

# THE LIABILITY OF AIRLINES FOR DAMAGE TO THIRD PARTIES ON THE GROUND IN THE RISK SOCIETY

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# Damage to Third Parties on the ground

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## Defining characteristics of the risk society:

swift from accidental to intentional, man-made risk events...

...which have the potential to challenge even the most innovative risk management models and liability principles...

...and undermine the relation of trust among individuals, governments and the aviation industry

# The International Framework 1<sup>st</sup> attempt

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- ➔ Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface (**1933 Rome Convention**)
- ➔ Protocol Supplementary to the Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface (**1938 Brussels Protocol**),



# International Framework ...cont

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- ➔ Strict liability imposed on the OPERATOR of the aircraft
- ➔ Liability limits depend on the weight of the aircraft
- ➔ Financial guarantees provided by the operator

# A 2<sup>nd</sup> attempt at change

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- ➔ ***Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*** signed at Rome on 7 October 1952 (**1952 Rome Convention**)
- ➔ ***Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface***, as adopted and signed at Montreal on 23 September 1978 and entered into force on 25 July 2002 (**The 1978 Protocol**)



# The key wording

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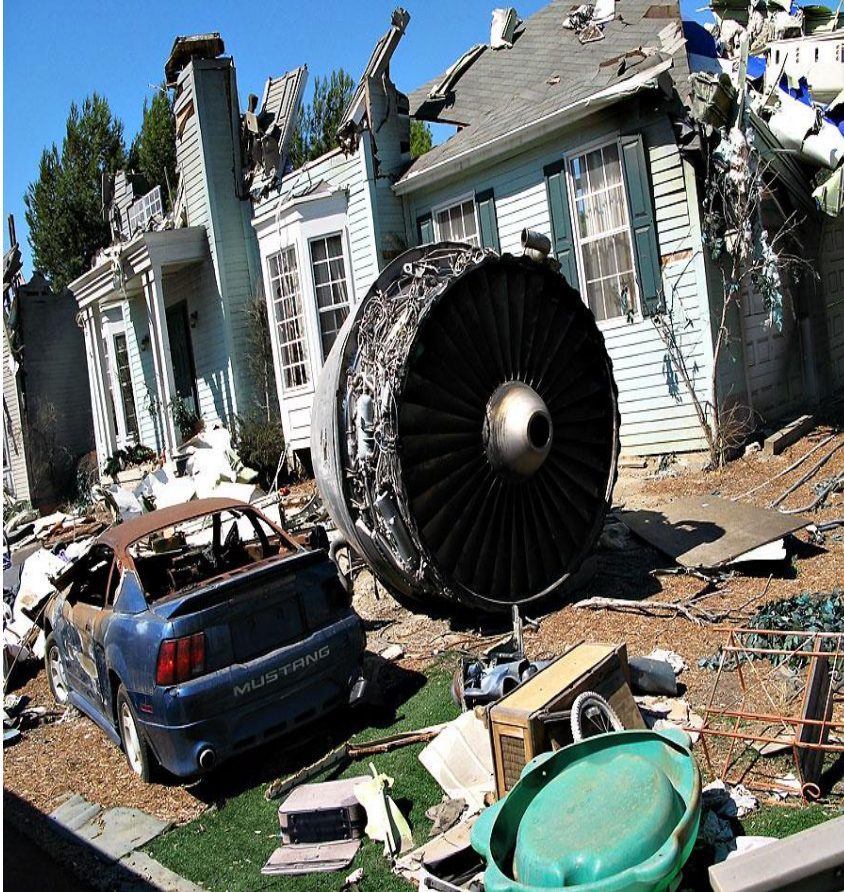


- ➔ *“Any person who suffers damage on the surface, shall, **upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation**”.*



# Attempting to limit liabilities

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- ➔ Liability in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured.
- ➔ .....(e) 10,500,000 francs plus 100 francs per kg over 50,000 kgs for aircraft weighing more than 50 000 kgs
- ➔ But these sums were outdated - average compensation in the USA more than US\$2m+



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# Breaking the Limits

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- ➔ Damage caused “by a **deliberate** act or omission of the operator, his servants or agents [acting in the course of their employment and within the scope of their authority], **done with intent to cause damage**”.
- ➔ **Unlimited liability** is incurred by any person who “*wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it*”.





# Limited appeal of treaty

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- ↳ Limited number of ratifications due to low limits of liability, as well as;
- ↳ Domestic legislation provides better remedies
- ↳ Noise and sonic boom issues not in the Convention
- ↳ Objections raised against adoption of a single forum
- ↳ Direct action against insurers



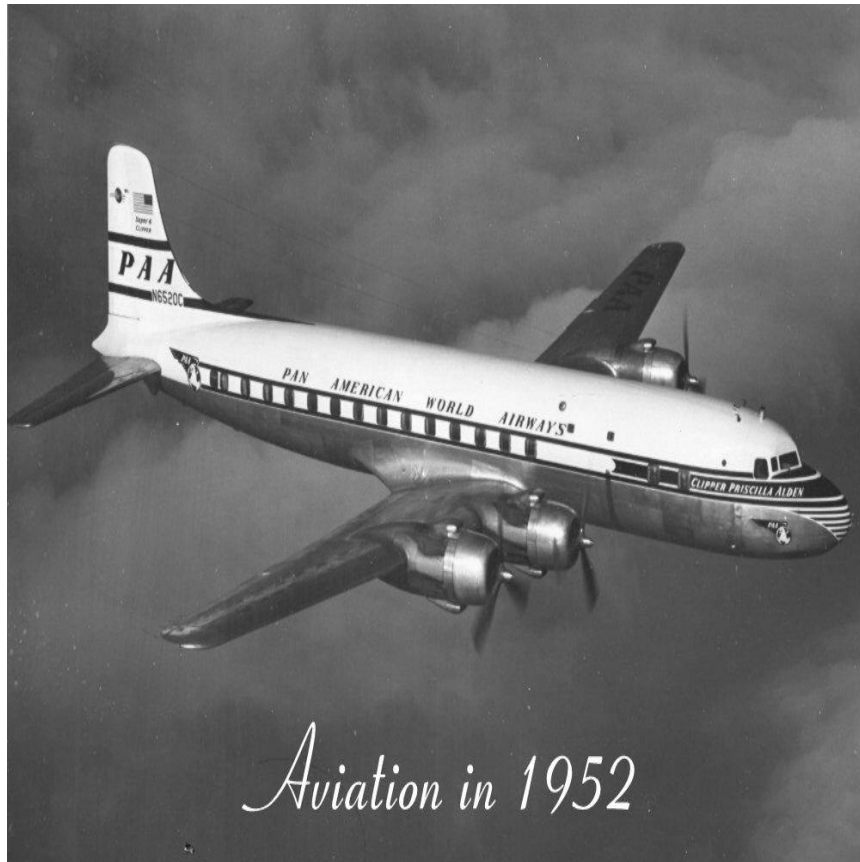
# Failure to amend earlier

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The broad availability of insurance gave a false sense of predictability and camouflaged the maximum loss capacity of intentional, man made risks

# Modernisation of 1952 Rome Convention

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- ➔ At last proposals to modernise raised in September 2000
- ➔ The idea gained more speed following 9/11
- ➔ Greater acceptance by countries that collective modernisation was long overdue

# Roadmap for change

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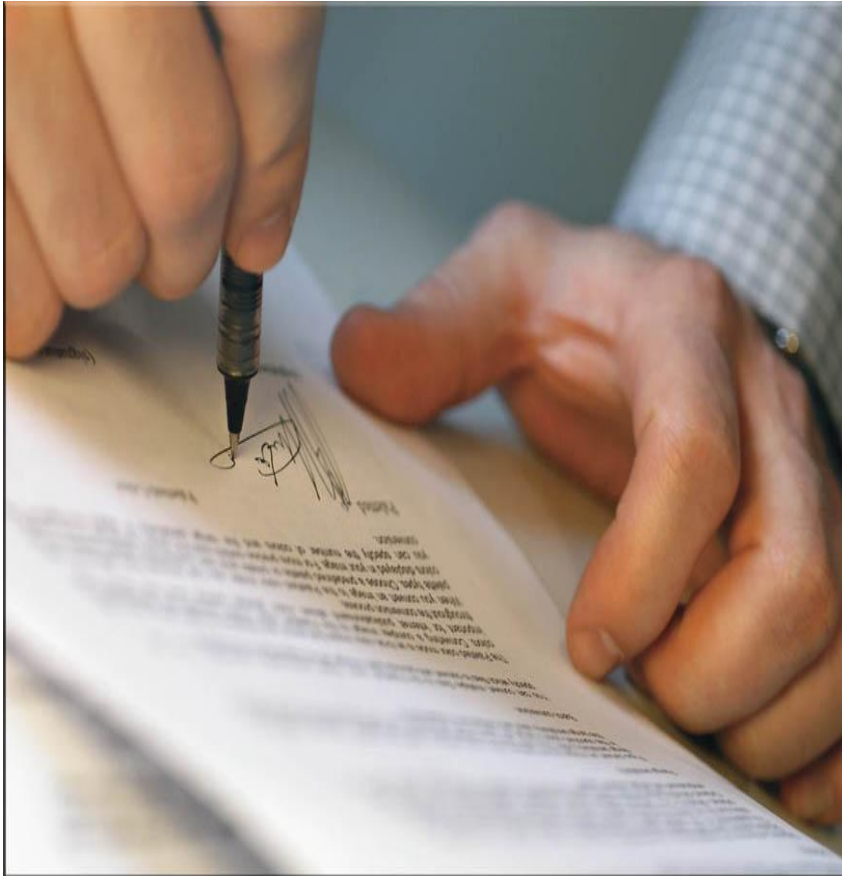
“provide a durable system for compensation, which can survive also events of a catastrophic nature”

reduce uncertainty and rebuild trust in the aviation system by broad risk sharing

strengthen the compensatory function by distinguishing culpability from recovery

# Two conventions proposed

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1. Liability for damage arising from safety-related accidents (basic risks)
2. Liability for damage resulting from acts of unlawful interference (terrorism-related risks)



# Basic Risks Convention

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- ➔ Follows structure of Montreal Convention 1999
- ➔ Proposed a 2 Tier liability structure
- ➔ 1<sup>st</sup> tier: Strict liability on the operator for damages arising from death and bodily injury and for property damage up to the limits of the EC Insurance Reg
- ➔ Above that threshold (2<sup>nd</sup> Tier) liability is unlimited unless.....

## 2<sup>nd</sup> Tier defenses

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- ➔ Carrier can prove that the damage was not due to its negligence or other wrongful act or omission or that of its servants or agents;
- ➔ Or that the damage was solely due to the negligence or other wrongful act or omission of another person in which case the carrier's liability is limited

# Terrorism-related liability

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- Channels liability to the airlines
- The liability of the operator is strict up to a limit related to the weight of the aircraft
- Compromise: breakable liability limits

More adjudication, less cooperation as a result of Article 23  
– Additional compensation



# Article 23 – Additional Compensation

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- ➔ Submitted to the Diplomatic Conference to be held in April 2009
- ➔ **Clause 2** - The operator shall be liable for such additional compensation to the extent that the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has contributed to the occurrence of the event by an act or omission done **with intent or recklessly and with knowledge that damage would probably result** – subject to.....

# Article 23 (3) - Defense

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- ➔ **Clause 3** - An operator, or, if it is a legal person, its senior management will be presumed not to have been reckless if, as regards the relevant area of security, it proves that a system to ensure compliance with the relevant regulatory requirements has been established and that the system was applied in relation to the event

# State Party Pronouncement

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- **Clause 4** - If a State party so declares to the Depository, an operator shall conclusively be deemed to not have been reckless in respect of an event causing damage within its territory if, as regards the relevant area of security, it proves that a system to ensure compliance with such commonly applied branch standard has been established and audited. The existence of such a system and the completion of such an audit 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 the State Party.

# Funding proposals

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- ➔ Damages that exceed the liability limits will be payable by a supplementary compensation mechanism funded by the end users of the air transport (passengers and shippers) and collected by the carriers.
- ➔ In case of a catastrophic event that exhausts the funds of the compensation mechanism, States will step in and provide the funds.
- ➔ States agree but object to codification

# Trust?

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- ➔ By obscuring the third layer, the scheme loses its trust-building potential
  
- ➔ When combined with proposals to make air carriers essentially the (unreliable) safety net the risk management effectiveness of the Convention is seriously impaired



# Structure

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## Level 3

Government/State solidarity payments. i.e. disaster relief

## Level 2

Supplementary compensation mechanism funded by the end users of the air transport (passengers and shippers) and collected by the carriers – risk sharing

## Level 1

Commercial insurance coverage provided by the aviation insurance market up to the liability limits prescribed by the Convention – risk retained by airlines



# Additional proposals

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- ➔ Airlines required to have a system for vetting prior to the employment of their employees  
Demonstrate that the system was applied in relation to the employee who committed the act
- ➔ Restricted definition of 'mental injury' be accepted:  
Recovery only for a recognisable psychiatric illness either caused by physical injury or which derives from a reasonable fear of exposure to personal injury  
Direct result of the act of unlawful interference
- ➔ 3 year time limit

# Controversial Issues

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- ➔ Breakability of the liability limits;
- ➔ Exoneration of other participants in the aviation industry including financiers but also airports, air traffic control organisations and service providers;
- ➔ Actions for compensation to be brought only before the courts of the State Party where the damage occurred;
- ➔ Inclusion of stand alone mental injury;
- ➔ Inclusion of domestic flights.



# Conclusions

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- There remains much to be discussed and agreed by the States
- Desire for change exists
- A scheme that favours liability over compensation and permits domestic courts to handle the effects of intentional risks is highly inappropriate
- Negotiating the path is difficult but not fruitless
- A convention outcome will provide certainty and a viable int'l framework

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# Thank you