

Third Party liability in Air Transport

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The Third International Conference on Private Air Law, held in Rome, resulted in the adoption of two conventions dealing with the subjects of air carrier liability to third parties and precautionary arrest of aircraft. The Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention 1933) and the Convention for the Unification of Certain Rules Relating to Precautionary Arrest of Aircraft were two of these conventions. The conventions attempted to achieve a balance between the rights of third parties affected by a foreign aircraft (i.e. damage caused by an aircraft in territory outside its home country) and the interests of the aircraft's home country to protect the interest of fledgling air transport industry to enable it stand the challenges.

Additional Protocol Related to the Rome Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface 1938 updated the Rome Convention 1933. The attempts to gain ratifications were unsuccessful.

As a result, the Rome Convention 1933 and the Protocol of 1938 were superseded by the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome 1952 (Rome Convention 1952).¹ The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on October 7, 1952, was signed in 1978.² Increased liability was included in the Protocol.³ Rome 1952 and Protocol of 1978 also did not get universal acceptance for certain reasons like inadequate liability, single jurisdiction, absolute liability and financial and insurance issues.

¹The convention came into force on February 4, 1958. Presently it has 51 parties. Australia, Canada and Nigeria were parties to the Convention. Australia and Canada became parties to it in 1958 and 1956 respectively, by signature and ratification. Nigeria became party by adherence in 1970. All these three countries later denounced the Convention in 2000, 1976 and 2002 respectively. ICAO Doc. 7364.

²The Protocol was signed at Montreal on 23 September 1978 and came into force in 2002. Currently it has 12 states parties to it. ICAO doc. 9257.

³ICAO Doc. No. 9257. It came into force on 25.07.02 but with only 12 parties.

Between 1978 and 2009 all material international efforts on the issue seemed to be suspended. In 2009 ICAO held Conference on Air Law in Montreal, Canada and two Conventions were drafted i.e. the Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft (Unlawful Interference Convention 2009);⁴ and the Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risk Convention 2009)⁵.

Though the efforts at the Conference culminated into adoption of Convention on the Compensation for Damage to Third Parties, Resulting From Acts of Unlawful Interference Involving Aircraft (Unlawful Interference compensation Convention) 2009⁶, the Convention is not yet in force as its enforcement is subject to two conditions: a) it will “enter into force on 180th day after the deposit of thirty fifth instrument of ratification, acceptance, approval or accession;”⁷ and b) at the time of thirty fifth ratification etc. the cumulative total number of passengers departing from the airports of all these party countries taken as a whole, during the preceding year is at least 750,000,000.⁸ At the time of submitting their instrument of ratification, accession, adoption or acceptance, the States have to make a declaration regarding number of passengers departed on international commercial flight from its airports during last year.⁹ In the absence of any of these conditions, the Convention shall not come into force.

Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risk Convention 2009) is also not in force as it shall come into force after sixtieth day of the deposit of thirty fifth instrument of ratification, adoption, accession or adherence.¹⁰

Both Conventions seek a balance by compensating third-party victims fairly while also shielding the business from financial and regulatory burdens.

⁴ICAO Doc. 9920.

⁵ICAO Doc. 9919.

⁶Currently, it has been signed by 11 states, ratified by 3 and acceded by 6 States. ICAO Doc. 9920.

⁷Art. 40(1), Unlawful Interference Compensation Convention 2009.

⁸Art. 40(1), Unlawful Interference Compensation Convention 2009.

⁹Art. 40(3), Unlawful Interference Compensation Convention 2009.

¹⁰Art. 23(1), General Risk Convention 2009. The Convention is signed by 13 States, ratified by 4 and acceded by 8 States.

General Risk Convention

The General Risk Convention is an endeavour to offer comfort to any person or property on the ground who has been damaged by a flying aircraft in an international carriage for no fault of his own.¹¹

The Convention is notable for providing a uniform third-party liability structure for both local and international flights.¹² It does not cover harm caused by unlawful interference because the Unlawful Interference Convention deals with it separately. The Convention takes precedence over MC99 since it addresses compensation for mental injuries. It also includes damage caused by death and bodily injury, in addition to mental injury. Compensation for environmental damage is now governed by the laws of the State Party where the harm occurred. Except in particular circumstances, liability is strict and limited. Only in the event of the operator's negligence or the act of another person are liability limits applicable. It covers damage caused by an aircraft in international flight on the territory of a Member state. Up to a specific limit, the liability is strict and beyond that it is fault-based.

The operator is liable for damage to property as well to death, bodily injury and mental injury. The strict liability is capped on the basis of weight and size of aircraft ranging from maximum mass of more than 500 kilogrammes to more than 500 000 kilogramme. On this basis the liability range from 750 000 Special Drawing Rights (SDR) and to 700, 000,000 SDR for each event.¹³ To strikes a balance between protection of the interest of third party as well as that of the operator, the Convention includes exclusivity provision like that in MC99 to restrict any action for damages strictly within the provisions of the Convention.¹⁴ The owner, financier or lessor are liable neither under this Convention nor under domestic laws unless they are the operators.¹⁵ To make the process of compensation easy and uniform for all the victims, all actions for damages under article 16 are to be brought within the State Party only where damage occurs but the judgment passed is enforceable in any other State Party except under certain circumstances provided in article 17. Limitation period to file suit is similar to that of Rome52 i.e. two years.

¹¹Art. 3(1).

¹²Art. 2(2).

¹³Art.4(1).

¹⁴Art. 12.

¹⁵Art. 13.

The General Risk Convention, based on the foundation of strict and absolute liability established by MC99, allows for expanded limits of strict liability for operators and, in some circumstances, imposes unlimited liability on operators. There is no liability for damage caused by armed conflict and civil unrest, as there was in the Rome Convention of 1952, and many States' municipal law provides remedies for the same. The Convention stipulates that the victim be compensated in advance.

Unlawful Interference Convention

Seen as an aftermath of 9/11, the Unlawful Interference Convention is the forerunner to recognize the need of having uniform regulations for equitable compensation, based on cooperation of all affected parties, to be provided to third parties who suffers due to acts of unlawful interference with aircraft.¹⁶The Convention is a one-of-a-kind piece of legislation that recognizes the aviation industry's susceptibility to such acts of unlawful interference and underscores the need of its protection and orderly growth in order to maintain the seamless movement of people and goods.

Operator is liable within the scope of this Convention¹⁷ only when the damage results from an 'event' involving an 'act of unlawful interference' when the aircraft is 'in flight'. Liability of the

¹⁶'Unlawful interference' means an 'offence' in the Convention for the Suppression of Unlawful seizure of Aircraft 1970 or the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971. Article 1 of Convention for the Suppression of Unlawful seizure of Aircraft 1970 defines 'offence' as under:

"Any person who on board an aircraft in flight (a) unlawfully, by force or threat thereof, or by any other form of intimidation seizes or exercises control of that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence." Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 defines "offence" as follows: "1. Any person commits an offence if he unlawfully and intentionally (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight. 2. Any person also commits an offence if he: (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or (b) is an accomplice of a person who commits or attempts to commit any such offence."

¹⁷Art. 3(1).

operator or the Fund to pay damages is wholly or partly exonerated in case of damage contributed by intentional or reckless act or omission of the claimant, done or omitted with the knowledge of probable damage. The Convention introduces much awaited and often discussed concept of risk allocation.¹⁸ This principles requires the carrier under the Convention, to pay damages to a certain amount even though it is not liable for loss or injury and the liability depends upon the mass of the aircraft at the time of takeoff.¹⁹ In addition to damages for death and bodily injury, strict liability extend to mental injury if the mental injury is resulted from a “recognizable psychiatric illness” connected with bodily injury or with “direct exposure to the likelihood of imminent death or bodily injury”.²⁰ If more than one aircraft is involved, the liability of operators is joint and several subject to their respective limit and contribution to the damage.²¹ The general liability is capped though breakable in certain circumstances. Damage to property is also compensable.

The convention also allows for damages in circumstances when a state party's aircraft operator causes injury in a non-party state, as long as the provisions of article 28 are met. If authorised by the domestic legislation of the event state, environmental damage is also compensable. Under some circumstances, liability is capped at u/a 4 and may be breached.

The liability on the second leg exceeds \$1.05 billion. This is covered by the International Civil Aviation Compensation Fund, which was established under the Convention. This sum must be collected and paid in the Fund by the operator for each passenger and each tonne of cargo departing on an international flight from a member state's airport. The “operators are unlikely to take on this additional task.”²²

Only when all claims of the victims have been settled and satisfied may the operator and the Fund utilize their right of recourse against the perpetrator, as provided for in u/a 24, 25. This suspension is planned in the victims' best interests, so that their claims are not delayed and they

¹⁸In many litigation related to Warsaw/Montreal, it was discussed in relation to imposition of liability on the carrier.

¹⁹Art. 4.

²⁰Art. 3(3).

²¹Art. 5.

²²Jennifer Ann Urban, *International Civil Aviation Organisation Initiative versus Industry Initiative: A Look at How Commercially Motivated Transactions Aviation Industry Safety*, 81 J. Air L. & Com. 683 (2016) p. 688.

get compensation as soon as possible. However, from the perspective of an operator, this provision appears to be unjust because victim claims can take years to resolve, and by that time, the person or entity against whom the operator is claiming may have become unreachable or have other difficulties, especially if the claim is against a criminal. The operator should be able to sue if this happens as soon as possible but without creating any hurdle or delay to the claims of victims. In conventions these provisions have been deleted and provision for recourse has been made simple.

Remedy is exclusive u/a 12 like that in MC 99 and Warsaw. Arts 23, 24, 25. Art. 26 provide right to recourse and set out limits thereon. No right of recourse is available against the owner, lessor, manufacturer or financier of the aircraft if they are not operators (Art. 27). Remedy available in the Convention is exclusive only against the operator or the Fund under the conditions provided in the Convention with the exception of action against the doer, organizer or financier of the fateful event (article 29). Under article 32(1), single jurisdiction, only in the State of occurrence of damage, is provided for any action for damages but the judgment shall be recognized and enforced in other States according to article 34.

International Civil Aviation Compensation Fund (The Fund)

The Unlawful Interference Convention establishes a method for operators to be held liable up to their insurable limitations. An international organization has been created under the name of International Civil Aviation Compensation Fund with its own legal structure to award compensation exceeding that amount. The organization is made up of a Conference of Parties (COP), which comprises of States parties, and a Secretariat, which is led by a Director. The Conference of the Parties (COP) is the main policy-making body, consisting of all States Parties. The COP is in charge of establishing the Fund's general parameters, which include remuneration, financial aid to operators, donations, and investments. For each event, the organization's contribution is restricted to 3000 000 000 Special Drawing Rights. The Convention outlines the organization's whole system, as well as its goals and objectives.

Concluding Remarks

The Unlawful Interference Convention offers a unique concept of compensation in the event of terrorist attacks or other unlawful interference situations. It floats the idea of community

participation by providing for contribution not only from the incumbent passengers and cargo of international flights, but also by encouraging general aviation and governments to contribute for the noble goal of assisting the victims, and it demonstrates the strength of togetherness and unity to those who try to dismantle society with their separatist and criminal actions by creating an international fund to cover liability in such cases.

Despite the fact that both Conventions have flaws and challenges in application and execution in real-life settings, they represent ambitious efforts to make third-party damages a reality and by providing scales of liability, gives ingress to certainty for third party liability to avoid money and time consuming litigation. It also helps the insurers, operators and carriers to arrange for insurance more accurately for the possible risk. The limits provided in the Conventions are easily covered by insurance policies available in the market. In certain countries, the damages awarded are much higher than available in the Conventions.