



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

(Presented by the Latin American Association for Aeronautical and Space Law – (ALADA))

1. As it has done since the beginning of the modernizing studies under the Rome Convention of 1952 on damage caused by foreign aircraft to third parties on the surface, and the Montreal Protocol of 1978, ALADA participates in this International Conference by contributing an academic opinion on this important process of updating aeronautical law.
2. During the 33rd Session of the Legal Committee (Montréal, from 21 April to 2 May 2008), two drafts were presented and adjusted, which unfolded the treatment of the international law update on tort liability.
3. Indeed, on one side the Conference is requested to consider the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, on one hand, and on the other the draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, which are the result of commendable studies performed by experts at formal meetings, and informal meetings held over a period of more than eight years.
4. The purpose of both drafts is to provide protection to two entities that are difficult to reconcile: the third party damaged by an ordinary or extraordinary risk, and at the same time the activity of air transport, which is vulnerable to the potential financial and economic impact of a serious air accident. Both drafts focus on the risk that results in the area of operational safety (Safety), and also the risk that arises in the field of civil aviation security (Security), both questions that integrate the strategic objectives of ICAO with the highest priority (2005-2010).
5. ALADA has also held its opinion throughout discussions during eight years, intended to preserve the main principles of an aircraft operator's liability in the situations contemplated by both drafts under review and, in this order of ideas, after the latest international meeting it held, once more it insists on the desirability of having one document, and not maintaining an unjustified separation into two draft conventions. The need to regulate both types of risk under a single legal instrument: the so-called "ordinary" or "general" risks and the type of risk first known as "war risks", and later replaced by the name "risks due to extraordinary acts of unlawful interference".
6. This proposal by ALADA is not only based on reasons of good legal and legislative methodology, but also on the practical reason that the third party does not distinguish the source or nature of the damaging event. Therefore, the third party should receive an adequate compensation for the damages sustained. Also, although the statistical information of the ICAO shows a clear improvement in both fields of security, it indicates that exposure to accidents resulting from Safety is ten times higher than the exposure resulting from acts of unlawful interference or in the field of Security. Besides, we should

* English and Spanish versions provided by ALADA.

also take into due account that an extraordinary or catastrophic event is not only inherent to acts of unlawful interference, so as to justify a separate and independent draft of the convention addressing the purpose.

We should also recall that the scope or definition of a catastrophic risk comprises natural or man-made events that occur in an accidental or voluntary manner, the magnitude of which exceeds the adapting capacity of the community in which they occur, and which affect it massively and indiscriminately so as to require outside assistance. In these cases, it is the State itself that must act on behalf of the community to cover the indemnities. This classification is found in most legislation on the subject of insurance and occurrences in Latin American countries.

7. Therefore, ALADA insists on the need to merge both drafts by including the relevant provisions in each case, as was the case in the original draft prepared in the Report by Michael Jennison to the 32nd Session of the Legal Committee. It seems more reasonable to contemplate one type of event in a special chapter on extraordinary risks, and to include in its scope both events resulting from an act of man, voluntarily or involuntarily, such as the case of unlawful interference, and those that result naturally or accidentally. In either case, the features are the concentration or accumulation of risks.

8. Another major subject of debate is the creation of a Supplementary Compensation Mechanism, similar to the compensation existing in the field of maritime transport of polluting hydrocarbons, which would apply where the amount of the claims exceeds the indemnity ceiling provided in the convention. Its funding is subject to contributions by passengers and carriers based upon passenger-kilometer information and tons of cargo-kilometers carried. In these areas, financial factors, competition among airlines, and also the potential unfairness of a greater load upon the user, can decrease the advantages of such a complex mechanism, which has also been articulated for the event of damages by acts of unlawful interference.

9. Likewise, there are other elements that, from the view of strict justice, erode the strength of the international instrument(s), which should be overcome in order to obtain wider ratification of the international legal instrument. ALADA refers to the liability system determined for the aircraft operator, as the one subject of allocation of damages, and with a clear statement of the circumstances that exempt or mitigate the duty to pay an indemnity.

10. In line with the above, we should recall the conclusions approved by unanimous vote at the *XXXII Jornadas Latino Americanas de Derecho Aeronáutico y Espacial*, held in Bogotá, Colombia (September 23-26, 2008), the relevant part of which reads as follows:

“Based upon the two draft Conventions currently under review by the ICAO, one on indemnity for damages caused to third parties by aircraft and the other on indemnity for damages to third parties arising from terrorist acts involving aircraft,

Considering that the primary interest to be safeguarded is the interest of the damaged party, who should be actually and suitably indemnified,

Acknowledging that the approval of two different conventions, based upon the cause of the damage, is not desirable, as a damage resulting from terrorist acts is not different from a damage arising from other causes, so it is not reasonable to conclude that the damaged party should be protected differently according to the cause of the damage, and also that the latter could be unknown until the end of the judicial investigation.

Upon especially reviewing the indemnity limitation system, based upon a scale that considers the weight of the aircraft, and also considering that a lighter aircraft can cause very substantial damage

Upon considering, likewise, the system for contributions to the “Supplementary Compensation Mechanism”, and also considering that an operator who is not a carrier can also cause damage to third parties, the latter should also participate in such contribution”.

RECOMMENDATIONS

1. *The two draft conventions should be unified into one, regardless of the cause of the damage.*
2. *The liability system to be adopted in this one convention should be as described today in the draft relating to damage caused by terrorist acts.*
3. *The diversified indemnity limits should be changed based upon the maximum weight at takeoff of the aircraft (Section 4). One limit should be adopted for all aircraft, in the amount of SDR 700 million (Special Drawing Rights seven hundred million)*
4. *The contribution to the “Supplementary Compensation Mechanism” (Section 12) should be made by all aircraft operators, and not only by those who carry persons and things.*

11. Action suggested to the Conference

In its capacity as an Observer, ALADA confirms its academic opinion, based upon clear principles of law, justice and fairness, and appreciates the opportunity to participate in this major Diplomatic Conference, and expresses its hope that ICAO may, once more, be able to unify legal solutions so as to suitably safeguard the interests of both damaged parties and aircraft operators.

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