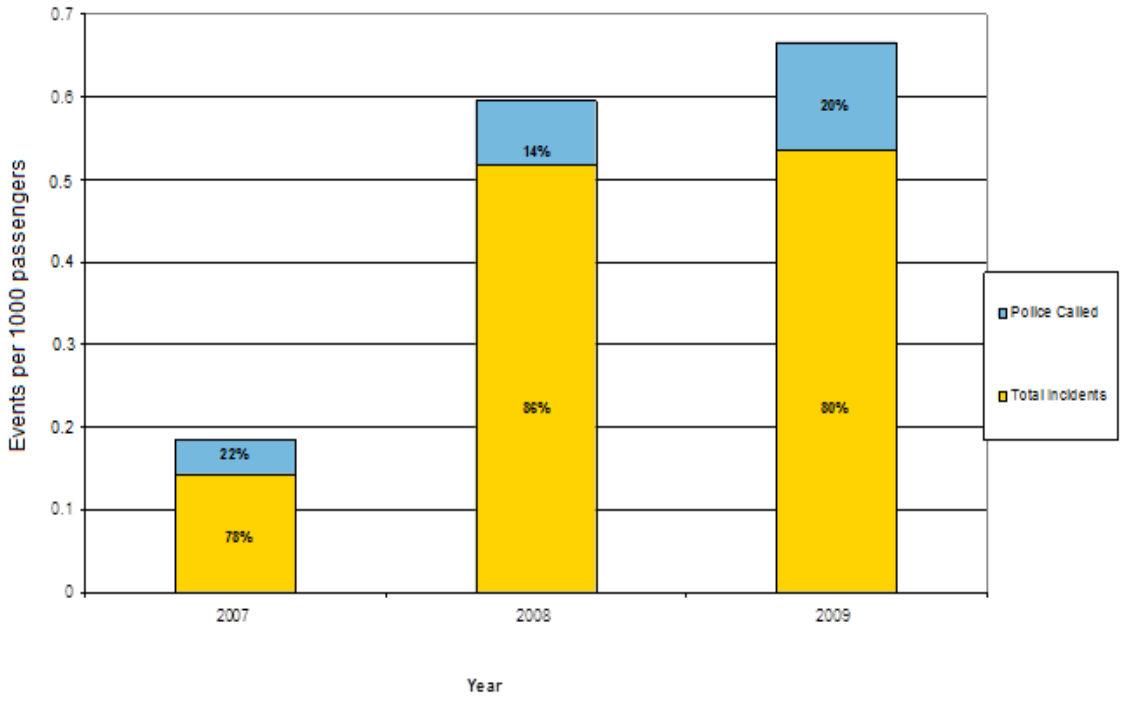
[1] Breakdown data for 2010 and 2011 is not yet available. Appendix Source: STEADES © 2010 International Air Transport Association (IATA). All Rights Reserved. No part of these graphs may be reproduced, recast, reformatted or transmitted in any form by any means, electronic or mechanical, including photocopying, recording or any information storage and retrieval system, without the prior written consent of IATA, Senior Vice President Safety, Operations and Infrastructure.

Appendix

Graph No. 2: UNRULY PASSENGER INCIDENTS PER YEAR (2007 - 2010)



Graph No. 3: TOTAL INCIDENTS vs. POLICE CALLED



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