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INTERNATIONAL CONFERENCE ON AIR LAW

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COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE OR FROM GENERAL RISKS

(Presented by the McGill University Institute of Air & Space Law)

1. INTRODUCTION

1.1 The Institute of Air & Space Law offers these constructive comments with a view to improving the draft Conventions - The Convention on Compensation for Damage Caused by Aircraft to Third Parties (the *General Risks Convention*), and The Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference (the *Unlawful Interference Convention*).

2. THE GENERAL RISKS CONVENTION

2.1 Breakable Limits of Liability

2.1.1 With respect to Article 4 ¶ (2)(b) of the General Risks Convention, we urge the delegates to delete the word "solely". The phrase was borrowed from the Montreal Convention of 1999.[1] However, there and here, the word "solely" emasculates the defense and makes it effectively surplus verbiage.[2] The requirement that the operator could exonerate itself from higher limits of liability by proving that the negligence or other wrongful act or omission of a third person was the *sole* cause of the damage poses an impossible burden of proof upon him. For example, if the principal cause of the injury was a manufacturing defect of the aircraft, the injured person would urge that the operator's maintenance staff negligently failed to discover it. Similarly, if an outsourced maintenance provider failed to properly repair an aircraft, and that negligence was the principal cause of the damage, the operator would have a difficult time proving that negligence was the sole cause; why, for example, did the operator's employees not properly supervise the maintenance or discover it?

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[1] Article 21(2) of the Montreal Convention of 1999 provides:

The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

*(b) such damage was **solely** due to the negligence or other wrongful act or omission of a third party.*

[2] See *Paul Stephen Dempsey & Michael Milde, International Air Carrier Liability: The Montreal Convention of 1999* 208-12 (McGill 2005).

2.1.2 Under Article 4, in order to avoid liability beyond the first tier, the carrier has to prove that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents, or such damage was *solely* due to the negligence or other wrongful act or omission of a third party. In a catastrophic crash, the operator likely not have evidence to sustain either that it was not negligent, or that a third party's acts were the sole cause of the damage. In all mass disaster litigation, the airline will have an insurmountable burden of proof, and find itself absolutely liable without fault to the full measure of the damages of all aboard. It will concede liability and proceed to the issue of plaintiffs' damages. This thwarts one of the Convention's major goals – to enhance predictability of damages so as to facilitate the ability of the industry to secure insurance at affordable levels.

2.1.3 The wording of Article 21 ¶ 2(b) of the Unlawful Interference could be used here. It speaks of "the primary cause of the event." We respectfully submit that this is a superior standard for measuring the operator's culpability. It is inequitable to impose liability upon the carrier without limit when its negligence is less than that of a third party. That third party should be the proper tortfeasor for the imposition of liability beyond the limits of the General Risks Convention.

2.1.4 Therefore, we respectfully urge the delegates to revise Article 4 ¶ (2)(b) of the General Risks Convention be amended to read as follows: "the wrongful act or omission of another person was the primary cause of the damage."

2.2 **Wilful Misconduct**

2.2.1 Article 20 provides that if the operator proves "the damage was caused, or contributed to, by an act or omission of a claimant . . . *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 . . . " [emphasis supplied]. We respectfully recommend the italicized language be deleted from Article 20.

2.2.2 The italicized language originated in the Hague Protocol of 1955 as a substitution for and reformulation of the term " wilful misconduct" in Article 25 the Warsaw Convention of 1929 (which provided for a breakability of liability limits if the passenger proved the carrier engaged in " wilful misconduct". The Hague Protocol clarified what was intended by the " wilful misconduct" provision of Article 25 with language establishing carrier liability where plaintiff proves "that the damages resulted from an act or omission of the carrier . . . done with the intent to cause damage or recklessly and with knowledge that damage would probably result."[3] The concept often was litigated as an important means of breaking through Warsaw's low liability ceilings. Hence, there is voluminous jurisprudence on the issue of wilful misconduct (also known as an "act done with intent or recklessly and with knowledge that damage would probably result").

[3] According to Professor Diederiks-Verschoor, "[t]he advantage of this new rule is that the elements of both 'dol' and 'wilful misconduct' are included, while at the same time 'omission' has been included as a ground for unlimited liability." I.H.Ph. Diederiks-Verschoor, *The Liability of the Carrier Under the Warsaw Convention* 91 (2001).

2.2.3 Under both Warsaw and Hague, wilful misconduct has been defined by the courts as (1) intentionally performing an act (or omission) with the knowledge it will probably result in an injury or damage, or (2) performing an act in reckless disregard of its consequences.[4] wilful misconduct is deemed by the jurisprudence as neither ordinary negligence, nor even gross negligence;[5] it is something more. As a US appellate court noted, "[o]n a *mens rea* spectrum from negligence to intent, article 25's standard is very close to the intent end. Negligence will not suffice, nor even recklessness judged objectively."[6] Some courts have insisted on a "conscious awareness that its acts or omissions were wrongful."[7] A British court held that "[t]o be guilty of wilful misconduct the person concerned must apprehend that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be."[8] Another held that, "' wilful misconduct' goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the results of his carelessness may be."[9] Hong Kong courts apply a similar test: "It is necessary for a plaintiff to establish actual conscious knowledge, at the time the act or omission occurs, that damage would probably result."[10]

2.2.4 All jurisdictions that have examined the question, save France,[11] have assessed the alleged wilful misconduct of the carrier using a subjective, rather than objective, test.[12] In a carefully

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[4] *Ospina v. Trans World Airlines, Inc*., 975 F.2d 35 at 37 (2d Cir. 1992) (wilful misconduct exists only where the airline "omitted to do an act (1) with knowledge that the omission of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences."); *In re Korean Air Lines Disaster*, 932 F.2d 1475 at 1479 (D.C. Cir. 1983) ("wilful misconduct is the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance."); *Koninklijke Luchtvaart Maatschappij N.V. v. KLM Royal Dutch Airlines Holland*, 292 F.2d 775 at 778 (D.C. Cir. 1961) (wilful misconduct is "the intentional performance of an act [or omission] with knowledge that the . . . act [or omission] will probably result in injury or damage, or . . . in some manner as to imply reckless disregard of the consequences of its performance."); *Pekelis v. Transcon. & W. Air, Inc*., 187 F.2d 122 at 124 (2d Cir. 1951) (wilful misconduct "does not mean that the defendant had a deliberate intention to kill . . . . [i]t means only that the defendant committed the act "with knowledge that the . . . act will probably result in injury or damage . . . [or] in reckless disregard of the probable consequences . . . ."); *see also Butler v. Aeromexico*, 774 F.2d 429 at 432 (11th Cir. 1985) (wilful misconduct found in turning off radar in inclement weather, causing crash).

The *Guatemala* and *Montreal Protocols* would delete the wilful misconduct language from Article 25 and substitute the following: "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." *Montreal Protocol No. 4*, art. IX (amending *Warsaw Convention*, art. 25).

[5] *Perera Co. v. Varig Brazilian Airlines, Inc*., 775 F.2d 21 at 23-24 (2d Cir. 1985); *Berner v. British Commonwealth Pac. Airlines, Ltd*., 346 F.2d 532 at 536-37 (2d Cir. 1965); *Pasinato v. American Airlines, Inc*., No. 93 C 1510, 1994 WL 171522 at 3 (N.D. Ill. May 2, 1994) (tote bag fell from overhead bin inflicting serious injuries on passenger's head, chest, and leg while flight attendant was retrieving pillow therefrom).

[6] *Bayer Corp. v. British Airways*, Plc, 210 F.3d 236 at 238 (4th Cir. 2000) [hereinafter *Bayer Corp*.] (citing *Piamba Cortes v. American Airlines, Inc.,* 177 F.3d 1272 at 1290-92 and 1291 n.13 (11th Cir. 1999) (internal citations omitted)).

[7] *Saba v. Compagnie Nationale Air Fr*., 78 F.3d 664 at 667 (D.C. Cir. 1996); *Bayer Corp.*, 210 F.3d at 239.

[8] *Horabin v. British Overseas Airways Corp*., [1952] 2 All E.R. 1016 at 1022 (Q.B. 1952).

[9] *Rustemberg Platinum Mines v. South African Airways,* [1977] 1 Lloyd's Rep. 564, 569 (Q.B.).

[10] *Chiu Pui Yin v. China Airlines*, HCPI 660/2001; HCPI 660A/2001; HCPI 715/2005 (2007); *Kwok v. China Airlines*, [2007] 5 HKC 481 (2007).

[11] A possible exception could be the decision of the Australia Court of Appeal of 1990 in *SS. Pharmaceutical Co. Ltd v. Quantas Airways Ltd* that accepted the "objective" criterion of the duty to care. However, in a well documented and thoughtful opinion Judge M. Kirby vigorously and convincingly advocated the "subjective" approach. *Lloyd's Law Reports[1991],* Vol.1, at 288-307.

[12] Among the issues that arise in cases of cargo and baggage, the interpretation of Article 25 stands out as the most controversial and litigated. There has been an ongoing disparity between the treatments applied by the courts in determining this issue, which evolves from disparities in the basic approach of the courts toward the *Warsaw* regime. Some courts felt that principles of domestic legislation are of very little importance in interpreting the provisions of those conventions, and the regime was the result of extensive negotiation between the nations to bring uniformity to the rules that govern liability for damage suffered in

researched and thoughtful opinion, *Connaught Laboratories, Ltd.* v. *British Airways*,[13] an Ontario, Canada, trial court reviewed jurisprudence from around the world, and found the subjective test had been applied in Belgium,[14] Canada, Switzerland,[15] the United Kingdom,[16] and the United States,[17] and that the

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course of international travel. Others felt that the measures of liabilities are unreasonably low and inadequate in cases of negligence and the provisions of the *Convention* could be interpreted to permit recovery that is truly compensatory. The first school prefers the subjective test, while the latter tends to apply an objective test. While the courts in the subjective-test category tried to interpret provisions on principles of treaty interpretation, the objective-test courts interpret the provisions on principles of or analogous to their domestic legislation. Following the *Vienna Convention on the Law of Treaties*, the three main sources for interpreting the words of the conventions: (a) the *Convention* itself; (b) the working papers and transcripts of debates at the time the *convention* and its amendments were drafted (legislative history); and (c) international case law.

While an "act or omission that is done 'with intent to cause damage'" is one which requires subjective intent, it is debatable whether one who performs an act or omission done "'recklessly and with knowledge that damage would probably result'" does so with "actual knowledge of probable damage or imputed knowledge based on what a reasonable person should have known will suffice." *Connaught Labs. Ltd. v. British Airways,* [2002], 217 D.L.R. (4th) 717 at 738 (Ont. Super. Ct. 2000) [hereinafter *Connaught Labs. Ltd*] (internal citations omitted). While in English and Belgian cases, it appears that the actual knowledge is important, in a number of Canadian cases the trend has been one of applying an objective standard of imputed knowledge. The trend in Canada, however, is moving increasingly toward applying the subjective standard, rather than the objective one. In Canada, the Courts have taken a mixed view towards applying both the objective and subjective tests in determining the purport and interpretation of Article 25 in air cargo and baggage cases.

In *Newell v. Canadian Pac. Airlines* [1977] 74 D.L.R. (3d) 574 (Co. Ct.), two dogs were carried in the cargo hold after the airline refused to let the animals in the passenger compartment. Due to the presence in the hold of dry ice, which was being carried to protect some vaccines being transported, one dog had died and the other was ill. *Id.,* at 577. Applying an objective test, the Court found conduct of the airline was "reckless." *Id.,* at 583-84. The Court went further, evaluating whether this reckless conduct was done "with the knowledge that damage will probably result" and held that the defendant's (airline) employees knew that the damage will probably result from the failure of the cargo department to tell the ramp supervisor that dry ice was on board. *Id.,* at 584.

In *Swiss Bank Corporation v. Air Canada, Swissair and Swissair Transport Co. Ltd.* [1982] 1 Ft. 756 (F.C.T.D.); [1988] 1 F.C. 71 (F.C.A.), a parcel of Canadian Bank Notes worth 60,400 CAD disappeared after being shipped to Montreal. Air Canada took the position that its liability is limited to 1,000 CAD. The plaintiff sought full recovery, relying upon Article 25. Applying the objective test, the Court held that the bank notes were likely to be stolen by an Air Canada Employee who must have had knowledge of the likelihood of damages to the owner of the notes. The decision was subsequently upheld by the Federal Court of Appeal.

In *Prudential Assurance Co. v. Canada* (C.A.) [1993] 2 F.C. 293 (F.C.A.), a shipment of electronic goods that was stored in a warehouse pending customs clearance was released by the Canada customs service to a person who misrepresented himself as the owner of the goods. The true owner sued and claimed the full value of goods based on Article 25. While comparing "recklessness" with the criminal code standard, the Court held that "civil law has always adopted an objective standard." Applying objective standards, the Court found that any reasonable person would know a failure to check identification could result in this loss and reached a conclusion in favor of the plaintiff.

In *World of Art Inc. v. Koninklijke Luchtvaart Maatschappij N.V.* [2000] O.J. No. 4565 (C.A.), the plaintiff, who was importing carpets from Tehran, asked KLM not to fly the goods through the United States, knowing that if the goods were transmitted through U.S., they would be seized. Due to two mistakes, the carpets were rerouted through Detroit where they were seized without compensation. The plaintiff sued KLM and, relying upon Article 25, moved for summary judgment directing a trial on damages alone without regard to limitation liability in Article 22. Applying the subjective standard with respect to knowledge (establishment of actual knowledge), the court held that was KLM liable for its acts or omissions.

The trend of courts throughout the world (except in France) is toward applying the subjective test to Article 25. See *e.g.*, *Goldman v. Thai Airways Int'l Ltd*. [1983] 3 All.E.R. 693 at 698-699 (C.A. 1983) [hereinafter *Goldman*] (holding that the "act or omission is not only qualified by the adverb 'recklessly', but also by the adverbial phrase 'with knowledge that damage would probably result'"); *Tondriau v. Air India* [1977] 31 R.F.D.A. 193 at 202 (Belg.); *S.S. Pharmaceutical Co. Ltd. v. Qantas Airways Ltd*. [1991] 1 Lloyd's Rep. 288 at 291 (Austl. C.A 1990); *Lacroix Baartmans, Callens, Und, Van Tichelen v. Swiss Air* [1974] 28 R.F.D.A. 75 (Tribunal Federal Suisse) [hereinafter *Swiss Air*]; *Saba v. Compagnie Nationale Air Fr*., 78 F.3d 664 at 668 (D.C. Cir. 1996) [hereinafter *Saba*]; *Piamba Cortes v. American Airlines, Inc.* 177 F.3d 1272 at 1291 (11th Cir. 1999) [hereinafter *Piamba Cortes*].

[13] *Connaught Labs. Ltd v. British Airways,* 217 D.L.R. (4th) at 739-40. In *Connaught Labs. Ltd.* at 720, the plaintiff shipped cartons of vaccine from Toronto to Melbourne, Australia, via British Airways. The shipment was delayed and the vaccines were ruined. *Id.* Plaintiff claimed damages of approximately 75,000 CAD, based on the invoice amount of damaged goods and shipping charges and the cost of destroying the original defective vaccine shipment. *Id.,* at 720-21. British Airways argued that if damages were recoverable they were limited to the *Warsaw Convention* limit of approximately 2500 CAD. *Id.,* at 281. Applying the subjective test to determine whether British Airways acted recklessly in failing to refrigerate vaccine cartons, the Court found that it knew that the shipment would probably be damaged as result of non-refrigeration. *Id.,* at 240.

[14] *Tondriau v. Air India* [1977] 31 R.F.D.A. 193, 202 (Belg.) [hereinafter *Tondriau*].

[15] *Swiss Air*, at 75

[16] *Goldman*, at 694.

objective test had been applied only in France.[18] The Canadian court noted that the first sentence of the Hague Protocol's formulation of wilful misconduct (i.e., "that the act or omission was done "with intent to cause damage") obviously requires subjective intent. The latter category (i.e., that the act was done "recklessly and with knowledge that damage would probably result") also facially suggests subjective intent, but the court found that some ambiguity in the language required further analysis.

2.2.5 In the seven decades since the Convention went into effect, and despite the fact that the issue has been litigated often, a relatively small number of cases have resulted in enhanced recovery under this provision, for wilful misconduct has been difficult to prove.[19] The inclusion of this language in Article 20 would impose a significantly more difficult burden of proof upon operators than the Montreal Convention of 1999 imposes upon carriers.

2.2.6 Article 20 of the Montreal Convention of 1999 provides, in part: "If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage." We respectfully recommend that this language be substituted for the draft language in Article 20 of the General Risks Convention. We respectfully submit that comparative fault principles should be negligence based, and not triggered by the difficult standard of wilful misconduct.

3. THE UNLAWFUL INTERFERENCE CONVENTION

3.1 Mental Injuries

3.1.1 Article 3 ¶ 3 allows recovery for mental injuries "resulting from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury." This provision has no analog in the Montreal Convention of 1999, though much jurisprudence allows recovery for mental injuries flowing from bodily injury under the Montreal and Warsaw regimes. The difficulty with claims for emotional damages is that they can be feigned. Claims for nervousness, loss of sleep, inability to concentrate or to work, loss of consortium and post traumatic stress disorder likely will grow if allowed under the Unlawful Interference Convention, as will the number of people who claim to have been in the vicinity of the incident. This will dilute the ability of insurers to predict risk, and cost it appropriately.

3.2 Right of Recourse

3.2.1 Article 24 ¶ 1, sentence two provides: "No such claim may be enforced until all claims from persons suffering damage due to an event have been fully settled and satisfied." It warrants clarification. If this is interpreted to prevent an airline filing suit against a terrorist until all other victims have been paid, it effectively destroys the possibility of recovery. Most jurisdictions impose a one year statute of limitations for filing an intentional tort lawsuit. Yet this Convention provides for a three year

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[17] *Saba*, at 667; *Piamba Cortes*, at 1287.

[18] English and Belgian courts have invoked the *Hague Protocol*'s conclusion that Article 25 should include imputed as well as actual knowledge – that is, whether the defendant acted recklessly and knew that damage would likely result. *Goldman*, at 368, at 698-700.

[19] *See, e.g.*, *In re Aircrash in Bali, Indon*., 871 F.2d 812 (9th Cir. 1989); *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985); *In re Pago-Pago Aircrash of January 30, 1974*, (9th Cir. 1982) (unreported decision); *Leroy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965); *KLM Royal Dutch Airline Holland v. Tuller*, 292 F.2d 775 at 778 (D.C. Cir. 1961); *American Airlines v. Ulen*, 186 F.2d 529 at 533 (D.C. Cir. 1949); *Tarar v. Pakistan Int'l Airlines*, 554 F. Supp. 471 (S.D. Tex. 1982); *Reiner v. Alitalia Airlines*, 9 A*v.* Cas. (CCH) ¶ 18,228 (N.Y. Sup. Ct. 1966).

statute of limitations. Hence, all claims will not likely have been settled for three years or more after the event, and the statute of limitations against a third party would have passed.

3.2.2 If on the other hand, an operator is not precluded from filing suit and obtaining (but not collecting or executing) a judgment from a third party, it is less troublesome. We respectfully recommend the sentence be reworded to provide clarification.

3.2.3 A better result would, we respectfully submit, to allow the right of recourse for all victims of terrorism – individuals and operators.

3.3 **Period of Limitation**

3.3.1 One goal of the Convention is to assure prompt recovery of damages for victims. Yet the three year period of limitation contained in Article 35 likely will have the opposite result. In a mass disaster setting, defendants likely will wait until all claims are submitted before processing them, since Article 22 requires a preference for bodily and mental injury claims first, and then a pro-rate reduction in remaining individual recoveries if there are insufficient funds available to pay them all fully.

4. CONCLUSION

4.1 We hope these comments are interpreted in the constructive manner in which they are intended. We follow these comments with a chart elucidating the similarities and differences between these two draft Conventions and their predecessors.

SUMMARY OF PROVISIONS IN ROME CONVENTIONS AND GENERAL RISK & UNLAWFUL INTERFERENCE DRAFT CONVENTIONS
McGill University Institute of Air & Space Law

TREATY → PROVISION ↓	Rome 33	Brussels Protocol 38	Rome 52 (entered into force 58)	Montreal Protocol 78 (entered into force 02)	General Risks Draft Convention	Unlawful Interference Draft Convention
Liable Party	Operator Art. 4(1)		Operator = person making use of the aircraft at the time of damage; presumption that registered owner is operator Art. 2		Operator = person making use of the aircraft at the time of damage. Art. 1(e)	Same. Art. 1(f)
Scope	Damage caused to persons or property on surface by aircraft in		Aircraft in flight or anything falling therefrom; direct		Aircraft in flight in international operations; direct consequence	Same except must be unlawful interference. Art. 2

	flight or anything falling therefrom Art. 2 Onto the surface of one contracting State by the aircraft of another contracting State. Art. 20		consequences Art. 1 Ship is territory of State of registry Art. 23		s; Damage to third parties in the territory of a State Party; ship or aircraft on high seas is territory of the registry State: domestic "opt-in" Art. 2	
State aircraft	Does not cover military, customs or police aircraft. Art. 21		Does not cover military, customs or police aircraft. Art. 26		Does not cover state aircraft (military, customs or police) Art. 21	Same. Art. 37
Liability Standard	Strict liability Art. 2		Strict liability Art. 1		Strict Liability Art. 3	Same Art. 3
Recoverable injuries	Personal injury or property damages Art. 2		Damage on the surface Art. 1		Death or bodily injury or property Psychiatric injury if caused by bodily injury or from reasonable fear of exposure to death or bodily injury; property damage; environmental damages if allowed domestically; no punitive damages; Art. 3	Same, except no liability for nuclear incident Art. 3
Application of Convention	From beginning of operations of departure		"in flight" from moment when power		"In flight" when all external doors are	Same Art. 1(c)

	until the end of operations of arrival Art. 2(3)		applied for actual takeoff to moment when landing run ends Art. 1(2)		closed following boarding to moment any door is opened for disembarking Art. 1(b)	
Joint and Several Liability	On surface; territory of contracting State; by aircraft registered in another contracting State Joint and several liability Art. 6		Joint and several liability Art. 7	Aircraft registered in another CS or where operator has his principal PPB or permanent residence	Uoint and several liability for aircraft collision Art. 6	Same Art. 5
Damages per occurrence	600,000 – 2,000,000 Poincare francs per kg; 2/3 personal injury or death, 1/3 property (US$137,000) Art. 8 Francs are 65 ½ milligrams of gold of millesimal fineness 900 Art. 19		500,000 – 10,500,000 plus 100 francs per kg over 50,000 kg Half personal Per aircraft (US$663,000) Art. 11 Franc equivalent in gold as in Rome 33 Art. 11(4)	300,000 SDRs – 2,500,000 SDRs plus 65 SDRs per kg over 30,000 (US$444,000 to $3,699,000)	250,000 – 500,000 SDRs (US$325,000 to $750,000) if not negligent or solely due to third party Art. 4 Limits to be adjusted periodically for inflation Art. 15	750,000 – 700 M SDRs (US$1,125,000 to US$1 billion); 1st layer – insurance; 2nd layer Supp Comp Mechanism; 3rd layer – States; SCM may "drop down" to cover first layer if insurance unavailable; 3 billion SDRs per event (and SCM collects maximum of 9 billion SDRs over 2 years (US$13.5 billion) Art. 4, 18 Limits to be adjusted

						periodically for inflation Art. 30
Damages per person	250 francs per kg of aircraft weight; Art. 8		500,000 (US$33,200) Art. 11(2)	125,000 SDRs (US$185,000)		
Breakability of liability ceiling	Unlimited if gross negligence or wilful misconduct Art. 14		Deliberate act or omission of operator or servant in course of employment, done with intent to cause damage, or one wrongfully taking and using the aircraft without consent. Art. 12		Unbreakable if the damage was not due to its negligence, or was solely due to the negligence or wrongful act of another. Art. 4	Breakable if operator or its senior management has contributed to the event through wilful misconduct that damage would probably result, and falls within its regulatory responsibility and control, and is, other than unlawful interference, the primary cause of the event. Safe harbor for following regulatory requirements. Art. 23
Defenses	Comparative fault: negligence of the injured party Art. 3 Does not apply if compensation governed by a contract of carriage or contract of employment	Insurer defenses: Insurance expiration; outside territory insured; fault of injured party; civil disturbance or armed conflict	"damage is the direct consequence of armed conflict or civil disturbance, or if such person has been deprived of the use of the aircraft by act of public		Act or omission of the claimant done with intent or recklessly and with knowledge; comparative fault Art. 10	Same. Art. 20

	between the injured person and the operator. Art. 22		authority." Art. 5 Comparative fault. Art. 6			
Insurance	Insurance or other gurarantee Art. 12		Insurance or other securities Art. 15-17	Insurance or guarantee	Adequate insurance required Art. 9	Same Art. 7
			Direct right of action against insurer			
Venue			Single forum: court where damage occurred		State where damage occurred; if more than one State damaged, courts in State airspace of which the aircraft was in or about to leave. Art. 16	Same Art. 31
Enforcement			Enforceable in State of residence or assets of debtor			
Environmental Damages				Nuclear damage excluded	Environmental damage if allowed under local law	
Right of Recourse	Right of recourse. Art. 7		Right of recourse. Art. 10		Right of recourse Art. 11	Right of recourse but only after all claims have been finally settled. Art. 24
Exclusivity			No liability other than provided in the Convention, unless the		Exclusive remedy against operator only; no liability	Action against operator or terrorist only

			operator "is guilty of a deliberate act or omission done with intent to cause damage." Art. 9		against owner, lessor or financer Art. 12-13	
Domestic applicability					Domestic "opt in" Art. 2(2)	Same
Statute of Limitations	Notice within 6 months. Art. 10 Suit within one year unless the injured party did not know of the damage; maximum three years Art. 17		Two years Art. 21		Three years Art. 19	Same Art. 35
Ratifications	5 States	2 States	49 States	12 States		

— END —