

# The Liability System of the Air Carrier for Damage Caused by Aircraft to Third Parties

Provisions of the draft Convention of ICAO related to damage caused as a result of an act of unlawful interference created much discussion in the 32<sup>nd</sup> Session of the Legal Committee and the views of the delegates were extremely divided. Acts of unlawful interference usually end up with wider damages than accidents and, with regard to consequence, they are more unpredictable; hence, they must be treated differently.

Professor Kang Bin Lee argues that the structure proposed in the draft Convention is generally acceptable; however, the limit of liability should be higher than the amount determined by the Montreal Convention.

By Professor Kang Bin Lee

## Introduction

Injury or damage to persons or property on the ground may occur when an aircraft lands or crashes, or when an object carried by the aircraft falls to the ground. A person injured in this way or whose property is damaged might be able to be awarded compensation from the person responsible for the control of the aircraft at the time of the accident, whether it be the owner/charterer, the pilot or both.

It is therefore essential that the liability for damage on the surface caused by aircraft be regulated at international level. Consequently, the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was signed on 29 May 1933 at the third International Conference on Private Air Law. The Rome Convention was later and this revision was signed by eighteen countries on 7 October 1952. A further amendment to the convention – The Protocol to Amend the Rome Convention of 1952 – was signed in Montreal on 23 September 1978.<sup>1</sup>

The Rome Convention of 1952 and the Montreal Protocol of 1978 did not have any significant worldwide repercussions since few countries ratified them. As a result, they are seldomly used. Recognizing the absence of a globally accepted regime with respect to liability for damage on the ground

and the need to modernize the existing legal framework, the ICAO discussed to review and modernize the Rome Convention in early 2001. The Secretariat of the ICAO produced a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties.

This paper reviews the status of aircraft accidents, the main provisions of the Rome Convention of 1952, and the background, the draft Convention, and the main issues with regard to the modernization of the Rome Convention of 1952 by the ICAO.

## The Worldwide Accidents of Aircraft

### *Aircraft Accidents*<sup>2</sup>

Around the world in 2004, there were 9 aircraft accidents with passenger fatalities that involved aircraft with a maximum certificated take-off mass of more than 2,250 kg. The number of passenger fatalities involved was 203. Compare this with 7 fatal accidents and 466 passenger fatalities in 2003. There has been a significant increase in traffic between 2003 and 2004, and this has resulted in a decrease in the number of passenger fatalities per 100 million passenger-kilometers from 0.02 to 0.01 in 2003. The number of fatal aircraft accidents per 100 million aircraft-kilometers flown remained at 0.03 and the number of fatal aircraft accidents per 100,000 landings



increased from 0.03 to 0.04 in 2003.<sup>3</sup>

Data available to ICAO on the safety of non-scheduled passenger operations show that there were 18 accidents that involved passenger fatalities on aircraft with a maximum certificated take-off mass of more than 2,250 kg in 2004 (including 2 aircraft operating all-cargo services with passengers onboard) compared with 25 in 2003. These accidents accounted for 207 passenger fatalities in 2004 compared with 217 in 2003.<sup>4</sup>

### *Acts of Unlawful Interference*

In 2004, 16 acts of unlawful interference were recorded. These acts consisted of 1 unlawful seizure, 4 attempted seizures, 2 facility attacks, 2 attempted facility attacks, 3 sabotages of which 2 resulted in total destruction of aircraft in flight and 90 persons killed, 1 attempted sabotage and 3 other acts of unlawful interference.<sup>5</sup>

### **The Liability System for Damage Caused by Aircraft to Third Parties under the Rome Convention**

#### *The Principle of Liability*

Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by a person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless, there shall be no right to compensation if the damage is not a direct consequence of the incident 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.<sup>6</sup>

This is the type of liability incurred upon mere proof that the damage exists and it has been inflicted by a particular person. No proof of intent or negligence is required here, and the liability is incurred irrespective of the perpetrator's compliance with the required standards of care.<sup>7</sup>

The Convention embodies the principle of absolute liability. The owner, easily traceable through the registration markings of the aircraft, shall be presumed to be the operator unless he proves that some other was in control.<sup>8</sup>

#### *The Exoneration from Liability*

The Convention contains the exceptions to the principle of liability. Any person who would otherwise be liable under the provisions of this Convention shall not be liable if the 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 authority.<sup>9</sup>

Any person who would otherwise be liable under the provisions of this

Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage.<sup>10</sup>

#### *The Limits of Liability*

The Convention adopts the principle of limited liability in order to afford some protection to the operator. The liability for damage giving a right to compensation, for each aircraft and incident, in respect of all persons liable under this Convention shall not exceed: (a) 300,000 SDR (Special Drawing Rights of the International Monetary Fund), (or 4,500,000 monetary units for those States which are not Members of the International Monetary Fund) for aircraft weighing 2,000 kilograms or less; (b) 300,000 SDR plus 175 SDR (or 4,500,000 monetary units plus 2,625 monetary units) per kilogram over 2,000 kilograms for aircraft weighing more than 2,000 but not exceeding 6,000 kilograms; (c) 1,000,000 SDR plus 62.5 SDR (or 15,000,000 monetary units plus 937.5 monetary units) per kilogram over 6,000 kilograms for aircraft

weighing more than 6,000 but not exceeding 30,000 kilograms; (d) 2,500,000 SDR plus 65 SDR (or 37,500,000 monetary units plus 975 monetary units) per kilogram over 30,000 kilograms for aircraft weighing more than 30,000 kilograms.<sup>11</sup>

The Liability in respect of loss of life or personal injury shall not exceed 125,000 SDR or 1,875,000 monetary units) per person killed or injured.<sup>12</sup>

#### *The Unlimited Liability*

If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.<sup>13</sup>

If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.<sup>14</sup>

#### *The Persons Liable*

The liability for compensation shall attach to the operator of the aircraft.<sup>15</sup> This provision demonstrates that the Convention places the burden of liability upon the operator rather than the registered owner.<sup>16</sup>

The term 'operator' shall mean the



*The ICAO Council Room in Montreal*

person who was making use of the aircraft at the time of 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.<sup>17</sup>

The operator will usually be an airline company, but he may also be a private person using the aircraft for private purpose. Owner and operator are mostly the same person.<sup>18</sup>

The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other persons was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.<sup>19</sup>

#### *Limitation of Actions*

Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.<sup>20</sup> An application for execution of a judgment must be made within two years from the date when such judgment became final.<sup>21</sup>

### **The Draft Convention on the Modernization of the Rome Convention**

#### *Background*

The 31<sup>st</sup> session of the ICAO Legal Committee (Montreal, 28 August - 8 September 2000) included in its Work Program the following subject: Consideration of Modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952. Work on a study by the Secretariat on the modernization of the Rome Convention commenced in early 2001.

The Secretariat Study Group on the Modernization of the Rome Convention held four meetings during 2002 and 2003. The Secretariat produced a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties (hereafter referred to as Draft

Convention). The 32<sup>nd</sup> session of the ICAO Legal Committee (Montreal, 15 - 21 March 2004) reviewed the texts of all the draft articles. The Council decided to establish a Special Group on the Modernization of the Rome Convention of 1952 to advance the work on 31 May 2004.<sup>22</sup>

The first meeting of the Special Group was convened on 10 - 14 January 2005 to further develop and refine the text of the draft Convention on Damage Caused by Foreign Aircraft to Third Parties. The second meeting of the Special Group was convened on 4 - 8 July 2005 and considered the 'Grey Point'.<sup>23</sup>

#### **The Main Provisions of the Draft Convention on Damage<sup>24</sup> Caused by Foreign Aircraft to Third Parties<sup>25</sup>** *Liability of the Operator*

The operator shall not be able to exclude or limit its liability for damages arising under Article 3, paragraph 1 not exceeding [100,000] SDR for each such third party.<sup>26</sup> The operator shall not be liable for damages arising under Article 3, paragraph 1 to the extent that they exceed for each such third party [100,000] if the operator proves that: a) such damage was not due to its negligence or other wrongful act or omission or that of its servants or agents; or b) such damage was solely due to the negligence or other wrongful act or omission of another person.<sup>27</sup>

For damage arising out of situations not involving an act of unlawful interference (the basic risk) a two-tier system similar to that found in Montreal Convention of 1999 applies. In the first tier, the operator is strictly liable for 100,000 SDR for provable damage. Beyond that, its liability is based on presumed fault. There is no liability cap for the basic risk.<sup>28</sup>

Nothing in this Convention shall prevent compensation for environmental damage if and insofar as such compensation is provided for under the law of the State in the territory of which, or under the jurisdiction of which, the damaged occurred.<sup>29</sup> In any action under this Convention, punitive, exemplary or any other non-compensatory damages shall not be recoverable.<sup>30</sup>

#### **Limit of Liability**

Where the damage is caused by an act of unlawful interference<sup>31</sup>, the liability of the operator shall not exceed for each aircraft and event: a) [ ] SDR for aircraft having a maximum mass<sup>32</sup> of [1,000]<sup>33</sup> kilograms or less; b) [ ] SDR plus [ ] SDR per kilogram over [1,000] kilograms for aircraft having a maximum mass of more than [1,000] but not exceeding [6,000] kilograms; c) [ ] SDR plus [ ] SDR per kilogram over [6,000] kilograms for aircraft having a maximum mass of more than [6,000] but not exceeding [25,000] kilograms; d) [ ] SDR plus [ ] SDR per kilogram over [25,000] kilograms for aircraft having a maximum mass of more than [25,000] kilograms but not exceeding [200,000] kilograms; e) [ ] SDR plus [ ] SDR per kilogram over [200,000] kilograms for aircraft having a maximum mass of more than [200,000] kilograms but not exceeding [500,000]; f) [ ] SDR plus [ ] SDR per kilogram over [500,000] kilograms for aircraft having a maximum mass of more than [500,000] kilograms.<sup>34</sup>

The regime for liability of the operator in case of acts of unlawful interference, including terrorist acts is found in a separate chapter. The two-tier liability system found in Article 3 for the basic risk continues to apply, except that the operator's liability would be limited based on the weight of the aircraft. The weight categories and limits are left for future decision.<sup>35</sup>

The limits of liability in paragraph 1 shall not apply when damage results from an act or omission of the operator or its servants or agents, done with intent to cause damage [or recklessly and with knowledge that damage would probably result, or from an act of non-compliance with applicable security regulations].<sup>36</sup>

#### **Two or More Operators Liable**

Whenever two or more operators are liable for the damage, they are liable jointly and severally. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability. Where an action is brought against two or more operators under this Convention, the person who suffers damage shall not be compensated in

excess of the highest liability limit, if any, which is applicable to any one of the operators under this Convention.<sup>37</sup>

A new Article has been incorporated to provide an international mechanism for third parties suffering damage on board an aircraft involved in a mid-air collision to claim compensation from the other carrier. The text envisages the joint and several liabilities of the operators involved.<sup>38</sup>

#### *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. This rule shall not apply to any person who is guilty of a deliberate act or omission done with intent to cause damage.<sup>39</sup>

#### *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.<sup>40</sup> This provision is intended to exclude from liability aircraft owners, financiers and lessors, in other words, those with no operational control over the aircraft.<sup>41</sup>

#### *Advance Payments*

In the case of damage falling within the scope of Articles 3 and 4 and involving death or bodily injury or uninsured immovable property, the operator shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.<sup>42</sup>

In a provision analogous to Article 28 of the 1999 Montreal Convention, in case of damage involving death or bodily injury or uninsured immovable property, the operator shall, if required by its national law, make advance payments to natural persons entitled to claim compensation.

### **The Decisions of the Special Group on the Modernization of the Rome Convention**

#### *General Points of Agreement*

The Special Group examined the draft Convention resulting from the deliberations of the Legal Committee at its first meeting from 10 – 14 January 2005. The Special Group decided on 12 General Points of Agreement and the main points of agreement are as follows: 1. Victim protection ought to be at least as good as under the 1999 Montreal Convention; 2. Any scheme to provide such victim protection needs to take into account that damages on the ground may not only affect

a person as such, but also his or her home or possibility to make a living; 3. An adequate protection for the air transport system, including the air carriers, ought to be provided, which especially addresses the problem of 'catastrophic losses', which lead to large-scale damages involving many victims; 4. Operators' financial resources for paying compensation are limited and they have to rely on insurance or other mechanisms for the continuation of their operations subsequent to an occurrence; 5. Any system upholding the principles of victim protection and protection for the air transport system as referred to above needs to be set up in the light of the availability of insurance cover in the market or other mechanisms; 6. Terrorist attacks are the major threat to the air transport system with regard to the issues at hand, especially if they lead to catastrophic losses.

#### *Conclusions of the Special Group on a Supplementary Compensation Mechanism*

The Special Group considered the 'Grey Points', at its second meeting from 4 to 8 July 2005. The bulk of the Special Group's time was spent on Grey Point No.1, namely 'the possibility of a supplementary funding mechanism, including its nature and modality', and the Special group arrived at 21 conclusion points. The main conclusions are as follows: 1. The Special Group reiterated the conclusion of its first meeting that a supplementary compensation mechanism was necessary to meet the dual goals of providing appropriate victim protection and viable protection for the air transport sector; 2. The Special Group agreed to work on the assumption that the supplementary compensation mechanism would cover 'terrorism-related' risks, whilst not definitely excluding cover also for basic risks having regard to the need for victim protection and the problems of defining which events ought to be regarded as 'terrorism-related'; 3. There was a clear tendency that the Special Group wanted to provide for the rules on the establishment and operation of the supplementary compensation mechanism in a separate instrument, be it a protocol or a convention.



*ICAO's Headquarters where Special Group meetings are usually held*

## Conclusions

The 1962 Rome Convention is still in force, but it did not have many ratifications either. Only 45 out of the more than 180 ICAO members did in fact ratify the Convention, and that number did not even include major powers like the United States, the United Kingdom, the German Federal Republic, or Canada.

The key issue in drafting the new Convention is the liability system for the air carrier, involving a radical change in modernization of the system, since the current system is complex and based on the weight of the aircraft as set forth in its airworthiness certificate.

With respect to basic risks for damage to third parties on the ground, the draft Convention introduces a liability system to the one under the 1999 Montreal Convention. The liability system of the draft Convention adopts the two-tier system. The carrier is liable for a sum of 100,000 SDR irrespective of fault but only to the extent of proven damages, and its unlimited liability over this amount is based on presumed fault. The draft Convention provides a first-tier liability limit of 100,000 SDR.

I believe that the structure proposed in the draft Convention is generally acceptable; however, the limit of liability should be higher than the amount determined by the Montreal Convention.

The provisions of the draft Convention related to damage caused as a result of an act of unlawful interference created much discussion in the 32<sup>nd</sup> Session of the Legal Committee and the views of the delegates were extremely divided. Acts of unlawful interference usually end up with wider damages than accidents and, with regard to consequence, they are more unpredictable; hence, they must be treated differently.

A supplementary compensation mechanism is necessary to meet the dual goals of providing appropriate victim protection and viable protection for the air transport sector. The supplementary compensation mechanism should be set up as a fund and not an insurance, and the participation in the

mechanism ought to be mandatory for all operators and other entities that might be covered in a State Party to the supplementary compensation mechanism.

In conclusion, in order to provide the adequate victim protection and the appropriate protection for the air transport system including air carriers, work on modernizing the Rome Convention should be continued and the new Convention should be finalized in the near future.

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\_\_\_\_\_, "Modernization of the Rome Convention of 1952", the 176<sup>th</sup> Session of the Council Working Paper, C-WP/12528, 4/10/05. Diederiks-Verschoor, I.H.Ph.(2001), An Introduction to Air Law, Seventh revised edition, Kluwer Law International.  
2 Shawcross and Beaumont(1989), Air Law, Fourth Edition, Volume 1, Butterworths, pp.v/115, v/116, v/124.  
3 The aircraft accidents covered under this heading exclude incidents caused by acts of unlawful interference.  
1,2 ICAO(2005), Annual Report of the Council 2004  
4 I.H.Ph. Diederiks-Verschoor,(2001), An Introduction to Air Law, Seven revised edition, Kluwer Law International, p.152.  
3,5,6,7,8,9,10,11,12,14,16,17,18 The Rome Convention, several articles 13,15 I.H.Ph. Diederiks-Verschoor,

op. cit., p.158 + p.159.

19 ICAO(2004), "Progress Report of the Modernization of the Rome Convention of 1952", the 35<sup>th</sup> Session of the Assembly of the Legal Commission Working Paper A35-WP/18 LE/3, 08/07/04.

20 ICAO(2005), "Modernization of the Rome Convention of 1952", the 176<sup>th</sup> Session of the Council Working Paper C-WP/12528, 4/10/05.

21 "Damage" means death, bodily injury or damage to property(The Draft Convention Article 1(f)).

22 "Third Party" means a person other than the operator, passenger of shipper of cargo; in the case of a collision, "third party" also means the operator, owner and crew of the aircraft and the passenger or shipper of cargo on board the other aircraft(The Draft Convention Article 1(e)).

23, 24,26,27,31,33,34,36,37,39 The Draft Convention, several articles.

25, 32, 35, 38, 40 ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report of the Modernization of the Rome Convention of 1952", the 172<sup>nd</sup> Session of the Council Several working papers

28 "An act of unlawful interference" means an act which constitutes an offence as defined 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, or any amendment or Protocol thereto which is in force (The Draft Convention Article 1(h)).

29 "Maximum mass" means the maximum certified take-off mass of the aircraft authorized by the certificate of airworthiness for take-off, excluding the effect of lifting gas when used (The Draft Convention Article 4, paragraph 2.)

30 Figures in square brackets are indicative figures for discussion purposes only.

41 ICAO(2005), "Modernization of the Rome Convention of 1952", the 174<sup>th</sup> Session of the Council Working Paper, C-WP/12391, 11/02/05.

42 Session of the Council Working Paper, C-WP/12528, 4/10/05.