

항공기에 의하여 발생된 지상 제3자의 손해에 대한 운항자의 책임

The Liability of the Operator for Damage to Third Parties on the
Surface Caused by Aircraft

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I. Introduction

There were 176 aircraft accidents with passenger fatalities involving aircraft with maximum certificated take-off mass of more than 2,250 kg on scheduled air services worldwide from 1995 to 2004.² ICAO(2005), Annual Report of the Council 2004, p.15.

The injury or damage may be caused to persons or property on the ground by the landing, and especially the crashing, of an aircraft, or by the fall to the ground of a part of the aircraft or some object carried by it. A person injured in this way or whose property is damaged may be able to recover compensation from the person responsible for the control of the aircraft at the time of the accident, where it be the owner (or charterer), the pilot or both.

It is desirable to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport. There is the need for unifying to the greatest extent possible, through an International Convention, the rules applying in the various countries of the world to the liabilities incurred for such damage.

It is essential that the liability for damage on the surface caused by aircraft be regulated at international level. So the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was agreed to at the third International Conference on Private Air Law and was signed on 29 May 1933. The revision of the Rome Convention of 1933 was considered at the fifth and seventh Sessions of the Legal Committee of ICAO and the draft was considered at an international conference held in Rome in 1952. The resulting Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was signed by eighteen countries on 7 October 1952. The revision of the Rome Convention of 1952 was considered at the 2nd Session of the Legal Committee of ICAO in 1976. A conference was convened by ICAO in Montreal in 1978 and the conference produced a Protocol to amend the Convention. The Protocol to Amend the Rome Convention of 1952 was

signed in Montreal on 23 September 1978.³ Shawcross and Beaumont(1989), Air Law, Fourth Edition, Volume 1, Butterworths, pp.v/115, v/116, v/124.

The Rome Convention of 1952 and the Montreal Protocol of 1978 did not have significant worldwiderpercussions sincefew countries have ratified them. So they are seldom used any more. 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 has discussed to review and modernize the Rome Convention from early 2001.

The Secretariat of the ICAO produced a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties. The 32nd Session of the ICAO Legal Committee from 15 to 21 March 2004 reviewed the texts of all the draft articles. The Special Group on the Modernization of the Rome Convention of 1952, at its two meetings from 10 to 14 January 2005 and from 4 to 8 July 2005, examined the draft Convention resulting from the deliberations of the Legal Committee, and as a result, made the changes to the text of the draft Convention.

This paper reviews the status of aircraft accident, 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.

II. The Status of Aircraft Accident

1. Aircraft Accidents⁴ The aircraft accidents covered under this heading exclude incidents caused by acts of unlawful interference.

(1) Scheduled Operations

The aircraft accidents involving passenger fatalities in scheduled air services worldwide shows that in 2004 there were 9 aircraft accidents with passenger fatalities involving aircraft with a maximum certificated take-off mass of more

than 2,250 kg. The number of passenger fatalities involved was 203. This compares with 7 fatal accidents and 466 passenger fatalities in 2003 as shown in table 1. Between 2003 and 2004, there was a significant increase in traffic, consequently the number of passenger fatalities per 100 million passenger-kilometres decreased to 0.01 from 0.02 in 2003. The number of fatal aircraft accidents per 100 million aircraft-kilometres flown remained at 0.03 and the number of fatal aircraft accidents per 100,000 landings increased to 0.04 from 0.03 in 2003.

The safety levels are significantly different for the various types of aircraft operated on scheduled passenger services. For instance, in turbojet aircraft operations, which account for over 98 per cent of the total volume of scheduled traffic, there were 3 accidents in 2004 with 102 passenger fatalities: in turboprop and piston-engined aircraft operations, which account for less than 2 per cent of the scheduled traffic volume, there were 5 accidents with 101 passenger fatalities. The fatality rate for turbojet aircraft operations was, therefore, far lower than for propeller-driven aircraft.⁵ ICAO(2005), Annual Report of the Council 2004, pp.15-16.

(2) Non-scheduled Commercial Operation

Non-scheduled commercial operations include both the non-scheduled flights of scheduled airlines and all air transport flights of non-scheduled commercial operators. Data available to ICAO on the safety of non-scheduled passenger operations show that there were 18 accidents involving 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 on board) compared with 25 in 2003. These accidents accounted for 207 passenger fatalities in 2004 compared with 217 in 2003.

In non-scheduled operations performed with aircraft of more than a maximum certificated take-off mass of 9,000 kg, whether by scheduled airlines or non-scheduled operators, there were 6 accidents involving 161 passenger fatalities in 2004 ICAO(2005), Annual Report of the Council 2004, p.16.

Table 1. Worldwide accidents of aircraft with a certificated maximum take-off mass of more than 2,250 kg on scheduled air services

Year						

Source : ICAO(2005), Annual Report of the Council 2004.

2. Acts of Unlawful Interference

In 2004, 16 acts of unlawfulinterference 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 as shown in table 2. ICAO(2005), Annual Report of the Council 2004, p.16.

Table 2. Acts of Unlawful Interference

Source : ICAO(2005), Annual Report of the Council 2004.

III. The Liability for Damage to Third Parties on the Surface under the Rome Convention

1. The Scope of the Rome Convention

The Rome Convention applies to damage caused in the territory of a Contracting State by an aircraft registered in another Contracting State or by an aircraft, whatever its registration may be, the operator of which has his principal place of business or, if he has no such place of business, his permanent residence in another Contracting State. The Rome Convention Article 23, paragraph 1. A ship or aircraft on the high seas shall be regarded as part of the territory of the state in which it is regarded. The Rome Convention Article 23, paragraph 2.

This would mean better protection for the injured party. The consequences of non-ratification have been dramatically highlighted by an Israeli cargo aeroplane crashing in the Bijlmermeer suburb of Amsterdam on 4 October 1992. Neither the Netherlands nor Israel are parties to the Convention, so Netherlands law was applicable. But Netherlands law has no rules and regulations governing liability for damage caused by air traffic, so general rules regarding negligence had to be invoked. Here, strict liability is the standard rule, but an exception has been made for aircraft. C. Stolker(1995), "Compensation for Damages to Third Parties on the Ground as a Result of Aviation Accidents", the proceedings of the International Symposium on the Use of the Air and Our Space at the Service of World Peace and Perspective, Beijing,(1995),pp.343-360; I.H.Ph. Diederiks-Verschoor(2001), An Introduction to Air Law, Seventh revised edition, Kluwer Law International, p.148.

The Rome Convention contains the exceptions of the scope of the Convention. The Convention shall not apply to damage on the surface if liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's

compensation applicable to a contract of employment between such persons. The Rome Convention Article 25. The Convention shall not apply to damage caused by aircraft used in military, customs or police services. The Rome Convention Article 26. It should be noted that the Convention applies to state-owned aircraft used for commercial purposes, as well as to mail-carrying aircraft. I.H.Ph. Diederiks-Verschoor, *op.cit.*, p.129. The Convention shall not apply to damage caused to an aircraft in flight, or to persons or goods on board such aircraft. The Rome Convention Article 24.

Finally, the Rome Convention applies only to damage caused by air collision to the extent that such damage is sustained on the surface of the earth.

2. 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 any person or thing falling therefrom, 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. The Rome Convention Article 1, paragraph 1.

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. I.H.Ph. Diederiks-Verschoor, *op.cit.*, p.152.

In the case of *Duchemin v. Pan American World Airways*, where there was a causal connection between the flight of supersonic aircraft and the collapse of a building, the court decided that the liability of the aircraft's operator in respect of damage caused by the noise from the aircraft during take-off and landing was limited to damage and inconvenience over and above that normally to be expected in an urban environment. *Duchemin v. Pan*

American World Airways et al, Cour de Cassation(2e Ch. Civ.), December 17, 1974:[1974] RGAE 273; Schoner's case law digest, Air Law, Vol.V(1980), p.52; I.H.Ph. Diederiks-Verschoor, op.cit., p.154.

The Convention embodies the principle of absolute liability, as is apparent from Article 2. Article 2, paragraph 1 attaches the liability to the operator of the aircraft within the meaning of the Convention. 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. The Rome Convention Article 2, paragraph 3.

3. 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. The Rome Convention Article 5.

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. Nevertheless there shall be no such exoneration or reduction if, in case of negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority. The Rome Convention Article 6, paragraph 1.

Under the Convention the operator is liable for damage caused by bombs placed in an aircraft by third parties, notwithstanding the fact that neither the operator nor his servants or agents could have prevented such acts. I.H.Ph.

Diederiks-Verschoor, *op.cit.*, p.155.

4. 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 kilogrammes or less; (b) 300,000 SDR plus 175 SDR(or 4,500,000 monetary units plus 2,625 monetary units) per kilogramme over 2,000 kilogrammes for aircraft weighing more than 2,000 but not exceeding 6,000 kilogrammes; (c) 1,000,000 SDR plus 62.5 SDR(or 15,000,000 monetary units plus 937.5 monetary units) per kilogramme over 6,000 kilogrammes for aircraft weighing more than 6,000 but not exceeding 30,000 kilogrammes (d) 2,500,000 SDR plus 65 SDR(or 37,500,000 monetary units plus 975 monetary units) per kilogramme over 30,000 kilogrammes for aircraft weighing more than 30,000 kilogrammes. The Rome Convention Article 11, paragraph 1 and 4.

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. The Rome Convention Article 11, paragraph 2 and 4.

In comparison to the Convention of 1952 the limits of the Convention of 1978 have been raised substantially, but the United States still consider these sums to be too low, especially in relation to large transport aircraft. The United States did not sign the Rome Convention because in the event of damage being caused in a state party to the Convention an American operator would be absolutely liable. The United States also objected to the special limits provided with regard to liability for death and injury. Other states shared these objections, e.g. The Netherlands. I.H.Ph. Diederiks-Verschoor, *op.cit.*, pp.156-157.

5. 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. The Rome Convention Article 12, paragraph 1.

Employees of the operator are persons whose duty it is to fly the aircraft, and persons performing services on the ground I.H.Ph. Diederiks-Verschoor, op. cit., p.158.

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. The Rome Convention Article 12, paragraph 2.

6. The Persons Liable

The liability for compensation shall attach to the operator of the aircraft. The Rome Convention Article 2, paragraph 1. This provision demonstrates that the Convention places the burden of liability upon the operator rather than the registered owner. I.H.Ph. Diederiks-Verschoor, op. cit., p.158.

The term "operator" shall mean the 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. A person is considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The Rome Convention Article 2, paragraph 2.

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. I.H.Ph. Diederiks-Verschoor, op. cit., p.159.

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. The Rome Convention Article 2, paragraph 3.

If the aircraft is registered as the property of a State, the liability devolves upon the person whom, in accordance with the law of the State concerned, the aircraft has been entrusted for operation. The Rome Convention Article 2, paragraph 4.

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention. The Rome Convention Article 3.

If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has proved that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for damage giving a right to compensation, each of them being bound under the provisions and within the limits of liability of this Convention. The Rome Convention Article 4.

When two or more aircraft have collided or interfered with each other in flight and damage for which a right to compensation results, or when two or more aircraft have jointly caused such damage, each of the aircraft concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable, each of them being bound under the provisions and within the limits of liability of this Convention. The Rome Convention Article 7.

7. The Guarantee for Liability

The Convention contains detailed rules covering the requirements considered to be satisfactory for insurance against claims.

Any Contracting State may require that the operator of an aircraft shall be covered by insurance or guaranteed by other security in respect of his liability for damage sustained in its territory for which a right of compensation exists up to the limits applicable. The operator shall provide evidence of such guarantee of the State overflown so requests. The Rome Convention Article 15, paragraph 1.

A Contracting State overflown may at any time require consultation with the State of the aircraft's registry, with the State of the operator or with any other Contracting State where the guarantee are provided, if it believes that the insurer or other person providing the guarantee is not financially capable of meeting the obligations imposed by the Convention. The Rome Convention Article 15, paragraph 2.

The insurer or other person providing guarantee for the liability of the operator may, in addition to the defenses available to the operator, and the defense of forgery, set up only the following defenses against claims based on the application of this Convention: (a) that the damage occurred after the guarantee ceased to be effective. However if the guarantee expires during a flight, it shall be continued in force until the next landing specified in the flight plan, but no longer than twenty-four hours; (b) that the damage occurred outside the territorial limits provided for by the guarantee unless flight outside of such limits was caused by force majeure, assistance justified by the circumstances, or an error in piloting, operation or navigation. The Rome Convention Article 16, paragraph 1.

Without prejudice to any right of direct action which he may have under the law applicable to the guarantee, the person suffering damage may bring a direct action against the insurer or guarantor only in the following cases: (a) where the guarantee is continued in force; (b) the bankruptcy of the operator. The Rome Convention Article 16, paragraph 3.

The guarantee shall be deemed sufficient if, in the case of an operator of one aircraft, it is for an amount equal to the limit applicable according to the provisions 11, and in the case of an operator of several aircraft, if it is for an amount not less than the aggregate of the limits of liability applicable to the

two aircraft subject to the highest limits. The Rome Convention Article 17, paragraph 2.

As soon as notice of a claim has been given to the operator, he shall ensure that the guarantee is mentioned up to a sum equivalent to the aggregate of: (a) the amount of the guarantee and (b) the amount of the claim not exceeding the applicable limit of liability. The above-mentioned sum shall be maintained until every claim has been disposed. The Rome Convention Article 17, paragraph 3.

Any sums due to an operator from an insurer shall be exempt from seizure and execution by creditors of the operator until claims of third parties under this Convention have been satisfied. The Rome Convention Article 18.

8. Jurisdiction

Actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred. Nevertheless, by agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other Contracting State, but no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred. The parties may also agree to submit disputes to arbitration in any Contracting State. The Rome Convention Article 20, paragraph 1.

9. 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. The Rome Convention Article 21, paragraph 1.

The grounds for suspension or interruption of the period shall be determined by the law of the court trying the actions; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage. The Rome Convention Article 21, paragraph 2.

An application for execution of a judgment must be made within two years from the date when such judgment became final. The Rome Convention Article 20, paragraph 12.

IV. The Modernization of the Rome Convention

1. Background

The 31st Session of the ICAO Legal Committee (Montreal, 28 August to 8 September 2000) included in its Work Programme the 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.

As a result of the events of 11 September 2001 in the United States, a seven-day notice of cancellation of war risk insurance coverage was given by insurance writers to airlines, effective 24 September 2001. Since then, war risk cover was partly reinstated. The 33rd Session of the ICAO Legal Commission requested the Council to establish a Special Group on this matter. In relation to damage on the ground arising from war and terrorist risk, the Special Group considered potential reform to third-party liability rules and recommended the expedited consideration of a new international convention on third-party liability.

With respect to the Study on the modernization of the Rome Convention, the Council agreed to the establishment of a Secretariat Study Group to assist the Secretariat in this area. 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 32nd Session of the ICAO Legal Committee (Montreal, 15 to 21 March 2004) reviewed the texts of all the draft articles. While considerable progress

had been made, further work was needed in certain areas, especially on what would apply beyond the level of caps and with respect to insurability.

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

The first meeting of the Special Group was convened from 10 to 14 January 2005 to further develop and refine the text of the draft Convention on Damage Caused by Foreign Aircraft to Third Parties, resulting from the work of the 32nd Session of the Legal Committee(Montreal, 15 to 21 March 2004), both on substantive policy issues as well as drafting and editorial matters. ICAO(2005), "Modernization of the Rome Convention of 1952", the 174th Session of the Council Working Paper C-WP/12391, 11/02/05.

The second meeting of the Special Group was convened from 4 to 8 July 2005 and considered the "Grey Point". The Special Group recommended to the Council to convene another five-day meeting of the Special Group. ICAO(2005), "Modernization of the Rome Convention of 1952", the 176th Session of the Council Working Paper C-WP/12528, 4/10/05.

2. The Main Changes of the Draft Convention on Damage "Damage" means death, bodily injury or damage to property(The Draft Convention Article 1(f)).Caused by Foreign Aircraft To Third Parties "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)).

(1) Structure of the Draft Convention

The Draft Convention is composed of five Chapters (Chapter 1. Principles; Chapter 2. General Provisions on Liability; Chapter 3. Special Provisions on

Liability Relating to Acts of Unlawful Interference [including Terrorist Acts]; Chapter 4. Extent of Liability; and Chapter 5. Exercise of Remedies and Related Provisions). The Preamble and Final Clause will be insured at a large stage, possibly at the Diplomatic Conference to adopt the new Convention.

A new 'Definition' Article located at the beginning of the text includes some new definitions as compared with the Rome Convention.

Separate chapters have been developed to deal with the liability of the operator for damage arising from safety-related accidents and incidents (the so-called basic risk), on the one hand, and for the liability of the operator for damage arising from acts of unlawful interference, including terrorist acts, on the other. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

(2) 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. The Draft Convention Article 3, paragraph 2. 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. The Draft Convention Article 3, paragraph 3.

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. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report of the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

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. The Draft Convention Article 3, paragraph 5.

In any action under this Convention, punitive, exemplary or any other non-compensatory damages shall not be recoverable. The Draft Convention Article 6, paragraph 6.

(3) Limit of Liability

Where the damage is caused by an act of unlawful interference "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))., the liability of the operator shall not exceed for each aircraft and event: a) [] SDR for aircraft having a maximum mass "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.) of [1,000] Figures in square brackets are indicative figures for discussion purposes only. kilogrammes or less; b) [] SDR plus [] SDR per kilogramme over [1,000] kilogrammes for aircraft having a maximum mass of more than [1,000] but not exceeding [6,000] kilogrammes; c) [] SDR plus [] SDR per kilogramme over [6,000] kilogrammes for aircraft having a maximum mass of more than [6,000] but not exceeding [25,000] kilogrammes; d) [] SDR plus [] SDR per kilogramme over [25,000] kilogrammes for aircraft having a maximum mass of more than [25,000] kilogrammes but not exceeding [200,000] kilogrammes; e) [] SDR plus [] SDR per kilogramme over [200,000] kilogrammes for aircraft having a maximum mass of more than [200,000] kilogrammes but not exceeding [500,000]; f) [] SDR plus [] SDR per kilogramme over [500,000] kilogrammes for aircraft having a

maximum mass of more than [500,000] kilogrammes. The Draft Convention Article 4, paragraph 1.

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. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

In case of an act of unlawful interference giving rise to damage, the lawful operator shall not lose its status as operator by virtue of the fact that another person commits such act of unlawful interference. The Draft Convention Article 4, paragraph 3.

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]. The Draft Convention Article 4, paragraph 4.

(4) Suspension of Liability Rules

Where an act of unlawful interference severely disrupts or may severely disrupt the availability of aviation insurance, the Council of the International Civil Aviation Organization may recommend to State Parties to suspend their rights and obligations under this Convention. Such suspension shall be declared by a notification to the depositary and shall become effective immediately. The Draft Convention Article 5, paragraph 1.

A new provision has been included to permit the Council to recommend to State Parties to suspend their rights and obligations under the new Convention, in circumstance where an act of unlawful interference severely disrupts or may severely disrupt the availability of aviation insurance. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization

of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

If more than one third of the States Parties follow the recommendation of the Council, the Council shall convene as soon as possible a meeting of the States Parties to this Convention to review the situation and take further decisions on this matter. The Draft Convention Article 5, paragraph 2.

(5) 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. The Draft Convention Article 9, paragraph 1.

If two or more operators are liable, recourse and its extent depend on their proportion of responsibility which contributed to the damage. The Draft Convention Article 9, paragraph 2.

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 liability of the operators involved. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

(6) 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. The Draft Convention Article 10.

(7) 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. The Draft Convention Article 10 bis.

This provision is intended to exclude from liability aircraft owners, financiers and lessors, in other words, those with no operational control over the aircraft. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

(8) Review of Limits

The sums prescribed in Article 3 and 4, shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year its entry into force, 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 SDR. The Draft Convention Article 12, paragraph 1.

If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties

register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision. The Draft Convention Article 12, paragraph 2.

The draft contains in Article 12 a provision allowing for an adjustment of the threshold figure in Article 3 (100,000 SDR) and the liability limits in Article 4, identical to the mechanism found in the Montreal Convention of 1999. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

(9) 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. The Draft Convention Article 23.

In a provision analogous to Article 28 of the Montreal Convention of 1999, 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. ICAO(2004), "Draft Assembly Working Paper on Item 34 -Progress Report on the Modernization of the Rome Convention of 1952", the 172nd Session of the Council Working Paper, C-WP/12258, 6/05/04.

3. The Results of the Meeting of the Special Group on the Modernization of the Rome Convention

(1) General Points of Agreement

The Special Group, at its first meeting from 10 to 14 January 2005, examined the draft Convention resulting from the deliberations of the Legal Committee. Drafting changes were made with respect to Articles 1 (Definitions), 2 (Scope), 3 (Liability of the Operator), 4 (Limit of Liability), 9 (Two or More Operators Liable), 13 (Insurance), 21 (Period of Limitation) and 23 (Advance Payments), Article 14 (Time Limit) was deleted.

In addition the Special Group decided on 12 General Points of Agreement 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. It is important to uphold the air transport system. Thus a compensation system that poses serious threats to the financial status of operators must be avoided; 6. 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; 7. 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; 8. The chief aim of the new convention ought to be to deal with compensation in case of incidents with an international element, although the new convention could provide States Parties with the possibility of using the compensation system also in relation to purely domestic incidents; 9. In light of the above, it will not be possible to reconcile the two goals of providing both adequate victim compensation and appropriate protection for the civil aviation sector within the present scope of the compensation system; 10. The modernized Rome Convention ought to provide a durable system for victim compensation, which can survive also events of a

catastrophic nature; 11. The current regime of Rome 1952 and the insurance obligations thereof may lead to the possibility of State Parties to suspend insurance obligations and a new durable compensation system is required to avoid the need for such suspension; 12. A supplementary funding mechanism for compensation could bridge the gap between what is an adequate level of victim protection and an appropriate protection for the civil aviation sector and ensure the durability of the system. The nature and modalities need to be studied. ICAO(2005), "Modernization of the Rome Convention of 1952", the 174th Session of the Council Working Paper, C-WP/12391, 11/02/05.

(2) List of 'Grey Points'

The Special Group, at its first meeting from 10 to 14 January 2005, arrived at a list of "Grey Points" as follows: 1. The possibility of a supplementary funding mechanism, including its nature and modality; 2. Whether one instrument should be developed for both types of risk (basic risk or terrorist risk) and how in such a case, or a separate instrument for each type, or one instrument for the terrorist risk with the possibility of having an opting-in provision for the basic risk; 3. Whether the new instrument ought to apply also to pure domestic events, or only in relation to aircraft registered in another States; 4. Whether there ought to be a global limit per event and to what extent such limit ought to be breakable; 5. How to deal with mid-air collisions; 6. The application of the principle of equal treatment to the provision on insurance; 7. The implications of the fact that aviation insurance may be subject to conditions and aggregate limits; 8. Issues of procedural law; 9. Whether manufacturers should be exonerated from liability for acts of terrorism for claims relating to the design of an aircraft made in compliance with applicable regulations; 10. Whether other entities involved in air transport, such as entities responsible for security, ought to be exonerated from liability for terrorism and, if so, under what conditions; 11. How to properly define "damage" and other concepts with the view of avoiding fraudulent claims. ICAO(2005), "Modernization of the Rome Convention of 1952", the 174th Session of the Council Working Paper C-WP/12391, 11/02/05.

(3) Conclusions of the Special Group on a Supplementary Compensation Mechanism

The Special Group, at its second meeting from 4 to 8 July 2005, considered the "Grey Points" and, as a result, made a few changes to Article 2 (Scope), Article 3, paragraph 1, Article 4, paragraph 4, Article 9 (Incident involving two or more operators or other persons), Article 13 (Insurance).

The bulk of the time of the Special Group 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 points of conclusion. The main points of conclusion 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. In relation to the question whether the two types of risks ought to be covered by separate liability instruments or not, there was no final agreement; however the general view of the Special Group was that it is very important to have regard to ratifiability in relation to this question; 4. 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; 5. As to the scope, the Special Group wished to continue working on the basis of a mandatory application to international incidents and at least an opt-in for domestic ones, being mindful of the importance of domestic cases for the funding of a supplementary compensation mechanism, and so on. ICAO(2005), "Modernization of the Rome Convention of 1952", the 176th Session of the Council Working Paper, C-WP/12528, 4/10/05.

V. Conclusions

The Rome Convention of 1952 is still in force, but it did not attract many ratifications either. Only 45 out of the over 180 ICAO members did in fact ratify, and the number did not even include major powers like the United States, the United Kingdom, the German Federal Republic or Canada. The reasons for this rather spectacular lack of interest may be described as follows: 1. The limits for compensation mentioned in the Rome Convention were considered too low; 2. National legislation provided adequate safeguards for the interests of third parties on the surface; 3. The Rome Convention did not deal with problems such as noise, sonic boom or nuclear damage; 4. There were objections against creating only one forum. I.H.Ph. Diederiks-Verschoor, *op. cit.*, p.148.

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 Montreal Convention of 1999. 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. The purpose of limiting the liability of international air carriers is based on the need to protect the air transport sectors of all countries as well as to facilitate speedy recoveries by victims and to establish a uniform law.

The author believes 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 a act of unlawful interference created much discussion in the 32nd Session

of the Legal Committee and the views of the delegates were extremely divided. The critical questions were whether carriers should be considered liable for damages resulting from an act of unlawful interference, and if so, to what extent. 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. The critical question is whether these acts should be considered within the State responsibility. 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. Terrorist risks were different from ordinary risks and warranted special treatment. It was only where aircraft was used intentionally to cause maximum damage that extreme consequences would result, such as the collapse of the insurance system.

Guaranteeing the rights of the parties suffering damages requires a valid insurance system and establishing the courts where the damaged parties can enforce their rights. Given the magnitude of the liability insured, ICAO should consider the possibility of managing such insurance itself or causing it to be managed by other organizations which would guarantee its effectiveness. The current regime of Rome Convention and the insurance obligations thereof may lead to the possibility of State Parties to suspend insurance obligations and a new durable compensation system is required to avoid the need for such suspension.

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 rules on the establishment and operation of the supplementary compensation mechanism should be in a separate instrument. 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.

During the 32nd Session of the legal Committee, no consensus was reached on the key areas of the existing draft Convention. The scope of air carriers' liability and insurability of the risks giving rise to that liability were the main

points of disagreement and differences of opinion. There was strong support for the process of modernizing the Rome Convention, and several delegations had emphasized the need for urgency in this regard.

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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Abstract

It is essential that the liability for damage on the surface caused by aircraft be regulated at international level. However, the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952 and the Montreal Protocol of 1978 did not have significant worldwide repercussions since few countries have ratified them. So the Secretariat of the ICAO has produced the draft Convention for the modernization of the Rome Convention in 2002 and the Special group has considered the text of the draft Convention so far. The draft Convention contains main issues with regard to the liability system of the operator and the insurability of the risks for damage to third parties on the ground. In order to protect the air transport sector of a country as well as to facilitate speedy recoveries by victims, Work on modernizing the Rome Convention should be continued and the new Convention should be finalized in the near future.

Keywords: Rome Convention, Montreal Protocol, Operator, Liability system, Damage to Third Parties, Modernization

국문요약

항공기에 의하여 발생된 지상의 손해에 대한 책임이 국제적 수준으로 규정되어야 함은 필수적이다. 그러나 1952년의 "외국항공기에 의하여 발생된 지상 제3자의 손해에 관한 로마협약" 및 1978년의 "몬트리올 의정서"는 소수의 국가들이 그것을 비준하였기 때문에 전세계적으로 중요한 영향을 가지지 못하였다. 그리하여 세계민간항공기구 사무국은 2002년에 로마협약의 현대화를 위한 협약초안을 작성하였으며, 특별 그룹은 현재까지 협약초안을 검토해오고 있다. 한편 협약초안은 항공기 운항자의 책임체제와 지상 제3자의 손해에 대한 위험의 부보가능성에 관한 주요한 문제들을 포함하고 있다. 한 국가의 항공운송 부문의 보호 뿐만 아니라 피해자의 신속한 회복을 용이하게 하기 위하여 로마협약의 현대화 작업은 계속되어야 하며 신협약은 가까운 장래에 마무리되어야 할 것이다.

주제어: 로마협약, 몬트리올의정서, 운항자, 책임체제, 제3자 손해, 현대화