



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

- a) “An act of unlawful interference” means an act which is defined as an offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, and any amendment in force at the time of the event.
- b) An aircraft is considered to be “in flight” at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.
- c) “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.
- d) “Maximum mass” means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used.
- e) “Operator” means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

- f) “Person” means any natural or legal person, including a State.
- g) “State Party” means a State for which this Convention is in force.
- h) “Third Party” means a person other than the operator, passenger or consignor or consignee of cargo; in the case of a collision, “third party” also means the operator, owner and crew of the other aircraft and the passenger or consignor or consignee of cargo on board the other aircraft.

Article 2 — Scope

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

Chapter II

Liability of the Operator and Related Issues

Article 3 — Liability of the Operator

1. The operator shall be liable for damage sustained by third parties upon condition only that the damage was caused by 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, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.
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 compensable¹.
5. Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

¹ The Final Clauses will need to make clear the relationship between this Convention and other international legal instruments with reference to claims for damage to property.

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

Article 4 – Limit of the operator’s liability

- (1) The liability of the operator arising under Article 3 shall not exceed for each aircraft and event:
- a) [750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;
 - b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;
 - c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;
 - d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;
 - e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;
 - f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;
 - g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;
 - h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;
 - i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;
 - j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.]
- (2) The limits in paragraph 1 of this Article shall only apply if the operator proves that the damage:
- a) was not due to its negligence or other wrongful act or omission or that of its servants or agents; or
 - b) was solely due to the negligence or other wrongful act or omission of another person.

Article 5 – Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Article 4, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily 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.

Article 6 — Events involving two or more operators or other persons

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.
2. If two or more operators are liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.
3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 7 — Court Costs and other Expenses

The court may award, in accordance with its own law, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action if that is later than the expiry of such period.

Article 8 — Advance Payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 9 — Insurance

Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators.

Chapter III

Recourse and exoneration

Article 10 — Acts or omissions of victims

If the operator proves that the damage was caused, or contributed to, by 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 shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article 11 — Right of Recourse

Subject to Article 13, nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any person.

Chapter IV

Exercise of Remedies and Related Provisions

Article 12 — Exclusive Remedy

Any action for compensation for damage to third parties caused by an aircraft in flight brought against the operator, or its servants or agents, however founded, whether under this Convention or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Article 13 – Exoneration of Status Liability

Neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party.

Article 14 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article 15 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Article 4, shall be reviewed by the Depositary, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned of Article 14.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify the States Parties of a revision of the limits of liability. Any such revision shall become effective six months after the notification to the States Parties, unless a majority of the States Parties register their disapproval. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

Article 16 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred [or the State in which the operator of the aircraft has its principal place of business].

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territorial airspace of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 17 — Recognition and Enforcement of Judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 16 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

- a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;
- b) the defendant was not served with notice of the proceedings in such time and manner as to allow him to prepare and submit a defence;
- c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognised as final and conclusive under the law of the State Party where recognition or enforcement is sought;
- d) the judgement has been obtained by fraud of any of the parties;
- e) the right to enforce the judgement is not vested in the person by whom the application is made; or
- f) the ground of refusal has been notified, before the occurrence of an event, to the Depositary by the State Party where recognition or enforcement is sought.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.

5. Where a judgement is enforceable, payment of any costs recoverable under the judgement shall also be enforceable.

**Article 18 — Regional and multilateral agreements
on the recognition and enforcement of judgements**

1. State Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.

2. State Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.

3. The provisions of Chapter IV of this Convention shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 19 — Period of Limitation

1. The right to compensation according to Article 3 shall be extinguished if an action is not brought within three years from the date of the event which caused the damage.

2. The method of calculating such three year period shall be determined in accordance with the law of the court seized of the case.

Article 20 — Death of Person Liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER V

Application of the Convention

Article 21 — State Aircraft

This Convention shall not apply to damage caused by state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Article 22 — Nuclear Damage

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.

[Final Provisions to be inserted]

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