



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES AND CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

(Presented by the Air Crash Victims Families Group)

1. PROPOSAL

- 1.1 A Convention whose deliberations extend over many years is a WORK IN PROGRESS.
- 1.2 Many fundamental changes have occurred in the world since 2004, most especially since the 33rd Session of the Legal Committee (21 April to 2 May 2008), affecting also the entire air transportation industry.
- 1.3 It is proposed that the Convention revert to its original task.
- 1.4 One General Risk Convention with provisions for all catastrophic occurrences including unlawful interference, involving aircraft.

2. PROLOGUE

2.1. During the 31st Sessions of the ICAO Legal Committee (28 August – 8 September 2000) the delegation of Sweden introduced a resolution to address the modernization of the 1952 “*Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface*” (Rome Convention) – after the successful adoption of the “*Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on May 28, 1999*”.

2.2 For the last eight years the leadership of ICAO has shepherded the deliberative process with great patience, fortitude and understanding inspired by the encouragement of Presidents of Council Excellencies Dr. Assad Kotaite, now Roberto Koebeh Gonzalez, the ICAO Secretary General Dr. Taïeb Chérif (and his predecessor Dr. Renato Costa Perreira), under the patient direction of the Legal Committee Chairman Gilles Lauzon, Q.C., the leadership of the chair of the Special Group (now the President of the Legal Committee), Henryk Kjellin, the chair of the Task Force, Siew Huay Tan, the ICAO Director, Legal Affairs and External Relations, Denys Wibaux (and his predecessor Dr. Ludwig Weber) the Deputy Secretary Senior Legal Officer John V. Augustin, the Assistant Secretary

Legal Officer, Arie Jakob, the Legal Bureau dedicated staff, and the Rapporteur, Michael Jennison – as well as the patient interpreters whenever needed. We owe them all our gratitude for many years of care and attention.

2.3 For the last twenty six years – since 1983 – ACVFG and its original constituents have worked with ICAO either as participants or observers in the development of international aviation – starting with the “Fact Finding Investigation Regarding the Shooting Down of Korean Air Lines Boeing 747 (Flight KAL007) on August 31, 1983 (C-WP 9781 – 6.5.1993) leading on to the Modernization of the 1929 Warsaw Convention System, resulting in the adoption of the 1999 Montreal Convention, by acclamation. After adoption of 1999 Montreal ACVFG has been actively involved in encouraging its constituents governments and legislators to give their Advice and Consent to the ratification of this important Convention for the twenty first century. Ninety States have so far ratified 1999 Montreal. Together with the ground breaking initiative of IATA resulting in the IATA Intercarrier Agreement of 1995 – most civil aviation transportation is covered by the IATA/1999 Montreal Regime.

3. INTRODUCTION

3.1 A Convention whose deliberative process extends over many years has to be pro active in its content because it is meant not only to be applicable in the immediate present – but foremost it is enacted with the need for long shelf life in the future.

3.2 A Convention can also come into force ONLY if all participants, States and Observers can live with its provisions, considering most especially their countries’ already existing laws – to encourage and support ratification, as well as to implement its recommendations, within a reasonable time. (A limping Convention is worthless to the world community – see Rome I and II).

3.3 There is a substantial difference between the 1929 Warsaw/1999 Montreal Convention that was adopted by unanimous acclamation of all parties involved and went on to wide spread ratification, compared to the two Rome Conventions that came into being by consensus (One Protocol came into force after twenty four years, the other never reached the required minimum of adherents, three States denounced the 1952 Rome Convention).

	Ratifications		Ratifications
1929 Warsaw Convention	152	1933 Rome Convention	5
1955 The Hague Protocols	137	1938 Brussels Protocols	2
1995 IATA Intercarrier Agreement	97	1952 Rome Convention II	49
1999 Montreal Convention	90 and going	1978 Montreal Protocols	12

3.4 The differences between the Warsaw/Montreal Regime and the Rome Conventions are:

- that the first laid the ground work pro actively – the legal basis on which international civil aviation was built, and exists today,

- while the 1933/1952 Rome Conventions and their 1938/1978 additional Protocols attempted to unify reactively the rules for compensations to third parties within the already existing (at first non engine driven) damages resolution system, involving third parties. (Guille vs. Swan, 19 Johns, 381 (N.Y. 1822 – “Liability for Damage Caused by Aircraft on the Surface – Past and Current Efforts to Unify the Law – Professor Dr Michael Milde, Montreal, ZLW57.Jg. 4/2008).

3.5 Warsaw/Montreal was and continues therefore to be ESSENTIAL and preferable in the development of unified rules and regulation for international transportation by air.

3.6 Rome I and II were at best preferable for a few States – BUT NEVER ESSENTIAL in the resolution of third party liability claims involving aircraft , because ample loss settlement experience, case law, rules and regulations exist already for over 187 years in most countries of this world.

3.7 A Convention whose deliberations extend over many years is also a “WORK IN PROGRESS” ” that has to be adaptable to changing conditions, worldwide. Otherwise the final Draft is overtaken by events – defeating the intent of the endeavour.

3.8 The present process started in 2000 in the wake and as an extension of the successful 1999 Montreal Convention for the 21st Century (see opening address to the 32nd Session of the ICAO Legal Committee (Montreal 15-21 March 2004) by the then President of the Council, Dr. Assad Kotaite – Doc 9832-LC192 – 2.3).

3.8.1 In 2004 a Special Group’s task was extended when the unsuccessful GLOBALTIME supplemental Compensation Plan was grafted onto the Rome Convention General Risk Draft.

3.8.2 The Special Group then separated General Risks and “Unlawful Interference” into two “free standing” Conventions.

3.9 The two Conventions Drafts now before the Diplomatic Conference have not been updated by the developments in civil air transportation since 2004 - for the last five years. They need to be in order to make them viable and ratifiable.

4. **DISCUSSION**

4.1 The history of the last seventy six years shows that “Rome” addressing compensation to third parties cannot find broad worldwide acceptance as a free standing Convention.

4.2 The history of the last thirty eight years shows also the failure of efforts to create supplemental compensation plans/mechanisms in the international air transportation field – starting with Article 35A of the Guatemala City Protocol of 1971 – going to the Montreal Additional Protocol No 3 of 1975 – to the 1992 Ford Mitchell Supplemental Compensation Act in the United States, to GLOBALTIME, EQUITIME and EUROTOME.

4.3 Many States have already created compensation funds to repair the economic and non economic damages in the wake of terrorist occurrences, lastly in the immediate aftermath of the September 11, 2001 terrorist attack by means of four hi-jacked aircraft in the United States.

4.4 Within eleven days after this apocalyptic attack, the United Congress passed legislation that reimbursed the transportation industry for their losses, assured affordable insurance, and addressed the repair of the economic and non economic damages incurred by the public at a total cost of over \$12 bio. (Public Law 107-42-September 22, 2001 – “Air Transportation Safety and System Stabilization Act”).

4.5 The Air Transportation Safety and System Stabilization Act” of 2001 created the benchmark for the crisis management of any future catastrophic occurrences.

4.6 History has also shown that multiple Conventions and or Protocols find little acceptance – if they come into force at all:

1929 Warsaw	Ratifications	1952 Rome	Ratifications
1961 Guadalajara	86	1978 Montreal	12
1971 Guatemala City	7		
1975 Montreal #1	49		
Montreal #2	50		
Montreal #3	21		
Montreal #4	57		

4.7 The concern with multiple Conventions on essentially the same subject is that they rarely are ratified in tandem – and if ratified at all the less important one gets accepted.

4.8 Because the 1975 Montreal Additional Protocols No. 3 – the centerpiece of the incremental Modernization of the 1929 Warsaw regime – could not be put into force by even only thirty countries it took twenty four more years before the 1929 Warsaw system was replaced by the 1999 Montreal Convention for the twenty first century.

4.9 Over the last one hundred years transportation by air has developed into a major industry that is essential to the well functioning economy worldwide. It is an industry no State could allow to fail.

4.10 Over the eight years since the Modernization of 1952 Rome has been debated substantial changes have occurred in the civil transportation industry by air.

4.10.1 The September 11, 2001 apocalyptic terrorist attack by means of aircraft.

4.10.2 The introduction of ever larger and bigger planes, carrying over 60,000 gallons of fuel, that can create as much or even more damages to third parties than any terrorist attack.

4.10.2.1 It is the burning fuel and its fires that caused the collapse of World Trade Center buildings 1 and 2, as well as World Trade Center building No 7 (no ground damage was caused by the 9/11 plane crash in rural Shankville, Pa and the damages caused by the crash into the sprawling low Pentagon complex in Arlington, Va were limited to a small portion of the building. The repairs remained within the insurance policy limits of the carrier, (each of the 9/11 flights were insured separately).

4.10.3 The recent worldwide economic crisis that has also affected the insurance industry because of their bad investments decisions that required Governments to save them from collapse – with capital injections that have exceeded already over \$170 bio, so far. The US Government presently owns the world largest aviation insurer American International Group (AIG).

4.10.4 The continued urbanization around airports – especially sports facilities with large capacities of spectators – located on or near airport flight paths, (see photograph at the Appendix hereto).

4.10.5 The assumption by Governments of airports safety and security including passengers check in and boarding clearance.

4.10.6 Creating the danger of major civilian accidents whose magnitude of damages to third parties could easily exceed destruction caused in the aftermath of a terrorist attack. (viz: Had American Airlines flight 587 taken off another runway at John F. Kennedy Airport on November 12, 2001 it could have crashed into either the Shea Stadium with over 50,000 spectators in attendance or into Co-Op City a complex of 24-33 stories high buildings with 15,372 apartments. . Had AF4590 (Concorde) managed to lift off at Charles de Gaulle Airport on July 25, 2000 it could have crashed into the Palais des Sports with 5,000 spectators. The EL Airline cargo plane crash of October 4, 1992 into apartment buildings in Biljmer (Holland) created substantial environmental damage, aside from civilian casualties. The flight paths of Congonhas airport in Sao Paulo, Brazil lead over complexes of high rise apartment buildings)

5. CONCLUSION

5.1 Since experience has shown that “Rome” I and II did not find worldwide acceptance as a free standing Convention – it could only be successful within a seamless connection to the 1999 Montreal Convention for the twenty first century – as was originally intended. (see Council President Assad Kotaite at 3.8).

5.2 Since experience has shown that multiple Conventions rarely do get accepted by a majority of States,

5.3 It should be evident that one Convention (General Risks) would have the best chance of success and acceptability.

5.4 With provisions for catastrophic occurrences, acts of unlawful misconduct included.

5.5 Instead of a complicated and costly “Supplemental Compensation Mechanism” the available resources to repair the damages in excess of available primary insurance coverage, could come from a catastrophic occurrence insurance rider – or a free standing secondary policy – with the first step insurance as an initial deductible.

5.5.1 The cost of such supplemental insurance should be very low , because the risk that an accident of catastrophic proportions to third parties is rare (International Union of Aerospace Insurers DCCD Doc No. 13).

5.5.2 Such a supplemental insurance would also be cost effective for the carriers which are already insured and can pass on the premium to the passengers as part of their cost of business package without any additional collection and processing expenses.

5.5.3 In order to make such excess insurance even more secure part of the annual premiums could be retained in a cumulative damages settlement reserve.

5.6 In case of tragedies with a large number of victims and dramatic destruction to Third Parties' properties of a magnitude leading Governments to declare a National Emergency it would be the States to assume\ the determination and payment of damages, with recourse to the responsible parties, if an investigation would determine any extent of their liability.

5.7 The Rome General Risk Draft Convention will have to be harmonized in structure, language and provisions with the 1999 Montreal Convention taking into account some pro active adjustments reflecting some of the advances by States regulations made over the last ten years (Appendix A).

APPENDIX

Convention on Compensation for Damage Caused by Aircraft to Third Parties

1. Article 4 (1) Limit of operators liability

1.1 The liability of the operator arising under Article 3 shall carry a *minimum* insurance coverage per accident and per aircraft see table.

Comment: Refer to Regulation (EC) 785/2004 of the European Parliament (Insurance for air carriers and aircraft operators)

1.2 The bracketed valuations have to be increased.

Comment: The bracketed valuations were listed in 2004. They do not reflect present day value, and most especially not at the time the Convention comes into effect after deposit of the thirtieth ratification (at least four or more years hence)

2. Article 5 – Reduced Compensation

2.1 This article should be stricken.

Comment: Victims are entitled to the payment of full compensation either by settlement or adjudication. Considering (a) Statute of Limitation under which claims must be filed (2 or 3 years), (b) in the slow claims handling process it would (c) take a very long time before determination can be made of the totality of awards compared to the availability of funds – depriving victims of full and timely payment. (d) Courts would not allow delaying payments of adjudicated damages.

3. Article 8 – Advance payments

3.1 This article should be clarified and expanded:

Comment: (a) Experience has shown that this language is extraneous and ambiguous because most States do not have any law addressing Advance Payments. (b) “without delay” is ambiguous because the nature of air transportation tragedies results in a lengthy process to identify victims bodies (c) delaying the availability of Death Certificates needed to file claims (d) the carriers/insurers practices vary widely whether to make advance payments or not and in which amount. (e) There is no compliance, nor any enforcement provision in the present Convention draft. (f) See also Regulation (EC) No 889/2002 of the European Parliament item 7 (1) (2).

Proposal: Advance payments have to be made:

- a) within 21 days after a tragedy occurred to the injured person and/or the legal representative of the decedent's Estate;

- b) the first advance payment shall be at least SDR 20,000 for fatalities and SDR 10,000 for injured persons;
- c) unless the damages incurred have been settled within thirty days after the first payment has been made a second advance shall be available representing one years salary of an injured person – if incapable to work as a result of the accident, and of the one year income of the fatality and;
- d) very year thereafter until the damages awards are settled or adjudicated;
- e) if advance payments are not made in a timely manner, the advances will not be deductible from the final damages settlement and or/adjudication; and
- f) if the advance payments are delayed beyond thirty days they are due, the amount of advances shall be doubled.

4. **Article 13 – Exoneration of Status Liability**

4.1 This article should be stricken.

Comment: Exoneration of anybody violates the parties' rights for due process and is tantamount to the introduction of tort reform by way of an international Convention into the judicial system of sovereign states. For this reason alone this Convention would not be ratifiable in many important States.

5. **Article 15 – Review of Limits**

5.1 The language of this article should be clarified by adding the sentence:

“The review of limits should be conducted not later than March 31 of each calendar year and the cumulative effect of prior years should be included”.

Comment: It would be more cost effective if the liability limits be adjusted automatically each year by the changes in the Consumer Price Indices – as is already practiced in many States.

6. **Article 16 – Forum**

6.1 This article should be harmonized with 1999 Montreal Article 33.

Comment: At minima it should be noted that damages should be awarded within the laws of the primary residence of the victim since there are substantial discrepancies in quantum and laws worldwide.

7. Comment: A chapter should be added regarding **all catastrophic tragedies – included.**

8. Although this Appendix does not address the Draft Convention for Damage Caused by Aircraft from Acts of Unlawful Interference” because it would become moot.

However, the following articles should specifically **not** be carried over into the “General Risk Convention” above.

- 8.1 Article 22 – Reduced Compensation
- 8.2 Article 23 (2) (3) (4) (5) Additional Compensation
- 8.3 Article 24 – Right of Recourse of the Operator
- 8.4 Article 25 – moot
- 8.5 Article 26 – Restrictions on rights of recourse
- 8.6 Article 28 – Exclusive Remedy

