

Aviation - International

Liability for Damage Caused by Aircraft

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Introduction

A diplomatic conference hosted by the International Civil Aviation Organization (ICAO) from April 20 2009 to May 2 2009 adopted two new air law conventions that set out international compensation and liability rules for damage caused by aircraft to third parties. The Convention on Compensation for Damage to Third Parties resulting from Acts of Unlawful Interference Involving Aircraft (the 'Unlawful Interference Convention') provides compensation for damages to victims on the ground in participating countries resulting from acts of unlawful interference⁽¹⁾ involving aircraft. This treaty also establishes an International Civil Aviation Compensation Fund to compensate further people who suffer damages covered by the convention. The second convention adopted by the ICAO conference was the Convention on Compensation for Damage Caused by Aircraft to Third Parties (the 'Ground Damage Convention'). This treaty regulates compensation for damage to victims on the ground in participating countries caused by aircraft, but not arising out of any unlawful interference with such aircraft.⁽²⁾

Scope of Convention Coverage

The Rome Convention, signed in 1952, addressed the rights of third parties which suffered damage from events involving aircraft.⁽³⁾ Similar to the treaties addressing liability for passenger injury, the Rome Convention established operator liability limits for damage caused on the surface. The size of the aircraft determined the limits instituted. However, the Rome Convention never received widespread acceptance.⁽⁴⁾ The Ground Damage Convention seeks to modernize and supersede the Rome Convention. It provides for strict liability of operators to compensate victims of damage on the ground from aircraft travelling on an international route, other than as a result of an act of unlawful interference, in a country that has signed the convention.

The Unlawful Interference Convention covers damage to third parties on the surface that occurs in a participating country caused by an act of unlawful interference of an aircraft travelling on an international route. No prior international treaty has dealt with this type of damage. The earlier Convention for Suppression of Unlawful Seizure of Aircraft, signed in 1970, regulated the criminal prosecution of perpetrators of unlawful seizure of aircraft, and rendered such a criminal act an international offence. Additionally, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in 1971 and as amended, established a framework for the prosecution of people who perform an act of violence on an aircraft or at an airport or against an aircraft or airport that endangers the safety of either.⁽⁵⁾ Both the new conventions apply only to international transportation. However, each convention contains an optional declaration which allows a participating country to elect to extend the application of the respective treaties to domestic as well as international travel. This provision can be adopted on a country-by-country basis.

Operator Liability

Each treaty makes operators liable for death, bodily injury and mental injury (only compensable if directly attributed to the damage by aircraft and evidenced by symptoms of a recognizable psychiatric illness), as well as environmental and property damage. No recovery is allowed for punitive, exemplary or non-compensatory damages. Operator liability limits range from 750,000 Special Drawing Rights (SDRs)⁽⁶⁾ for an aircraft weighing 500 kilogrammes (kg) to 700,000kg, to 7 billion SDRs for an aircraft weighing 500,000kg, per event. If two different operators caused the damage, they are jointly and severally liable.

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The Rome Convention presumed that the registered owner of the aircraft was the operator of the aircraft and was held liable as such, unless proven otherwise. Moreover, notwithstanding such proof, the registered owner was still jointly and severally liable with the operator if the operator's possession of the aircraft was not exclusive and for a period longer than 14 days. In contrast, the Ground Damage and Unlawful Interference Conventions protect owners, lessors and financiers that are not aircraft operators from liability. This shift comports with modern-day financing structures for aircraft acquisitions and operation.

In the Ground Damage Convention the compensation limits are applicable only if the operator can prove that (i) it was not negligent and did not act wrongfully, or (ii) the act of another person caused the damages. In any case, the operator bears the burden of proof to show that it was not at fault. Under the Unlawful Interference Convention, if the total damages for an event exceed the limits set forth therein (including additional compensation from the fund, as described below), the burden of proof rests with the victim, who must prove that the operator contributed to the occurrence of the event with the intent to cause damage, or acted recklessly and with knowledge that damage would probably result. Even if it is determined that the damage results from the actions of an employee of the operator, the operator can nonetheless avoid additional liability by proving that either it had an appropriate system for selection and monitoring of employees in place, or that it acted in compliance with security requirements under the Chicago Convention.⁽⁷⁾

The Unlawful Interference Convention establishes the fund to provide compensation above the operator liability limits and even allows for additional compensation to passengers on board aircraft involved in an event where the damages recovered by passengers were not commensurate with the damages available to victims on the ground under the convention.⁽⁸⁾ The maximum amount of compensation available from the fund for each event is 3 billion SDRs.

Both conventions exonerate operators to the extent that they prove the damage was caused, or contributed to, by an act or omission of a claimant; the Unlawful Interference Convention also exonerates the fund if it can prove likewise. This exception is important because it prevents persons or their family members responsible for such events from collecting under the strict liability regimes provided under the conventions. In addition, the Unlawful Interference Convention permits an operator recourse against any person who "committed, organized or financed the act of unlawful interference".

Implementation

Neither convention will enter into force until ratified by at least 35 participating countries. For the Unlawful Interference Convention to come into force, all 35 signatories are required to have had at least 750 million passengers depart from the country in the previous year. If these two treaties are ratified, operators will need to obtain insurance to cover their exposure under these conventions.⁽⁹⁾

Both conventions are a long way from coming into effect. So far, no countries have ratified the treaties. Nevertheless, they represent a serious effort by the ICAO to address the problems of aviation losses caused by what is in essence criminal conduct and ground losses.

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Endnotes

(1) The definition of 'unlawful interference' in both conventions means "an act which is defined as an offence in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971".

(2) "Two New Treaties Adopted by International Conference on Air Law", ICAO News Release PIO 05/09 (May 12 2009).

(3) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7 1952 (the 'Rome Convention').

(4) Less than 25% of the ICAO's membership has accepted the Rome Convention and the Protocol to Amend the Rome Convention, signed at Montreal in 1978, has been ratified by only five countries. *Study on the Modernization of the Rome Convention of 1952*, Council -166th Session, ICAO Working Paper (May 14 2002). The United States is not a signatory to the Rome Convention.

(5) The United States has ratified the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Convention for the Suppression of Unlawful Seizure of Aircraft.

(6) SDRs are a unit of currency established by the International Monetary Fund used by

certain international organizations.

(7) The Chicago Convention, ratified on December 7 1944, established the ICAO and international air operating rules. In 1974 Annex 17 was passed, setting forth a security programme for operators to implement to safeguard the aircraft against unlawful interference.

(8) An international body will be established to regulate the fund, constituted by representatives of participating countries and the director of the fund. Taxes on passengers travelling on international flights from a participant country will finance the fund.

(9) Under the unlawful interference convention, if such insurance is wholly or partially unavailable because insurers will not cover it or it is too expensive for the continued operations of operators, regulators of the fund may provide such insurance coverage for a presumably reasonable fee.

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