

ASSEMBLY — 35TH SESSION

LEGAL COMMISSION

- Agenda Item 34: Progress report on the modernization of the Rome Convention of 1952**
Agenda Item 37: Work Programme of the Organization in the legal field

“ATTACHMENT”, “ARREST” AND “PRECAUTIONARY MEASURES” IN CASE OF DAMAGE CAUSED TO THIRD PARTIES AND OTHER CASES OF AERONAUTICAL LIABILITY

(Presented by the Republic of Colombia)

SUMMARY

This working paper addresses the advisability of analysing the matter of the revision of the provisions on “attachments”, “arrests” and other “precautionary measures” in the work progressed by the Legal Committee of ICAO in relation to the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* and other international conventions related to liability derived from aeronautical activities.

Action by the Assembly is in paragraph 3.

1. INTRODUCTION

1.1 During the 32nd Session of the Legal Committee of ICAO¹, the main agenda item considered was the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952².

* Spanish version provided by the Republic of Colombia.

¹ The 32nd Session of the Legal Committee of ICAO was held in Montreal from 15 to 21 March 2004.

² ICAO Doc 7364

1.2 At that meeting, the Colombian delegation expressed its total support for the work progressed by the Organization³ and, in particular, the report of the Rapporteur⁴, when it stated that the modernization of the Convention was of vital importance under the present conditions and in view of the need to adapt to recent requirements the international instruments relating to damage to third parties on the surface and to harmonize them with the relevant international legal norms.

1.3 In recognizing the important work in the unification of international air law and in particular in the settlement of conflicts of laws progressed by CITEJA⁵ and the Legal Committee of ICAO, the experts from Colombia addressed the advisability of considering the inclusion of provisions that would facilitate the adoption of and compliance with precautionary measures or other types of security measures, aimed at ensuring the effectiveness of the judgments relating to damage caused by foreign aircraft to third parties.

2. SOME INTERNATIONAL DEVELOPMENTS

2.1 This proposal has its origin in the importance that different jurisdictions, legal traditions and also international instruments have given to this subject. Jurisdictions such as those of the United States of America recognize concepts such as “Attachment” and “Arrest” and also recognize in certain extraordinary situations the possibility of attachments prior to judgment⁶. Similarly, the United Kingdom and other countries belonging to the “common law” legal tradition have developed concepts such as “Attachment”, “Writ in Rem” and “Mareva Injunction”⁷. Generally, the legal systems belonging to the civil tradition contain norms relating to the precautionary attachment of property for the purpose of preventing the debtor from squandering his property in order to become insolvent⁸.

³ In this regard, see the paper presented by Colombia, LC/32-WP/3-7.

⁴ See LC/32-WP/3-3, Report of the Rapporteur on the Modernization of the Rome Convention, presented by M. Jennison, United States.

⁵ Comité International Technique d'Experts Juridiques Aériens

⁶ The decisions that have dealt with this subject are *Ownbey v. Morgan* 256 U.S. 94 (1921); *Sniadach v. Family Finance Corp.* 395 U.S. 337 (1969); *Fuentes v. Shevin* 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.* 416 U.S. 600 (1974); *Calero-Toledo v. Pearson Yacht Leasing* 416 U.S. 600 (1974); *Shaffer v. Heitner* 433 U.S. 186 (1977), among others.

⁷ For a broader explanation of the development in comparative law of aspects related to these and other precautionary measures, see Tetley, William “Maritime Liens and Claims”, second edition, (Montreal: BLAIS, 1998), 933 pages.

⁸ See for example Law 91-650 of 9 July 1991 and Decree 92-755 of 31 July 1992 which reformed French legislation with respect to enforcement actions and which regulate “precautionary attachment” (“saisie conservatoire”). See also most of the codes of civil procedure of the Latin American countries which have concepts such as attachment and precautionary seizure of property.

2.2 There are also precedents in international instruments that have dealt with this problem. As precedents, we can mention for the European Union, the Brussels Convention of 1968⁹ and the Lugano Convention of 1988¹⁰ and in the Americas, the Inter-American Convention on Precautionary Measures signed at Montevideo on 8 May 1979¹¹, which have however a limited scope. In maritime law, the Convention relating to arrest of 1952¹² and the International Convention on the Arrest of Ships of 1999¹³ (which is not yet in force) incorporate some provisions that unify and regulate in a detailed manner the enforcement of these types of precautionary measures with respect to sea-going ships.

2.3 The Colombian delegation considers it timely to stress the fact that the matter raised is not foreign to the work of the Organization. In fact, the Convention on the Precautionary Attachment of Aircraft of 1933¹⁴ defines some matters relating to the precautionary attachment of aircraft, but it has a low level of acceptance¹⁵. More recently, ICAO and its Legal Committee, together with UNIDROIT, have dealt with the international recognition of rights and interests in mobile equipment¹⁶, and, in particular, by adopting a Protocol on aircraft equipment¹⁷, which regulate the recognition, registration and enforcement of certain rights and interests. It would be desirable for this important unification work to continue considering aspects relating to precautionary attachment for the enforcement of judgments for the purposes of modernizing the existing provisions and harmonizing them with other international conventions.

⁹ See 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters at [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ES&numdoc=41968A0927\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ES&numdoc=41968A0927(01)&model=guichett)

¹⁰ See the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 16 September 1988 at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ES&numdoc=41988A0592&model=guichett

¹¹ See text at <http://www.oas.org/juridico/spanish/tratados/b-42.html>

¹² International Convention Relating to the Arrest of Sea-Going Ships, which was adopted at Brussels on 10 May 1952 and which entered into force on 24 February 1956.

¹³ For the text of the final act and of the Convention, see <http://www.unctad.org/sp/docs/imo99d6.sp.pdf>

¹⁴ Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, signed at Rome in May 1933, see <http://www.aviation.go.th/airtrans/airlaw/ArrestofAircraft.html#1>

¹⁵ The States that have ratified it are: Belgium, Brazil, Denmark (excluding Greenland), Germany, Guatemala, Hungary, Italy, Norway, Poland, the Kingdom of the Netherlands (excluding its colonies) and Switzerland. The States that have adhered to it are: Algeria, Finland, Haiti, Mali, Mauritania, Nigeria, Senegal, Sweden and Zaire.

¹⁶ See Doc 9793, Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001 at <http://www.unidroit.org/spanish/conventions/mobile-equipment/mobile-equipment.pdf>

¹⁷ See Doc 9794, Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment at <http://www.unidroit.org/spanish/conventions/mobile-equipment/aircraftprotocol.pdf>

2.4 Although Articles 17¹⁸, 18¹⁹, 19²⁰ and 20²¹ of the Draft Convention on Damage Caused by Foreign Aircraft to Third Parties refer to procedural aspects aimed at the recognition and enforcement of judgments, the Colombian delegation considers it advisable for the Legal Committee of the Organization to continue exploring the unification of some aspects relating to “attachments”, “arrests”, “precautionary measures” and other types of measures to ensure compliance with the judgments in cases of damage to third parties and other cases of aeronautical liability.

2.5 This work could be undertaken by broadening the mandate of the Legal Committee to include the task of the modernization of the Convention on the Precautionary Attachment of Aircraft of 1933 or as an independent task for the discussion and the preparation of a Protocol to unify and modernize matters relating to precautionary measures for the enforcement of judgments that attribute aeronautical liability.

3. ACTION BY THE ASSEMBLY

3.1 The Assembly is invited to note the aspects contained in this working paper and to express its views with respect to the advisability of the proposal contained in paragraph 2.5.

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¹⁸ See the text of the Draft in the Appendix to LC/32-WP/3-1, Article 17, Primacy of Proceedings in State of Occurrence.

¹⁹ Ibid., Article 18, Execution When Limits of Liability Apply.

²⁰ Ibid., Article 19, Recognition and Enforcement of Judgments.

²¹ Ibid., Article 20, Execution.