



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

CONVENTION ON COMPENSATION FOR DAMAGES TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT – JOINT INDUSTRY PAPER

(Presented by the International Air Transport Association (IATA), the International Union of Aerospace Insurers (IUAI), the London & International Insurance Brokers' Association (LIIBA), the Civil Air Navigation Services Organisation (CANSO), the Airports Council International (ACI), the Aviation Security Services Association International (ASSA-I) and the Aviation Working Group (AWG))

1. INTRODUCTION

1.1 For the past eight years, the members of the Joint Industry Group have participated in the diplomatic initiative of the International Civil Aviation Organization (ICAO) to construct a novel and unique legal framework to address the issue of third party surface damage resulting from criminal or terrorist acts involving aircraft operations.

1.2 We engaged in this process with a commitment to assist in the search for a principled compromise that would:

- recognize that terrorists' actions which cause damage to persons and property on the ground are aimed at governments, not airlines;
- provide prompt compensation to third party victims on the ground in amounts that would likely exceed the assets of the airline involved;
- avoid a punitive approach to dealing with the innocent airline victims of criminal or terrorist interference with their aircraft;
- give the airlines, which are also victims of terrorism, strict but limited liability, capped at insurable amounts;
- recognize that if a government, with all of its resources, can fail to prevent a terrorist attack, then any industry failure should not result in punitive liability; and
- avoid industry bankruptcies and protect jobs in the face of any terrorist atrocity.

1.3 We have remained engaged in this process as the successive drafts of the convention have, despite our efforts, moved further and further from a reasonable compromise between these legitimate interests.

1.4 The Joint Industry Group does not support key elements of the current draft convention that has been submitted to the Diplomatic Conference.

2. DISCUSSION

2.1 The Joint Industry Group has already demonstrated considerable flexibility in considering compromises on two of the three key features of the draft convention: the breakability of the liability cap and the right of recourse provisions. The draft convention that emerged from the 33rd Session of the ICAO Legal Committee, however, departs too far from fundamental principles of fairness. Critical provisions of this draft now adopt a standard of strict and unlimited liability that has no place in a compromise between the interests of governments, injured surface victims, airlines and other industry stakeholders. The draft creates a complete lack of certainty for airlines, leaving it up to individual States to determine when an operator can benefit from the safe-harbour provision. It opens up the possibility of unlimited liability for the acts of servants and agents rather than limiting this to decisions taken by those in an airline's senior management positions who make security related decisions. Airlines risk being subjected to liability for criminal or terrorist acts that are beyond their control.

2.2 If adopted, the draft convention would deprive airlines of legitimate defences that they presently enjoy in many jurisdictions, with no benefit in return. In many jurisdictions, the convention would substitute a strict liability regime in place of a domestic fault-based system that imposes liability only in cases of the airline's negligence. In other jurisdictions, the domestic legal system expressly exonerates the airline for third-party damages resulting from terrorist acts.

2.3 This draft represents the worst of all worlds for the airline industry: strict liability which is unlimited and may be triggered by the acts of any employee who failed to comply with a robust airline security programme, and the additional burden of collecting contributions to the Supplementary Compensation Mechanism (with the accompanying reduction in demand for airline services).

2.4 One can draw certain comparisons with the balance established under the Warsaw Convention regime, whereby airlines accepted strict liability regardless of fault, in exchange for a fixed cap on that liability. That regime has served the international aviation industry well. Victims of aviation accidents have been fairly compensated while the liability cap has offered some protection and certainty to aircraft operators in return for their acceptance of the no-fault burden. This consensual *quid pro quo* carried through, largely unscathed, to the Montreal Convention of 1999.

2.5 Likewise, the proposed Unlawful Interference Convention, as currently drafted, properly preserves the right of third-party victims to fair and timely compensation. At the same time, however, it threatens the position of airlines by severely weakening the cap on their liability to such an extent that the convention can no longer be regarded as representing an adequate balance between the interest of the victims and the affected industry participants.

2.6 The imposition of strict liability on any group is a departure from the norm of liability for fault. It was accepted in civil aviation so as to permit compensation to be channelled to third-party ground victims regardless of the operator's fault, in order to ensure prompt compensation, with the minimum of expense and delay. The *quid pro quo* for industry has always been the airlines' hard cap on their liability, enabling them to trade through a crisis situation and to have certainty as to their exposure. This in turn has allowed the airlines to purchase sufficient insurance to cover their third-party liabilities. However, the proposed new convention effectively nullifies this insurance protection and additional layers of cover add substantial extra cost.

2.7 The cap on an airline's unlimited liability must be all but unbreakable. While the action of senior management, acting "recklessly and with knowledge", may be a valid trigger for additional

compensation, the inclusion of *bona fide* servants and agents committing an act of unlawful interference is intolerable. The carefully placed “sleeper” terrorist has defeated, and is likely to defeat again, the most rigorous of selection and security procedures.

2.8 At this last stage of the process, the basic question that the Diplomatic Conference must address is: Who should pay the price for the risk of terrorist acts involving aircraft operations? There is consensus from all sides that innocent third-party surface victims should not be left to bear the entire cost. A principled approach would be to recognize that since national governments – the target of terrorists seeking political change through violence – bear primary responsibility for protecting their citizens from unlawful acts of terrorism, society as a whole, acting through its national governments, is the logical candidate. But if that approach is not politically feasible, governments can either punish the airlines or adopt a principled compromise that advances the interests of all victims.

2.9 The Joint Industry Group cannot support the punitive approach. This convention should not serve as a vehicle for States to avoid their responsibility to their citizens by shifting the burden for compensating third-party victims onto the innocent airline victims of terrorism or other industry stakeholders. The Diplomatic Conference should instead turn to a principled compromise that advances the interests of all victims of terrorist interference with aircraft operations, including the aviation industry. The current draft does not achieve that objective.

2.10 The Joint Industry Group recognizes, however, that the current draft could serve as the basic framework for a regime in which all victims of aviation terrorism would be treated more fairly than is presently the case under applicable national laws or the existing international law regime. In order to restore a minimally fair balance between the interests of all victims, several essential revisions (set forth in the Attachment to this Working Paper) are required. Third-party surface victims would benefit from certain, prompt and substantial compensation that is likely to exceed the assets of an airline forced into bankruptcy. Airlines would benefit from a substantially unbreakable cap on liability for any losses that exceed their insurance cover if they adopt robust security programmes to protect against terrorism. Other actors in the aviation sector would be protected from legal and financial exposure by the channelling of liability to an insured airline and a right of recourse provision that reflects long-standing current practice and is agreeable to the industry as a whole.

2.11 The Joint Industry Group will only support a final convention if, and only if, amendments that substantially reflect the revisions in the Attachment are incorporated. However, if the Diplomatic Conference produces a text that does not reflect these revisions, we anticipate that members of the various industry organizations that subscribe to this Working Paper will work against its ratification.

2.12 The Diplomatic Conference is faced with a choice:

- a) a convention which provides a balance between compensating innocent third-party surface victims and protecting innocent airline victims and other industry stakeholders, against acts of terrorism; or
- b) a convention which does not have the support of the aviation industry as a whole. We urge the former, which will significantly increase the prospects of States ratifying the convention.

APPENDIX A

We set out below our proposed specific revisions to the text of the Unlawful Interference Convention, along with our explanatory comments.

Article 1 — Definitions

...

d) ~~“International flight” means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State.~~

Comment:

The Convention should apply to domestic and international carriage. The scope of the current draft which is limited to international carriage gives rise to the following issues:

- (i) *surface victims would be compensated differently depending on the nature of the flight in question, which is completely arbitrary;*
- (ii) *statistically, there is more chance of an incident arising in the course of domestic carriage than on an international flight;*
- (iii) *the SCM would either be under-funded or the contributions would be much higher*
- (iv) *incidents arising in domestic carriage would continue to be governed by national law, with the accompanying uncertainty which currently exists;*
- (v) *there may be issues of compatibility with EU law*
- (vi) *the Convention would not even address the factual scenario which arose in the 9/11 attacks, which has been one of the main drivers behind development of the text.*

...

h) ~~“Senior management” means members of an operator’s supervisory board, members of its board of directors, or other senior officers of the operator who are responsible for making decisions regarding the overall management of the operator’s activities or of the operator’s security system, have the authority to make and have significant roles in making binding decisions about how the whole of or a substantial part of the operator’s activities are to be managed or organized are responsible for making decisions regarding the overall management of the operator’s activities or of the operator’s security system.~~

Comment:

The definition of senior management, whose acts may potentially give rise to the operator’s unlimited liability under Article 23 must be restricted further to only the most senior members of the operator’s organisation and other senior executives with specific responsibility for security issues. This is an integral element of the fair compromise on the basis of which the airlines can accept strict liability for acts of terrorism for which they are not responsible.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party ~~caused by~~ involving an aircraft in flight ~~on an international flight~~, as a result of an act of unlawful interference. This Convention shall also apply to such damage that occurs in a State non-party as provided for in Article 27.

~~2. If a State Party so declares to the Depositary, this Convention shall also apply to damage to third parties that occurs in the territory of that State Party which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.~~

~~2.3.~~ For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Comment

See comment under Article 1 regarding the application of the Convention to domestic carriage.

Article 3 — Liability of the Operator

1. The operator shall be liable for damage sustained in case of death or bodily injury or for damage to property within the scope of this Convention upon condition only that the damage was caused by the unlawful interference with an aircraft in flight.

2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.

~~3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.~~

~~4. Damage to property shall be compensable.~~

~~5.~~

~~5.3.~~ Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State in the territory of which the damage occurred.

~~6.4.~~ No liability shall arise under this Convention for damage caused by a nuclear incident ~~as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and any amendment or supplements to these Conventions in force at the time of the event.~~

~~7.5.~~ Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Comment

The provision establishing the principle of the operator's strict liability should reflect the primary cause of the loss, not simply the instrument which is used by terrorists to carry out the act of unlawful interference.

In keeping with the principle established in article 17(1) of the Montreal Convention 1999, damages for mental injury should be excluded. The Joint Industry group intends to file a separate Working Paper dealing specifically with this issue.

Standard aviation insurance policies contain a complete exclusion for nuclear damage, such cover being unavailable in the market. The operator should not be liable for nuclear risk in any circumstances, without limitation to the definitions in the Paris Convention 1960 or Vienna Convention 1963.

Article 4 — Limit of Operator's Liability

The liability of ~~the~~ an operator shall not exceed for each aircraft and event:

...

Comment

Clarification.

Article 5 — Events involving two or more operators or other persons

...

3. In any event, No operator shall be liable for any damage suffered by a third party for a sum in excess of the limit, if any, applicable to its liability.

Comment

Clarification.

Article 8 — The constitution and objectives of the Supplementary Compensation Mechanism

...

2. The Supplementary Compensation Mechanism shall have the following purposes:
 - a) to provide compensation for damage according to Article 18, paragraph 1, pay damages for which an operator or operators would otherwise be liable under Articles 3, 4 and 5 according to Article 18, paragraph 3, and provide financial support under Article 27;

Comment

Clarification.

...

6. The Supplementary Compensation Mechanism shall enjoy tax exemption and such other privileges as are agreed with the host State. The funds of the Supplementary Compensation Mechanism, and any proceeds from them, shall be exempted from tax in all States Parties.

Comment

We see no justification for the proceeds of the SCM funds to be subject to tax in any State Party.

Article 12 — Contributions to the Supplementary Compensation Mechanism

The contributions to the Supplementary Compensation Mechanism shall be:

a) the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on ~~an international~~ commercial flight from an airport in a State Party. Such contributions shall ensure equal treatment between passengers flying transit and direct routes ~~Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party;~~

...

Comment

See comment under Article 1 regarding the application of the Convention to domestic carriage. The principle of fair treatment between passengers on transit and direct routes should also be enshrined in the Convention.

Article 14 — Period and Rate of Contributions

...

2. Contributions shall be fixed in accordance with paragraph 1 so that the funds available amount to at least ~~{25%}[100 %]~~ of the limit of compensation set out in Article 18, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to at least [50 %][100 %] of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which the Convention subsequently enters into force.

...

...

5. The annual administrative costs incurred by the Supplementary Compensation Mechanism shall not exceed [X].

Comment

We strongly urge that the Convention adopts a pre-financing mechanism for the SCM. Otherwise, the Convention may enter into force without adequate funds in the SCM to compensate victims in accordance with Article 18.

The SCM should be encouraged to adopt prudent financial management.

Article 16 — Duties of States Parties

...

2. Each State Party shall ensure that the following information is provided to the Supplementary Compensation Mechanism:

- a) the number of passengers and quantity of cargo departing on ~~international~~ commercial flights from that State Party;

Comment

See comment under Article 1 regarding the application of the Convention to domestic carriage.

Article 18 — Compensation

1. The Supplementary Compensation Mechanism shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party. ~~Where the damage is caused by an aircraft in flight on a flight other than an international flight, compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2.~~ Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

...

Comment

See comment under Article 1 regarding the application of the Convention to domestic carriage.

Article 20 — Acts or omissions of victims

If the operator or Supplementary Compensation Mechanism proves that the damage was caused, or contributed to, by the negligence or other wrongful an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the Supplementary Compensation Mechanism shall be wholly or partly exonerated from its liability to that claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of the person suffering damages compensation is claimed by a person other than the person suffering damages, the operator shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person suffering damages.

Comment

This language mirrors the corresponding provision in article 20 of the Montreal Convention 1999.

Article 22 – Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and 18, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, and bodily injury ~~and mental injury~~ in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respect of other damage.

Comment

See comment under Article 3 regarding the exclusion of damages for mental injury.

Article 23 – Additional Compensation

1. To the extent the total amount of damages exceeds the combined limits applicable according to Articles 4 and 18, paragraph 2, a person who has suffered damage may, in accordance with this Article, claim compensation from the operator.

...

3. The senior management of an operator shall be conclusively deemed not to have acted recklessly and with knowledge that damage would probably result if, as regards the relevant area of security, it proves that a system to facilitate and audit compliance with industry standards and Annex 17 of the Chicago Convention (“Annex 17”) has been established. Without limit to the means of proving compliance with industry standards and Annex 17, an operator who has passed an IATA Operational Safety Audit (IOSA), and whose senior management has adopted a policy for its implementation and maintenance, shall be conclusively deemed to have met such standards unless the competent authority of a State Party, prior to an event, has issued a finding which has not been subsequently revoked that the operator has not met all applicable security requirements established by the State Party and that the operator shall not be deemed to have met industry standards and Annex 17.

~~3. _____ Without prejudice to paragraph 4, an operator, or, if it is a legal person, its senior management will be presumed not to have been reckless if, as regards the relevant area of security, it proves that a system to ensure compliance with applicable regulatory requirements has been established and that the system was applied in relation to the event.~~

~~4. _____ If a State Party so declares to the Depository, an operator shall conclusively be deemed to not have been reckless in respect of an event causing damage within the territory of that State Party if, as regards the relevant area of security, it proves that a system to ensure compliance with such commonly applied standard as has been specified by that State Party in its declaration has been established and audited. The existence of such a system and completion of such an audit shall not be conclusive if, prior to the event, the competent authority in that State Party has issued a finding that the operator has not met all applicable security requirements established by that State.~~

~~5. _____ Where a servant or agent of the operator has committed an act of unlawful interference, the operator shall not be liable if it proves that a system to ensure effective selection of servants and agents has been established by its senior management and that such system [requires/provides for] [with regard to the security aspect and] a prompt response to security information concerning such servants and agents and was applied in relation to the servant or agent [who committed the act].~~

Comment

The cap on an airline's unlimited liability must be all but unbreakable. This is the only fair basis upon which the operator should have to accept the counter-intuitive notion of strict liability for criminal acts of terrorism. We agree to the current wording of Articles 23.1 and 23.2.

Furthermore, the action of individual employees or agents must not break the unlimited liability cap. The only exception to this should be the intentional acts by the airline's senior management.

An essential element of the liability cap is a corporate safe harbour provision based on the adoption of an agreed industry standard, which is objective and certifiable and provides an absolute defence to a claim of unlimited liability against the operator. We agree that a State may issue a finding that a particular carrier has not met the safe harbour standard prior to an event taking place.

Article 24 — Right of Recourse of the Operator

1. The operator liable for damage shall have a right of recourse against 1° any natural person who has committed the act of unlawful interference or 2° any legal person whose senior management has committed the act of unlawful interference. No such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.

2. Subject to article 26, Nothing in this Convention shall prejudice the question whether an operator liable for damage has a right of recourse against any other person, provided that no such claim may (a) be enforced until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been finally settled and satisfied or (b) exceed that person's relative percentage of the total liability of all persons, other than a person committing an act of unlawful interference, causing damage in connection with an event.

Comment

The proposed right of recourse provision reflects an inter-industry allocation of risk and standard insurance arrangements. That allocation is dealt with by contractual cross-indemnities, reflecting the structure and economics of the air transport industry. The proposed revisions to Articles 24, 25 and 26 have no impact on the rights of primary victims under the Convention.

Article 25 — Right of Recourse of the Supplementary Compensation Mechanism

1. The Supplementary Compensation Mechanism shall have a right of recourse against 1° any natural person who has committed the act of unlawful interference or 2° any legal person whose senior management has committed the act of unlawful interference. No such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.

...

Comment

See comment under Article 24 regarding rights of recourse.

Article 26 — Restrictions on rights of recourse

1. No right of recourse shall lie under Article 24, paragraph 2 ~~or Article 25, paragraph 2~~ against an owner, lessor or financier retaining title of or holding security in an aircraft, or against a manufacturer of an aircraft, its engines or component parts in relation to the approved design of an aircraft, its engines or components.

2. The rights of recourse under Article 24, paragraph 2, and Article 25, paragraph 2 shall not arise to the extent that the person against whom recourse is sought would have been unable to maintain insurance covering liability for an event on a commercially reasonable basis~~damage caused by an event could not reasonably have been covered by insurance.~~

3. Except as provided for in Article 24, paragraph 1, A~~an operator shall have no right of recourse in relation to any amount exceeding that specified in Article 4 (1) additional compensation for which it is liable under Article 23.~~

...

Comment

See comment under Article 24 regarding rights of recourse.

Article 27 — Assistance in case of events in States non-party

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-party, ~~the Conference of Parties may decide, on a case-by-case basis, that~~ the Supplementary Compensation Mechanism shall provide financial support to that operator. Such support may only be provided in respect of damage that would have fallen under the Convention if the State non-party had been a State Party and if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the provisions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of the Parties. The financial support shall not exceed the maximum amount for compensation set out in Article 18, paragraph 2. If the solvency of the operator liable is threatened even if support is given, such support shall only be given if the liable operator has sufficient arrangements protecting its solvency.

Comment

The intervention of the SCM in the case of an event in a State non-party but which involves an operator whose home State is a State party should be obligatory. In the case of an event in a State non-party, the rights of the primary victims and industry stakeholders under the Convention are substantially the same. Apart from basic fairness, any other approach would provide a disincentive to ratification.

Article 35 — Period of Limitation

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within ~~three~~ two years from the date of the event which caused the damage.
2. The right of compensation according to Article 18 shall be extinguished if an action is not brought, or a notification pursuant to Article 32, paragraph 3, is not made, within ~~three~~ two years from the date of the event which caused the damage.
3. The method of calculating such ~~three~~ two year period shall be determined by the law of the court seized of the case.

Comment

In line with the parallel provision (Article 35(1)) in the Montreal Convention 1999, the period of limitation should be two years.