Aviation Insurance under the Modernization of Rome Convention 1952

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Abstract

This thesis begins with analysis of the past & current legal frameworks and insurance regulations in respect of air carrier's liability for damage caused by the aircraft on the surface. The insufficiency and inadequacy of the said legal frameworks and regulations are emphasized and explained as the rationale for the promulgation of the General Risk Convention and the Unlawful Risk Convention.

Continuing with the introduction of aviation insurance regarding damages caused by aircraft on the surface, Third Party Liability and War Risk Insurance are focused and updated with current insurance market information. Furthermore, after the attack on September 11, 2001, the solution for War Risk Insurance is discussed.

At last, based on the previous analysis in relevant regulations and aviation insurance, this thesis points out the potential risks to aviation industry under the General Risk Convention and the Unlawful Risk Convention.

Ce mémoire commence par une analyse, passée et présente, du cadre juridique et de la réglementation en matière d'assurance relative à la responsabilité du transporteur aérien, pour dommage causé au sol par l'aéronef. L'insuffisance et la faiblesse desdits cadres juridiques et réglementations sont soulignés et expliqués comme justification de la promulgation de la Convention sur les dommages causés aux tiers et de la Convention sur les actes d'intervention illicite.

Puis, nous enchainons par une introduction sur les assurances aéronautiques relatives aux dommages causés par les aéronefs au sol, à la responsabilité du fait d'autrui, ainsi qu'à l'assurance pour risque de guerre, qui sont étudiées et actualisées à l'aide des dernières

informations du marché des assurances. Par ailleurs, suite aux tragiques accidents du 11 septembre 2001, le recours à l'assurance pour risque de guerre est débattu.

Enfin, sur la base de l'analyse précédente, s'agissant de la règlementation et de l'assurance aéronautique, ce mémoire souligne les risques potentiels, pour l'industrie aéronautique, liés à la Convention sur les dommages causés aux tiers et à la Convention sur les actes d'intervention illicite.

Resume

Jialing Shan received her bachelor degree in economic & financial laws from National Taiwan University. And then she earned her master degree in civil law from National Taipei University and finished her thesis titled 'International Jurisdiction of Air Transportation Claims'.

She has been the legal counsel of Far Eastern Air Transport in Taiwan from 2005 till 2008 focusing on cargo & passenger liability, aviation insurance, litigation, aircraft financing, and contracting. Then she spent one great year studying in Air & Space Law Institute of McGill University in Montréal for her advanced education in Aviation Law. Since 2009 she has been working in China Airlines as legal counsel and exposing herself once again to her most favorite field.

Jialing Shan a reçu son baccalauréat en droit économique et financier de l'Université Nationale de Taiwan. Puis, elle a obtenu sa maîtrise en droit civil de l'Université Nationale de Taipei, en complétant sa thèse intitulée : « La compétence juridictionnelle internationale en matière de transport aérien ».

Elle a été juriste chez Far Eastern Air Transport, à Taiwan, de 2005 à 2008, avec une spécialisation en matière de responsabilité passagers et fret, assurance aérienne, contentieux, financement d'aéronef et contrats. Puis, elle a passé une excellente année à étudier au sein de l'Institut de Droit Aérien et Spatial de l'Université McGill, à Montréal, afin de compléter sa formation en matière de droit aérien. Depuis 2009, elle travaille pour China Airlines, en qualité de juriste, se dédiant une fois de plus à son domaine favori.

Acknowledgement

My sincere appreciation is dedicated to Air and Space Law Institute ("IASL") and Law Faculty of McGill University. Many thanks to the chances and supports they have given me to experience and enjoy the academic study and research of aviation law in Montréal.

I wish to express my greatest gratitude to my supervisors, Professor Dr. Paul S. Dempsey and Professor Dr. Rod D. Margo. Without their guidance and encouragement, I would never have been able to complete this thesis. My sincere acknowledgement to Dr. Michael Jennison (Federal Aviation Administration) for his precious comments and wise suggestions.

My deepest thanks should be also given to David Gasson (International Union of Aerospace Insurers), Sean Gates (Gates & Partners), George Leloudas (Gates & Partners), Ken Coombes (London & International Insurance Brokers' Association), Marko Ninkovic (QBE), John Balfour (Beaumont & Son), Alejandro Piera (IATA), Eric Strain (Nixon Peabody) and all the other greatest aviation practitioners who gave me intelligent advice and brilliant inspiration while I was doing the research interview with them. Specially, I would like to give my greatest thanks to Alan Polivnick (Watson, Farley & Williams) who helped me to better this thesis.

Especially, I would like to thank my best friends and also my school mates, Rachel Pachoud, Mark Glynn and David K. Chen who encouraged me, accompanied me and helped me to perfect this thesis. Special thanks are given to Maria Damico, a big sister and a good friend to me who always takes good care of students in IASL.

Furthermore, I want to give my wholeheartedly gratitude to my ex-colleagues in Far Eastern Air Transport, Michael Lo (Chairman), S.S. Kao, K.M. Tsu, Alex Shih, Rafael

Fang, Pearl Pan, Jack Shih, Roger Huang, K.H Kou and all the others not named here for your kindly support in my career and life. I wish to express my earnest thanks to China Airlines which gives me opportunities to keep exploring aviation law and helps me experiencing more airline business after my return from Montréal.

Finally, I want to thank my baby sister, Jia-jen Shan, who supports my decision to pursue my abroad study and encourages me all the way. Also my best friends in National Taiwan University, Yu-Chin Yu, Yu-Chun Chiang, Ji-Jiun Tsai and Hsiyi Chen, sincere thanks are given to them for their continuous supports and endless warmth to me all the time.

This thesis is dedicated to my parents who are lost but never forgotten for they gave me the strength and courage to be who I am today.

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Chapter I Introduction

ICAO Assembly Hall, where the Diplomatic Conference 2009 convened

The ‘Modernization of the Rome Convention’ has been considered for many years by the International Civil Aviation Organization and was accelerated by the attack on September 11, 2001. The adoption in 2009 of the Unlawful Interference Convention, dealing with the aftermath of the terrorist attacks, and the General Risk Convention, succeeding the Rome Convention of 1952, is the outcome of all of those efforts made by many aviation experts in the International Conference on Air Law 2009 (Diplomatic Conference) of International Civil Aviation Organization (“ICAO”).

The primary focus and concern of this thesis are the legal issues from the perspective of

aviation insurance under the Modernization of the Rome Convention 1952. It is believed that these issues may ultimately constitute threats to the very survival of the airline industry. This thesis examines the new conventions and their impact on the interests of the victims and victims' families, and in the meantime the need to ensure sustainable and functional operation of the airline industries and aviation insurance markets.

In the beginning, this thesis will focus on reviewing the legal liability regimes of the international carrier for the surface damage caused by aircraft, comparing the current legal liability regime in different jurisdictions, and analyzing the deficiencies of the past conventions which necessitated the Modernization of the Rome Convention 1952.

Secondly, the aviation insurance market in respect of third party liability and war risk insurance will be introduced and updated. The impact of September 11 2001 on the aviation insurance market and the response of the States to the unavailability of insurance will be discussed as well. Finally, the modernized legal regime of the new conventions promulgated by the ICAO Diplomatic Conference in 2009 regarding ground damage caused by aircraft in flight will be examined from the perspective of the aviation insurance market and the war risk insurance market. Through the use of empirical data, these new conventions will be scrutinized to see whether or not they serve the best interests of the victims and surviving dependents, and also serve the needs of the airline industries and aviation insurance markets.

II Legal Frameworks and Insurance Regulations Regarding Air Carriers' Liability for Damage Caused by Aircraft on the Surface

Reviewing the previous conventions concerning air carriers' liability for damage caused by aircraft on the surface will provide better insight into the issues raised and a better understanding of what the new conventions have sought to do.

The current legal framework regarding air carriers' liability for damage caused by aircraft on the surface[1] is composed of the Rome Convention 1933,[2] the Rome Convention 1952,[3] and the Rome Convention 1952 as amended by the Montreal Protocol 1978[4] (collectively, "Rome Convention Regime") which received little acceptance,[5] and rare implementation by the world community.[6] In the last fifty years, none of the major commercial aircraft accidents has engaged the application of the Rome Convention Regime.

The applicable legal framework has two components: a liability regime, and insurance requirements in respect of air carriers' liability for damage caused by aircraft on the surface. The former is an international legal regime with relatively few ratifications, while the latter adopted by the European Union has been extensively implemented.

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[1] Such liability is included in the Third Party Liability Insurance and War Risk Insurance which will be discussed in Chapter III.

[2] *Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface*, Peter Martin, & Elizabeth de Montlaur Martin, *Shawcross and Beaumont: Air law,* rev. ed. (London : Butterworths, 1989), Volume 2, at A.73. [Rome Convention 1933]

[3] *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, ICAO, doc. 7364 [Rome Convention 1952].

[4] *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on 7 October 1952*, ICAO, doc. 9257 [Montreal Protocol 1978].

[5] The Rome Convention 1952 has been ratified by 49 countries, and the Montreal Protocol 1978 only gained 12 ratifications. ICAO Current Lists of Parties to Multilateral Air Law Treaties, online International Civil Aviation Organization [ICAO] < http://www.icao.int/cgi/airlaw.pl>.

[6] George N. Tompkins Jr. "Some Thoughts to Ponder When Considering Whether to Adopt the New Aviation General Risks and Unlawful Interference Conventions Proposed by ICAO" (2008) 33 A. & S. L. 81 at 82.The most disastrous catastrophe in history caused by aircraft on the surface was dealt with under the national regime of the United States amounting to around 2750 casualties plus 40-billion dollar loss. Peter Chalk et al, *Trends in terrorism: threats to the United States and the future of the Terrorism Risk Insurance Act*. (Santa

1. Currently applicable legal frameworks

1.1 International convention

The first attempt to deal with the unification of liability for damage caused by aircraft to third parties on the surface was the Rome Convention 1933. It was later replaced by the Rome Convention 1952, which was supplemented by the Montreal Protocol 1978.

1.1.1 Rome Convention 1933

(1) Framework

a. Liability regime

The Rome Convention 1933 was intended not to change national laws of Contracting States but to deploy special rules for damage caused by foreign aircraft. Therefore, it is only applicable if the aircraft that causes the damage is registered in a State other than that in which the damage is caused.[7]

The operator of the aircraft has strict but limited liabilities, with monetary limitations based on the weight of the aircraft.[8] More precisely, the cap equates to the total maximum payload in kilogrammes multiplied by 250 francs (US$ 20)[9] ranging from 600,000 (US$ 48,000) to 2,000,000 francs (US$ 160,000).[10] The liability imposed upon the operator can be diminished or set aside pro rata where there is contributory negligence on the part of the injured party.[11] Nevertheless, the operator will not be eligible for any limit of liability if:

Monica, CA: RAND Center for Terrorism Risk Management Policy, 2005), at 2.

[7] *Rome Convention 1933*, *supra* note 2, art 20 (1).

[8] *Ibid*, art 2 (1) and art 4 (1).

[9] The 250 French francs per kilo standard was interpreted and codified by the U.S. Civil Aeronautics Board (CAB Order 74-1-16, App. 54, 39 Fed. Reg. 1526, 1974 and CAB Order 78-8-10, 43 Fed.Reg. 35971, 35972, 1978) to be sanctioned the use of the last official price of gold -$42.22 per ounce, as a conversion factor, which is equivalent to $20.00 per kilogram, or $9,07 per pound and recognized by the U.S. Supreme Court in *TWA v. Franklin Mint Corp.*, 466 U.S. 243 (1984). Paul S. Dempsey & Michael Milde, *International air carrier liability: the Montreal Convention of 1999* (Montreal: McGill University Centre for Research in Air & Space Law, c2005) at 15. [Paul S. Dempsey & Michael Milde]

[10] *Rome Convention 1933*, *supra* note 2, art 8.

[11] *Ibid*, art 3.

(a) it is proved that the damage results from the gross negligence or wilful misconduct of the operator, or his servants or agents, except where the operator proves that the damage results from negligence in the pilotage, handling or navigation of the aircraft, or, where his servants or agents are concerned, that he has taken all proper steps to prevent the damage;

(b) the securities (insurance or other guarantee) have not been furnished by the operator under the requirement of the convention.[12]

It is noteworthy that the statute of limitations in respect of the injured third party to claim from the operator is one year and in 'all cases' from awareness of prejudice, and with knowledge to awareness of injury or not, the action is subject to a period of limitation of three years from the date of the damage.[13] The forum is the defendant's ordinary place of residence or the place where the damage was caused, and this is at the plaintiff's discretion.[14]

b. Insurance requirement

The Rome Convention 1933 required specifically that each aircraft operating in commercial civil aviation and registered in the Contracting State should be supplemented with insurance or guarantee of third party liability on the surface within the limits fixed by the convention up to 2,000,000 francs (US$ 160,000).[15]

Non-compliance with the insurance requirement will deprive the operator of the invocation of limited liability as mentioned above.[16] Furthermore, the choice of forum shall not prejudice any direct action on the part of the injured third party against the insurer in all

[12] *Ibid*, art 14.
[13] *Ibid*, art 17.
[14] *Ibid*, art 16.
[15] *Ibid*, art 12 (1) and art 8.
[16] *Ibid*, art 14.

cases where such direct action lies.[17]

(2) Brussels Protocol 1938

In the Brussels Protocol 1938,[18] there was an attempt to prevent the insurers of the operators from seeking to avoid liability by limiting defences against direct action of the third party on the surface based on Rome Convention 1933.[19] The aforesaid defences are:

(a) the damage occurred after the insurance ceased to have effect;

(b) the damage occurred outside the territorial limits prescribed in the insurance contract except in the case of force majeure, a justifiable deviation, or negligence in piloting, in handling of the aircraft or in navigation; or

(c) the damage was the direct consequence of international armed conflict or civil disorder.[20]

Excepting the aforementioned defences, any plea of nullity or of any right of retroactive cancellation is not available to the insurer as a defence with respect to third parties.[21]

The Brussels Protocol 1938 was only ratified by Brazil and Italy, and thus is generally regarded as a dead letter.[22] Nowadays such aforementioned defences would also be found in the insurance contract or standard aviation insurance clause, e.g. geographical limitation, and war risk exclusion between the operator and the insurer. Such defences would also be available to the insurer against the injured third parties pursuing direct action.[23]

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[17] *Ibid*, art 16.

[18] Protocol to Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome in 1933. Peter Martin, & Elizabeth de Montlaur Martin, *Shawcross and Beaumont: Air law,* rev. ed. (London : Butterworths, 1989), Volume 2, at A.79. [Brussels Protocol 1938]

[19] Rod D. Margo, *Aviation insurance: the law and practice of aviation insurance, including hovercraft and spacecraft insurance*, 3rd ed. (London: Butterworths, 2000) at 16. [Margo]

[20] Brussels Protocol 1938, *supra* note 18, art 1 (1),

[21] *Ibid*, Art. 1 (2).

[22] Christopher N. Shawcross, *Shawcross and Beaumont: Air law,* rev. ed. (London : Butterworths, 1977), at IX-5. [Shawcross]

[23] Geographical limit in the insurance policy has evolved with the political risks around the world. For a

1.1.2 Rome Convention 1952

(1) Liability regime

The Rome Convention 1952 was drawn up to supersede and improve the Rome Convention 1933.[24] Given the obsolete monetary limitation of the Rome Convention 1933, the Rome Convention 1952 was intended as a much more evolved and advanced instrument in respect of damage caused by 'foreign' aircraft to third parties on the surface at that time, and it came into force in February 1958.[25]

The applicability of the Rome Convention 1952 is limited to damage caused in the territory of a Contracting State by an aircraft registered in the territory of another Contracting State.[26] In addition, damages which occur outside the regime of the Rome Convention 1952 will be governed by the national laws of the State where damages occur, *i.e. lex loci delicti.* Strict liability is imposed upon the operator with a monetary cap linked to the maximum permissible take-off weight of the aircraft on a 'per aircraft and per incident basis' up to

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regional Asian airline, normally the geographic limit is stated as 'worldwide', but in respect of Extended Coverage Endorsement (Aviation Liabilities) AVN52E coverage it excludes Iraq and former States of Yugoslavia and in respect of Hull and Spares War and Allied Perils, 'worldwide' is subject to the following:

1. This insurance excludes loss, damage or expense arising from any of the following country(ies) and region(s):
   (a) Algeria, Angola, Burundi, Congo, Democratic Republic of Congo, Eritrea, Guinea, Bissau, Ethiopia , Liberia, Libya, Rwanda, Sierra Leone, Somalia, Sudan;
   (b) Colombia, Ecuador, Peru;
   (c) Afghanistan, Azerbaijan, Checheno/ Ingushaskaya;
   (d) Sri Lanka, Sumatra (Indonesia), East Timor;
   (e) Iran, Iraq, Lebanon, Palestine, Syria;
   (f) Albania, Bosnia, Kosovo, Macedonia, Montenegro, Serbia.
2. However, coverage is granted for the cover flight of any of the excluded countries where the flight is within an internationally recognized air corridor and is performed in accordance with ICAO. recommendations.
3. In addition to those countries listed above, coverage is excluded for any flight into any country where such operation of aircraft is in breach of United Nations sanctions.
4. Any excluded country may be covered by Insurers at terms to be specified and agreed by insurers prior to flight.

[24] Bengt G. Nilsson, "Liability and Insurance for Damage Caused by Foreign Aircraft to Third Parties on the Surface- A Possible New Approach to an Old Problem" in Arnold Kean, ed., *Essays in air law* (Boston: Nijhoff; Hingham, MA: Distributors for the U.S. and Canada, Kluwer Boston, 1982) 181 at 181.
[25] Shawcross, *supra* note 22, at V-403.
[26] *Rome Convention 1952*, *supra* note 3, art 23 (1).

10,500,000 francs (US$ 840,000).[27] As to loss of life or 'personal injury', there is a sub-limit of 500,000 francs (US$ 40,000) per person killed or injured.[28] The operator also enjoys defences which exempt the operator from liability completely or partially if:

(a) the damage is the direct consequence of armed conflict or civil disturbance, or the operator has been deprived of the use of the aircraft by public authority;[29]

(b) the operator 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;

(c) the operator 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 the latter's servants or agents;[30]

Nonetheless, the capped liability is not absolute and can be broken. The limitation on liability may be pierced to the extent that damage was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, i.e. wilful misconduct of the operator, his servants or agents, instead of recklessness.[31]

Action shall be subject to a six-month notice and a period of limitation of two years, both calculated from the date of the incident which caused the damage.[32] There is only one single forum which the actions can be brought before, that is the Contracting State where the damage occurred. Notwithstanding this, a jurisdictional agreement between the

[27] *Ibid*, art 2 and art 11 (1).
[28] *Ibid*, art 11 (2).
[29] *Ibid*, art 5.
[30] *Ibid*, art 6. It is also stated that an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in art 6 (1) to exempt the operator from liability completely or partially.
[31] *Ibid*, art 12 (1).
[32] *Ibid*, art 19 and 21.

claimant(s) and the defendant(s) or arbitration may allow the change of forum to another Contracting State.[33]

(2) Insurance requirement

The Rome Convention 1933 and the Rome Convention 1952 both contain a 'compulsory insurance requirement' against legal liability to third parties.[34] Unlike the Rome Convention 1933, the requirement of insurance in the Rome Convention 1952 was left to the discretion of the Contracting State and capped liability is unaffected by inadequate insurance requirements.[35] The insurance coverage requirement, *in lieu* of any other satisfactory security, serves as a mechanism for the compensation guarantee to the operator's capped liability to third parties.

As a successor of the Rome Convention 1933, the Rome Convention 1952 entitles the person suffering damage to bring a direct action against the insurer or guarantor, provided that the security is in force and the operator is insolvent.[36] The insurer or guarantor may rely on the defences available to the operator or the defences of forgery and two additional defences which were similar to the defences of the Brussels Protocol 1938, i.e. the termination of the insurance coverage and the geographical limit.[37] Any ground of nullity or retroactive cancellation could not be used to limit or exclude liabilities of insurer or guarantor against direct actions of third parties.[38]

1.1.3 Rome Convention 1952 as amended by Montreal Protocol 1978

The Montreal Protocol 1978 made several significant amendments to the Rome Convention 1952. Among such amendments, the increase of monetary limitation, and the

[33] *Ibid*, art 20 (1).
[34] Margo, *supra* note 19, at 15.
[35] *Rome Convention 1952*, *supra* note 3, art 15.
[36] *Ibid*, art 16 (5).
[37] *Ibid*, art 16 (1).

currency change from 'Poincaré francs' to 'Special Drawing Rights' ("SDR") are primary focuses.

The limit of the operator's liability remains linked to the maximum permissible take-off weight of the aircraft on a 'per aircraft and per incident basis' but has been raised up to 2,500,000 SDR (US$ 3,695,142)[39] plus 65 SDR accumulated per kilogramme if the maximum permissible take-off weight is over 30,000 kilogram; in respect of loss of life or personal injury, the compensation has also increased up to 125,000 SDR (US$ 184,757) per person killed or injured.[40]

As to the applicability, the Montreal Protocol 1978 magnifies the application of the Rome Convention 1952 to damages caused in the territory of a Contracting State by an aircraft no matter what its registration may be, provided that the operator of such aircraft causing such damages has his principal place of business or, if he has no such place of business, his permanent residence in another Contracting State.[41]

Furthermore, it is worthy of note that the Montreal Protocol 1978 explicitly excluded nuclear damage from the compensation coverage,[42] which was also an important feature at that time evidencing the reflection of cold war and harmonization with the industry standard (i.e. AVN 48: the War, Hi-jacking and Other Perils Exclusion Clause (Aviation) issued on 12 November 1969).[43]

1.2 Regulation (EC) No 785/2004

Entering into force on April 30, 2005, Regulation (EC) No 785/2004[44] set out a "minimum

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[38] *Ibid*, art 16 (6).
[39] 1USD = 0.676564 SDR, IMF SDR rate for Feb 19, 2009, online IMF: < http://www.imf.org/external/index.htm>.
[40] Montreal Protocol 1978, *supra* note 4, art III (1) and (2).
[41] *Ibid*, art XII.
[42] *Ibid*, art XIV.
[43] Margo, *supra* note 19, at 325.
[44] *Regulation (EC) No 785/2004 of the European Parliament and the Council on Insurance requirements for*

insurance requirement",[45] in respect of passenger, baggage, cargo, mail and third party liability. Regulation (EC) No 785/2004 left the liability regime to be decided by the applicable 'international conventions' regarding passenger, baggage, cargo and mail.[46] Third party liability is determined by the applicable 'national laws' of EU Member States since currently the European Community has no harmonized rules on third party liability.[47]

1.2.1 Applicability and coverage

Regulation (EC) No 785/2004 applies to all air carriers and to all aircraft operators flying within, into, out of, or over the territories of EU Member States. This subsumes foreign operators registered in countries outside the European Union,[48] or the European Economic Area.[49] But certain kinds of aircraft are excluded from Regulation (EC) No 785/2004, e.g. State aircraft, model aircraft with 'Maximum Take-Off Mass' ("MTOM") less than 20 kg, foot-launched flying machines, captive balloons, kites and parachutes.[50]

The minimum insurance coverage in respect of third party liability is categorized in accordance with MTOM corresponding to a certified amount specific to all aircraft types as

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air carriers and aircraft operators, [2004] O.J.L. 138/1 [Regulation (EC) No 785/2004].

[45] *Ibid*, Preamble (2).

[46] *Regulation (EC) No. 889/2002 of the European Parliament and Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on Air Carrier liability in the event of accident*, [2002] O.J. L 140/2 [Regulation (EC) No 889/2002]. Regulation (EC) No 889/2002 implements the relevant provisions of Montreal Convention 1999 regarding carriage of passengers and baggage by air.

[47] Insurance Requirements for Aircraft Operators in the EU - A Report on the Operation of Regulation 785/2004, Communication From The Commission to The European Parliament and The Council, online: European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0216:FIN:EN:PDF> at 4, [EU Insurance Requirements for Aircraft Operators Report].

[48] Member States of the EU (at time of writing) are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. European countries, online: European Union < http://europa.eu/abc/european_countries/index_en.htm>.

[49] European Economic Area [EEA], including Norway, Iceland and Liechtenstein, adapted Regulation (EC) No 785/2004 by Annex XIII to EEA Agreement, online: European Commission < http://ec.europa.eu/external_relations/eea/>. Under Article 6 of Regulation (EC) No 785/2004, insurance regarding liability for passenger, baggage and cargo does not apply with respect to flights over the territory of the Member States carried out by non-Community air carriers and by aircraft operators using aircraft registered outside the Community which does not involve a landing on, or take-off from, such territory.

[50] *Regulation (EC) No 785/2004, supra* note 43, art 2(2).

stated in the certificate of airworthiness of the aircraft. In essence, the insurance requirements in respect of third-party coverage have been characterized into 10 classifications from the lowest 750,000 SDR (less than 500 kg of MTOM) to the highest 700,000,000 SDR (more than 500,000 kg of MTOM); the minimum insurance coverage shall be maintained on a 'per accident and per aircraft basis' and shall be insured for existence for 'each and every flight'.[51]

1.2.2 Risk of war or terrorism and allied perils

Under Regulation (EC) No 785/2004, the insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.[52] It is noted that the complete exclusion of such risks could be deemed as a contradiction to the aforesaid insurance requirement. Nonetheless, the hostile use of weapons of mass destruction ("WMD") was excluded entirely under AVN48C coupled with AVN52H and AVN52J. And now AVN48D partnered with AVN52K and AVN52L drafted to cover limited WMD has been recognized complying with the requirement of Regulation (EC) No

[51] *Ibid*, art 7 (1) and art 5(2).
With respect to liability for third parties, the minimum insurance coverage per accident, for each and every aircraft, shall be:

Category	MTOM (kg)	Minimum insurance (million SDRs)
1	< 500	0,75
2	< 1 000	1,5
3	< 2 700	3
4	< 6 000	7
5	< 12 000	18
6	< 25 000	80
7	< 50 000	150
8	< 200 000	300
9	< 500 000	500
10	≧500 000	700

[52] *Ibid*, art 4 (1).

785/2004 which will be discussed in the next chapter.

To cope with the market unavailability of third party liability in case of risks of war or terrorism, the air carrier or aircraft operator may satisfy its obligation to insure such risks on an 'aggregate basis' which means the cover for occurrence of ground accidents will be limited on an annual basis. The current aviation liability policy in respect of war and terrorism risks is issued on an 'aggregate basis' while the general third party liability is issued on a 'per occurrence basis'.

Furthermore, in exceptional cases of insurance market failure such as the catastrophe of September 11, 2001, the European Commission may determine the appropriate measures for the application of insurance requirements, which suggests an extra mechanism may be developed and deployed, at the European Commission's discretion, to deal with the insurance market failure.[53]

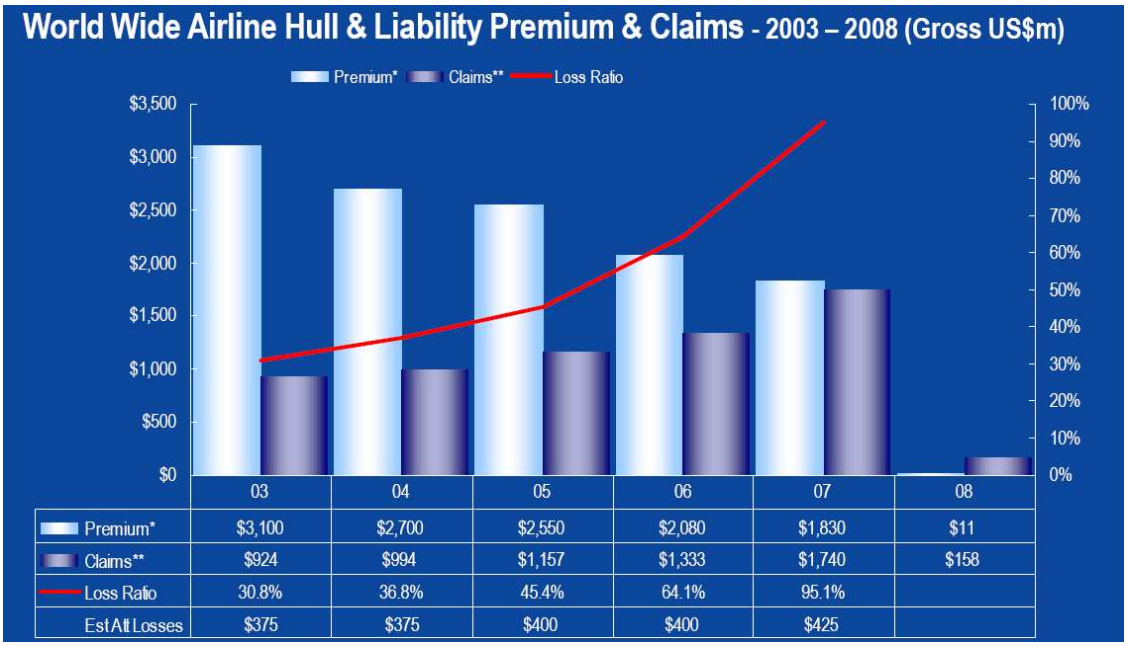
1.2.3 Sanctions and implementation

All carriers, irrespective of country of origin, flying within, into out of, or over the territory of a Member State, must demonstrate compliance with the insurance requirements by providing a deposit of an insurance certificate or other evidence of valid insurance. Non-EU carriers, not landing or taking off from an EU Member State, may need to provide, upon the request of the EU Member State, evidence of compliance with insurance requirements.[54]

Infringement of Regulation (EC) No 785/2004 will lead to sanctions, including withdrawal of the operating license of an EU Community carrier or refusal of the right to land to a non-EU carrier.[55] Few cases have been reported of noncompliance with Regulation (EC)

[53] *Ibid*, art 5 (5).
[54] *Ibid*, art 5 (1) and art 8 (2).
[55] *Ibid*, art 8 (5) and (6).

No 785/2004,[56] which seems to evidence the applicability and practicability of the insurance requirement established by Regulation (EC) No 785/2004. Nevertheless, it should be borne in mind that as a result of premium reductions, which resulted from low loss records of air carriers (the 2003 loss ratio was 30.8 per cent, and in 2004 it was 36.8 per cent, as shown in the following chart), and overcapacity in the reinsurance-market[57], the soft insurance market was more able to accommodate new insurance requirements of Regulation (EC) No 785/2004.



	03	04	05	06	07	08
Premium*	$3,100	$2,700	$2,550	$2,080	$1,830	$11
Claims**	$924	$994	$1,157	$1,333	$1,740	$158
Loss Ratio	30.8%	36.8%	45.4%	64.1%	95.1%	
Est All Losses	$375	$375	$400	$400	$425	

Source: Willis Ltd.[58]

2. The Modernization of the Rome Convention 1952

The modernization of the Rome Convention 1952 was first raised by a Swedish proposal in 2000 and was catalyzed by the four hijacked aircraft on September 11, 2001.[59] After six

[56] EU Insurance Requirements for Aircraft Operators Report, *supra* note 47, at 5.
[57] Willis Ltd., "Willis Re-view 2005", online: Willis < http://willis.de/Documents/Publications/General_Publications/WillisRe_reView_010105.pdf>.
[58] Willis Ltd., "Global Aviation Bulletin", online : Willis< http://www.willis.com/Documents/Publications/Industries/Aerospace/Issue_150.pdf>.
[59] Harold Caplan, "Modernization of the 1952 Rome Convention and Protocol" (2007) 32 A. & S. L. 19 at 20.

meetings of the Special Group[60] in charge of the Modernization of the Rome Convention 1952, the drafts on compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks, namely the "Convention on Compensation for Damage Caused by Aircraft to Third Parties",[61] and "Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft"[62] (collectively, the "Conventions"), were developed and reached their final stage during the ICAO Diplomatic Conference from 20 April to 2 May 2009 ("Diplomatic Conference").[63] The Conventions were partially inspired by the insufficiency and inadequacy of the Rome Convention Regime which, as will be argued, was the rationale for the promulgation of the Conventions. The structure and main elements of the Conventions will be introduced separately.

2.1 Insufficiency and inadequacy of the Rome Convention Regime

At the time of writing, the Rome Convention 1952 currently has only 49 State Parties and the Montreal Protocol 1978 has only 12 State Parties. Compared with 152 parties to the Warsaw Convention 1929,[64] and 97 parties of the Montreal Convention 1999,[65] the Rome Convention 1952 and the Montreal Protocol 1978 are relatively less recognizable and applicable.[66]

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[60] On 31 May 2004, the Special Group was established by the ICAO Council with the task to modernize the international rules on third party liability. Henrik Kjellin, "The New International Regime for Third Party Liability (Successor(s) of The 1952 Rome Convention)" (2008) 32 A. & S. L. 63 at 64.
[61] *Convention on Compensation for Damage Caused by Aircraft to Third Parties*, ICAO DCCD Doc No. 42 [General Risk Convention]
[62] *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*, ICAO DCCD Doc No. 43 [Unlawful Interference Convention]
[63] International Conference on Air Law, Montreal, 20 April to 2 May 2009, Provisional Agenda, online: ICAO <http://www.icao.int/DCCD2009/docs/DCCD_doc_1_en.pdf>.
[64] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 L.N.T.S. 11, 49 Stat.3000, TS No. 876, ICAO Doc. 7838 [Warsaw Convention 1929].
[65] *The Convention for the Unification of Certain Rules Relating to International Carriage by Air", signed at Montreal on 28 May 1999*, ICAO Doc. 9740[Montreal Convention 1999].
[66] ICAO Current Lists of Parties to Multilateral Air Law Treaties, *supra* note 5.

One possible reason for the lesser acceptance of the Rome Convention 1952 and the Montreal Protocol 1978 may be that existing national laws had provided more protection to the victims on the ground than the conventions. In the United Kingdom, strict and unlimited liability is imposed on the owner of the aircraft.[67] In the United States, surface damage caused by aircraft in operation is governed by a negligence standard without a cap.[68] In Germany, France, and Switzerland, strict liability has already been imposed for damage to third parties.[69] Therefore, States with major aviation sectors lost the incentive to be compelled to join the unified international regime.

2.2 General Risk Convention and Unlawful Interference Convention

2.2.1 Building blocks

According to Henrik Kjellin, who chaired the Special Group for three years, the building blocks of the Conventions are the modern principles of burden sharing, channeling of liability and risk management.[70] The Special Group embraced these modern principles, over fault, blame and punishment.[71] And such ideas are reflected in the exclusion of

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[67] Strict liability is imposed by the Civil Aviation Act 1982 Sec. 76 (2), "where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recovered without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft." Bernard A. Koch, ed., *Terrorism, tort law and insurance: a comparative survey* (Wien: New York: Springer, c2004) at 173. [Koch]

[68] As to ground damage caused by aircraft, the Restatement (Second) of Torts provides:
If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from an aircraft, (a) the operator of the aircraft is subject to liability for the harm, even though he has exercised to utmost care to prevent it, and (b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation. American Law Institute, Restatement (Second) of Torts § 520A, Ground Damage from Aircraft (1977). Paul S. Dempsey, "Negligence" (2008) [unpublished, archived at Institute of Air and Space Law, McGill University Faculty of Law] at 35.

[69] German law provides for strict liability of keepers of aeroplanes under §33 para. 1 of the Air Traffic Act; In France, strict liability is imposed upon airlines on the basis of art. 1384 §1 of the Civil Code; In Switzerland, airline companies are strictly liable for bodily injury or property damage on the ground caused by falling aircraft under Article 64 of Civil Aviation Act of 21 December 1948. Supra note 66, at 50, 38 and 131.

[70] Henrik Kjellin, *supra* note 60, at 71 and 78.

[71] *Ibid*, at 70.

punitive, exemplary or any other non-compensatory damage in the Conventions.[72]

Harold Caplan, the respected former Legal Advisor of the International Union of Aviation Insurers ("IUAI"), is not in favor of the Unlawful Interference Convention due to its unfairness.[73] Even IATA,[74] is not supportive of the General Risk Convention and sees no merits in adopting it.[75]

Nevertheless, the necessity of the promulgation of the Conventions lies behind the concept of risk assessment and management. A capped liability is, without a doubt, better than unlimited liability for identifying and evaluating loss. Furthermore, with a capped figure, it would be possible to manage risk control and risk sharing in advance. Given the strict and/or unlimited liability imposed by major jurisprudence as mentioned before, the promulgation of the Conventions for the modernization of the Rome Convention is truly to the benefit of the airline industry and the stakeholders because of the notion of 'capped liability' and 'channeling'.

2.2.2 Main elements

Originally following the scope of the Montreal Convention 1999, the Special Group, in its third meeting, split the successor of the Rome Convention 1952 into two draft conventions in which one deals with the general risks on ground caused by aircraft, while the other handles risks from unlawful interference[76], including terrorism.[77]

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[72] *General Risk Convention*, *supra* note 61, art 3 (6); *Unlawful Interference Convention*, *supra* note 62, art 3 (7).

[73] Harold Caplan, *Supra* note 59, at 30.

[74] International Air Transport Association now represents 230 airlines which comprise 93 % of international air traffic, online: International Air Transportation Association < http://www.iata.org/about/mission.htm>. [IATA]

[75] Working Paper-General Risk Convention presented by IATA 08/04/08, ICAO doc. LC/33-WP/3-10. IATA reiterated its view in Working Paper-General Risk Convention 20/04/09, ICAO DCCD Doc No. 17 Revision No. 1.

[76] Unlawful interference is defined in Article 1 a) as an offence 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,

In the Diplomatic Conference, the Conventions were finalized through intensive and lengthy debates, discussions and deliberations by 81 States.[78] The main elements of the Conventions will be introduced in the following discussion.

(1) General Risk Convention

A. Rationale for and Scope of General Risk Convention

The General Risk Convention is a successor of the Rome Convention 1952, but follows the scheme of the Montreal Convention 1999 by imposing strict liability upon the operator.[79] The General Risk Convention can greatly help the aviation industry to deal with the 'unlimited liability' which it faces in most major jurisdictions, e.g. France, Switzerland, the United Kingdom, and the United States.

During the Diplomatic Conference, the Aviation Working Group ("AWG")[80] strongly urged that the manufacturer should also share the concept of capped liability as the airlines have. Because the capped liability enjoyed by the airlines may shift the claims to the manufacturers who are exposed to unlimited liability. Such a proposal was only supported by the United States, Brazil and Russia where the major aircraft manufacturers resides but the majority rejected such a proposal by pointing out that the General Risk Convention deals with the operator's liability rather than the manufacturer's liability.

Furthermore, there is, *de jure*, a two-layer compensation system, i.e. through the operator

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and any amendment in force at the time of the event.

[77] Henrik Kjellin, *supra* note 60, at 66.

[78] Final Act, ICAO DCCD Doc No.44. The author of this thesis was one of the representatives of McGill University Institute of Air and Space Law as Observer in the Diplomatic Conference and witnessed the whole process of the establishment of General Risk Convention and Unlawful Interference Convention, including discussion and negotiation in the Plenary which was extracted in this thesis as *travaux préparatoires*.

[79] Shawcross, *supra* note 22, at V-419.

[80] AWG is a not-for-profit legal entity comprising major aviation manufacturers, (Airbus, Boeing, Pratt & Whitney, Rolls-Royce and etc.), leasing companies (e.g. ILFC and GECAS), and financial institutions, like JP Morgan. AWG has continuously monitored and assessed emerging issues that may impact international aviation financing and leasing, such as Cape Town Convention 2001. Online: AWG < http://www.awg.aero/ >.

and the International Civil Aviation Compensation Fund (the "International Fund"), set up by the Unlawful Interference Convention, but in the General Risk Convention, there is only one layer to be responsible for the compensation, namely the operator.

B. Coverage and limitation of the operator's liability

Compensable surface damages under the Conventions will be wider-ranging than those of the passengers on board the aircraft. In addition to death and bodily damage, mental injury shall be compensable only if caused by a "recognisable psychiatric illness" resulting either from bodily injury or from direct exposure to "the likelihood of imminent death or bodily injury".[81]

Property damage is recoverable.[82] Environmental damage is compensable insofar as such compensation is provided for under the laws of the State Party where the damage occurred.[83] No liability is imposed for damage caused by a nuclear incident[84] which also recognizes the non-insurability of nuclear incidents in the aviation insurance market (War Hi-jacking and other perils exclusion clause).

During the Diplomatic Conference, one State argued that to exclude armed conflict or civil disturbance as a cause of operator's liability is a step backward, and more aggressive action should be taken. Nonetheless, the majority of States favored incorporating such a defense for the operator in line with the Rome Convention 1952.[85]

The maximum take-off weight ("MTOW") basis as a threshold, following the category of

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[81] *General Risk Convention*, *supra* note 61, art 3 (3). It is noted that neither 'recognisable psychiatric illness' nor 'the likelihood of imminent death or bodily injury' was defined in the Conventions. It is worthy of mentioning that the conference of the Warsaw Convention 1929, adopted 'bodily injury' extinguished from mental injury. Paul S. Dempsey & Michael Milde, *supra* note 9, at 122. In the Montreal Convention 1999, 'bodily injury' was inherited. Hence the adoption of mental injury in the General Risk Convention literarily stated its difference in compensation from the Warsaw Convention 1929 and the Montreal Convention 1999.
[82] *Ibid*, art 3(4).
[83] *Ibid*, art 3(5).
[84] *Ibid*, art 3(6).

Regulation (EC) No 785/2004, will cap the operator's liability at such threshold. Beyond the threshold, unlimited liability will be imposed upon the operator unless the operator can prove:

(a) the damage was not due to its negligence or other wrongful act of omission; or

(b) the damage was solely due to the negligence or other wrongful act or omission of another person.[86]

Under the capped liability, there is a need to place the sequence of priority of the compensation. Originally there were two proposals made for the consideration of the Plenary of the Diplomatic Conference. One proposal was based on the policy decision made early in the Diplomatic Conference to prioritize death and bodily injury while the other version was to retain the original text so as not to differentiate death, bodily injury and mental injury.[87] In the end, the latter version was adopted to prioritize the 'personal injury' over other damages, e.g. property damage and environmental damage.

Mirroring the Montreal Convention 1999, an advance payment clause was also inserted in the Conventions on the condition that the legislation of the State where the damage occurred so requires.[88]

C. Insurance requirement

Referring to MTOW basis, each State Party shall require its operators to maintain adequate insurance or guarantee covering their liability. Without foreign discrimination, the State Party may require an operator operating in or into its territory to furnish evidence of such

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[85] *Ibid*, art 3(8).
[86] *General Risk Convention*, *supra* note 61, art 4 (1) and (2).
[87] Report of the Commission of the Whole on the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, ICAO DCCD Doc No.38, art 5.
[88] *General Risk Convention*, *supra* note 61, art 8.

adequate insurance or guarantee.[89]

For the developed countries, unification of such rules regarding ground damages caused by the aircraft is common practice (MTOW basis has been in use under Regulation (EC) No 785/2004 since April 30, 2005) while for developing countries, the new compensation coverage will inevitably result in increased insurance premiums which may frustrate the growing aviation industry once the General Risk Convention comes into force.

Unlike Regulation (EC) No 785/2004 and the Unlawful Interference Convention, it is noted that there is no 'aggregate basis' applicable in the General Risk Convention. When a catastrophic event like September 11, 2001 happens, the current policy of the affected carrier (per event basis) still applies. The problem is insurers may issue cancellation notices thereafter and subsequent policies will be issued on aggregate basis for risk control. Aggregate basis will not meet the insurance requirement of the General Risk Convention and hence the operators may end up in breach of the insurance requirement under the General Risk Convention.

D. Events involving two or more operators

When there is an event involving multiple operators, e.g. in a mid-air collision, the operators of those aircraft are jointly and severably liable for any damage suffered by a third party.[90] The question of interplay between the Montreal Convention 1999 and the General Risk Convention was debated and discussed during the Plenary because passengers on board one aircraft may be the potential victims as well as third parties to the other operator.

At the Diplomatic Conference, the delegation of Canada suggested addressing the issue of

[89] *Ibid*, art. 9.
[90] *Ibid*, art. 6.

multiple aircraft incidents by simplifying the term, 'third party' for excluding passengers on board the aircraft. If 'third party' includes the passengers on board, under the exclusive remedy clause of the General Risk Convention passengers will not be able to recover under the Montreal Convention 1999.

For avoiding such complexity and allowing passengers to enjoy more benefits under the Montreal Convention 1999, e.g. fifth jurisdiction, it is better to leave the passengers in the legal regime of the Montreal Convention 1999 where they presently fall. Such proposal was supported by the majority of States and therefore the General Risk Convention was retained for the third party victims other than passengers,[91]whose primary international framework is governed by the Montreal Convention 1999.

E. Exclusive remedy and exoneration

Mirroring the exclusive remedy of the Montreal Convention 1999, any action for compensation for third party damage caused by aircraft in flight brought against the operator, or its servants or agents, however founded, whether under the General Risk Convention, in tort or otherwise, can only be brought subject to the conditions and limitations of liability as set out in the General Risk Convention.[92]

At the Diplomatic Conference, the United States affirmatively stated that the aviation industry (other than operator) should not be responsible for nuclear damage, punitive damage, and armed conflict or civil disturbance which the operator is exempted from. In other words, if the damages are not allowed to be compensated under the General Risk Convention, they should not be allowed to be recovered from other entities either. Such proposal originally put forward by the AWG and supported by three States, namely the

[91] *Ibid*, art. 1 (i).
[92] *Ibid*, art. 12 (1).

United States, Cuba, and Canada, and opposed by one State, namely Germany, was eventually adopted.[93]

The owner, lessor or financier who retains title or holds security of aircraft, and who is not the operator of the aircraft, is exonerated from the liability for damages to the third party.[94] As for the passenger's claim against owner, lessor and financier, it was intentionally omitted in the General Risk Convention and was left to the Montreal Convention 1999, tort law or otherwise. Furthermore, actions are not compulsorily channeled to the operator in the General Risk Convention. That is to say, other entities with deep pockets, other than owner, lessor and financier, are exposed to the potential risks of action against them, e.g. the manufacturers, airports, service providers and security companies.

F. Forum and period of limitation

'Single forum' is the policy decision made during the Diplomatic Conference for the Conventions to expedite compensation proceedings and avoid 'forum shopping'.[95] The European Community then proposed a new clause, "regional and multilateral agreements on forum" i.e. the 'Disconnecting Clause',[96] which allows States Parties to apply different jurisdiction formulation through regional or multilateral agreements. Such a proposal was supported by many European countries but was against the policy decision of a single forum which was made earlier. Therefore such proposal was rejected by the majority of States.

As for the period of limitation, there were arguments in favor of 3-year vis-à-vis proposals for a period of 2 years on the table at the Diplomatic Conference. States in favor of the 3-year limitation, e.g. the European Community and its members, and Brazil, preferred a

[93] *Ibid*, art 12 (2).
[94] *Ibid*, art 13.
[95] *Ibid*, art 16.

more protective approach for the victims on the ground. On the other hand, pro 2-year limitation States, e.g. the United States, the United Kingdom, Canada, Australia, Singapore, Malaysia, Indonesia, Mexico, and Saudi Arabia, favored a unified approach in line with the period of limitation in the Montreal Convention 1999.

From the insurance perspective, it was well explained by IUAI that should the General Risk Convention adopt a different period of limitation, the combined single limit which both the victims and the passengers will be sharing will have to deal with the difference of claims arising from three years for third-party victims and two years for passengers. The former group may exhaust the combined single limit ahead of the latter and leave the latter without better protection. For the balance between the passengers and victims on the ground and facilitating the prompt compensation for the victims, the majority favored the two-year limitation and hence it was adopted.[97]

(2) Unlawful Interference Convention

In the Preamble of the Unlawful Interference Convention, both the importance of ensuring protection of third-party victim's interests and the need to protect the aviation industry from the consequences of damage caused by unlawful interference with aircraft were recognized.[98] The balance between third-party victims and the aviation industry has been the focus throughout the Unlawful Interference Convention and how to strike such a balance has been the focal point during the Diplomatic Conference.

A. 'Three-layer compensation approach'

(a) First layer

Under the Unlawful Interference Convention, 'strict liability' is imposed upon operators

[96] The European Commission, Working Paper-General Risk Convention, ICAO DCCD Doc No. 35.
[97] *General Risk Convention*, *supra* note 61, art 17.
[98] *Unlawful Interference Convention*, *supra* note 62, Preamble.

coupled with monetary limitation based on the MTOW originating from Regulation (EC) No 785/2004. Nevertheless, such monetary limitation is breakable to the extent that the operator or its employees have contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.[99]

The operator, who is in a good position to insure the risk, is required to provide compensation of up to 700,000,000 SDR (US$ 1.03 billion) at the MTOW of more than 500,000 kilogrammes, [100] for instance, in the case of the Airbus A380, as the first layer.[101] The operator is also required to maintain 'adequate' insurance or guarantee covering the liability under the Unlawful Interference Convention on a 'per event basis' or on an 'aggregate basis' if the former basis is not available.[102]

(b) Second layer

The second layer would be the International Fund which was to some extent built on the model of the International Oil Pollution Compensation Fund and adapted to the special circumstances of air transport.[103] The purposes of the International Fund are to provide compensation when damages exceed the limit of the operator's liability or when there is a 'drop-down' mechanism available.[104] The International Fund sets up the cover-up for compensation exceeding the first layer (700,000,000 SDR; US$ 1.03 billion) up to

[99] *Ibid*, art 23 (2).
[100] *Ibid*, art 4.
[101] Henrik Kejillin, *supra* note 60, at 68.
[102] *Unlawful Interference Convention*, *supra* note 62, art 7.
[103] Henrik Kejillin, *supra* note 60, at 69. The International Oil Pollution Compensation Funds ("IOPC Funds"), comprising of the 1971 Fund, the 1992 Fund and the Supplementary Fund, are part of an international regime of liability and compensation for oil pollution damage caused by oil spills from tankers. If compensation amount, up to certain limit, does not cover all the admissible claims, further compensation is available from the 1992 Fund if the damage occurs in a State which is a Member of that Fund. Additional compensation may also be available from the Supplementary Fund if the State is a Member of that Fund as well. Online: IOPC Funds < http://www.iopcfund.org/ >.
[104] *Unlawful Interference Convention*, *supra* note 62, art. 8(2) (a).

3,000,000,000 SDR (US$ 4.43 billion) and includes a recourse amount recovered from other entities.[105]

The financial resources of the International Fund will rely on the mandatory contribution collected by the operator from each passenger and each tonne of cargo departing on an international 'commercial' flight from an airport in a State Party.[106] Contributions to the International Fund shall be collected at the rate and period set out by the Conference of Parties to enable the funds available amounting to 100 per cent of the limit of compensation (3 billion SDR) within four years by adopting a 'pre-funding' mechanism.[107] The period of four years was explained as an appropriate time period because normally the pay-out of a claim needs 3-4 years to be settled according to professionals in previous discussions of Special Group. Therefore within 4 years, even assuming the unspoken event happens on Day 1, the fund still has time to suffice and support the compensation.

The total amount of contributions collected by the International Fund within any period of two consecutive calendar years shall not exceed three times the maximum amount of compensation, i.e. 9 billion SDR.[108] The intention here is to ensure the operators are not overburdened when the funds already reached 9 billion SDR, which is deemed as sufficient even for three occurrences at any one time.

(c) Third layer

As for the third layer of compensation, which used to be the responsibility of the State,[109] but now is referred to as the 'additional payment' (breakability). This requires the operator to be responsible for compensation exceeding the capped liability set up by the Unlawful

[105] *Ibid*, art 18(2).
[106] *Ibid*, art 12.
[107] *Ibid*, art. 14(2).
[108] *Ibid*, art. 14(3).
[109] It has also been said that the third layer would be a consequence of the limits to the first and second layer

Interference Convention.[110]

To summarize, in the Unlawful Interference Convention, the first layer refers to the limit of compensation, covered by the insurance of the operator. The second layer is the International Fund which handles what is beyond the first layer (limit of compensation) or when there is an insurance market failure. The third layer is referring to additional compensation which means compensation beyond the capped limits, namely, breakability.

B. 'Drop-down' mechanism

When the insurance in respect of the damage covered in the Unlawful Interference Convention is wholly or partially unavailable with respect to the amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport 'generally', at the discretion of the Conference of Parties[111], the International Fund shall pay such damage and such payment shall discharge the liability of the operators.[112] This non-compulsory 'drop-down' mechanism enables the International Fund to function as an alternative quasi-insurance at the discretion of the Conference of Parties as a backstop when there is an insurance market failure.[113]

As to the unavailability of war risk insurance after September 11, 2001, States had no choice but to step in to provide a government back-up scheme for national airlines for the sustainability of their operations. The drop-down mechanism is meant to deal with such situation on a case by case basis by requiring a fee from the operator and working as insurance.

During the discussion of the Diplomatic Conference, over the 'drop-down' mechanism, the

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and the solidarity within a society and between States. Henrik Kejillin, *supra* note 60, at 66 and 70.
[110] *Unlawful Interference Convention*, *supra* note 62, art. 23(1).
[111] *Unlawful Interference Convention*, *supra* note 62, art 9.
[112] *Ibid*, art 18 (3).
[113] *Ibid*.

existence of such mechanism was rejected by some States asserting that the State itself can provide guarantee better than the International Fund when insurers are unavailable to provide the insurance in respect of war and terrorist risks. On the other hand, some States believed that the 'drop-down' mechanism is advantageous to the State itself because the International Fund will step in and cover up to 3 billion SDRs—enough to absorb the loss when there is no insurance available, instead of having to resort to State guarantee. With more supporters in the Diplomatic Conference, the 'drop-down' mechanism was retained and will be provided on a discretionary basis requiring two-thirds majority of Conference of Parties voting.[114]

C. Breakability (additional payment) and safe harbors

As aforementioned, the capped liability in the Unlawful Interference Convention is breakable in certain circumstances in connection with the act or omission of the operator or its employee. In the meantime, safe harbors are also provided for the operator for exoneration of liability in respect of its 'senior management' or its 'employee' by proving its system complied with the requirements of the Unlawful Interference Convention.

In a situation where an employee of the operator has contributed to the damage, the operator shall not be liable for any additional compensation if it proves that an 'appropriate system' for the selection and monitoring of its employees has been established and implemented.[115]

The senior management of an operator, should it be a legal person, shall be presumed not to have been reckless if it proves that it has established and implemented a system to comply with the 'security requirements'. Compliance with the 'security requirements' should

[114] *Ibid*, art 9 (o) and art. 10 (4).
[115] *Ibid*, art 23 (3).

conform with not only Annex 17 to the Chicago Convention 1944,[116] but also the law of the State Party in which the operator has its principal place of business, or if it has no such place of business, its permanent residence.[117]

D. Recourse

(a) Right of recourse

The right of recourse of the operator has been given to pursue against any person who has committed, organised or financed the act of unlawful interference or any other person, e.g. service provider, airport, air traffic control and manufacturer.[118] The International Fund can slip into the shoes of the operator to claim against any parties for indemnity or compensation, and furthermore the International Fund can make claims against the operator subject to the conditions set out in Article 23.[119]

(b) Restrictions on right of recourse

Although the operator and International Fund have rights of recourse against any other person (other than the perpetrator and the operator), such rights of recourse have been limited to the extent that the person against whom recourse is sought could have been covered by insurance available on a 'commercially reasonable basis'.[120]

Such limitation is designed to avoid the other person's insolvency as a chain reaction triggered by the recourse because the amount of the compensation subrogated may be far beyond its insurance coverage. For a service provider, to purchase a third-party liability coverage up to the combined single limit as an operator (most airlines purchase limits of

[116] *Convention on International Civil Aviation,* signed at Chicago, 7 December 1944, ICAO Doc 7300.
[117] *Unlawful Interference Convention, supra* note 62, art 23 (4).
[118] *Ibid,* art 24.
[119] *Ibid,* art 25.
[120] *Ibid,* art 26 (1).

US$ 1 billion)[121] is costly and unpractical. In view of handling multiple operators, the service provider has exposures more than an aircraft operator, and it is therefore necessary to limit the recourse to be executed against service providers or any other entities only if the insurance covering such exposures is available on a 'commercially reasonable basis'.

Nevertheless, such limitation on recourse will be removed if 'the other person' whom recourse is sought against has contributed to the occurrence of the event by an act or omission done recklessly and with knowledge that damage would probably result,[122] provided that such recourse, at the discretion of the Conference of Parties, would not give rise to the application of the 'drop-down' mechanism.[123]

(c) Exoneration from recourse

The owner, lessor, or financier retaining title of or holding security in an aircraft, not being an operator, are all exonerated from recourse by the operator or the International Fund. As for the manufacturer, if it can prove that it has complied with the mandatory requirements in respect of the design of the aircraft, its engines or components, the manufacturer is exonerated from recourse as well.[124]

E. 'Exclusive remedy'

According to the exclusive remedy clause, all actions are channeled against the operator and all other entities, including the States, or any other responsible entity, are immune from the victims' claim for any compensation under the Unlawful Interference Convention. Such exemption shall not apply to an action against a person who has committed, organised or financed an act of unlawful interference.[125]

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[121] IUAI, "A Guide to Aviation Insurance Pre- and Post-11 September 2001", at 3.
[122] *Unlawful Interference Convention*, *supra* note 62, art 26(2).
[123] *Ibid*, art. 26 (3).
[124] *Ibid*, art. 27.
[125] *Ibid*, art 29.

‘Exclusive remedy’ was referred to as the ‘cornerstone’ of the Unlawful Interference Convention by the delegation of Singapore in the Diplomatic Conference. It is the application of the notion of ‘channeling liability’ and has been discussed and debated intensively. Some States pointed out that they would accept the basic idea of channeling but would not accept that the other person who has acted recklessly also could be exonerated. In case of the insolvency of the operator or the International Fund, the victims will have no other remedy against other person.

As the delegation of Singapore explained well, this article should not be accepted in its ‘stand-alone’ form—which is not the case here. Without this article, there is no channeling of liability and claims, as envisaged, against all other parties in different places will exceed the limit of liability. The idea here is to channel liability, but this does not mean to let other responsible entities escape liability because the recourse will step in if necessary and applicable.

At the Diplomatic Conference, the majority of States agreed to retain this article as the cornerstone of the Unlawful Interference Convention. To avoid the complexity of the interplay with the Montreal Convention 1999, it is specified in the Unlawful Interference Convention that any action for compensation by ‘a third party’ can only be brought against the operator and ‘a third party’ means a person other than the passenger for leaving the passengers in their present legal regime.

F. States non-Party

Where an operator of a State Party is liable for damage occurring in the territory of a State non-Party, the Conference of Parties may decide, on a case by case basis, to provide financial support to the operator.[126] It was designed to protect the operator of a State Party

[126] Henrik Kjellin, *supra* note 60, at 77.

and to incentivize a State non-Party to adhere to the Unlawful Interference Convention. Such financial support can only be provided to the extent that such damage would have fallen under the Unlawful Interference Convention if the State non-Party would have been a State Party.[127] The State non-Party has to agree to be bound by the Unlawful Interference Convention in a form acceptable to the Conference of Parties.[128] The financial support is only available up to 3,000,000,000 SDRs, the maximum amount of compensation. For practical reasons, if the operator should end up insolvent, whether the financial support would have been given or not, the financial support will not be provided.[129]

[127] *Unlawful Interference Convention*, *supra* note 61, art. 28 (a).
[128] *Ibid*, art. 28 (b).
[129] *Ibid*, art. 28 (c) and (d).

III. Aviation Insurance for Damages Caused by Aircraft on the Surface - Third Party Liability and War Risk Insurance

1. Introduction to aviation liability insurance

1.1. Classification

There is no formal definition of aviation insurance,[130] but practically speaking, it can be categorized into: (1) aviation hull insurance, including hull all-risks and aircraft spare-all risks; (2) aviation liability insurance, including aircraft third party, passenger, cargo and mail legal liability, and general third party legal liability;[131] (3) war risk insurance; and (4) others, e.g. loss of license insurance, and personal accident insurance. The focus of this chapter is on that part of aviation insurance relevant to damages caused by aircrafts and incurred on the ground, namely, third party liability insurance and war risk insurance.

1.2 Insurability

Insurability is at the core of the commercial insurance business, as it can only operate and function within the limit of insurability.[132] A risk may be insurable if it is: (1) financially quantifiable; (2) financially limited; (3) fortuitous; (4) and within the resources, or capacity, of the market.[133]

Before insurers are willing to provide coverage, the risk must be identifiable and quantifiable.[134] These two conditions are designed for better financial assessment and calculation of the premium, which is directly related to the number and the extent of

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[130] Margo, *supra* note 19, at 10.
[131] General Third Party Liability includes Premises Liability, Hangarkeepers Liability, Products Liability, and Vehicle Liability on Airports.
[132] Christophe Courbage & Patrick M. Liedtke, "On Insurability and its Limit", in Patrick M. Liedtke & Christophe Courbage eds., *Insurance and September 11 one year after : impact, lessons and unresolved issues* (Geneva: International Association for the Study of Insurance Economics, 2002) 223 at 224. [Liedtke & Courbage]
[133] David Gasson, Aviation insurance and insurability- War risk exclusion (November 2004), online: IUAI < http://www.amecie.com/iuai/htdocs/site%20data/position%20papers/iuaipp304.pdf > at 3.
[134] Liedtke & Courbage, supra note 132, at 225.

losses.[135] In order to identify or quantify a risk, estimates may be made by looking at the preceding frequency and loss record of that risk. The risk exposure shall be limited and capped at a certain figure that is quantifiable for assessment and calculation. No insurers will underwrite an unlimited policy because there is no rationale for risking their capital and assets with a limited premium for unlimited exposure.

The risk also needs to be fortuitous. This 'fortuity principle', which is a fundamental element of all insurance policies,[136] ensures that insurance acts as a mechanism for spreading risks rather than insuring certainty. Lastly, the most important factor of insurability, which is based on past precedents, is market availability. If the insurance market is not willing to provide coverage for certain types of risks, e.g. nuclear risk, it is not possible to allocate such risks through the private sector.

1.3 Insurance premium of aviation liability

1.3.1 Calculation of the premium

The premium is normally decided by the insurers after discussion and negotiation with the airline's broker and considering all the facts that are material to the risks, and the basis for its calculation varies according to the type of risk covered.[137] The premium for aviation liability, including passenger liability and third party liability, is calculated on the basis of aircraft departures and number of passengers carried (previously, it was based on Revenue Passenger Kilometers/Miles Flown, "RPK" or "RPM")[138].

In setting premium rates for liability coverage, insurers will consider the similar factors that

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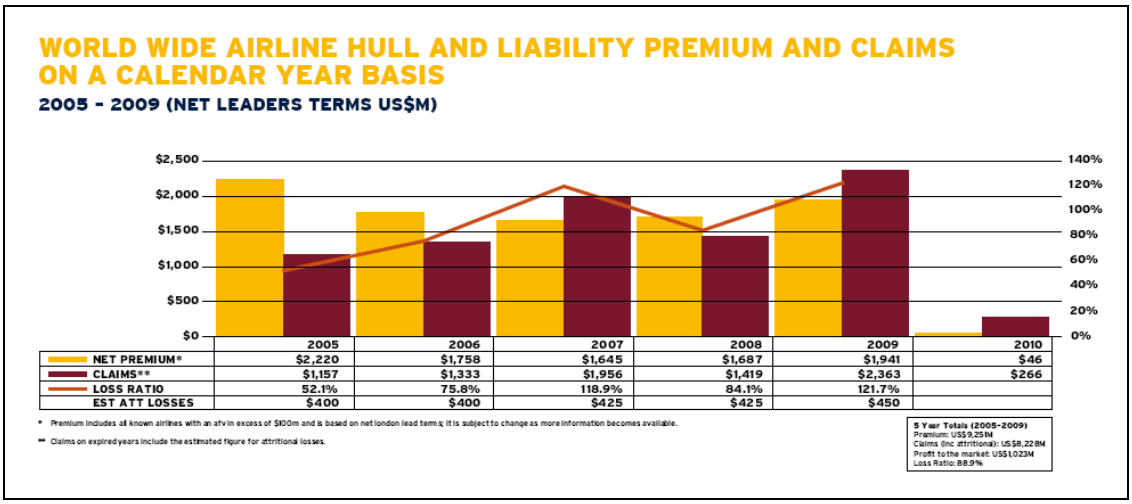
[135] Alexander T. Wells and Bruce D. Chadbourne, *Introduction to aviation insurance and risk management* (Malabar, Fla.: Krieger Pub. 2000) at 60.
[136] John C. Yang, "The Fortuity Principle: Understanding the Fundamentals Underlying the Laws of Insurance" (2005), online: Wiley Rein LLP < http://www.wileyrein.com/docs/events/1167.pdf > at 24.
[137] Margo, *supra* note 19, at 173.
[138] Justyn Harding et al., "Aviation Insurance" (May 2002), online: Actuaries Professional < http://www.actuaries.org.uk/__data/assets/pdf_file/0017/18710/Harding.pdf > at 10. [Harding]

are considered in relation to hull insurance, i.e. limit purchased, the overall structure, financial condition of the operator, aircraft ownership, the route system flown by the operator, political conditions where the aircraft is flown, the airports and facilities where the aircraft is operated, qualifications and experience of aircrew and maintenance personnel, the operating history and prior loss record of the operator, and so forth.[139] In addition, passenger seating, passenger profile, applicable conditions of carriage,[140] brand and image,[141] and underlying legal regimes are also considered.[142]

1.3.2 Overview of market premium

(1) Airlines



Source: Willis Ltd.[143]

Average airline premiums reached a peak starting in the final quarter of 2001 and ending in

[139] Margo, *supra* note 19, at 173.
[140] For non-Convention air carriage, the condition of carriage of a carrier involving in accidents during such air carriage may still have chances to influence the liability limit of the carrier. Hence insurers will look into the carrier's condition of carriage for considering its premium rating.
[141] Introduction to Airline Hull, Spares & Liability Insurance, Paul Blakeley, Willis International Aviation Insurance Course 2010, at 10.
[142] Different legal regimes will impose different responsibility and compensation on operators. Hence such difference will influence the risk assessment and insurance premium. Further discussion, see Chapter II 2.1.
[143] Willis Ltd., Airline Insurance Insight March 2010, at 2.

the final quarter of 2002.[144] Generally, the average airline premium has been declining since the end of 2002, which was a bounce back to the market response to the catastrophe of September 11, 2001. While the overall premium has been going down, the average loss ratio has been climbing since 2004 to a peak in 2007 with 118.9% of loss ratio and another peak in 2009 with 121.7% of loss ratio, as shown in the chart above.

The chart below shows that the lead hull and liability premium of airlines had an average growth of 20 per cent in 2009/2010 policy compared with 2008/2009 policy. Following the tragic loss of Air France AF447 which stands as the second largest loss in aviation history (excluding September 11, 2001),[145] the insurance market was suggesting an increase up to 30 per cent.[146] But many of the renewals in July 2009 had agreed terms agreed by leading markets prior to the loss and subsequently lowered the average monthly premium increase to 20 per cent. As shown in the chart above, claims in 2009 totaled around US$2.3 million with only US$2 million premium made the year of 2009 another unsatisfactory loss making year.

[144] Aon Ltd., Airline Insurance Market Review 2007, at 9.

[145] Marsh Ltd., Aviation News 2010 Issue 1 and 2009 review, at 2. On 31 May 2009, flight AF447 of Air France (using Airbus A330-203) took off from Rio de Janeiro Galeão airport bound for Paris Charles de Gaulle. The airplane was in contact with the Brazilian ATLANTICO ATC centre on the INTOL – SALPU – ORARO route. There were no further communications with the crew after passing the INTOL point. Bodies and airplane parts were found from 6 June 2009 onwards by the French and Brazilian navies. The number of fatalities is 228 including all the crew and passengers on board AF447. Bureau d'Enquêtes et d'Analyses ("BEA"), "Interim Report- on the accident on 1st June 2009 to the Airbus A330-203 registered F-GZCP operated by Air France flight AF 447 Rio de Janeiro – Paris ", online: BEA < http://www.bea.aero/docspa/2009/f-cp090601e1.en/pdf/f-cp090601e1.en.pdf> at 9.

[146] Capacity & the 4th QTR-Friend or Foe, David Boyle, Willis Aviation Insurance Conference 2010.

	Total renewals			Lead hull and liability premium			Average liability limit		
	2009	2010	% change	2009 (US$m)	2010 (US$m)	% change	2009 (US$m)	2010 (US$m)	% change
US$5bn+	33	35	6%	951.33	1,119.30	18%	1,627.86	1,667.14	2%
US$2-5bn	26	26	0%	211.56	262.41	24%	1,496.15	1,500.00	0%
US$1-2bn	25	24	-4%	125.93	146.83	17%	1,220.83	1,202.08	-2%
US$500m-1bn	36	40	11%	128.52	168.39	31%	933.25	916.25	-2%
US$150-500m	86	91	6%	182.97	218.14	19%	778.90	769.51	-1%
Total/Average	**206**	**216**	**5%**	**1,600.32**	**1,915.07**	**20%**	**1,068.39**	**1,093.42**	**2%**

Source: Aon Ltd.[147]

The Average Fleet Value ("AFV") of 2009 is concluded by 3 per cent growth while the Projected Passenger Numbers ("PPN") by 2 per cent reduction, as shown below. Such figures of AFV and PPN influenced by the economic downturn also minimized the risks to the insurance market and thus contributed to fewer premiums in 2009. With hard market conditions persisting, the market will be loss sensitive if major losses take place in the following months.[148]

	Credit balance	Average fleet value		Projected passenger numbers		Cost per passenger	
	US$m	Total (US$m)	% change	Total (m)	% change	Total (US$)	% change
US$5bn+	1,505.79	527,954.16	2%	1,792.79	-2%	0.62	20%
US$2-5bn	176.06	88,800.23	3%	367.77	-3%	0.71	28%
US$1-2bn	287.49	34,284.27	7%	126.89	7%	1.16	9%
US$500m-1bn	335.32	29,132.71	13%	112.35	-2%	1.50	34%
US$150-500m	269.43	25,330.30	11%	97.83	-2%	2.23	22%
Total/Average	**2,574.10**	**705,501.68**	**3%**	**2,497.63**	**-2%**	**0.77**	**22%**

Source: Aon Ltd.[149]

(2) Aerospace industry

The premium for the aerospace industry is less homogenous than the airline industry, but it has a close relationship with the airline industry because a claim against one likely leads to

[147] Aon Ltd., Airline Insurance Market Outlook 2010, at 31.
[148] Marsh Ltd., Aviation News 2009 1st Quarter Review, at 2 and 3.
[149] Aon Ltd., *supra* note 147 at 31.

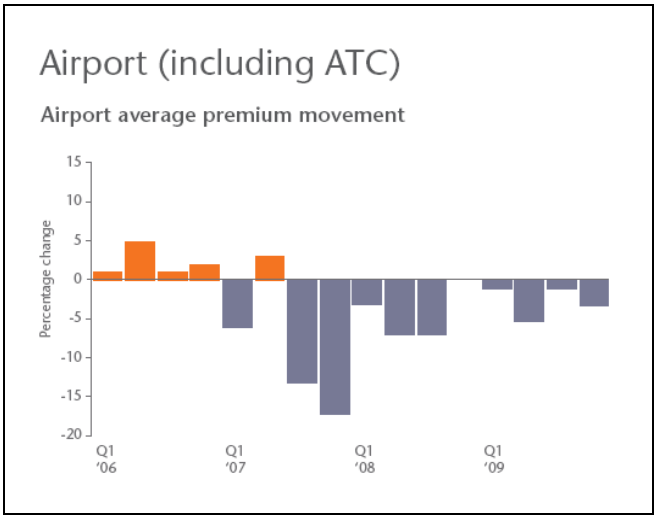
a claim against the other.[150] As shown in the chart below, the industry had a total average reduction of 2 per cent in 2009. The service provider sector continued to enjoy the highest reduction at 6 per cent in 2009 as in 2008. In 2009, the manufacturer sector received static premium which had an increase of 3 per cent in 2008. The Airport sector had a reduction of 2 per cent which is less than the reduction of 4 per cent in 2008 (to remove the currency fluctuation factor, all figures discussed in reporting currency).

	Total renewals			Premium			
	2008	2009	% change	2008 (US$m)	2009 (US$m)	% change (US$)	% change (RC)
Airport	81	80	-1%	128.78	117.62	-5%	-2%
Manufacturer	122	119	-2%	611.43	621.67	-1%	0%
Service Provider	44	46	5%	49.66	43.20	-8%	-6%
Total/Average	**247**	**245**	-1%	**789.88**	**782.49**	-4%	-2%

Source: Aon Ltd.[151]

In 2007 and 2008, the lead premium of airport sector fell by 5 per cent and 4 per cent respectively. This was a result of the improving safety of the aviation industry and better treatment by the aerospace industry as a whole, although the market hardened in the final quarter of 2008 due to the economic downturn across the aviation industry.[152] The airport sector continued to enjoy a soft market in 2009 with a fall of 2 per cent in the average liability premium. In comparison with 2007 and 2008, this represents the soft market is slightly hardening for the three consecutive years of price falling. Nevertheless, such firming trend may be tempered by the potential exposure reduction due to the economic challenges.[153]

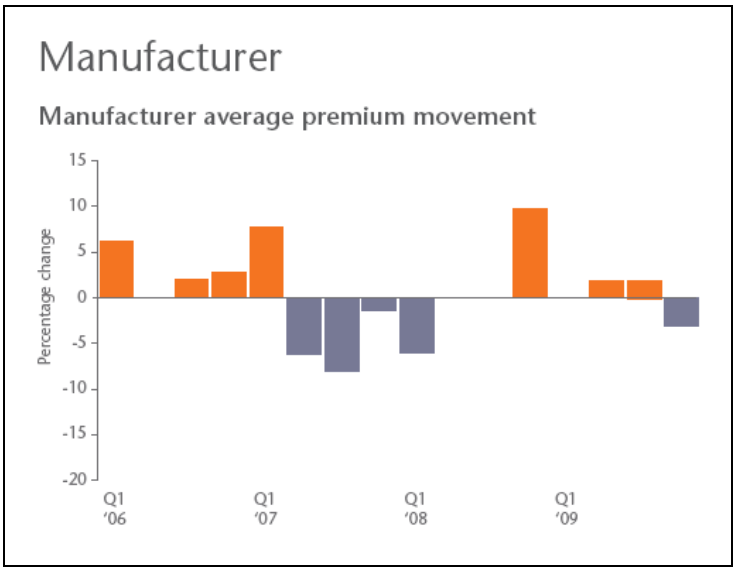
[150] Aon Ltd., Aerospace Insurance Market Outlook 2009, at 26.
[151] Aon Ltd., Aerospace Insurance Market Outlook 2010, at 18.
[152] *Ibid*, at 19.
[153] *Ibid*, at 20.



Source: Aon Ltd.[154]

Representing 75 per cent of the aerospace industry premium both in 2007 and 2008, the manufacturer sector had even more significant influence on the entire aerospace insurance market by reaching nearly 80% of the total lead premium.[155] The insurance market took a firm and thorough approach towards all renewals of manufacturer sector in 2009 despite of the profitability of this sector. This reflects the continuing perceived loss potential in this sector.[156]

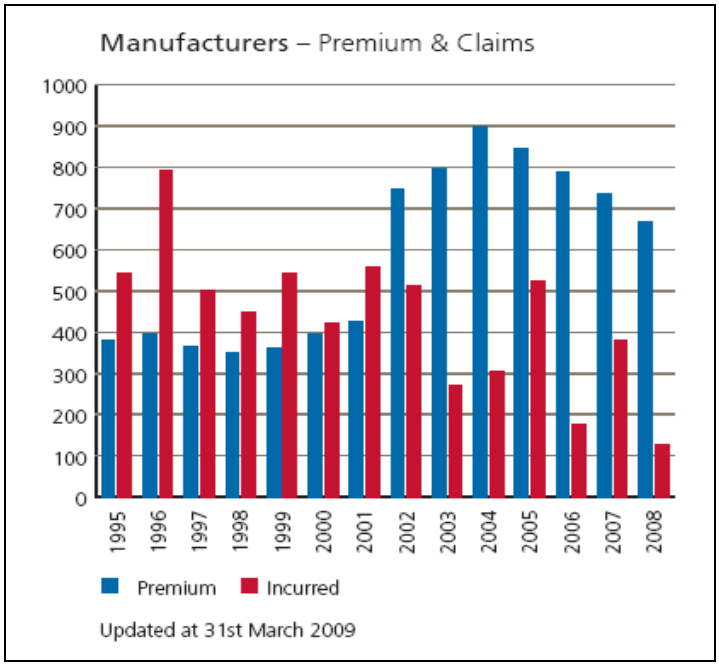
[154] *Ibid*, at 19.
[155] *Ibid*, at 21.
[156] Willis Ltd., Aerospace Insurance index 4th Quarter 2009, at 3.



Source: Aon Ltd.[157]

The sub-sector of aircraft prime manufacturers which shared 61 per cert of the total premium in manufacturer sector virtually maintained its renewal premium of 2009 as in 2008.[158] Both sub-sectors of aircraft prime manufacturers and engine manufacturers, which are responsible for 77 per cent of the total premium, received firm line from the market in 2009 despite of the growing premium credit balance they have contributed.[159] No major losses were reported and associated with manufacturers in 2009 and the loss ratio of past ten years, as shown below, is around 57 per cent.[160] The direction of this sector in 2010 will depend on any loss activities in the following months and developments of the accidents occurred in 2009, if this sector is involved.[161]

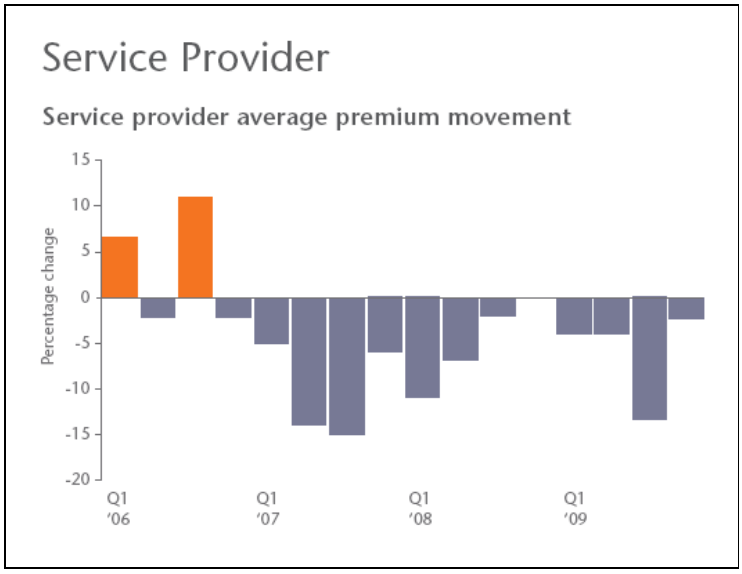
[157] Aon Ltd., *supra* note 151 at 21.
[158] Willis Ltd., *supra* note 156, at 2.
[159] *Ibid.*
[160] Marsh Ltd., *supra* note 145, at 6.
[161] Aon Ltd., *supra* note 151 at 22.



Source: Marsh Ltd.[162]

Service providers, the smallest sector of the aerospace industry, benefited from the soft market with a 6 per cent fall of the average lead premium in 2007 and another 6 per cent in 2008.[163] In 2009, service providers received another 6 per cent fall of lead premium which was recorded for last 13 consecutive quarters of premium reductions and was summed up for 25 per cent since 2006.[164] A large share of service providers in the Americas and Asia are placed by local insurers as the airport sector and hence are not covered in the chart below.[165]

[162] Marsh Ltd., *supra* note 145, at 6.
[163] Aon Ltd., *supra* note 150 at 29.
[164] Aon Ltd., *supra* note 151 at 23.
[165] *Ibid*.



Source: Aon Ltd.[166]

Losses in this sector were resolved more quickly than in other parts of the aerospace industry, as the claims of service providers are less complex than those of the airlines.[167] The modest premium reduction observed in the service provider sector will be affected by any substantial change in coverage limits, self-insured retention and claims activity.[168]

1.4 Compulsory insurance

In air transportation, third party and passenger liability insurance is generally compulsory. Such compulsory insurance is required by international conventions regarding passenger liability and third party liability.[169] As regards surface damage caused by aircraft, third party liability insurance and war and hijacking insurance are compulsory insurance

[166] *Ibid*.
[167] Aon Ltd., *supra* note 150 at 29.
[168] Marsh Ltd., *supra* note 145 at 7.
[169] Article 50 of Montreal Convention imposes an obligation on the contracting states to require their carriers to maintain adequate insurance to cover their legal liabilities in respect of passengers, baggage, cargo and mail. Article of 12 Rome Convention 1933, and Article 15 of Rome Convention 1952 both contain insurance requirements against legal liability for damage on the surface caused by an aircraft in flight. Margo, *supra* note 19, at 15.

requirement specifically imposed by national or regional legislation.[170]

1.4.1 The United States

The United States, Canada and the European Union,[171] all impose mandatory insurance requirements upon air carriers in respect of their legal liabilities. In the United Sates, Federal Aviation Regulations place minimum insurance requirements on U.S. carriers and foreign carriers:

(1) Third-party aircraft accident liability coverage for bodily injury to or death of persons, including non-employee cargo attendants, other than passengers, and for damage to property, with minimum limits of $300,000 for any one person in any one occurrence, and a total of $20,000,000 'per involved aircraft' for 'each occurrence', except that for aircraft of not more than 60 seats or 18,000 pounds maximum payload capacity, carriers need only maintain coverage of $2,000,000 per involved aircraft for each occurrence.

(2) Any such carrier providing air transportation for passengers shall, in addition to the coverage required above, maintain aircraft accident liability insurance coverage for bodily injury to or death of aircraft passengers, with minimum limits of $300,000 for any one passenger, and a total per involved aircraft for each occurrence of $300,000 times 75 per cent of the number of passenger seats installed in the aircraft.[172]

As to war risk insurance, Federal Aviation Regulations also require that if the war risk exclusion is activated by the insurer, the insurer or its representative shall immediately notify the Department of Transportation.[173] In the wake of the 9/11 attacks, war risk

[170] E. g., United States and European Union.
[171] Regulation (EC) No 785/2004. Further discussion, see Chapter II 1.2.3.
[172] 14CFR205, online: FAA <http://www.faa.gov/about/office_org/headquarters_offices/aep/insurance_program/reference_info/media/CFR205.doc>.
[173] *Ibid*, Section 205.7 (b).

insurance has been provided under the Federal Aviation Administration's War Risk Insurance Program, which will be discussed later in this chapter.

1.4.2 Canada

In Canada, aircraft owners, including air operators and flight training unit operators, for every incident related to the operation of the aircraft, must have liability insurance covering risks of public liability in an amount that is not less than:

(1) $1,000,000, where the maximum permissible take-off weight of the aircraft is not greater than 3,402 kg (7,500 pounds);

(2) $2,000,000, where the maximum permissible take-off weight of the aircraft is greater than 3,402 kg (7,500 pounds) but not greater than 8,165 kg (18,000 pounds); and

(3) where the maximum permissible take-off weight of the aircraft is greater than 8,165 kg (18,000 pounds), $2,000,000 plus an amount determined by multiplying $150 by the number of pounds by which the maximum permissible take-off weight of the aircraft exceeds 8,165 kg (18,000 pounds).[174]

Furthermore, any liability insurance that contains an exclusion or waiver provision that reduces the insurance coverage for any incident below the applicable minimum above is not permitted, unless such exclusion or provision fulfills certain conditions, for example, a standard exclusion clause adopted by the international aviation insurance industry that applies in cases of (i) war, hijacking and other perils,[175] (ii) noise, pollution and other perils,[176] or (iii) radioactive contamination; or in respect of a chemical drift.[177] Since September 22, 2001, indemnification for Third Party Liability-aviation war risk has been

[174] Liability Insurance, C.A.R. 2008-2 606.02, online: Transport Canada < http://www.tc.gc.ca/CivilAviation/Regserv/Affairs/cars/PART6/606.htm#606_02>.
[175] i.e., AVN 48B, the War, Hi-jacking and Other Perils Exclusion.
[176] i.e., AVN 46B, the Noise and Pollution and Other Perils Exclusion Clause.
[177] Radioactive contamination and bio/chemical risks are excluded in AVN 48C but partially covered by AVN

provided by the Canadian government for Canadian air carriers (including new entrants), airports, NAV CANADA, and other essential service providers.[178]

2. Third Party Liability

2.1 Coverage of Third Party Liability

Third party liability insurance protects the insured against legal liability to third parties, other than passengers, who may suffer damage or injury, including death, as a result of the operation of the insured's aircraft.[179] The coverage includes the following two categories:

(a) the legal liability of the insured to the third parties for damage to persons or property caused by an aircraft in flight, taking off or landing, or by an object falling therefrom;

(b) the legal liability of the insured to the third parties for damage caused to persons or property by the operation of the aircraft, which broadens the risks to include, inter alia, loss or damage caused in a mid-air collision, or during taxing, e.g. jet blast.[180]

2.2 Exclusions of Third Party Liability

An exclusion, sometimes also called an exception, is a clause in a policy which limits the risks by excluding or excepting the insurers from liability for certain types of claims or for claims arising from certain types of risks.[181] The insurance policy of airlines will contain usual warranties, general conditions and common exclusions, such as whilst the aircraft is being used for any illegal purpose,[182] whilst the aircraft is outside the geographic limits

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48D.

[178] Minister of Transport, Infrastructure and Communities, Undertaking with respect to Aviation War Risk Liability (2009-05-01), online: Transport Canada < http://www.tc.gc.ca/eng/programs/airports-liabilityprogram-undertakingmay09-299.htm >. [Transport Canada]

[179] Margo, *supra* note 19, at 251.

[180] Shawcross, *supra* note 22, at IX-46.

[181] Margo, *supra* note 19, at 185.

[182] AVN 1C, s IV(A), general exclusion 1.

stated in the schedule unless due to force majeure,[183] and to loss, damage or liability directly or indirectly caused by or attributed to, or arising from nuclear risks.[184]

In addition to such common exclusions, there are other exclusions in respect of claims directly or indirectly occasioned by noise, vibration, pollution, electrical/electromagnetic interference and interference with the use of the property unless caused by or resulting in a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation.[185] In many cases, it is possible to obtain separate insurance to cover such excluded risks.

Sometimes, excluded risks may also be 'written back' into the policy from which they are excluded by arrangement with the insurer and usually on payment of an additional premium. This may also be achieved by deletion of an existing exclusion, or by means of an endorsement to the policy.[186] Passenger, baggage and cargo legal liability coverage is frequently combined with third party legal liability cover into what is called 'combined single limit' in which a global figure is selected and all such liabilities share the same coverage.[187]

From 1970 to September 10, 2001, there were around 5,200 commercial aviation accidents accounting for approximately 49,500 fatalities/injuries, and 3 per cent of the 49,500 fatalities/injuries were related to ground victims.[188] If the catastrophe of September 11, 2001 is included, 8 per cent of fatalities and injuries from commercial aviation accidents

[183] AVN 1C, s IV(A), general exclusion 2.
[184] AVN 38B, the Nuclear Risk Exclusion Clause, and AVN 71, the Nuclear Risks Exclusion Clause. See also NMA 1270, Radioactive Contamination Exclusion Clause. Margo, *supra* note 19, at 200.
[185] AVN 46B, the Noise and Pollution and Other Perils Exclusion Clause. Shawcross, *supra* note 22, at IX-47.
[186] I. e. AVN 52C, D and E, Extended Coverage Endorsement (Aviation Liabilities).
[187] Shawcross, *supra* note 22, at IX-47.
[188] European Commission, "Discussion Paper-the negotiations on an international convention on the compensation of third party victims for damage caused by aircraft and arising from acts of unlawful interference or from general risks, from a European policy perspective", at 4.

through 2007 occurred on the ground. [189] In the Diplomatic Conference, IUAI pointed out that the settlements of all legitimate claims of the ground victims with respect to damage caused by aircraft in relation to general risks, excluding unlawful interference, have been finalized with no exclusions or exceptions.

3. War Risk Insurance

3.1 Before September 11, 2001

Aviation hull and liability policies invariably contain an express exclusion of war and hijacking risks.[190] Originally following the wording of marine insurance war risk clause to some extent, the current exclusion widely in use, known as AVN48B, declares that the policy of which it forms a part does not cover claim caused by:[191]

(a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

(b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

(c) Strikes, riots, civil commotions or labour disturbances.

(d) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

(e) Any malicious act or act of sabotage.

(f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for

[189] *Ibid.*
[190] Shawcross, *supra* note 22, at IX-51.
[191] After the Israeli raid on Beirut airport of 28 December 1968, the London market introduced a war and hijacking risk exclusion clause, AVN 48. After undergoing certain amendments, AVN 48B, replacing AVN 48A, is now inserted into every aviation hull and liability policy. It is still being described still as War,

title or use by or under the order of any government (whether civil military or de facto) or public or local authority.

(g) Hijacking or any unlawful seizure or wrongful exercise of control of the aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the aircraft acting without the consent of the insured.[192]

Furthermore, AVN48B does not cover claims arising whilst the aircraft is outside the control of the insured by reason of any of the above perils. The aircraft shall be deemed to have been restored to the control of the insured on the safe return of the aircraft to the insured at an airfield not excluded by the geographical limits of AVN48B, and entirely suitable for the operation of the aircraft (such safe return shall require that the aircraft be parked with engines shut down and under no duress).[193]

Having excluded war and hijacking risks from aviation hull and liability 'all risks policies', the aviation market then introduced a 'write-back' endorsement by means of which an insured can obtain coverage of certain, but not all, of the excluded risks upon payment of a higher rate of premium or of an additional premium,[194] or by way of a stand-alone War Risks Policy issued by specialist war risk insurers.[195]

In the case of liability, all the risks excluded by AVN48B with the exception of those contained in sub-paragraph (b), may be written back into the liability all risks policy, known as AVN52C. All coverage provided by AVN52C will terminate automatically upon

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Hi-jacking and other Perils Exclusion Clause (Aviation). Margo, *supra* note 19, at 325.

[192] AVN48B, online: QBE Nordic Aviation Insurance < http://www.nff.aero/Downloads/avn48b.pdf> [AVN48B].

[193] *Ibid*.

[194] Prior to 11 September 2001, the coverage of AVN 52C was available for a minimal additional premium, in certain circumstance insurers were prepared to write back these risks for no additional premium. Rod D. Margo, "11 September 2001, An Aviation Insurance Perspective" (2002) 27 A. & S. L. 386 at 388. [Margo]

[195] A war risks policy commonly used in the London Market is LSW 555B, the Aviation Hull War and Allied Perils Policy, for the risks contained in paragraphs (a), (d) or (f) of AVN 48B. Rod D. Margo, "11 September 2001, An Aviation Insurance Perspective" (2002) 27 A. & S. L. 386 at 387.

the outbreak of war (whether there be a declaration of war or not) between any two or more of the following States: France, the People's Republic of China, the Russian Federation, the United Kingdom, and the United States of America.[196] Any coverage extended with respect to the deletion of sub-paragraph (a) of Clause AVN 48B will terminate automatically upon the hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter wheresoever or whensoever such detonation may occur and whether or not the insured aircraft may be involved. All coverage with respect to any of the insured aircraft requisitioned for either title or use will terminate automatically upon such requisition.[197] However, if an insured aircraft is in the air when the cause of automatic termination occurs, then the cover provided by the endorsement of AVN52C (unless otherwise cancelled, terminated or suspended) shall continue in respect of such an aircraft until completion of its first landing thereafter and any passengers have disembarked.[198]

Insurers generally reserve the right to give a 7-day notice of their review of premium for reassessment of risks and, if necessary, a 7-day notice of cancellation may be given to cancel the coverage provided by AVN52C.[199] A 48-hour notice may be given by the insurer to cancel one or more parts of the coverage provided by AVN52C by reference to sub-paragraphs (c), (d), (e), (f) and/ or (g) of AVN 48B (sub-paragraph (a) terminated automatically) when sub-paragraph (b) takes place.[200] Insurers may consider reinstating the policy if an agreement can be reached with the insured on a new premium rate, conditions,

[196] AVN52C, art. 3(i), online: QBE Nordic Aviation Insurance < http://www.nff.aero/Downloads/avn52c.pdf > [AVN52C]
[197] *Ibid*, art. 3(ii).
[198] *Ibid*, art. 3(iii).
[199] *Ibid*, art. 4 (a) and (c)
[200] *Ibid*, art. 4 (b).

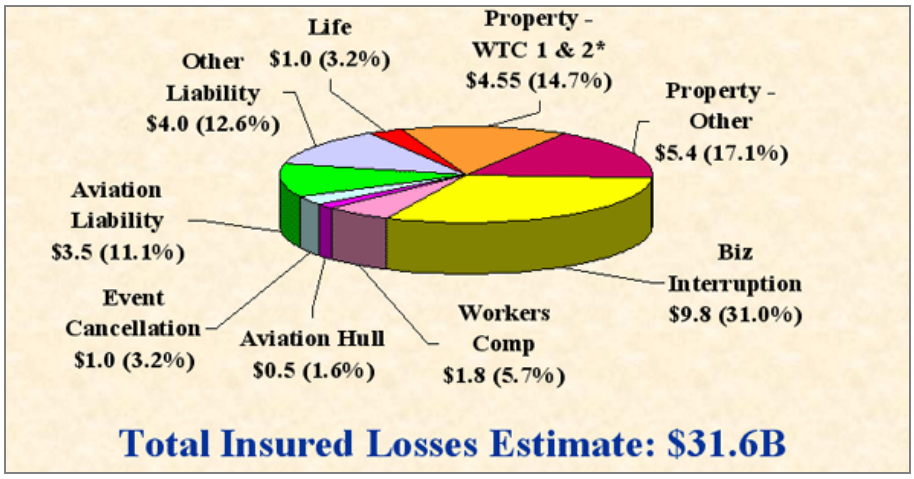
and geographical limits.[201]

3.2 Aftermath of September 11, 2001

3.2.1 Response of aviation insurance market

(1) Immediate market responses

The attacks of 4 hijacked planes on September 11, 2001, caused the largest loss sustained by the insurance industry to date. Among the US$ 31.6 billion (stated in 2001 US$) in losses, the aviation liability portion of the loss was around US$3.5 billion, as the following chart shown.[202] The estimated gross loss for the London Lloyd's market was £5.43 billion, making Lloyd's gross exposure the largest in the insurance industry.[203] The ultimate net loss, after reinsurance recoveries, was £2.02 billion, which inevitably caused premiums to peak in the following renewal period.[204]



Source: Insurance Information Institute[205]

Given the unprecedented loss from the 11 September 2001 catastrophe, the first act of

[201] Margo, *supra* note 19, at 329.
[202] Insurance Information Institute, "9/11and Insurance: The Five Year Anniversary", online: Insurance Information Institute <http://www.iii.org/media/research/sept11anniversary/>.
[203] Willis Ltd., Lloyd's Review 2003, at 14.
[204] *Ibid.*
[205] Insurance Information Institute, *supra* note 202.

aviation insurance markets after the attacks was to withdraw all outstanding airline all risk and hull war quotes for clarifying the uncertain exposure and position.[206] On 17 September 2001, insurers in the London aviation market cancelled war risk coverage, which expired on 23 September, with the first ever worldwide blanket notice of cancellation to the insured.[207] Non-war hull, passenger and third party coverage was unaffected by the catastrophe on September 11, 2001.[208]

From 24 September 2001 when the notice of cancellation took effect, a third-party war market facility was placed and led by AIG and GE FRANKONA. With the participation of non-aviation capacity, US$ 1 billion aggregate coverage was provided for air carriers and service providers on a net-line basis without reinsurance.[209]

Reinstatement has been initiated on a more restricted basis with significant limitations in third party liability. AVN52C was amended and re-issued as AVN52D, effective 25 September 2001. Passenger liability as a result of war, hijacking or terrorism was still available for the full policy limit without a sub-limit; on the other hand, third party bodily injury and property damage have been restricted to US$ 50 million (or the policy limit, whichever is the lesser) for any one occurrence and in the annual aggregate for any of the named perils excluded by AVN48B.[210]

An additional premium of US$ 1.25 per passenger carried, which was levied on every airline insured, was conducted under the sub-limit of US$ 50 million.[211] Coverage over US$ 50 million could be purchased for an additional charge of US$ 1.85 per passenger

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[206] Willis Ltd., Global Aviation Bulletin, Issue 45, 19th September 2001.
[207] Margo, *supra* note 194, at 389.
[208] International Union of Aviation Insurers, A Guide to Aviation Insurance Pre- and Post-11 September 2001. [IUAI Guide 2004]
[209] Guy Carpenter & Company LLC, Global Terror Insurance Market 2007, online: Marsh & McLennan Companies <http://www.mmc.com/knowledgecenter/GCTerrorReport2007.pdf> at 25. [Carpenter]
[210] Margo, *supra* note 194, at 389.
[211] *Ibid*.

carried covering two layers, namely from US$ 50 million to US$ 150 million and from US$ 150 million to US$ 1billion.[212] A thirty-day cancellation provision was valid for such two layers beginning March 2002.[213] For general aviation operators, AVN52E was issued to limit third party liability to US$ 10 million. AVN 52F and AVN 52G were further issued for the service providers.[214]

As to the renewal of airlines' insurance policies in December 2001, there was an inevitable significant average increase of 80.2 per cent (for hull, 91 per cent; for liability, 80 per cent), with an actual premium increase of US$ 211 million.[215] More severe premium increases, averaging over 100 per cent, were imposed on aviation service providers, aerospace manufacturers, and airport operators.[216] A few months later, the US$ 1.85 excess charge was negotiable based on the risk profile of individual airlines. As of 2004, such excess charge could be negotiated for less than US$0.70 per passenger carried.[217]

In 2002, Berkshire Hathaway and Allianz had set up a scheme in addition to the AIG-GE facility and, as a result of more capacity, prices were down to US$ 1 per passenger carried for the excess of US$ 50 million up to US$ 1 billion.[218] The Berkshire-Allianz scheme stopped renewing policies as of November 2004 due to the withdrawal of 55 per cent by Berkshire Hathaway from the co-insurance scheme.[219] As one can observe through the chart below, since 1992 the aviation premium and claim record of 2001 are historically high for the past 15 years, more than two times higher than the average aviation premium

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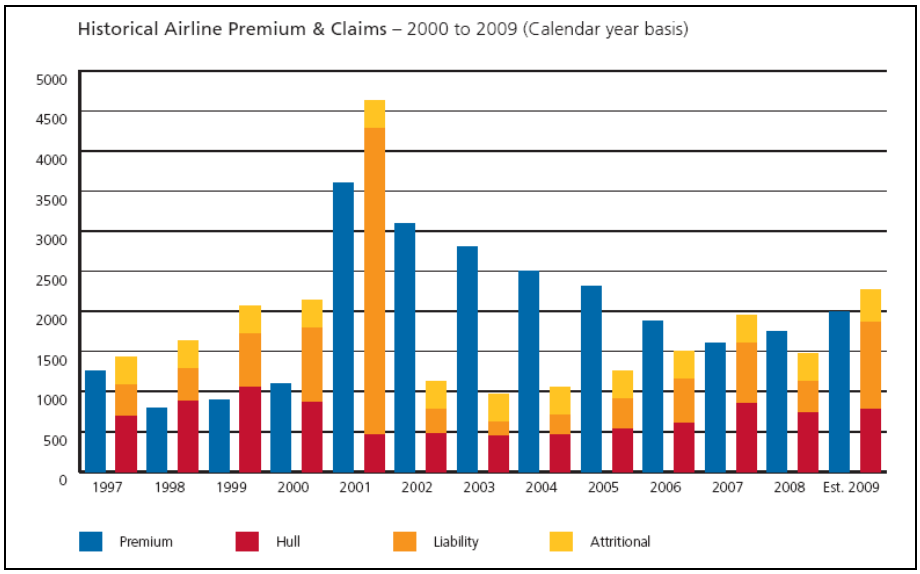
[212] *Ibid*.
[213] *Ibid*.
[214] *Ibid*.
[215] *Ibid*, at 390.
[216] *Ibid.*
[217] IUAI Guide 2004, *supra note* 208, at 3.
[218] Colin Williams, "Aviation Insurance-One Year after WTC", in Patrick M. Liedtke & Christophe Courbage eds., *Insurance and September 11 one year after : impact, lessons and unresolved issues* (Geneva: International Association for the Study of Insurance Economics, 2002) 186 at 188.
[219] Flore-Anne Messy *et al.*, *Catastrophic risks and insurance* (Paris: Organisation for Economic

and claim. Already finding it hard to absorb major premium increases for their primary insurance coverage, many air carriers found the extra third party liability coverage premiums inaccessible and turned to their governments for help.



Source: Marsh Ltd.[220]

(2) Excess AVN52

In the aftermath of September 11 2001, Excess War Third Party Liability coverage ("Excess AVN52") was separated from the airline 'all risks' policies, with the exception of a sub-limit of US$50 million.[221] The market of Excess AVN 52 was formed to cover the gap of third-party war risk insurance in excess of the coverage provided by the primary market. The Excess AVN52 market, the newest among aviation insurance core coverage, has not yet reported any insurable loss.[222] Due to the absence of losses, there has been an infusion of capacity, and subsequent competition has driven premiums down, as the chart

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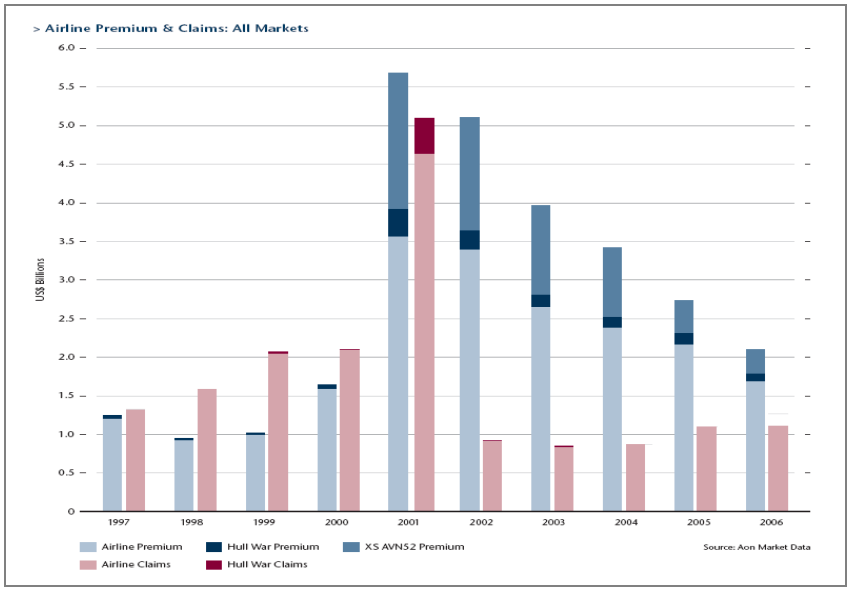
Co-operation and Development 2005) at 76. [Messy]
[220] Marsh Ltd., *supra* note 145, at 4.
[221] JLT Aerospace, Plane Talking, February 2008, at 3.
[222] Aon Ltd., Airline Insurance Market Outlook 2009, at 20.

below demonstrates.[223] The premium has slid from US$1.5 billion in 2002 to US$250 million in 2007,[224] US$210 million in 2008,[225] and just over US$200 million in 2009.[226]



Source: Aon Ltd.[227]

While other parts of the aviation markets were hardening in the 2009, the Excess AVN52 market had steady decline in premium. The absence of claims has contributed to profits around US$7 billion to participating capacity since 2001, while primary coverage limit has gradually increased from US$50 million up to US$150 million, under the 'all risks' policies.[228] Driven by the profits, more insurers are joining in to underwrite under excess facilities, which has resulted in deflating income due to the decreasing premium divided by increasing capacity.[229]

If the trend of reductions in premium remains at the same scale that has been displayed over the past few years, the Excess AVN52 market may have to ponder whether Excess AVN52

[223] *Ibid*, at 14.
[224] Aon Ltd., Airline Insurance Market Review 2007, at 10.
[225] Aon Ltd., *supra* note 222, at 20.
[226] Aon Ltd., *supra* note 147 at 18.
[227] Aon Ltd., Airline Insurance Market Review 2006, at 8.
[228] Aon Ltd., *supra* note 147 at 18.

is commercially practical to underwrite the coverage separated from the hull and liability 'all risks' policies, or whether Excess AVN52 should return to the primary market.[230]

(3) WMD exclusion

Currently aviation liability insurance policies of operators and service providers remain subject to War, Hijacking and other Perils Exclusion Clause AVN48B or equivalent clauses.[231] With the exception of hostile nuclear detonation or the like (sub-paragraph b of AVN 48B), all exclusions are eligible to be written back into policy coverage for both passenger and third party liability by AVN52D (for aircraft operator) and AVN52F (for service provider), as previously mentioned. In other words, any hostile detonation of any weapon of war employing atomic or nuclear fission/fusion or other reaction or radioactive force or matter has been absolutely excluded without any possibility of write-back. This originated from Cold War times, and reflected the unquantifiable nature and potential mass accumulative losses that could result.[232]

The threats posed by weapons of mass destruction ("WMD"), i.e. nuclear, radioactive contamination ("RADCON"), bio/chemical ("BIO/CHEM") and electromagnetic pulse devices or materials ("EMP"), have been constant popular subjects in the news.[233] Absolute WMD exclusion was intended to exclude all coverage for the hostile use of WMD because the hostile use of WMD will cause unquantifiable loss accumulation and fail to satisfy the previously-mentioned criteria of insurability. Absolute WMD exclusion was introduced by the aviation insurance market beginning in June 2003, in line with other property and

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[229] JLT Aerospace, Plane Talking, February 2008, at 3.
[230] Aon Ltd., *supra* note 222, at 20.
[231] *Information Paper of London Market Insurance Brokers Committee (LMBC)*, ICAO, 2005 ICAO SG-MR/1-IP/4, at 1. [LMBC]
[232] *Ibid.*
[233] The Times, "Rising threat of dirty bomb attack on UK" March 25, 2009, online: Timesonline <http://www.timesonline.co.uk/tol/news/uk/article5966489.ece>.

casualty markets, e.g. marine, and energy,[234] as a way of trying to replace AVN48B on subsequent renewals.[235] The aviation hull war market started to impose WMD exclusions on renewals in May 2005, but the liability exclusions have yet to be used.[236]

In August 2006, Aviation Insurance Clauses Group ("AICG") published two sets of war risk exclusions and write-back clauses, i.e. AVN48C partnered with AVN52H (for aircraft operators) and AVN52J (for service providers), sponsored by insurers vis-à-vis AVN48D coupled with AVN52K (for aircraft operators) and AVN52L (for service providers) sponsored by Marsh Ltd., the Association of European Airlines and IATA.[237] The former set of war risk exclusion and write-back clauses fully exclude WMD perils, while the latter set is intended to provide limited WMD coverage for RADCON, BIO/CHEM and EMP, in addition to perils originally written back by AVN 52.[238]

In contrast to AVN52H and AVN52J, which have no coverage for WMD at all, the mechanics of AVN52K and AVN52L provide insurers and insureds options of limited WMD coverage, excluding nuclear risks.[239] As for BIO/CHEM, it can be insured by 'single aircraft cover' in which any aircraft with a BIO/CHEM device or material on board, whether on the ground or in the air, and/or any aircraft suffering crash fire explosion collision or recorded emergency caused by exposure to BIO/CHEM material or device not on board the aircraft when in flight, may be covered to the full policy limit.[240] Another option is regulatory coverage in which all BIO/CHEM losses are covered, but only for restricted limits, pursuant to regulatory requirements such as Regulation (EC) No 785/2004,

[234] Messy, *supra* note 219, at 77.
[235] Carpenter, *supra* note 209 at 26.
[236] *Ibid*.
[237] *Ibid*.
[238] Marsh Ltd., Aviation and Aerospace Practice Special Bulletin, August 2006.
[239] Beaumont & Son- Aviation at Clyde & Co, Beaumont Bulletin January 2007, at 4.
[240] Paragraph 1.2 (i) and (ii) of AVN52K/L. Marsh Ltd., Aviation and Aerospace Practice Special Bulletin Appendix 2, August 2006.

and subject to negotiation with underwriters, unless the previous option is in operation.[241] Except for nuclear or atomic devices, RADCON can be covered by the same options as BIO/CHEM, subject to the agreement of underwriters.

As for EMP, one option for 'single aircraft cover' is further restricted to situations where any aircraft with an EMP device on board, whether on the ground or in the air, could be covered to full policy limits.[242] Under a second option, similar to BIO/CHEM, all EMP losses are covered, but only to restricted limits, again referring to regulatory requirements such as Regulation (EC) No 785/2004, and subject to negotiation with underwriters, unless the previous option is in operation.[243]

To date AICG's new clauses, AVN48D, AVN52K and AVN52L, have not yet to be applied widely by the insurance market.[244] The European Commission informed insurance underwriters in January 2007 that excluding all WMD perils from insurance policies, i.e. AVN48C, AVN52H and AVN52J, would leave aircraft operators in breach of the minimum insurance requirements, especially war risk insurance, under Regulation (EC) No 785/2004.[245] Even though AVN 48C partnered with AVN52H and AVN 52J may not be acceptable to the authorities, if a WMD event happens in the future, it is still possible for the insurers to invoke a 7-day notice cancellation for reassessment of risks and introduce

[241] *Ibid*, Paragraph 1.3.
[242] *Ibid*, Paragraph 1.2 (i).
[243] *Ibid*, Paragraph 1.3.
[244] AVN52K was subsequently modified by AVN52R for full policy limit still can be applied to claims for the liability in respect of passengers, their baggage/personal effects, cargo and mail on board an aircraft on which a device had been placed or, in the case of perils listed in paragraphs b(ii) and b(iv) of AVN 48D, are on board an aircraft that is subject to a recorded emergency while in flight. Any other aircraft affected by such an attack were intended to be subject to any sub-limits negotiated as originally stated in AVN52K. AICG, "Guidance Note: Extended Coverage Endorsement (Aviation Liabilities)", online: AICG< http://www.aicg.co.uk/AM/Template.cfm?Section=Resource_Center&Template=/CM/ContentDisplay.cfm&ContentID=12268>
[245] EU Insurance Requirements for Aircraft Operators Report, *supra* note 47, at 7.

AVN 48C into the insurance market.[246]

3.2.2 Global response to War Risk Insurance

After September 11, 2001, the war risk insurance market could not be fully available, and was overexposed to its underwriting risks. Either paying an extremely high premium rate of war risk insurance, or receiving inadequate coverage (right after September 11, 2001, there was no cover at all), the airlines' fleets were completely grounded for not meeting the regulatory and contractual requirements. This aggravated the financial woes caused by security issues post September 11, 2001 and accelerated the bankruptcy or insolvency of airlines all over the world. Many States had to step in and bail out their national airlines by providing short-term war risk insurance coverage for third party liability and long-range sustainable insurance coverage.

(1) State intervention

After September 11, 2001, the Federal Aviation Administration of the United States ("FAA") began issuing third party liability war risk insurance to U.S. air carriers under the Federal Aviation Administration War Risk Insurance Program ("FAA Program").[247] The FAA Program was extended on September 24, 2001, and offered US carriers twice the coverage of third party liability pre-September 11 2001 policy limit, i.e. a maximum of US$ 4 billion per any one occurrence at a premium of US$ 0.10 per passenger.[248]

In December 2002, the FAA Program was expanded to include hull loss and passenger liability, and was required as a provision for continuation of this insurance by the Homeland Security Act of 2002[249] at total cost about US$ 0.20 per passenger.[250]

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[246] LMBC, *supra* note 231, at 2.
[247] FAA, "War Risk Insurance Program", online: FAA < http://www.faa.gov/about/office_org/headquarters_offices/aep/insurance_program/ >.
[248] Carpenter, *supra* note 209, at 25.
[249] Public Law 108-11.

Furthermore, the U.S. Air Transportation Safety and System Stabilization Act of 2001 was enacted to limit the third-party liability of air carriers resulting from 'an act of terrorism' up to US$ 100 million in the aggregate.[251]

Worldwide, most States instantly reacted to the war risk insurance market unavailability by providing government backed-up guarantees to air carriers and/or service providers.[252] The United Kingdom, in the first instance, provided indemnity for third party liability of U.K. air carriers in respect of war and terrorism above the US$ 50 million which was available by then insurance coverage of air carriers.[253] 'Troika', an insurance company composed of Aon, Marsh and Willis, was set up to replace the government scheme with commercial insurance to provide insurance policies filling up the gap in excess of US$ 50 million.[254]

Following European Commission guidelines on premiums, providing state aid is principally prohibited but is allowed when it 'makes good the damage' caused by the 'exceptional occurrences'.[255] For ensuring the State aid to 'make good the damage' caused by the 'exceptional occurrences',[256] a tiered system was set up which charged for coverage between US$ 50 million and US$ 150 million at a premium of not less than US$0.35 per passenger, coverage between US$150 million and US$ 1 billion at a premium of not less than US$ 0.35 per passenger and above US$ 1 billion at a premium of not less than

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[250] Messy, *supra* note 219, at 75.
[251] *Air Transportation Safety and System Stabilization Act of 2001*, Pub. L. No. 107-42, Sec. 201, 115 Stat. 234.
[252] Carpenter, *supra* note 209, at 25.
[253] H. M. Treasury press notice 103/01, online: H. M. Treasury < http://archive.treasury.gov.uk/press/2001/p103_01.htm >.
[254] H. M. Treasury press notice 128/01, online: H. M. Treasury < http://www.hm-treasury.gov.uk/press_128_01.htm >.
[255] Commission of the European Communities, "Communication from the Commission on Insurance in the Air Transport sector following the terrorist attacks of 11 September 2001 in the United States", Brussels, 2.7.2002 COM (2002) 320 final, online: European Parliament < http://www.europarl.europa.eu/meetdocs/committees/rett/20020909/com(02)0320_EN.pdf> at 3. [EC Communication 2002]
[256] *Ibid.*

US$0.25 per passenger, with all premiums accumulating.[257]

A majority of States scaled back the government backed-up schemes and replaced them with commercial capacity due to the decrease in the premiums of third party liability insurance (war and terrorism).[258] Nevertheless, the United States Congress extended the FAA Program and legislation for maintaining the US$ 100 million cap. The latest renewed coverage of war risk hull loss, passenger, and third-party liability insurance to U.S. air carrier has been extended to August 31, 2010.[259]

(2) Multinational scheme

A. International initiative: Globaltime

In order to develop a global scheme to facilitate war risk insurance and to avoid such unavailability from happening again, a "Participation Agreement" called the "ICAO Global Scheme on Aviation War Risk Insurance" was designed, also known as 'Globaltime'.[260] Globaltime has been tasked to establish a non-profit "Insurance Entity" providing non-cancelable third party war risk coverage from the "Excess Point" up to US$ 1.5 billion.[261] With the collection of premiums from passenger fares, Globaltime will provide indemnity for damage caused to ground victims, namely third parties. Such a scheme would be a State-guaranteed war risk insurance triggered by an occurrence falling within its policy. Globaltime would only be practical on a contingency basis, provided that States contributing over 51 per cent of ICAO budget participated. This goal was not met due to the lack of support from major States, such as the United States and Japan.[262]

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[257] H. M. Treasury press notice 128/01, *supra* note 253.
[258] Carpenter, *supra* note 209, at 25.
[259] FAA, "Premium War Risk Insurance", online: FAA < http://www.faa.gov/about/office_org/headquarters_offices/aep/insurance_program/ext_coverage/>.
[260] ICAO Doc C-WP/11946.
[261] ICAO Doc C-WP/12003 Appendix C. The Excess Point is defined in Art. 1 of the Participation Agreement, as US$ 50 million in square bracket.
[262] Michael Milde, *International air law and ICAO* (Utrecht, Netherlands: Eleven International Publishing

Therefore, Globaltime, subject to participation by States representing at least 51 per cent of ICAO contributing rates, is retained on a contingency basis and is only activated when there is an insurance market failure as determined by the ICAO Council.[263]

B. Regional Initiatives: Equitime and Eurotime

Equitime, proposed by the American Air Transportation Association, was designed for U.S. carriers to obtain coverage for passenger liability and third party liability war risks up to US$ 2 billion of combined single limit per occurrence, with the retention of US$ 300 million planned to be held by the scheme, and the balance to be re-insured by the U.S. government.[264] Nevertheless, this arrangement has not come into play because the U.S. Congress extended the Federal Aviation Administration Insurance Program, which provides wider coverage with better premium.[265]

The Association of European Airlines proposed Eurotime for third party liability in May 2002 for a coverage of US$ 1 billion for any one occurrence, but with a retention of the carriers above the excess of US$ 50 million being US$ 150 million for the first year, US$ 250 million the second year and US$ 500 million the third year.[266] Nonetheless, in September 2002 the European Commission announced its preference for a comprehensive global scheme, such as Globaltime, which would not give rise to the competition issues that Eurotime or Equitime may cause, and because such a global scheme could allocate the risks on a global basis within the participating countries.[267]

All of these three schemes are similar in that they require government participation. Also all three schemes have not been in operation due to the lack of sufficient support and

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2008) at 290.
[263] ICAO Doc C-WP/12003.
[264] ICAO CAR DCA/1 IP/24.
[265] Messy, *supra* note 219, at 75.
[266] *Ibid*.

acceptance of their principles by participating States.[268]

3.2.3 The necessity of a long-term solution for War Risk Insurance

For U.S. carriers, without a government-backed scheme, namely the FAA Program and correlative legislation, the lack of war risk insurance immediately after the attacks of September 11, 2001 would have resulted in an 'aircraft on the ground' ("AOG") situation for more than three days. Other carriers around the world shared the same experience at the same time. The question follows: should a government-backed scheme become a long-term solution?

The European Commission disfavored government intervention for the purpose of continuing to provide third party insurance for war and terrorist risks. The European Commission viewed it as an ad-hoc measure engaged to react to an exceptional circumstance that is an eligible cause for State aid under the Rome Treaty[269] (Art. 87 § 2 b). [270] Furthermore, the European Commission announced the cessation of the government-backed plan for all the Member States on 31 October 2002, and considered that ICAO's mutual scheme, i.e. Globaltime, would be preferred, provided that the scheme did not restrict the commercial insurance market and limited government exposure along with having a clear exit strategy for government involvement.[271] Nevertheless, such a global scheme has yet to be implemented.

Unlike Europe, the United States and Canada still provide their air carriers with government backed-up schemes, with competitive premiums or no premium at all.[272] The

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[267] Koch, *supra* note 67, at 280.
[268] Organisation for Economic Co-operation and Development, *Terrorism risk insurance in OECD countries*, (Paris: Organisation for Economic Co-operation and Development 2005) at 40.
[269] *Treaty establishing the European Community* (consolidated text), *Official Journal C 325 of 24 December 2002, online: Europa < http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf>*.
[270] EC Communication 2002, *supra* note 255, at 4.
[271] *Ibid*, at 11.
[272] Since September 22, 2001, Canada has provided indemnification for Third Party Liability-aviation war

difference is the fear in Europe of unfair competition complaints being pursued by the European Commission, as arose in the cases of Equitime and Eurotime. Leaving the unfair competition issue aside, the problem of the insurability of the WMD is still on the table, which can be triggered upon a 7-day notice to cancel the policy, as occurred in the aftermath of September 11, 2001. Such a serious loophole in risk management will affect the continuation and sustainability of aviation industry if there is no government- backed scheme to bridge the gap between government mandatory insurance requirement and coverage provided by the insurance market.

So far the sustainability and affordability of the war risk insurance are due to the moderate loss record post September 11, 2001. However, if an unspeakable event like September 11, 2001 happens again, such sustainability and affordability will quickly vanish and the operational costs of airlines will go up as the premium of war risk insurance increases sharply. The consequence will be aircraft grounded for all airlines globally.

Therefore, the government, which has more resources and which assumes the responsibility to secure and defend its nationals' safety, should take a more proactive role in war and terrorist risks, not just acting as a last resort. A global scheme shared by States, the aviation industry and commercial insurance market may be a more balanced approach as a solution to State-targeted acts.[273] Such an effort was attempted through the enormous work by ICAO, but it is still waiting for more States to join the effort.

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risk for Canadian air carriers (including new entrants), airports, NAV CANADA, and other essential service providers at airports, such as ground handlers and re-fuellers. It is reviewed and extended on a yearly basis, and current extension was undertaken from May 1, 2009 to December 31, 2010. Transport Canada, *supra* note 178.

[273] Messy, *supra* note 219, at 80.

IV The Potential Risks to Aviation Industry under the Modernization of Rome Convention 1952

As noted in the previous chapter, the insurance market has recovered from the effects of the September 11 terrorist attacks, albeit with limited coverage, exclusions and more cautious approaches to risk control. Under the current aviation insurance market development, should the Conventions come into force, they will have certain impacts on the risk and liability regimes of the aviation industry. These are considered in this chapter.

1. Potential risks from the General Risk Convention

In view of the extensive ratification of the Montreal Convention 1999, the General Risk Convention has incorporated concepts from the Montreal Convention 1999. It was hoped that the General Risk Convention - as the successor to the Rome Convention 1952 - would be more successful and widely adopted by the international community than the Rome Convention 1952.

One fundamental question must be answered before discussion of the substance of the General Risk Convention. Should the passenger on board the aircraft be blamed for creating risks and causing the damage to the victim on the ground, and hence should the victim on the ground benefit from greater protection and rights to compensation than the passenger on board? In fact, it is the person who contributed to the accident exposing both the passenger on board and the victim on the ground to this unexpected risk who is at fault. Therefore, neither the passenger nor the victim on the ground should be blamed for creating this unexpected risk. Furthermore, there should be no distinction between the victim on the ground and the passenger on board because they are both innocent. Therefore, it is reasonable to follow the path of the Montreal Convention 1999 to establish the liability regime of the operator in respect of ground damage, and the architects did this with the

General Risk Convention mirroring the Montreal Convention 1999.

1.1 Liability regime

As in the Montreal Convention 1999, the General Risk Convention followed the 'two tier approach',[274] which provides operators with a monetary cap coupled with strict liability, and, beyond the monetary cap, there is the presumed liability with no monetary limit. Only when the operator proves that the damage did not result from its negligence, other wrongful act, and omission, or it was due to the negligence, other wrongful act and omission of another person, can it benefit from the monetary cap.[275]

Here lies a complex problem, the same one as in the Montreal Convention 1999 regarding the operator who applies the defence, solely due to the negligence, other wrongful act or omission of another person.[276] In the catastrophe of September 11, 2001, the perpetrators were the terrorists who hijacked the planes and caused enormous damages both on the ground and aboard. Could the airline invoke the defence and prove the incident was solely caused by the terrorists? It was highly unlikely that the airlines could prove they in no material way contributed to the occurrence of the accident. There is always a glitch found in the airline service chain. Therefore, the word, 'solely', will leave the operators with an impossible burden of proof thus exposing them to unlimited liability.

1.2 Role of manufacturers

1.2.1 Manufacturers with no exoneration

Under the General Risk Convention, only the owner, lessor and financier are exonerated from the liability for damages on the ground, and other actions are not compulsorily channeled to the operator. It means that all entities with deep pockets, other than owner,

[274] ICAO C-WP/13031 Appendix A.
[275] *General Risk Convention*, *supra* note 61, art. 4(2).
[276] McGill University Institute of Air and Space Law, Working Paper-General Risk Convention and Unlawful

lessor and financier, have potential risks to be sued by any party.[277] The time-consuming litigation proceeding, which will definitely prolong the compensation process, will not serve the purpose of effective and efficient compensation, for which the General Risk Convention was designed.[278] The same concern was shared with the Unlawful Interference Convention, and hence the notion of 'channeling liability' was accepted in the Unlawful Interference Convention by the majority of the States.

Since the lessors are exonerated under the General Risk Convention, the negligent entrustment once pursued against them in passenger injury and death claims, could not be used with respect to ground damage.[279] Leasing companies typically have no actual control of the operation of the leased aircrafts and more likely sit in the position of rent collectors leaving the actual control over the leased aircrafts to the operators. Financiers are even less implicated in the operations of an aircraft. Therefore, in the United States, a lessor, owner, or secured party will not be held liable unless a civil aircraft is in the actual possession or control of that lessor, owner, or secured party.[280]

It is difficult to accept the rationale for manufacturers to be excluded completely. Manufacturers will be liable for proven manufacturing defects and such claims are governed by national or regional laws. It is also important to note that although product liability claims may be directed at manufacturers, strategically operators may receive the same courtesy jointly for it's human error (e.g. upset maneuver) when such error has

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Interference Convention, ICAO DCCD 2009 No.25.

[277] *General Risk Convention*, *supra* note 61, art. 12 and 13.

[278] *Ibid*, Preamble.

[279] In 2000, 131 passengers and crew on board Air Philippines Flight 541 were lost due to the air crash in the Island Garden City of Samal. The American companies which leased the aircraft to Air Philippines agreed to pay US$165 million to settle the negligence entrustment case filed by the victims' relatives. Durianpost , "US$165Million for Kin of Victions in Air Philippins Flight 541 Crash in Davao",online: Durianpost < http://durianpost.wordpress.com/2008/03/13/i65-million-for-kin-of-victims-in-air-philippines-flight-541-crash-in-davao/> Case of Air Philippines Flight 541 set up unprecedented settlement for leasing companies.

[280] U.S. Law 49 U.S.C. § 44112.

connection with such manufacturing defects. In addition, cross-indemnification clauses are generally included in purchase agreements between operators and manufacturers. As a result, operators are contractually required to defend manufacturers and share costs with them in respect of liability claims. It is also a standard practice for manufacturers and lessors to be named as additional insureds in the aviation insurance policies of operators. As an additional insured,[281] covered by the insurance policy of the named insured, manufacturers might take protection from the insurance coverage of the operators.

1.2.2 Manufacturers with no capped liability

During the Diplomatic Conference, the AWG strongly urged for manufacturers to enjoy the same capped liability as the operators. A failure to do so may result in a shift in liability from airlines to manufacturers for the latter enjoy no limit of liability.[282] This proposal was supported by the United States, Brazil and Russia, where the major aircraft manufacturers are located. On the other hand, IATA disagreed completely with AWG noting that the negligence regime which manufacturers already enjoy should not have the same token (capped liability) vis-à-vis the strict liability imposed upon the airlines.

In the General Risk Convention, only owners, lessors, and financiers are excluded from liability and there is no liability limit for manufacturers. In the practical experience cross-indemnification clauses have always been required in the purchase agreements with the manufacturers as mentioned before and the naming as additional insured is also required contractually. Manufacturers have their own policy for product liability while the carriers have their own airline operation policy. In the United States, carriers (operators) were jointly sued together with the manufacturers.[283] Although a manufacturer can not

[281] Manufacturer as additional insured AVN 29.
[282] Working Paper-General Risk Convention presented by AWG 27/02/09, ICAO DCCD Doc No. 5.
[283] See Singapore airline SQ006: Ai Chen SUN, et al., Plaintiffs, v. SINGAPORE AIRLINES, LTD., et al.,

enjoy the same protection available to an operator, the operator is contractually obligated to indemnify the manufacturer and ensure that its insurance cover extend to the manufacturer. Especially when there is a pilot error or a maintenance defect involved, the carriers may not be able to enjoy the limited liability for they are contractually obliged to hold the manufacturers harmless and thus will also be exposed to unlimited liability.

Airlines and aircraft manufacturers' liability must operate in tandem, for they are highly correlated with each other contractually and factually. The entire aviation industry is as a whole interdependent; when part of it suffers huge losses, other parts will have to share such losses one way or the other and the insurance industry works in the same way.

1.3 Insurance requirements

1.3.1 Adequate insurance?

In the General Risk Convention, adequate insurance is required to be maintained by the operator, having regard to the limit of the operator's liability.[284] Since the limit of the operator's liability is breakable, if the operator fails to meet its burden of proof and hence faces unlimited liability, can we say for sure the limit of the operator's liability is the adequate coverage of the insurance? There may be some doubts.

In Regulation (EC) No 785/2004, minimum insurance cover with respect to third parties is clearly stated and was adopted by the General Risk Convention as the limit of the operator's liability.[285] For the avoidance of doubt and the uniform implementation worldwide, to clarify the minimum insurance requirement on an MOTW basis is essential to airlines. Otherwise, with ambiguity, there may be different understandings in different

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Defendants. N.E.2d, 2004 WL 601953; In re AIR CRASH AT TAIPEI,TAIWAN, on October 31, 2000, 2004 WL 1234131 (C.D.Cal.). See China Airline CI611: In re AIR CRASH OVER THE TAIWAN STRAITS ON MAY 25, 2002., 331 F.Supp.2d 1176 (C.D.Cal.,2004.).

[284] *General Risk Convention*, *supra* note 61, art. 9.

[285] *Regulation (EC) No 785/2004*, *supra* note 43, art. 7.

regimes of the same concept. This may end up in interruption to the operation of the airlines due to the lack of adequate insurance.

It may be too complex to standardize adequate insurance requirements on a global scale. According to the first chart below, the top 2009/2010 policy average liability limit is obtained by Asian carriers which is around 1.3 times greater than that of African carriers. And the insurance cost per passenger of African carriers in the second chart is US$2.11 which is around 3.1 times greater than US$0.68 of Asian carriers. All these facts suggest that the insurance coverage for different regions will not easily be integrated into a single global standard. This observation resulted not only from the difference in passenger numbers or fleet size of different carriers, but also from different regions having different exposure and loss ratios, which will influence the risk assessment of underwriters for premium. Hence, the risk to be deemed as not having adequate insurance will vary from region to region and from country to country.

	Total renewals			Lead hull and liability premium			Average liability limit		
	2008	2009	% change	2009 (US$m)	2010 (US$m)	% change	2009 (US$m)	2010 (US$m)	% change
Africa	15	16	7%	82.37	101.47	23%	971.88	971.88	0%
Asia	48	51	6%	432.43	481.11	11%	1,288.82	1,270.10	-1%
Europe	71	74	4%	439.98	562.57	28%	963.51	978.51	2%
Latin America	19	20	5%	96.81	117.29	21%	881.25	913.75	4%
Middle East	15	17	13%	96.06	127.19	32%	1,064.71	1,010.59	-5%
North America	38	38	0%	452.67	525.45	16%	1,172.89	1,189.34	1%
Total/Average	**206**	**216**	**5%**	**1,600.32**	**1,915.07**	**20%**	**1,068.39**	**1,093.42**	**2%**

Source: Aon Ltd.[286]

[286] Aon Ltd., *supra* note 147, at 27.

	Credit balance	Average fleet value		Projected passenger numbers		Cost per passenger	
	US$m	Total (US$m)	% change	Total (m)	% change	Total (US$m)	% change
Africa	162.93	16,785.79	10%	47.99	7%	2.11	15%
Asia	1,618.02	225,533.08	6%	708.63	-1%	0.68	13%
Europe	-301.00	199,909.67	2%	745.13	-1%	0.75	30%
Latin America	-467.65	24,354.77	9%	125.55	8%	0.93	12%
Middle East	118.37	58,352.86	12%	117.34	12%	1.08	19%
North America	1,443.43	180,565.51	-3%	752.98	-6%	0.70	24%
Total/Average	2,574.10	705,501.68	3%	2,497.63	-2%	0.77	22%

Source: Aon Ltd.[287]

1.3.2 Aggregate basis?

During the Diplomatic Conference, IATA proposed that in the event that insurance is not available to an airline on a per event basis due to market failure or multiple losses, insurance can be obtained on an aggregate basis to fulfill the adequate insurance requirement.[288] The European Community objected to IATA's proposal by saying that the case here is not the same as the Unlawful Interference Convention and that insurance is available under general risks in respect of third party liability. In the final discussion, there were two options of proposed wording. One option is analogous to the wording of the Unlawful Interference Convention by using 'aggregate basis' while the other retains the current wording, namely 'per event basis'.[289] The Plenary of the Diplomatic Conference adopted the per event basis with overwhelming supports.

Currently the third party liability policy is issued on a per occurrence basis which has served the insurance requirement in accordance with the General Risk Convention. When there is a single aircraft occurrence, the insurance coverage will be sufficient to cover damage caused by the occurrence. When it comes to multiple aircraft occurrences, the insurance reserves may be wiped out, 7-day notice of cancellation may be given to reassess

[287] *Ibid*.
[288] Working Paper-General Risk Convention presented by IATA 20/04/09, ICAO DCCD Doc No. 17.
[289] Report of the Drafting Committee on the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, ICAO DCCD Doc No. 30.

the risks, and the aggregate basis may be introduced for controlling the risks in respect of similar catastrophe. In such case, the airlines will be deemed in breach of the adequate insurance requirement.

1.4 Compensation coverage

1.4.1 Priority of compensation

In the General Risk Convention, individual damage is prioritized and can be compensated prior to property damage and environmental damage.[290] And in the original draft wording, it was the intention not to rank the damages, namely, death, bodily injury and mental injury, of individual claimants.

After lengthy discussion in the Diplomatic Conference, it was first concluded in the Plenary that a majority of States (including the United Kingdom, Columbia, Brazil, Mexico, Saudi Arabia, and Egypt) have taken the view that death and bodily injury would be compensated in the first place and mental injury compensated last in respect of allocating compensation for personal injury. This principle applied both in the Unlawful Interference Convention and the General Risk Convention. Such policy principle was referred to the Draft Committee,[291] which proposed two options of texts: one is based on the Plenary's initial decision to prioritize death and bodily injury while the other version is to retain the original text not to differentiate death, bodily injury and mental injury.[292] The Draft Committee favored the second option and after the second round of discussion the majority of the Plenary supported the second option, i.e. no prioritization amongst personal injuries. Leaving the issue of recoverability of mental injury aside, from a practical perspective,

[290] *General Risk Convention*, *supra* note 61, art. 5.
[291] Members of the Draft Committee were Brazil, Canada, China, Cuba, Finland, France, Germany, Japan, Lebanon, Mexico, Russia, Singapore, South Africa, Sweden, United Arab Emirates, United Kingdom, and United States. Observers in the Draft Committee were AWG, the European Community, IATA, and IUAI.
[292] Report of the Commission of the Whole on the Draft Convention on Compensation for Damage Caused by

where a large scale accident happens resulting in great losses of casualties on the ground and also on board, the operator, with a 'Combined Single Limit', will have to compensate both passengers and third parties according to the identified claims of the individuals. Given the fact that death and bodily injury can be objectively recognized in the first instance, and mental injury may be prolonged by medical evaluation and assessment, the operator's insurance coverage may be exhausted before the mental injury damage (especially those in their stand-alone form) is confirmed, leaving the victims who claimed mental injury facing the possibility of the insolvency of the operator.

According to the delegation from Singapore, the 'individual' claim has no limitation but the operator's liability 'overall' does have a limit when the operator fulfills its burden of proof. The individual compensation will be lessened as the limit of liability is fixed by the General Risk Convention and the claims, assuming death, bodily injury and mental injury occur only, exceed the limit collectively. Different categories of personal injury, say total claims exceed the limit of liability, has to be proportionately deducted to fit such limit. In such cases, compensation of individual claimants will be diluted and unfairness will be perceived among the victims or victim's families.

1.4.2 Mental injury

Mental injury has tended to be indemnified in major jurisprudence governed by the Warsaw Convention 1929 or the Montreal Convention 1999.[293] Nonetheless, given the text and the context of those conventions, only 'bodily injury' was compensable, not mental injury.[294]

Aircraft to Third Parties, ICAO DCCD Doc No. 38.

[293] See Eastern Airlines v. Floyd, 499 U.S. 530, 111 S.Ct. 1489 (1991), and Jack v. Trans World Airlines, Inc 854 F. Supp. 654; 1994 U.S. Dist. Lexis 2878. In Morris v. KLM Royal Dutch Airlines; King v. Bristow Helicopters Ltd. [2002] UKHL7, the passenger was compensated for his ulcer caused by PTSD. Hence some cases having physical manifestation of emotional harm did get compensation in common law jurisdiction but some cases didn't.

[294] Paul S. Dempsey and Michael Milde, *supra* note 9, at 122.

The question about mental injury has evolved by different interpretation of different courts. In the United States, after the Floyd case,[295] litigation claiming for mental injury, e.g. Post Traumatic Stress Disorder ("PTSD"), emerged and progressed to push the boundaries of recovery for physical manifestation of emotional harm.[296]

Before the Diplomatic Conference, many States affirmatively recognized the recoverability of mental injury which they said was relevant to their ratification. Based on the industry practice, mental injury is nothing new. So, what matters the most is the extent to which mental injury can be compensated.

Aware of such a common problem, the representatives of IUAI suggested the language of mental injury should be further limited to "if caused by a recognisable psychiatric illness resulting either from bodily injury caused by an unlawful interference or from a reasonable fear of exposure to death or bodily injury as a direct result of an unlawful interference".[297] Such limitation was refined in the draft conventions and was approved by the Plenary as "only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury."[298]

IATA opposed the inclusion of mental injury even with this limitation, noting that this would discriminate between passengers on board and victims on the ground.[299] IATA also noted that the current text allows for claims for mental injury not only flowing from bodily injury but also 'stand-alone' mental injuries resulting from direct exposure to the

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[295] Eastern Airlines v. Floyd, 499 U.S. 530, 111 S.Ct. 1489 (1991).

[296] The U.S. Courts have denied and granted physical manifestation of emotional harm. Cases denied for physical manifestation of emotional harm, see Carey v. United Airlines, (255 F.3rd 1044 (9th Cir 2001)), Terrafranca v. Virgin Atlantic Airways(151 F. 3rd 108 (3rd Cir. 1998)), Lloyd v. American Airlines, (291 F. 3rd 503 (8th Cir, 2002)). Cases granted for physical manifestation of emotional harm, see Weaver v. Delta Airlines (56F. Supp. 2nd 1190) and Rosman v. Trans World Airlines, (314 N.E. 2nd 848 (N.Y. 1974)).

[297] IUAI, Position Paper-Meeting of the Special Group on the Modernisation of the Rome Convention - Montreal 26th to 29th June 2007, at 2.

[298] *General Risk Convention*, *supra* note 61, art. 3(3). *Unlawful Interference Convention*, *supra* note 62, art. 3(3).

'likelihood' of imminent death or bodily injury.[300] IATA expressed concern as the ambiguity of 'likelihood' and the differing liability regimes for passengers on board the aircraft and victims on the ground.

Critically speaking, victims on the ground who suffer no mental injury will have their compensation delayed because the lengthy assessment and evaluation process took place for claims involving mental injuries. In addition, as the pool of compensation will be shared among victims claiming death, bodily injury and mental injury equally, there is a clear risk of dilution of damages if the pool of compensation has to accommodate large claims for mental injury and the cost of assessment, particularly in the United States.

2. Potential risks from Unlawful Interference Convention

According to the following four maps revealing terrorism all over the world, the threat of terrorism is emerging globally and very few regions are free from such risk. Specific countries and cities are targeted by different groups of terrorists seeking different political purposes. Civilians and commercial activities are the easiest objects to attack in most cases. For the first time, passenger aircraft were used as guided missiles to attack commercial and military symbols on September 11, 2001.[301] The unprecedented losses and damages have changed the world in many ways. This attack accelerated the modernization of the Rome Convention and one of the outcomes is the promulgation of the Unlawful Interference Convention.

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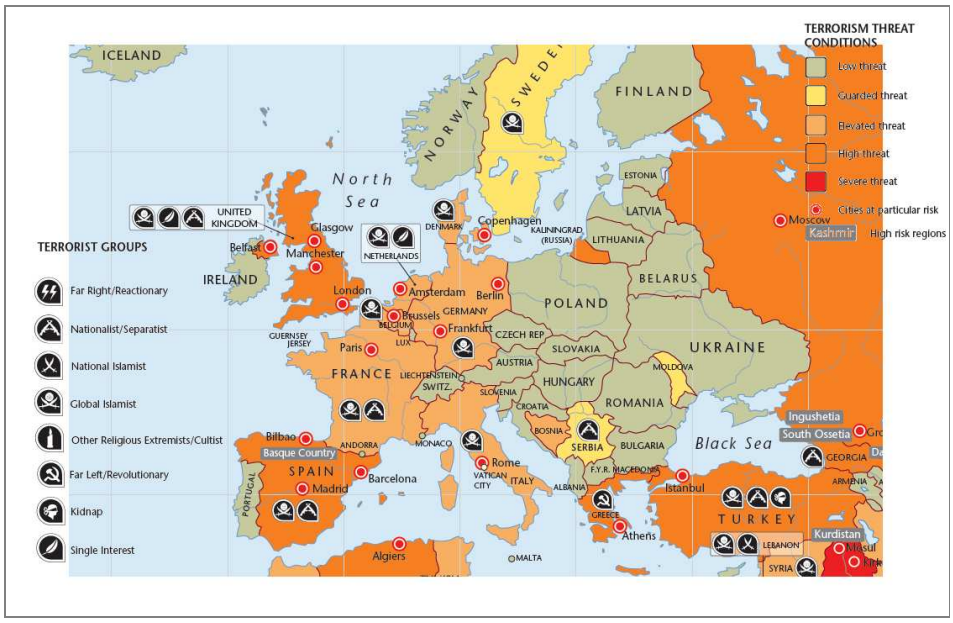
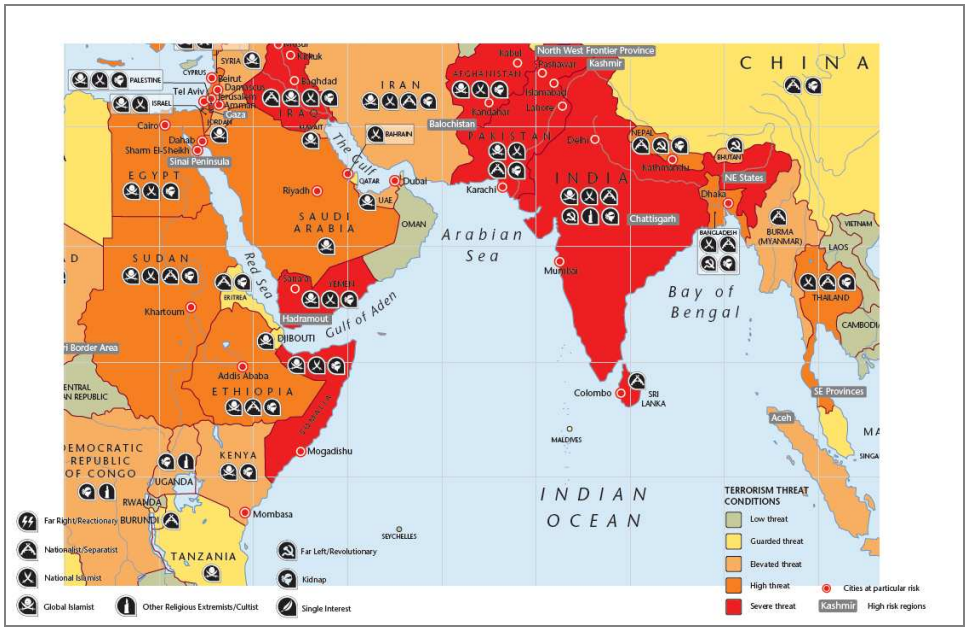
[299] Working Paper-General Risk Convention presented by IATA 20/04/09, ICAO DCCD Doc 21.
[300] *Ibid*.
[301] Paul S. Dempsey and Michael Milde, *supra* note 9, at 241.



Source: Aon Ltd.[302]

Source: Aon Ltd.[303]

[302] Aon Ltd., Terrorism Threat Map 2009.
[303] *Ibid.*



Source: Aon Ltd.[304]

Source: Aon Ltd.[305]

2.1 "Three-layer" compensation mechanism

At the Diplomatic Conference, IATA raised two important points which should have been

[304] *Ibid.*

emphasized in the Preamble:

(1) The recognition of airlines also being a victim. To be consistent with the same concept stated in the Unlawful Interference Convention that airlines are not liable for the 'damage' but for the 'compensation' to the third parties on the ground due to the unlawful interference;

(2) The expression of the third layer, i.e. the State to be the insurer of the last resort to cover the compensation beyond the first layer (the operator) plus the second layer (the International Fund). In 2008, in the ICAO 33rd Legal Committee, it was suggested that State liability should be included in the Preamble.

France, along with Germany, Finland, Japan, Slovenia, Lebanon, Saudi Arabia, Italy, Venezuela and Portugal opposed the inclusion of State responsibility in the Preamble. On the other hand, the United States supported IATA's proposal on the inclusion of the third layer. Singapore noted that it was reasonable to include IATA's proposal to distinguish between the General Risk Convention and the Unlawful Interference Convention. Canada stated that it was useful to recognize the whole industry as victims. As for the third layer, Canada opposed any imposition of a duty of the State to intervene in the compensation of victims because different States have different means of dealing with terrorism.

After discussion during the Plenary, a majority of States agreed that there should be no reference to the third layer of State responsibility. Instead, the third layer was referred to as additional compensation (breakability) of the operator in the context of the Unlawful Interference Convention which will be discussed later. In addition, the recognition of airlines as victims was not supported by the majority.

At the second meeting of the ICAO Special Group on the modernization of the Rome

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[305] *Ibid.*

Convention, the principle of the third layer was described as the solidarity within a society and between States. "[I]t is a consequence of the limits to the first and second layers. …The third layer will probably stay 'invisible'; the solutions would differ from case to case, and the general responsibilities of a society such as these are normally not put on paper. If the third layer is recognized in the text in any way, it would reasonably be in the preamble."[306] Until the ICAO 33rd Legal Committee in 2008, the concept of the third layer was established on States. The wind changed sometime and somewhere between the ICAO 33rd Legal Committee and the Diplomatic Conference. Given the scale and complexity of terrorist attacks, such State-targeted acts should never be the sole responsibility of the private sectors but the whole society altogether for the seamless cooperation. The government shall take the lead in such cooperation and private sectors shall work along with the government for perfecting the prevention of State-targeted act. When the damages caused by the catastrophe exhaust the first and second layers, the State as the third layer should step in regardless of whether such an obligation has been codified or not.

2.2 Compensation

2.2.1 Coverage

The Unlawful Interference Convention provides similar compensation to victims as the General Risk Convention. Hence there are similar coverage issues in the Unlawful Interference Convention as in the General Risk Convention, particularly in relation to claims for mental injuries and the apportionment of damages from a pool of compensation. In addition to these common issues, there are additional concerns which were clearly demonstrated by the September 11 terrorist attacks. In the aftermath of September 11, there were claims for respiratory problems and serious sickness and death caused by the collapse

[306] Henrik Kjellin, *supra* note 60, at 70.

of the World Trade Center towers. Thousands of emergency-response workers, and residents near Ground Zero were exposed to devastating toxic dust containing substances which included carcinogens.[307]

Property damage, in the absence of a clearer definition than in the current text, will create confusion that damage other than to tangible property, e.g. personal injury claims caused by property damage, may be included in this category, thereby leaving significant and unforeseeable risk exposures for the operators and their insurers.[308] Similarly, the environmental impact of September 11, 2001 was significant and its impact on the area near Ground Zero could not be readily or reliably quantified. Such damage can take years to be properly evaluated. This will inevitably delay compensation, particularly compensation to individual victims and thwart one of the goals of the Unlawful Interference Convention, expeditious compensation.

2.2.2 Reduced compensation

Initially at the Diplomatic Conference, a majority of States took the view that where claims exceed the pool of compensation, claims for death and bodily injury should take precedence over claims for mental injury.[309] This principle was to be applied to both the Unlawful Interference Convention and the General Risk Convention. Ultimately, the majority accepted the non-prioritized approach proposed by the Draft Committee. As noted above in relation to the General Risk Convention, such an approach is likely to result in unfairness between victims on the basis of the nature of their injuries and the prolonged process of evaluation and assessment of mental injury claims.

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[307] Anita Gates, "Buildings Rise From Rubble While Health Crumbles", online: nytimes <http://www.nytimes.com/2006/09/11/arts/television/11dust.html?_r=1&ref=nyregionspecial3>.
[308] IUAI, Modernisation of the Rome Convention 1952 -A Position Paper by The International Union of Aviation Insurers Presented to the EC Ad-Hoc Insurance Group 23 February 2004, at 1.
[309] E.g. the United Kingdom, Columbia, Brazil, Mexico, Saudi Arabia, and Egypt.

2.3 WMD damage

In the Unlawful Interference Convention, only nuclear incidents and nuclear damage among WMD damages are excluded from the operator's liability. The definition of nuclear incident and nuclear damage are subject to the Paris Convention[310] and the Vienna Convention respectively.[311] The definitions in the Convention are much narrower than the common wording typically used in the aviation insurance market.[312] WMD in AVN 48C, includes not only nuclear incident but also radioactive contamination, electromagnetic pulses, and bio-chemical materials or devices which may give rise to a 48-hour prior notice of cancellation of coverage.

The Unlawful Interference Convention so far only excludes nuclear incidents as the current policy AVN 48B accompanied by AVN 52D and E (before September 11, 2001, AVN 52C). The standard insurance clause AVN 48C along with AVN 52 H and J excludes 'all' WMD vis-à-vis AVN 48D coupled with AVN 52 K and L provides 'limited' WMD cover. Gaps of

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[310] *Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982*, art. 1 a. i., "A nuclear incident" means any occurrence or succession of occurrences having the same origin which causes damage, provided that such occurrence or succession of occurrences, or any of the damage caused, arises out of or results either from the radioactive properties, or a combination of radioactive properties with toxic, explosive, or other hazardous properties of nuclear fuel or radioactive products or waste or with any of them, or from ionizing radiations emitted by any source of radiation inside a nuclear installation." , online: Nuclear Energy Agent: <http://www.nea.fr/law/nlparis_conv.html>

[311] *Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage*, art. 1 (1) K, "Nuclear damage" means-

i. loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;
ii. any other loss or damage so arising or resulting if and to the extent that the law of the competent court so provides; and
iii. if the law of the Installation State so provides, loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation.

online International Atomic Energy Agency:< http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml>

[312] AVN48B, "Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter."

different coverages can be observed among the three types of exclusions above. If the second or the third exclusion is in place, how to bridge such a lacuna of coverage will be a critical problem which may have serious effects on victims' compensation.

To date AVN 48D coupled with AVN 52K and 52L has not been used and AVN 48C along with AVN 52H and 52J may still be introduced by the insurers in the event of a catastrophe involving WMD. The issue of insurability of WMD remains unresolved. Assuming AVN48C or AVN48D is in place, when an event falls within the WMD category but is not a nuclear incident, such event may not be covered by commercial insurance. The operator will still be liable for the damage caused by WMD and will face uninsured risks and liability unless the 'drop-down' mechanism is deployed.

Nonetheless, there is no guarantee that the 'drop-down' mechanism of the International Fund will respond because the activation of the 'drop-down' mechanism is determined by the Conference of Parties and is entirely within the discretion of the Conference. At the same time, an operator's liability is calculated by reference to the MTOW of the aircraft. Therefore, the operators may be exposed to massive damages caused by WMD but be without proper coverage or guarantee.

Nuclear incidents were excluded from the 1978 Montreal Protocol due to their massively destructive nature and unquantifiable risks. By the same token, RADCON, BIO/CHEM, and EMP and whatsoever has such same nature should also be excluded. Under the current text, if a catastrophe involving non-nuclear WMD takes place, insurers will highly likely issue 7-day notice, and leave operators exposed to uninsured risks and leave their fleets grounded for not meeting the adequate insurance requirements.

2.4 Drop-down mechanism

The drop-down mechanism, working as additional insurance cover, is designed to deal with

the unavailability of commercial insurance cover. Such unavailability may put operators in breach of minimum insurance requirements. In the past, governments stepped in immediately after the tragic catastrophe of September 11, 2001, and the 'drop-down mechanism' was intended to take the similar position by gathering the solidarity of the Contracting States.

In the Unlawful Interference Convention, it was decided that the drop-down mechanism shall be engaged at the discretion of the Conference of Parties. Such mechanism shall provide equitable treatment to all operators, without discrimination, when the insurance coverage in relation to the damages covered by the Unlawful Interference Convention is wholly or partially unavailable or only available at a cost incompatible with the continued operation of air transport 'generally'.[313]

The first question raised here is whether the drop-down mechanism is triggered only when the unavailability of insurance 'generally' affects air transport which includes carriers, service providers, general aviation and others of the aviation industry. In other words, the drop-down mechanism cannot provide its quasi-insurance coverage when the unavailability only relates specifically to certain sectors of air transport.

In the aftermath of September 11, 2001, service providers were unable to purchase third-party insurance coverage for several weeks and even longer for airport and aviation security service providers.[314] In such situations, airports, service providers and security companies, who form part of the aviation industry, were left exposed to risks without commercial insurance coverage when coverage was available to operators. The ambiguity in determining whether the air transport sector is 'generally' affected is likely to make the

[313] *Unlawful Interference Convention*, *supra* note 62, art. 18(3).
[314] Guy Carpenter & Company, LLC, "Global Terror Insurance Market 2007", at 25.

operation of the ‘drop-down’ mechanism more complex and uncertain.

In the Unlawful Interference Convention, a two-thirds majority is required on ballot of the Conference of Parties to decide to engage the ‘drop-down’ mechanism.[315] Therefore, when the unavailability of insurance market appears, the Conference of Parties has to convene and has to reach a decision based on a two-thirds majority in order to activate the ‘drop-down mechanism’. A certain period of time has to be consumed before the decision is reached by the Conference of Parties. Since the condition of initiation of ‘drop-down’ mechanism is codified, the engagement shall be deployed on a compulsory basis, without requiring the Conference of Parties, in order to help the air transport sectors in time. Under the current mechanism, before the due process is done, the operators will have to suffer their fleets grounded due to the breach of insurance requirements.

2.5 Safe harbor

During the discussion of ‘additional compensation’ (breakability), ‘recourse’, ‘State non-party’ and ‘exclusive remedy’, i.e. the focal points of the Unlawful Interference Convention, there were overwhelming debates and considerations during the Plenary. The Special Group,[316] assigned by the Plenary, was tasked to propose solutions in respect of those focal points. A compromise package (the “Compromise Package”),[317] proposed by the Special Group, received the support from the majority of States without a word being changed in the package. The balance here was thought to be delicately designed in connection with each clause in the package because amending one clause would affect the others. If one clause had been changed, the perfect balance would disappear.

[315] *Unlawful Interference Convention*, *supra* note 62, art. 9 and art. 10(4)
[316] Members of the Special Group are Brazil, Canada, China, France, Germany, Japan, Singapore, South Africa, Sweden, United Arab Emirates, United Kingdom, and United States. Observers of the Special Group are IATA, IUAI, and AWG.
[317] ICAO DCCD Flimsy No.3.

France and Germany, thinking this package still more protective towards the operators and less favorable to the victims, voiced their dissatisfaction. IATA, together with its member airlines, did not support this Compromise Package, on the basis that it did not provide sufficient protection for the air transport industry. Since not all parties were satisfied by the Compromise Package, was a balance struck here?

2.5.1 The notion of additional compensation (breakability)

The consensus reached by the majority of States in the Plenary, in respect of three layers, was that the first layer is operator's liability,[318] the second layer is the International Fund,[319] and the third layer is the additional payment by the operator.[320] The idea of the third layer of States was rejected by the majority and the 'additional compensation' was defined as the third layer which means the operator's responsibility to cover the compensation beyond the limit of its liability. And the additional compensation only applies when the person claiming compensation proves that the operator or its employee has contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.[321] Nevertheless, additional compensation was intended to deprive the operators of liability limits. Therefore, it is an exception to the first layer, rather than a new third layer.

As aforementioned, the third layer, with a sudden shift, has been changed from the State to the operator. Will the States still act as the third layer when there is no additional compensation (breakability) applicable and the sum of claims is far beyond the first layer plus the second layer? It will depend on the State where the damages took place and the extent to which the Contracting States will come to the assistance of a State in time of need.

[318] *Unlawful Interference Convention*, *supra* note 62, art. 4.
[319] *Ibid*, art.18
[320] *Ibid*, art. 23.

2.5.2 From 'senior management' to 'employee'

Breakability has been the issue frustrating the aviation industry in the past discussion of the draft of the Unlawful Interference Convention. Breakability is believed to deviate from the concept of 'channeling liability' which is the cornerstone of the Unlawful Interference Convention agreed by the majority of States. Nonetheless, breakability has been objected to by some States claiming that absolute unbreakability breaches inalienable rights to the enjoyment of property and is thereby unconstitutional.[322] Seesawing between different positions, a solution was achieved by linking breakability to 'senior management' of the operator.

After the ICAO 33rd Legal Committee, the proposed breakability was linked to the conducts of the 'senior management' and the 'servants or agents' of the operator.[323] One of the safe harbors designed for the operators is that the senior management will be presumed not to have been reckless when the operator proves that a system was applied to ensure compliance with applicable regulatory requirements established. The liability of the operator in respect of the commitment of unlawful interference of its servants or agents can be immune when the operator proves that a system was established and applied to ensure effective selection of servants and agents.[324]

In the Diplomatic Conference, France, Germany, the Netherlands and Austria were in line to criticize the safe harbor structure as giving too much protection for the airlines. On the other hand, the United States, Singapore, Canada and China took a more neutral position and preferred to maintain the draft text subject to certain modifications.

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[321] *Ibid*, art. 23(2).
[322] IUAI, *supra* note 297, at 2.
[323] *Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*, ICAO DCCD DOC No.3, art. 23(2) and 23(5). [Draft Unlawful Interference Convention]

As the Singapore delegation well explained, the airlines will have to provide the first layer and help to collect the second layer under the Unlawful Interference Convention. The Singapore delegation further argued that should a lower standard of safe harbor be used here to easily trigger the breakability given what the airlines are already required to comply? ICAO security regulations (e.g. Annex 17 to the Convention on International Civil Aviation) have been in place to monitor something not properly taken. Airlines do not have the resources to monitor developments in terrorism, let alone identify terrorists. Secondly, airlines are unable to get access to the government intelligence unless the government is willing to share, e.g. no-fly list. As the private sector, it will be difficult for the airlines to prevent such intentional penetration which is supposed to be prevented and defended by the governments. Hence, the safe harbor built on 'senior management' of the operator is necessary for not overburdening the operator.

However, in the Compromise Package, 'senior management' has been replaced by 'employee'.[325] That is to say the possibility of breaking the limit of the operator's liability for compensation has risen much higher since any employee may be found to be covered by this clause if he has contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result. Therefore, the removal of the senior management threshold will leave the operator with more possibilities to trigger its unlimited liability since airlines will face significant difficulties monitoring potential terrorism linked by employees.

2.5.3 Defences of the operator

In the Draft Unlawful Interference Convention, if a State Party opted for a 'commonly

[324] *Ibid*, art. 23 (3) and 23 (5).
[325] *Unlawful Interference Convention*, *supra* note 62, art. 23(2).

applied standard', and declared to the Depository in advance, the operator shall conclusively be deemed to not have been reckless for an event causing damage in that State Party provided in the area of security, it can prove a system to ensure compliance with such 'commonly applied standard' was established and audited. Such presumption shall not be conclusive if, prior to the event, the competent authority in that State Party has issued a finding that the operator has not met all applicable security requirements established by that State and the finding remains valid at the time of the event.[326]

In the Joint Industry Paper submitted to the Diplomatic Conference,[327] it was proposed to adopt the IATA Operational Safety Audit ("IOSA") as the 'commonly applied standard'. As of April 1, 2009, all IATA member airlines (224) comprising of 93 % scheduled international air traffic have satisfied the IOSA requirements and are entered on the IOSA Registry,[328] which can be convincingly referred to as the 'common industry standards'.

Nevertheless, in the Compromise Package, this option was removed. All the defences of the operator have to be proved subsequently to the damage taking place, for example, evidence of the implementation and operation of an appropriate system for the selection and monitoring of its employees to be established and implemented. There is always a glitch somewhere between the cause of chain during the operation of the operator which may be dissatisfying to the court of the State where the damages took place irrespective of whether the operator has fulfilled the 'common industry standard' in advance or not. It is generally difficult for operators to satisfy the burden of proof of compliance with regulatory requirements after a terrorist attack since such an event will be at least in part be remotely related to some failure of the operator's system or compliance with such a system,

[326] *Draft Unlawful Interference Convention*, *supra* note 323, art. 23 (5).
[327] Joint Industry Paper, ICAO DCCD Doc No. 10.
[328] IATA News 1 April 2009 No. 14, "All IATA Airlines Are IOSA Registered-An Important Mark of

thereby leaving the cap easy to break.[329]

2.6 Right of Recourse

2.6.1 Operator

In the Draft Unlawful Interference Convention, an operator liable for damage has a right of recourse against any person who has committed the act of unlawful interference and against any other person. Such claims can not be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.[330] The operator is able to file against not only the perpetrator but also against any other person. Furthermore, the right of recourse of the operator was intended to be inferior to the compensation of victims by means of the deferral of enforcement of judgment.

During the Plenary, with the introduction of the Compromise Package, the compensation of victims and the recourse of the operator were revised as parallel methods to allow operators to engage settlement negotiation with the victims while pursuing recourse against the perpetrators. The parallel methods will avoid the perpetrators benefiting from the prolonged process of victims' settlement. In addition, the right of recourse of the operator is allowed to target any person who has committed, 'organized' or 'financed' the act of unlawful interference, and any other person.

The recourse to any other person, e.g. airports, service providers, and security companies, is likely to result in accumulated losses in the industry which may ultimately bring down the commercial insurability. As the notion of 'channeling liability' has been accepted, it should be interpreted consistently throughout the entire Unlawful Interference Convention. That is to say, all the claims shall be channeled to the operator and the operator only. The

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Quality".

[329] Aon Ltd., Airline Insurance Market News April 2009, at 3.

[330] *Draft Unlawful Interference Convention, supra* note 323, art. 24 (1).

purpose, which was set up in the Preamble to protect the aviation industry from the consequences of damage caused by the unlawful interference with the aircraft, will not be achieved due to the ripple effect caused by the recourse against any other entity.

2.6.2 International Fund

Similar to the recourse of the operator, the Draft Unlawful Interference Convention provided the International Fund with a right of recourse against any person, who has committed the act of unlawful interference, and against the operator. Such claim can not be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.[331]

In the Compromise Package, dancing at the same pace with the operator, the right of recourse of the International Fund was revised to enable claims against the perpetrator, the operator and 'any other person'. During the Plenary, the United States, in line with AWG, pointed out that should recourse against other entities (persons) be included, the related notion, e.g. safe harbor, must also be taken into consideration for the other entities (persons). In the end, the recourse against any other person was accepted subject to one limitation, i.e. insurance availability to that person. This limitation can be removed provided that such person has contributed to the occurrence of the event by an act or omission done recklessly and with knowledge that damage would probably result. Hence it will leave such person facing losses without proper insurance coverage and ending up in insolvency.

In the Unlawful Interference Convention, such recourse may not be pursued if the Conference of Parties determines that to do so would give rise to the application of the

[331] *Ibid*, art. 25(1).

'drop-down mechanism'.[332] As is the problem of the employment of the 'drop-down mechanism', this limit of recourse is decided on a discretionary basis which is uncertain, unpredictable and inefficient to the continuous operation of the air transport sector and insurance market as a whole.

2.6.3 Restrictions on right of recourse

(1) insurance availability

The right of recourse can only be exercised against any other person (entity) who could have been covered by insurance available on a commercially reasonable basis.[333] In other words, if the other person is unable to obtain insurance cover on a commercially reasonable basis, neither the operator nor the International Fund can pursue claims against such person. The resulting question is what it means for 'the insurance to be available on a 'commercially reasonable basis'. There are two kinds of explanations:

One view is that this clause limits recourse to situations where the other entity's insurance may be unavailable at the time of the catastrophe. If such cover is cancelled or offered at a non-commercial price, it is necessary to limit the right of recourse to prevent accumulated industry losses in the aviation industry. Another view is that the right of recourse is limited to the reasonable insurance coverage which the other entity purchased (up to his policy limit).

The situation becomes more complicated by attempts to determine what constitutes commercially reasonable insurance coverage. This will be decided by the law of the place where the accident took place, *lex loci delicti*. To the person against whom the recourse was pursued, the coverage may be set at a level which was chosen according to various

[332] *Unlawful Interference Convention*, *supra* note 62, art. 26(3).
[333] *Ibid*, art. 26(1).

concerns, including capital of the operator, contractual obligations, geographical exposure, regulatory requirements and other substantive factors. Therefore, the court may find the coverage purchased is not commercially reasonable at a different point of view and may interpret that the insurance is not sufficient monetarily or in coverage. Such a court interpretation will further expose that entity to liability exceeding his insurance coverage.[334]

(2) Exception to the restriction

During the Diplomatic Conference, some States expressed explicitly their preference that the operator should be able to proceed recourse against any contributory person, e.g. manufacturers. On the other hand, the voice of the aviation industry has opposed such a proposal. The solution sought out here is to protect the other person under the umbrella of his insurance coverage but such protection can be removed if the other person is proved to have contributed to the occurrence of the event by an act or omission done recklessly and with knowledge that damage would probably result.[335]

Such exception to the restriction of recourse may expose such parties, e.g. airports, service providers, air traffic controllers and security companies, to liability in excess of their insurance coverage. It is contradictory to the concept of channeling which was intended to avoid accumulated losses that may topple entire air transportation sectors.

For the sustainability of the whole air transportation sector and the insurance sector, the notion of 'channeling' was accepted by the aviation industry. If the notion of channeling can not be fully maintained, the whole sectors will still suffer the accumulated losses which may lead to the breakdown of the insurance market. Such a breakdown is something the

[334] Sean Gates and George Leloudas, "Diplomatic Conference ICAO, Montreal, April 2009", at 1.
[335] *Unlawful Interference Convention*, *supra* note 62, art. 26(2).

architects attempted to prevent by the promulgation of Unlawful Interference Convention. To prevent the recourse of the International Fund from causing the breakdown of the insurance market and thus triggering the 'drop-down' mechanism, the Conference of Party may determine that the International Fund should not pursue such recourse against that person. The rationale here was well explained by the delegation of Sweden that due to the limited coverage of war risk insurance, the recourse of the International Fund may exhaust such coverage by pursuing the recourse and therefore trigger the 'drop-down' mechanism itself which may cause the International Fund to shoulder more potential responsibility by its recourse. We may have a mechanism to prevent such insurance breakdown. But as with the activation of the drop-down mechanism, such prevention is on a discretionary basis, the aviation industry will continue to be plagued by uncertainty and unforeseeability.

Furthermore, that entity may not have the same levels of insurance coverage as the operator. From previous experience, in a ground handling agreement (serving aircraft McDonnell Douglas 82 and Boeing 757), the liability insurance coverage required for a handling company is US$ 10 million per occurrence for general risks which is far less than an operator's general third party liability coverage (e.g. liability coverage of Boeing 757 aircraft can be more than US$ 500 million).

	Renewals			Premium				Composition		
	2008	2009	% change	2008 (US$m)	2009 (US$m)	% change (US$)	% change (RC)	Manf %	Service Provider %	Airport %
US$2bn+	17	16	-6%	295.35	306.56	4%	3%	95%	0%	5%
US$1.5-1.99bn	22	19	-14%	102.00	98.73	-3%	-2%	75%	0%	25%
US$1-1.49bn	97	102	5%	214.75	209.92	-2%	2%	69%	10%	21%
US$750-999m	52	41	-21%	66.12	61.65	-7%	-3%	66%	11%	23%
US$500-749m	36	40	11%	59.42	56.79	-4%	3%	60%	20%	20%
US$0-499m	23	27	17%	52.24	48.85	-6%	-2%	75%	9%	16%
Total/Average	247	245	-1%	789.88	782.49	-4%	-2%	79%	6%	15%

Source: Aon Ltd.[336]

The chart above clearly shows the allocation of liability limit purchased by manufacturers, service providers and airports in 2009. Liability limits in excess of US$2 billion are dominated by manufacturers. Airports located relatively in the segment of US$500 to US$ 1.99 billion while the service providers situated comparatively in the US$500 to US$ 749 million segment. For carriers, liability limits can be up to US$ 2 billion,[337] which is beyond the coverage of most airports or service providers. In addition, such entities, e.g. airport, air traffic controller or security company, usually serve multiple clients which may result in multiple risks but such risks are still under the same policy limit unless additional coverage is sought with the premium rising significantly.

Therefore, it is crucial and difficult for the air transport sectors, excluding the operator, to deal with the recourse if applicable. Not having enough coverage or having coverage with an unaffordable premium will both be fatal to their continuous operation. And what follows will be the accumulated losses for the entire insurance market and the uninsurability for all air transport sectors.

[336] Aon Ltd., *supra* note 151, at 36.
[337] Impact of the Proposed Unlawful Interference Convention (ICAO DCCD Doc No. 3) on Aviation Insurance presented by IUAI, ICAO DCCD Doc No. 12.

V Conclusion

Almost a decade after the question of third party liability was placed onto the working programme of the ICAO Legal Committee in 2000, the Unlawful Interference Convention and the General Risk Convention were tasked to provide protection for both the victims and the aviation industry. In the initial period, the events of September 11, 2001 drew worldwide attention to this matter and catalyzed the process of the Modernization of the Rome Convention 1952.

In the Diplomatic Conference, the author had the opportunity to evidence the whole process of the birth of these two conventions. All the negotiations, compromises, discussions, debate, interventions, understandings, and misunderstandings were part of the history known as the 'travaux préparatoires'. With all the knowledge, wisdom and expertise available, two novel international civil aviation conventions were established to strike the best balance and find the highest common factor between victims and the aviation industry. This process required and incorporated many compromises.

In light of those compromises in the Conventions, most States still have no long term solution for War Risk Insurance but only rely on the insurance coverage of the airlines. And will all the airlines qualify the adequate insurance requirement stipulated in the Conventions? There is no legal definition for 'adequate' in the Conventions nor is there any common industry standard of 'adequate insurance'. Hence the insurance policy the airline holds will be put into test when such airline encounters an unlawful interference event. Nevertheless, such unlawful interference event, if WMD is involved, will highly likely trigger the 7-day cancellation notice from the insurers and leave the airlines exposed to uninsured risks.

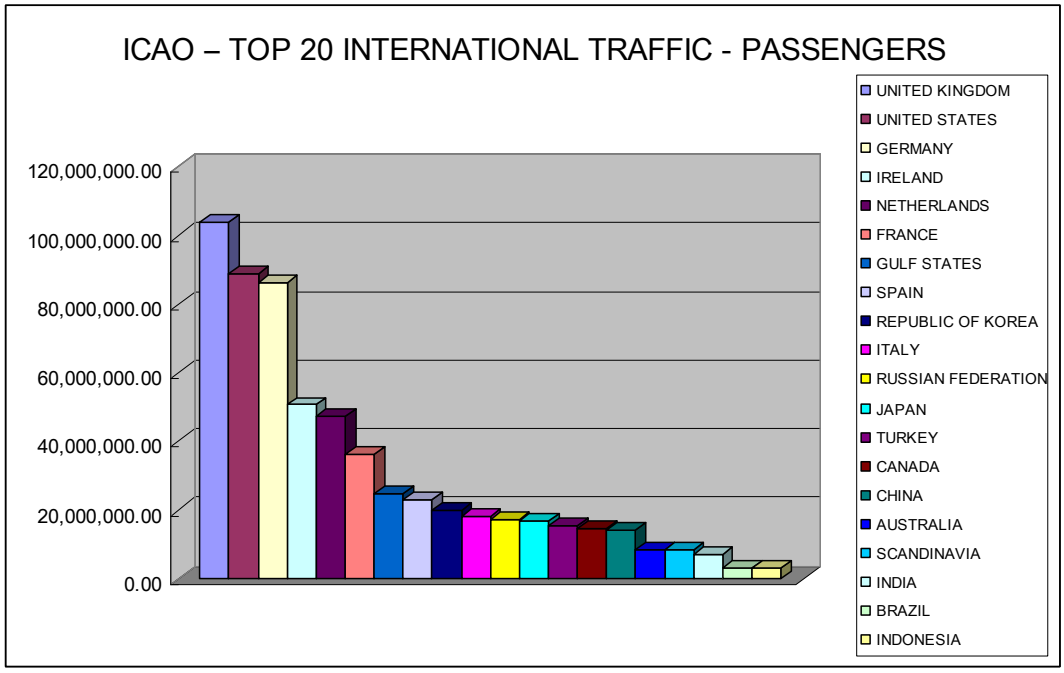
In addition, the current insurance coverage amount airlines have may not be adequate for covering all the compensation for damages and injuries in the Conventions where new compensable categories were inserted compared to the Rome Convention 1952 and the Montreal Convention 1999. It is more concerned that under the standard insurance policy wording AVN48C and AVN48D, there is no coverage or only limited coverage provided for WMD events while in the Conventions only nuclear incidents are excluded from the operator's liability. All the issues observed in previous discussions clearly point out that the Conventions did not solve all the old problems but created new ones for the airline industry and the insurance market.

However, the Conventions did update the Rome Convention Regime with important features. The MTOW basis mirroring Regulation (EC) No785/2004 was introduced as the limit of the operator's liability. The corner stone of the Unlawful Interference Convention, 'channeling liability' was basically accepted but with conflicts, such as breakability and recourse. The International Fund was structured, following the IOPC Funds, to provide compensation as the second layer. The third layer was established on the additional compensation from the operator, but not on the State as initially agreed. These important features were intended to modernize the Rome Convention Regime. Certainly, these features updated the Rome Convention Regime but many of them were not in the way originally designed.

At the end of the Diplomatic Conference, there were six countries which immediately signed the Conventions, namely Congo, Ivoire, Ghana, Serbia, Uganda and Zambia. Others, e.g. Australia, China, Canada, France, Netherlands, Singapore, the United Kingdom and the United States, only signed the Final Act.[338]

[338] Final Act, ICAO DCCD Doc 44.

The common threshold for the Unlawful Interference Convention and the General Risk Convention entering into force is the ratification by thirty five countries[339] which is higher than the five ratifications of the Rome Convention 1952 and the thirty ratifications of the Montreal Convention 1999.[340] As for the Unlawful Interference Convention, it has one more financial threshold. In addition to thirty-five ratifications, for the viability of the International Fund which is the financial heart of the Unlawful Interference Convention, it is required to have the total number of passengers departing in the previous year from airports in the States that have ratified, accepted, approved or acceded at least 750,000,000. Such a passenger number is the result by dividing 3 billion SDR, which is the maximum compensation margin stipulated in the Unlawful Interference Convention, into 4 years and with a surcharge of one SDR per passenger.



According to the IATA statistics of 2008, the world top 20 transporting counties,

[339] Unlawful Interference Convention, *supra* note 62, art. 40. General Risk Convention, *supra* note 61, art. 23.
[340] Rome Convention 1952, *supra* note 3, art. 33. Montreal Convention 1999, *supra* note 65, art. 53.

comprising 72 percent of world international air traffic, represented 618,179,384 passengers last year as shown by the above chart.[341] In order to achieve the number of 750 million, the participation of the world top 20 transporting countries is vital. Nevertheless, some of these countries, especially those in Europe, are not favorable to the text of the Unlawful Interference Convention which was claimed to be under protective of the victims on the ground vis à vis passengers. Without support from Europe (among the top 20 countries, France, Germany and Netherlands representing almost 170 million international passengers have voiced their opposition), the number of 750 million international passengers is not easy to achieve.

As aforementioned, the Conventions may bring highly potential risks to the aviation industry, especially the terrorist related risks which shall fall upon the shoulder of the State and shall be covered by a global scheme. Nevertheless, the Conventions did modernize the Rome Convention 1952 by introducing new mechanisms and concepts. Bearing the pros and cons of the Conventions in mind, it is sincerely hoped that the Conventions will gather enough support not only to enter into force but also to work as a functional international mechanism under the unified legal regime for the victims on the ground and also for the aviation industry.

[341] The top twenty countries are United Kingdom, United States, Germany, Ireland, Netherlands, France, Gulf States, Spain, Republic of Korea, Scandinavia, Italy, Russian Federation, Japan, Turkey, Canada, China, Australia, India, Brazil, and Indonesia.

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DCCD Doc No. 42
1/5/09

INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING the need to ensure adequate compensation for third parties who suffer damage resulting from events involving an aircraft in flight;

RECOGNIZIN*G* the need to modernize the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, Signed at Rome on 7 October 1952, and the *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed at Rome on 7 October 1952*, Signed at Montreal on 23 September 1978;

RECOGNIZING the importance of ensuring protection of the interests of third-party victims and the need for equitable compensation, as well as the need to enable the continued stability of the aviation industry;

REAFFIRMING the desirability of the orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944; and

CONVINCED that collective State action for further harmonization and codification of certain rules governing the compensation of third parties who suffer damage resulting from events involving aircraft in flight through a new Convention is the most desirable and effective means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

(a) an "act of unlawful interference" means an act which is defined as an offence 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, and any amendment in force at the time of the event;

(b) an "event" occurs when damage is caused by an aircraft in flight other than as a result of an act of unlawful interference;

(c) an aircraft is considered to be "in flight" at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading;

(d) "international flight" means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there is a break in the flight, or within the territory of one State if there is an intended stopping place in the territory of another State;

(e) "maximum mass" means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used;

(f) "operator" means the person who makes use of the aircraft, provided that if control of the navigation of the aircraft is retained by the person from whom the right to make use of the aircraft is derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority;

(g) "person" means any natural or legal person, including a State;

(h) "State Party" means a State for which this Convention is in force; and

(i) "third party" means a person other than the operator, passenger or consignor or consignee of cargo.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, other than as a result of an act of unlawful interference.

2. If a State Party so declares to the Depositary, this Convention shall also apply where an aircraft in flight other than on an international flight causes damage in the territory of that State, other than as a result of an act of unlawful interference.

3. For the purposes of this Convention:

(a) damage to a ship in or an aircraft above the High Seas or the Exclusive Economic Zone shall be regarded as damage occurring in the territory of the State in which it is registered; however, if the operator of the aircraft has its principal place of business in the territory of a State other than the State of Registry, the damage to the aircraft shall be regarded as having occurred in the territory of the State in which it has its principal place of business; and

(b) damage to a drilling platform or other installation permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as having occurred in the territory of the State which has jurisdiction over such platform or installation in

accordance with international law including the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982.

4. This Convention shall not apply to damage caused by State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft.

Chapter II

Liability of the operator and related issues

Article 3 — Liability of the operator

1. The operator shall be liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight.

2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event 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.

3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

4. Damage to property shall be compensable.

5. Environmental damage shall be compensable, in so far as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

6. No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the *Paris Convention on Third Party Liability in the Field of Nuclear Energy* (29 July 1960) or for nuclear damage as defined in the *Vienna Convention on Civil Liability for Nuclear Damage* (21 May 1963), and any amendment or supplements to these Conventions in force at the time of the event.

7. Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

8. An operator 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.

Article 4 — Limit of the operator's liability

1. The liability of the operator arising under Article 3 shall not exceed for an event the following limit based on the mass of the aircraft involved:

(a) 750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;

(b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;

(c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;

(d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;

(e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;

(f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;

(g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;

(h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;

(i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;

(j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.

2. If an event involves two or more aircraft operated by the same operator, the limit of liability in respect of the aircraft with the highest maximum mass shall apply.

3. The limits in this Article shall only apply if the operator proves that the damage:

(a) was not due to its negligence or other wrongful act or omission or that of its servants or agents; or

(b) was solely due to the negligence or other wrongful act or omission of another person.

Article 5 — Priority of compensation

If the total amount of the damages to be paid exceeds the amounts available according to Article 4, paragraph 1, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily injury and mental injury, in the first instance. The remainder, if any, of the total amount payable shall be awarded proportionately among the claims in respect of other damage.

Article 6 — Events involving two or more operators

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.

2. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.

3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 7 ─ Court costs and other expenses

1. The court may award, in accordance with its own law, the whole or part of the court costs and of the other expenses of the litigation incurred by the claimant, including interest.

2. Paragraph 1 shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the claimant within a period of six months from the date of the event causing the damage, or before the commencement of the action, whichever is the later.

Article 8 — Advance payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently payable as damages by the operator.

Article 9 — Insurance

1. Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention.

2. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other States Parties as it applies to its own operators.

Chapter III

Exoneration and recourse

Article 10 — Exoneration

If the operator proves that the damage was caused, or contributed to, by the negligence or other wrongful act or omission of a claimant, or the person from whom he or she derives his or her rights, the operator shall be wholly or partly exonerated from its liability to that claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

Article 11 — Right of recourse

Subject to Article 13, nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any person.

Chapter IV

Exercise of remedies and related provisions

Article 12 — Exclusive remedy

1. 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 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.

2. Article 3, paragraphs 6, 7 and 8, shall apply to any other person from whom the damages specified in those paragraphs would otherwise be recoverable or compensable, whether under this Convention or in tort or otherwise.

Article 13 — Exclusion of 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 relating to third party damage.

Article 14 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4, paragraph 1.

Article 15 — Review of limits

1. Subject to paragraph 2 of this Article, the sums prescribed in Article 4, paragraph 1, shall be reviewed by the Depositary 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 this 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 Special Drawing Right mentioned in Article 14.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify the States Parties of a revision of the limits of liability. Any such revision shall become effective six months after the notification to the States Parties, unless a majority of the States Parties register their disapproval. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

Article 16 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party in whose territory the damage occurred.

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territory of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 17 — Recognition and enforcement of judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 16 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

(a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;

(b) the defendant was not served with notice of the proceedings in such time and manner as to allow him or her to prepare and submit a defence;

(c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognized as final and conclusive under the law of the State Party where recognition or enforcement is sought;

(d) the judgement has been obtained by fraud of any of the parties; or

(e) the right to enforce the judgement is not vested in the person by whom the application is made.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.

5. Where a judgement is enforceable, payment of any court costs and other expenses incurred by the plaintiff, including interest recoverable under the judgement, shall also be enforceable.

Article 18 – Regional and multilateral agreements on the recognition and enforcement of judgements

1. States Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.

2. States Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.

3. The provisions of this Chapter shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 19 — Period of limitation

1. The right to compensation under Article 3 shall be extinguished if an action is not brought within two years from the date of the event which caused the damage.

2. The method of calculating such two-year period shall be determined in accordance with the law of the court seised of the case.

Article 20 — Death of person liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER V

Final clauses

Article 21 – Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature in Montréal on 2 May 2009 by States participating in the International Conference on Air Law held at Montréal from 20 April to 2 May 2009. After 2 May 2009, the Convention shall be open to all States for signature at the Headquarters of the

International Civil Aviation Organization in Montréal until it enters into force in accordance with Article 23.

2. This Convention shall be subject to ratification by States which have signed it.

3. Any State which does not sign this Convention may accept, approve or accede to it at any time.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

Article 22 – Regional Economic Integration Organizations

1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a State Party to the extent that that Organization has competence over matters governed by this Convention.

2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “State Party” or “States Parties” in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.

Article 23 – Entry into force

1. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instruments. An instrument deposited by a Regional Economic Integration Organization shall not be counted for the purpose of this paragraph.

2. For other States and for other Regional Economic Integration Organizations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

Article 24 – Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary; in respect of damage contemplated in Article 3 arising from an event which occurred before the expiration of the one hundred and eighty day period, the Convention shall continue to apply as if the denunciation had not been made.

Article 25 – Relationship to other treaties

The rules of this Convention shall prevail over any rules in the following instruments which would otherwise be applicable to damage covered by this Convention:

(a) the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,* Signed at Rome on 7 October 1952; or

(b) the *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed at Rome on 7 October 1952*, Signed at Montréal on 23 September 1978.

Article 26 – States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which this Convention applies.

3. For a declaration made under Article 2, paragraph 2, by a State Party having two or more territorial units in which different systems of law are applicable, it may declare that this Convention shall apply to damage to third parties that occurs in all its territorial units or in one or more of them and may modify this declaration by submitting another declaration at any time.

4. In relation to a State Party which has made a declaration under this Article:

(a) the reference in Article 8 to "the law of the State" shall be construed as referring to the law of the relevant territorial unit of that State; and

(b) references in Article 14 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State.

Article 27 – Reservations and declarations

1. No reservation may be made to this Convention but declarations authorized by Article 2, paragraph 2, Article 22, paragraph 2, and Article 26 may be made in accordance with these provisions.

2. Any declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

Article 28 – Functions of the Depositary

The Depositary shall promptly notify all signatories and States Parties of:

(a) each new signature of this Convention and the date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and the date thereof;

(c) each declaration and the date thereof;

(d) the modification or withdrawal of any declaration and the date thereof;

(e) the date of entry into force of this Convention;

(f) the date of the coming into force of any revision of the limits of liability established under this Convention; and

(g) any denunciation with the date thereof and the date on which it takes effect.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montréal on the 2nd day of May of the year two thousand and nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all Contracting States to this Convention, as well as to all States Parties to the Conventions and Protocol referred to in Article 25.

— END —

DCCD Doc No. 43
1/5/09

INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING the serious consequences of acts of unlawful interference with aircraft which cause damage to third parties and to property;

RECOGNIZING that there are currently no harmonized rules relating to such consequences;

RECOGNIZING the importance of ensuring protection of the interests of third-party victims and the need for equitable compensation, as well as the need to protect the aviation industry from the consequences of damage caused by unlawful interference with aircraft;

CONSIDERING the need for a coordinated and concerted approach to providing compensation to third-party victims, based on cooperation between all affected parties;

REAFFIRMING the desirability of the orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944; and

CONVINCED that collective State action for harmonization and codification of certain rules governing compensation for the consequences of an event of unlawful interference with aircraft in flight through a new Convention is the most desirable and effective means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

(a) an "act of unlawful interference" means an act which is defined as an offence 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 Montréal on 23 September 1971, and any amendment in force at the time of the event;

(b) an "event" occurs when damage results from an act of unlawful interference involving an aircraft in flight;

(c) an aircraft is considered to be "in flight" at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading;

(d) "international flight" means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there is a break in the flight, or within the territory of one State if there is an intended stopping place in the territory of another State;

(e) "maximum mass" means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used;

(f) "operator" means the person who makes use of the aircraft, provided that if control of the navigation of the aircraft is retained by the person from whom the right to make use of the aircraft is derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The operator shall not lose its status as operator by virtue of the fact that another person commits an act of unlawful interference;

(g) "person" means any natural or legal person, including a State;

(h) "senior management" means members of an operator's supervisory board, members of its board of directors, or other senior officers of the operator who have the authority to make and have significant roles in making binding decisions about how the whole of or a substantial part of the operator's activities are to be managed or organized;

(i) "State Party" means a State for which this Convention is in force; and

(j) "third party" means a person other than the operator, passenger or consignor or consignee of cargo.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, as a result of an act of unlawful interference. This Convention shall also apply to such damage that occurs in a State non-Party as provided for in Article 28.

2. If a State Party so declares to the Depositary, this Convention shall also apply to damage to third parties that occurs in the territory of that State Party which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.

3. For the purposes of this Convention:

(a) damage to a ship in or an aircraft above the High Seas or the Exclusive Economic Zone shall be regarded as damage occurring in the territory of the State in which it is registered; however, if the operator of the aircraft has its principal place of business in the territory of a State other than the State of Registry, the damage to the aircraft shall be regarded as having occurred in the territory of the State in which it has its principal place of business; and

(b) damage to a drilling platform or other installation permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as having occurred in the territory of the State Party which has jurisdiction over such platform or installation in accordance with international law, including the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982.

4. This Convention shall not apply to damage caused by State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft.

Chapter II

Liability of the operator and related issues

Article 3 — Liability of the operator

1. The operator shall be liable to compensate for damage within the scope of this Convention upon condition only that the damage was caused by an aircraft in flight.

2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.

3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

4. Damage to property shall be compensable.

5. Environmental damage shall be compensable, in so far as such compensation is provided for under the law of the State in the territory of which the damage occurred.

6. No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the *Paris Convention on Third Party Liability in the Field of Nuclear Energy* (29 July 1960) or for nuclear damage as defined in the *Vienna Convention on Civil Liability for Nuclear Damage* (21 May 1963), and any amendment or supplements to these Conventions in force at the time of the event.

7. Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 4 — Limit of the operator's liability

1. The liability of the operator arising under Article 3 shall not exceed for an event the following limit based on the mass of the aircraft involved:

(a) 750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;

(b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;

(c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;

(d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;

(e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;

(f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;

(g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;

(h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;

(i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;

(j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.

2. If an event involves two or more aircraft operated by the same operator, the limit of liability in respect of the aircraft with the highest maximum mass shall apply.

Article 5 — Events involving two or more operators

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.

2. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.

3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 6 — Advance payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently payable as damages by the operator.

Article 7 — Insurance

1. Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. If such insurance or guarantee is not

available to an operator on a per event basis, the operator may satisfy this obligation by insuring on an aggregate basis. States Parties shall not require their operators to maintain such insurance or guarantee to the extent that they are covered by a decision made pursuant to Article 11, paragraph 1(e) or Article 18, paragraph 3.

2. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other States Parties as it applies to its own operators. Proof that an operator is covered by a decision made pursuant to Article 11, paragraph 1(e) or Article 18, paragraph 3, shall be sufficient evidence for the purpose of this paragraph.

Chapter III

The International Civil Aviation Compensation Fund

Article 8 — The constitution and objectives of the International Civil Aviation Compensation Fund

1. An organization named the International Civil Aviation Compensation Fund, hereinafter referred to as "the International Fund", is established by this Convention. The International Fund shall be made up of a Conference of Parties, consisting of the States Parties, and a Secretariat headed by a Director.

2. The International Fund shall have the following purposes:

(a) to provide compensation for damage according to Article 18, paragraph 1, pay damages according to Article 18, paragraph 3, and provide financial support under Article 28;

(b) to decide whether to provide supplementary compensation to passengers on board an aircraft involved in an event, according to Article 9, paragraph (j);

(c) to make advance payments under Article 19, paragraph 1, and to take reasonable measures after an event to minimize or mitigate damage caused by an event, according to Article 19, paragraph 2; and

(d) to perform other functions compatible with these purposes.

3. The International Fund shall have its seat at the same place as the International Civil Aviation Organization.

4. The International Fund shall have international legal personality.

5. In each State Party, the International Fund shall be recognized as a legal person capable under the laws of that State of assuming rights and obligations, entering into contracts, acquiring and disposing of movable and immovable property and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director of the International Fund as the legal representative of the International Fund.

6. The International Fund shall enjoy tax exemption and such other privileges as are agreed with the

host State. Contributions to the International Fund and its funds, and any proceeds from them, shall be exempted from tax in all States Parties.

7. The International Fund shall be immune from legal process, except in respect of actions relating to credits obtained in accordance with Article 17 or to compensation payable in accordance with Article 18. The Director of the International Fund shall be immune from legal process in relation to acts performed by him or her in his or her official capacity. The immunity of the Director may be waived by the Conference of Parties. The other personnel of the International Fund shall be immune from legal process in relation to acts performed by them in their official capacity. The immunity of the other personnel may be waived by the Director.

8. Neither a State Party nor the International Civil Aviation Organization shall be liable for acts, omissions or obligations of the International Fund.

Article 9 — The Conference of Parties

The Conference of Parties shall:

(a) determine its own rules of procedure and, at each meeting, elect its officers;

(b) establish the Regulations of the International Fund and the Guidelines for Compensation;

(c) appoint the Director and determine the terms of his or her employment and, to the extent this is not delegated to the Director, the terms of employment of the other employees of the International Fund;

(d) delegate to the Director, in addition to powers given in Article 11, such powers and authority as may be necessary or desirable for the discharge of the duties of the International Fund and revoke or modify such delegations of powers and authority at any time;

(e) decide the period for, and the amount of, initial contributions and fix the contributions to be made to the International Fund for each year until the next meeting of the Conference of Parties;

(f) in the case where the aggregate limit on contributions under Article 14, paragraph 3, has been applied, determine the global amount to be disbursed to the victims of all events occurring during the time period with regard to which Article 14, paragraph 3, was applied;

(g) appoint the auditors;

(h) vote budgets and determine the financial arrangements of the International Fund including the Guidelines on Investment, review expenditures, approve the accounts of the International Fund, and consider the reports of the auditors and the comments of the Director thereon;

(i) examine and take appropriate action on the reports of the Director, including reports on claims for compensation, and decide on any matter referred to it by the Director;

(j) decide whether and in what circumstances supplementary compensation may be payable by the International Fund to passengers on board an aircraft involved in an event in circumstances where the damages recovered by passengers according to applicable law did not result in the recovery of compensation commensurate with that available to third parties

under this Convention. In exercising this discretion, the Conference of Parties shall seek to ensure that passengers and third parties are treated equally;

(k) establish the Guidelines for the application of Article 28, decide whether to apply Article 28 and set the maximum amount of such assistance;

(l) determine which States non-Party and which intergovernmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Conference of Parties and subsidiary bodies;

(m) establish any body necessary to assist it in its functions, including, if appropriate, an Executive Committee consisting of representatives of States Parties, and define the powers of such body;

(n) decide whether to obtain credits and grant security for credits obtained pursuant to Article 17, paragraph 4;

(o) make such determinations as it sees fit under Article 18, paragraph 3;

(p) enter into arrangements on behalf of the International Fund with the International Civil Aviation Organization;

(q) request the International Civil Aviation Organization to assume an assistance, guidance and supervisory role with respect to the International Fund as far as the principles and objectives of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944, are concerned. ICAO may assume these tasks in accordance with pertinent decisions of its Council;

(r) as appropriate, enter into arrangements on behalf of the International Fund with other international bodies; and

(s) consider any matter relating to this Convention that a State Party or the International Civil Aviation Organization has referred to it.

Article 10 — The meetings of the Conference of Parties

1. The Conference of Parties shall meet once a year, unless a Conference of Parties decides to hold its next meeting at another interval. The Director shall convene the meeting at a suitable time and place.

2. An extraordinary meeting of the Conference of Parties shall be convened by the Director:

(a) at the request of no less than one-fifth of the total number of States Parties;

(b) if an aircraft has caused damage falling within the scope of this Convention, and the damages are likely to exceed the applicable limit of liability according to Article 4 by more than 50 per cent of the available funds of the International Fund;

(c) if the aggregate limit on contributions according to Article 14, paragraph 3, has been reached; or

(d) if the Director has exercised the authority according to Article 11, paragraph 1 (d) or (e).

3. All States Parties shall have an equal right to be represented at the meetings of the Conference of Parties and each State Party shall be entitled to one vote. The International Civil Aviation Organization shall have the right to be represented, without voting rights, at the meetings of the Conference of Parties.

4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority vote of the States Parties present and voting. Decisions under Article 9, subparagraphs (a), (b), (c), (d), (e), (k), (m), (n) and (o) shall be taken by a two-thirds majority of the States Parties present and voting.

5. Any State Party may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly impair the ability of the International Fund to perform its functions, request the Director to convene an extraordinary meeting of the Conference of Parties. The Director may convene the Conference of Parties to meet not later than sixty days after receipt of the request.

6. The Director may convene, on his or her own initiative, an extraordinary meeting of the Conference of Parties to meet within sixty days after the deposit of any instrument of denunciation, if he or she considers that such denunciation will significantly impair the ability of the International Fund to perform its functions.

7. If the Conference of Parties at an extraordinary meeting convened in accordance with paragraph 5 or 6 decides by a two-thirds majority of the States Parties present and voting that the denunciation will significantly impair the ability of the International Fund to perform its functions, any State Party may, not later than one hundred and twenty days before the date on which the denunciation takes effect, denounce this Convention with effect from that same date.

Article 11 — The Secretariat and the Director

1. The International Fund shall have a Secretariat led by a Director. The Director shall hire personnel, supervise the Secretariat and direct the day-to-day activities of the International Fund. In addition, the Director:

(a) shall report to the Conference of Parties on the functioning of the International Fund and present its accounts and a budget;

(b) shall collect all contributions payable under this Convention, administer and invest the funds of the International Fund in accordance with the Guidelines on Investment, maintain accounts for the funds, and assist in the auditing of the accounts and the funds in accordance with Article 17;

(c) shall handle claims for compensation in accordance with the Guidelines for Compensation, and prepare a report for the Conference of Parties on how each has been handled;

(d) may decide to temporarily take action under Article 19 until the next meeting of the Conference of Parties;

(e) shall decide to temporarily take action under Article 18, paragraph 3, until the next meeting of the Conference of Parties called in accordance with Article 10, paragraph 2 (d);

(f) shall review the sums prescribed under Articles 4 and 18 and inform the Conference of Parties of any revision to the limits of liability in accordance with Article 31; and

(g) shall discharge any other duties assigned to him or her by or under this Convention and decide any other matter delegated by the Conference of Parties.

2. The Director and the other personnel of the Secretariat shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the International Fund. Each State Party undertakes to fully respect the international character of the responsibilities of the personnel and not seek to influence any of its nationals in the discharge of their responsibilities.

Article 12 — Contributions to the International Fund

1. The contributions to the International Fund shall be:

(a) the mandatory amounts collected in respect of each passenger and each tonne of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each tonne of cargo departing on a commercial flight between two airports in that State Party; and

(b) such amounts as the Conference of Parties may specify in respect of general aviation or any sector thereof.

The operator shall collect these amounts and remit them to the International Fund.

2. Contributions collected in respect of each passenger and each tonne of cargo shall not be collected more than once in respect of each journey, whether or not that journey includes one or more stops or transfers.

Article 13 — Basis for fixing the contributions

1. Contributions shall be fixed having regard to the following principles:

(a) the objectives of the International Fund should be efficiently achieved;

(b) competition within the air transport sector should not be distorted;

(c) the competitiveness of the air transport sector in relation to other modes of transportation should not be adversely affected; and

(d) in relation to general aviation, the costs of collecting contributions shall not be excessive in relation to the amount of such contributions, taking into account the diversity that exists in this sector.

2. The Conference of Parties shall fix contributions in a manner that does not discriminate between States, operators, passengers and consignors or consignees of cargo.

3. On the basis of the budget drawn up according to Article 11, paragraph 1 (a), the contributions shall be fixed having regard to:

(a) the upper limit for compensation set out in Article 18, paragraph 2;

(b) the need for reserves where Article 18, paragraph 3, is applied;

(c) claims for compensation, measures to minimize or mitigate damages and financial assistance under this Convention;

(d) the costs and expenses of administration, including the costs and expenses incurred by meetings of the Conference of Parties;

(e) the income of the International Fund; and

(f) the availability of additional funds for compensation pursuant to Article 17, paragraph 4.

Article 14 — Period and rate of contributions

1. At its first meeting, the Conference of Parties shall decide the period and the rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of this Convention for that State Party. If a State Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such declaration from the time it takes effect. The period and the rate shall be equal for all States Parties.

2. Contributions shall be fixed in accordance with paragraph 1 so that the funds available amount to 100 per cent of the limit of compensation set out in Article 18, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to 100 per cent of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which this Convention subsequently enters into force.

3. The total amount of contributions collected by the International Fund within any period of two consecutive calendar years shall not exceed three times the maximum amount of compensation according to Article 18, paragraph 2.

4. Subject to Article 28, the contributions collected by an operator in respect of a State Party may not be used to provide compensation for an event which occurred in its territory prior to the entry into force of this Convention for that State Party.

Article 15 — Collection of the contributions

1. The Conference of Parties shall establish in the Regulations of the International Fund a transparent, accountable and cost-effective mechanism supporting the collection, remittal and recovery of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens on operators and contributors to the funds of the International Fund. Contributions which are in arrears shall bear interest as provided for in the Regulations.

2. Where an operator does not collect or does not remit contributions it has collected to the International Fund, the International Fund shall take appropriate measures against such operator with a view to the recovery of the amount due. Each State Party shall ensure that an action to recover the amount due may be taken within its jurisdiction, notwithstanding in which State Party the debt actually accrued.

Article 16 — Duties of States Parties

1. Each State Party shall take appropriate measures, including imposing such sanctions as it may deem necessary, to ensure that an operator fulfils its obligations to collect and remit contributions to the International Fund.

2. Each State Party shall ensure that the following information is provided to the International Fund:

(a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party;

(b) such information on general aviation flights as the Conference of Parties may decide; and

(c) the identity of the operators performing such flights.

3. Where a State Party has made a declaration under Article 2, paragraph 2, it shall ensure that information detailing the number of passengers and quantity of cargo departing on commercial flights between two airports in that State Party, such information on general aviation flights as the Conference of Parties may decide, and the identity of the operators performing such flights, are also provided. In each case, such statistics shall be *prima facie* evidence of the facts stated therein.

4. Where a State Party does not fulfil its obligations under paragraphs 2 and 3 of this Article and this results in a shortfall in contributions for the International Fund, the State Party shall be liable for such shortfall. The Conference of Parties shall, on recommendation by the Director, decide whether the State Party shall pay for such shortfall.

Article 17 — The funds of the International Fund

1. The funds of the International Fund may only be used for the purposes set out in Article 8, paragraph 2.

2. The International Fund shall exercise the highest degree of prudence in the management and preservation of its funds. The funds shall be preserved in accordance with the Guidelines on Investment determined by the Conference of Parties under Article 9, subparagraph (h). Investments may only be made in States Parties.

3. Accounts shall be maintained for the funds of the International Fund. The auditors of the International Fund shall review the accounts and report on them to the Conference of Parties.

4. Where the International Fund is not able to meet valid compensation claims because insufficient contributions have been collected, it may obtain credits from financial institutions for the payment of compensation and may grant security for such credits.

Chapter IV

Compensation from the International Fund

Article 18 — Compensation

1. The International Fund shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party. Where the damage is caused by an aircraft in flight on a flight other than an international flight, compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

2. The maximum amount of compensation available from the International Fund shall be 3 000 000 000 Special Drawing Rights for each event. Payments made according to paragraph 3 of this Article and distribution of amounts recovered according to Article 25 shall be in addition to the maximum amount for compensation.

3. If and to the extent that the Conference of Parties determines and for the period that it so determines that insurance in respect of the damage covered by this Convention is wholly or partially unavailable with respect to amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport generally, the International Fund may, at its discretion, in respect of future events causing damage compensable under this Convention, pay the damages for which the operators are liable under Articles 3 and 4 and such payment shall discharge such liability of the operators. The Conference of Parties shall decide on a fee, the payment of which by the operators, for the period covered, shall be a condition for the International Fund taking the action specified in this paragraph.

Article 19 — Advance payments and other measures

1. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the International Fund may make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute recognition of a right to compensation and may be offset against any amount subsequently payable by the International Fund.

2. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the International Fund may also take other measures to minimize or mitigate damage caused by an event.

Chapter V

Special provisions on compensation and recourse

Article 20 — Exoneration

If the operator or the International Fund proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the International Fund shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article 21 ─ Court costs and other expenses

1. The limits prescribed in Articles 4 and 18, paragraph 2, shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the claimant, including interest.

2. Paragraph 1 shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the claimant within a period of six months from the date of the event causing the damage, or before the commencement of the action, whichever is the later.

Article 22 — Priority of compensation

If the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and 18, paragraph 2, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily injury and mental injury, in the first instance. The remainder, if any, of the total amount payable shall be awarded proportionately among the claims in respect of other damage.

Article 23 – Additional compensation

1. To the extent the total amount of damages exceeds the aggregate amount payable under Articles 4 and 18, paragraph 2, a person who has suffered damage may claim additional compensation from the operator.

2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator or its employees have contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.

3. Where an employee has contributed to the damage, the operator shall not be liable for any additional compensation under this Article if it proves that an appropriate system for the selection and monitoring of its employees has been established and implemented.

4. An operator or, if it is a legal person, its senior management shall be presumed not to have been reckless if it proves that it has established and implemented a system to comply with the security requirements specified pursuant to Annex 17 to the *Convention on International Civil Aviation* (Chicago, 1944) in accordance with the law of the State Party in which the operator has its principal place of business, or if it has no such place of business, its permanent residence.

Article 24 — Right of recourse of the operator

The operator shall have a right of recourse against:

(a) any person who has committed, organized or financed the act of unlawful interference; and

(b) any other person.

Article 25 — Right of recourse of the International Fund

The International Fund shall have a right of recourse against:

(a) any person who has committed, organized or financed the act of unlawful interference;

(b) the operator subject to the conditions set out in Article 23; and

(c) any other person.

Article 26 - Restrictions on rights of recourse

1. The rights of recourse under Article 24, subparagraph (b), and Article 25, subparagraph (c), shall only arise to the extent that the person against whom recourse is sought could have been covered by insurance available on a commercially reasonable basis.

2. Paragraph 1 shall not apply if the person against whom recourse is sought under Article 25, subparagraph (c) has contributed to the occurrence of the event by an act or omission done recklessly and with knowledge that damage would probably result.

3. The International Fund shall not pursue any claim under Article 25, subparagraph (c) if the Conference of Parties determines that to do so would give rise to the application of Article 18, paragraph 3.

Article 27 – Exoneration from recourse

No right of recourse shall lie against an owner, lessor, or financier retaining title of or holding security in an aircraft, not being an operator, or against a manufacturer if that manufacturer proves that it has complied with the mandatory requirements in respect of the design of the aircraft, its engines or components.

Chapter VI

Assistance in case of events in States non-Party

Article 28 — Assistance in case of events in States non-Party

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-Party, the Conference of Parties may decide, on a case by case basis, that the International Fund shall provide financial support to that operator. Such support may only be provided:

(a) in respect of damage that would have fallen under the Convention if the State non-Party had been a State Party;

(b) if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the provisions of this Convention in respect of the event giving rise to such damage;

(c) up to the maximum amount for compensation set out in Article 18, paragraph 2; and

(d) if the solvency of the operator liable is threatened even if support is given, where the Conference of Parties determines that the operator has sufficient arrangements protecting its solvency.

Chapter VII

Exercise of remedies and related provisions

Article 29 — Exclusive remedy

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage to a third party due to an act of unlawful interference, however founded, whether under this Convention or in tort or in contract or otherwise, can only be brought against the operator and, if need be, against the International Fund and shall be subject to the conditions and limits of liability set out in this Convention. No claims by a third party shall lie against any other person for compensation for such damage.

2. Paragraph 1 shall not apply to an action against a person who has committed, organized or financed an act of unlawful interference.

Article 30 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by

that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article 31 — Review of limits

1. Subject to paragraph 2 of this Article, the sums prescribed in Articles 4 and 18, paragraph 2, shall be reviewed by the Director of the International Fund, 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 this 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 Special Drawing Right mentioned in Article 30.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Director shall inform the Conference of Parties of a revision of the limits of liability. Any such revision shall become effective six months after the meeting of the Conference of Parties, unless a majority of the States Parties register their disapproval. The Director shall immediately notify all States Parties of the coming into force of any revision.

Article 32 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party in whose territory the damage occurred.

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territory of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 33 — Intervention by the International Fund

1. Each State Party shall ensure that the International Fund has the right to intervene in proceedings brought against the operator in its courts.

2. Except as provided in paragraph 3 of this Article, the International Fund shall not be bound by any judgement or decision in proceedings to which it has not been a party or in which it has not intervened.

3. If an action is brought against the operator in a State Party, each party to such proceedings shall be entitled to notify the International Fund of the proceedings. Where such notification has been made in accordance with the law of the court seised and in such time that the International Fund had time to intervene in the proceedings, the International Fund shall be bound by a judgement or decision in proceedings even if it has not intervened.

Article 34 — Recognition and enforcement of judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 32 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

(a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;

(b) the defendant was not served with notice of the proceedings in such time and manner as to allow him or her to prepare and submit a defence;

(c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognized as final and conclusive under the law of the State Party where recognition or enforcement is sought;

(d) the judgement has been obtained by fraud of any of the parties; or

(e) the right to enforce the judgement is not vested in the person by whom the application is made.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.

5. Where a judgement is enforceable, payment of any court costs and other expenses incurred by the plaintiff, including interest recoverable under the judgement, shall also be enforceable.

Article 35 — Regional and multilateral agreements on the recognition and enforcement of judgements

1. States Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.

2. States Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.

3. The provisions of this Chapter shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 36 ─ Period of limitation

1. The right to compensation under Article 3 shall be extinguished if an action is not brought within two years from the date of the event which caused the damage.

2. The right to compensation under Article 18 shall be extinguished if an action is not brought, or a notification pursuant to Article 33, paragraph 3, is not made, within two years from the date of the event which caused the damage.

3. The method of calculating such two-year period shall be determined in accordance with the law of the court seised of the case.

Article 37 — Death of person liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

Chapter VIII

Final clauses

Article 38 – Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature in Montréal on 2 May 2009 by States participating in the International Conference on Air Law held at Montréal from 20 April to 2 May 2009. After 2 May 2009, the Convention shall be open to all States for signature at the headquarters of the International Civil Aviation Organization in Montréal until it enters into force in accordance with Article 40.

2. This Convention shall be subject to ratification by States which have signed it.

3. Any State which does not sign this Convention may accept, approve or accede to it at any time.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

Article 39 – Regional Economic Integration Organizations

1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a State Party, to the extent that the Organization has competence over matters governed by this Convention. Where the number of States Parties is relevant in this Convention,

including in respect of Article 10, the Regional Economic Integration Organization shall not count as a State Party in addition to its Member States which are States Parties.

2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "State Party" or "States Parties" in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.

Article 40 – Entry into force

1. This Convention shall enter into force on the one hundred and eightieth day after the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession on condition, however, that the total number of passengers departing in the previous year from airports in the States that have ratified, accepted, approved or acceded is at least 750 000 000 as appears from the declarations made by ratifying, accepting, approving or acceding States. If, at the time of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession this condition has not been fulfilled, the Convention shall not come into force until the one hundred and eightieth day after this condition shall have been satisfied. An instrument deposited by a Regional Economic Integration Organization shall not be counted for the purpose of this paragraph.

2. This Convention shall come into force for each State ratifying, accepting, approving or acceding after the deposit of the last instrument of ratification, acceptance, approval or accession necessary for entry into force of this Convention on the ninetieth day after the deposit of its instrument of ratification, acceptance, approval or accession.

3. At the time of deposit of its instrument of ratification, acceptance, approval or accession a State shall declare the total number of passengers that departed on international commercial flights from airports in its territory in the previous year. The declaration at Article 2, paragraph 2, shall include the number of domestic passengers in the previous year and that number shall be counted for the purposes of determining the total number of passengers required under paragraph 1.

4. In making such declarations a State shall endeavour not to count a passenger that has already departed from an airport in a State Party on a journey including one or more stops or transfers. Such declarations may be amended from time to time to reflect passenger numbers in subsequent years. If a declaration is not amended, the number of passengers shall be presumed to be constant.

Article 41 – Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one year following the date on which notification is received by the Depositary; in respect of damage contemplated in Article 3 arising from events which occurred before the expiration of the one year period and the contributions required to cover such damage, the Convention shall continue to apply as if the denunciation had not been made.

Article 42 – Termination

1. This Convention shall cease to be in force on the date when the number of States Parties falls below eight or on such earlier date as the Conference of Parties shall decide by a two-thirds majority of States that have not denounced the Convention.

2. States which are bound by this Convention on the day before the date it ceases to be in force shall enable the International Fund to exercise its functions as described under Article 43 of this Convention and shall, for that purpose only, remain bound by this Convention.

Article 43 – Winding up of the International Fund

1. If this Convention ceases to be in force, the International Fund shall nevertheless:

(a) meet its obligations in respect of any event occurring before the Convention ceased to be in force and of any credits obtained pursuant to paragraph 4 of Article 17 while the Convention was still in force; and

(b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under subparagraph (a), including expenses for the administration of the International Fund necessary for this purpose.

2. The Conference of Parties shall take all appropriate measures to complete the winding up of the International Fund including the distribution in an equitable manner of any remaining assets for a purpose consonant with the aims of this Convention or for the benefit of those persons who have contributed to the International Fund.

3. For the purposes of this Article the International Fund shall remain a legal person.

Article 44 – Relationship to other treaties

1. The rules of this Convention shall prevail over any rules in the following instruments which would otherwise be applicable to damage covered by this Convention:

(a) the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,* Signed at Rome on 7 October 1952; or

(b) the *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed at Rome on 7 October 1952*, Signed at Montréal on 23 September 1978.

Article 45 – States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. For a declaration made under Article 2, paragraph 2, by a State Party having two or more territorial units in which different systems of law are applicable, it may declare that this Convention shall apply to damage to third parties that occurs in all its territorial units or in one or more of them and may modify this declaration by submitting another declaration at any time.

4. In relation to a State Party which has made a declaration under this Article:

(a) the reference in Article 6 to "the law of the State" shall be construed as referring to the law of the relevant territorial unit of that State; and

(b) references in Article 30 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State.

Article 46 – Reservations and declarations

1. No reservation may be made to this Convention but declarations authorized by Article 2, paragraph 2, Article 39, paragraph 2, Article 40, paragraph 3, and Article 45 may be made in accordance with these provisions.

2. Any declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

Article 47 – Functions of the Depositary

The Depositary shall promptly notify all signatories and States Parties of:

(a) each new signature of this Convention and the date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and the date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) each declaration or modification thereto, together with the date thereof;

(f) the withdrawal of any declaration and the date thereof;

(g) any denunciation together with the date thereof and the date on which it takes effect; and

(h) the termination of the Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montréal on the 2nd day of May of the year two thousand and nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all Contracting States to this Convention, as well as to all States Parties to the Convention and Protocol referred to in Article 44.

— END —