

## **SPECIAL GROUP ON THE MODERNIZATION OF THE ROME CONVENTION OF 1952**

**Montreal, 10 – 14 January 2005**

(Information paper submitted by the Aviation Working Group)

### **1. INTRODUCTION**

The Aviation Working Group (AWG) is pleased to submit this information paper to the first meeting of the Special Group on the Modernization of the Rome Convention of 1952 (SGMR).

### **2. ANNEX - AWG SUBMISSION TO THE LEGAL COMMITTEE**

AWG submitted a detailed paper (AWG Paper) to the 32nd Session of the Legal Committee stating and supporting its position on the draft Convention. For information, that paper, which is current as of the date of the Legal Committee, is annexed hereto.

### **3. KEY POINTS FOR CONSIDERATION BY THE SGMR**

For the reasons stated in the AWG Paper, we believe it imperative that:

- (a) the text of Art. 10 bis of the current draft be retained, without square brackets; and
- (b) manufacturers be exonerated for losses arising as a result of acts of unlawful interference, to the extent they have complied with applicable regulations relating to the design of an aircraft and have not acted with the intent to cause damage.

In addition, AWG believes that, in order to materially enhance the prospects for broad acceptance of the Convention, serious consideration should be given to:

- (a) restricting the scope of the Convention to acts of unlawful interference;
- (b) significantly revising Art. 5 of the Convention to create a more coherent and systematic regime applicable in the case of withdrawal of insurance cover below the capped airline liability; and
- (c) an express recognition of the role of State support in the context of acts of unlawful interference.



**ANNEX TO SUBMISSION TO SGMR**

**32nd Session of the ICAO Legal Committee  
MODERNIZATION OF THE ROME CONVENTION  
15-21 MARCH 2004**

**(Submission of the Aviation Working Group)**

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## **1. INTRODUCTION**

1.1 This document summarizes the submissions made by the AWG to the ICAO Secretariat Study Group on modernization of the Rome Convention and addresses the key issues from the AWG's point of view in the current (C-WP/12077, 26 November 2003) draft of the Convention. It comprises two main sections: (a) a summary of the rationale for manufacturers, owners, lessors and financiers non-liability for acts of unlawful interference, and (b) select drafting and related comments on the draft text.

1.2 The AWG, IATA and IAUA have reached a common industry position in relation to the basic principles that should be embodied in a new Convention as regards acts of unlawful interference. That common position has been submitted as a separate paper.

1.3 *Annex 1* comprises a comparative survey of the liability of aircraft owners/lessors/financiers in various jurisdictions around the world. That information, assessed in conjunction with the points made herein, provides a strong empirical basis for the treatment in Article 10 of the current text relieving such parties of third party liability where they are not exercising operational control of an aircraft. Drafting amendments to Article 10 are provided below.

1.4 *Annex 2* sets out a summary of liability considerations relating to aircraft manufacturers in the context of acts of unlawful interference. It does so with respect to EU, UK, French, German and US law. That information, assessed in conjunction with points made herein, justifies the insertion of provisions relieving manufacturers of liability in that context. Draft wording is provided below.

## **2. RATIONALE FOR MANUFACTURERS, OWNERS, LESSORS AND FINANCIERS NON-LIABILITY FOR ACTS OF UNLAWFUL INTERFERENCE**

### **Terrorism constitutes geopolitical action not commercial activity**

2.1 Terrorist acts are geopolitical in nature, since their true targets are States. States have ultimate responsibility for preventing and combating such acts. Accordingly, states rather than manufacturers, lessors or financiers should have ultimate responsibility for the consequences of these acts. States act in this field, nationally and internationally, including through laws, policies and practices. For example:

- (a) Governments have set up legal frameworks to deal with terrorist acts, including new ministries and agencies;
- (b) Governments regulate the screening of passengers and carry on luggage. It is noteworthy that, post September 11th, certain governments reassumed responsibility for these measures which had previously been devolved;
- (c) Governments provide personnel to deal with in-flight security;
- (d) Governments are responsible for the aviation authorities who certify that an aircraft is safe to fly and are responsible for requiring the introduction of any modifications which might mitigate against risks presented by war and terrorist acts. For example, most aviation authorities have mandated secure cockpit door modifications since September 11th; and

- (e) Governments are responsible for collecting intelligence on terrorist activities and based on that intelligence advise people where not to travel, and, most recently, have taken the responsibility of directing safety-related flight cancellations.

### **Traditional liability rules are inappropriate to geopolitical acts**

2.2 Liability rules have developed historically to incentivise parties to act in a particular way and to disincentive parties acting otherwise. Application of these rules to terrorist acts imposes commercial liability where none should rightly be imposed. The unique character of terrorist acts and war therefore requires different treatment to that expounded in traditional commercial theories in order to ensure that operators, manufacturers, financiers and owners are not liable for any resulting losses. This is especially the case with non-operators that have a passive role in the operation of aircraft and have no influence over passenger or baggage control or routes flown.

### **Alternative means of risk allocation have been developed for other high-loss ‘hazardous’ events – a more comprehensive approach**

2.3 International precedents already exist for allocation of risk in high loss events, particularly where risks and exposures are unquantifiable, thus falling outside standard commercial risk management. Examples include international conventions dealing with maritime carriage of oil, hazardous materials and nuclear material. These instruments (i) take a more comprehensive view, venturing beyond standard liability rules, and often include the creation of a fund and/or have other quasi-insurance features, (ii) sharply limit industry liability, (iii) address the role and responsibility of States, and (iv) recognize that further, special rules are appropriate in the context of war/terrorism events within their sphere. Such an approach should be followed as regards third party aviation terrorism.

### **Place the risk with those best placed to manage it**

2.4 Basic principles of law and economics, now largely accepted in broad terms, require that risk (and liability) be borne by the parties best placed to efficiently manage them. In this case, there is overwhelming evidence that such parties are governments.

### **Consequences of inefficiently allocating the risk**

2.5 The potential and unquantifiable liability of operators, manufacturers, financiers and owners will have numerous adverse consequences for their businesses and the health of the aviation and related industries and economies generally. In short, industry dynamics and rudimentary economics dictate that industry should not be held liable for terrorist or war related acts.

### **From the owners’, lessors’ and financiers’ perspective**

2.6 Aircraft leasing and financing, like that in most other industries, is based on the provision of credit (in the case of a lease, in the form of use rights without acquisition costs) in exchange for periodic payments. They are financial products – which presuppose that the borrower takes all operational risk. In fact, operators contractually indemnify owners/lessors/financiers for all operational risks, including those relating to terrorist acts. If that assumption changes, so do basic lease and financing terms. Owners, lessor and financiers require that risk to be covered not just by the airline indemnification but by adequate

insurances. Adequate insurances against escalating claims and in an environment where parties' liabilities for claims is unclear, lead to increasingly onerous costs of insurances for airlines or, indeed, a withdrawal by insurers from the insurance markets. Owners, lessors and financiers will not remain in the aviation market absent adequate insurance, which may, depending on facts and circumstances, hinge on a revised legal framework that embodies the principles set out in this paper.

### **From the manufacturers' perspective**

2.7 States, not manufacturers, are ultimately responsible for decisions regarding anti-terrorism aircraft design and modification. They set standards for cockpit security. They make determinations regarding anti-missile technology. These, and other items, have significant cost implications, and may well overlap with the regulation of advanced and weapon technology. While manufacturers naturally assist in technical work and assessment, ultimate choices are made by States. It is clear that claims are being made against manufacturers by victims of terrorist attacks which maintain that they are responsible under product liability legislation and/or in tort for the consequences of those attacks. See *In re September 11 Litigation*. The basis of these claims is that design and construction of the aircraft was not adequate enough to prevent foreseeable terrorist attacks. For the reasons stated above, these claims ought not be sustainable, and any ability to assert them may have material adverse consequences for the aerospace manufacturing business, with the employment and macro-economic effects which that implies.

### **Why ad hoc measures will not do**

2.8 The damages resulting from September 11th were so vast that the US Government was forced to intervene and compensate businesses and individuals for loss. If a similar event were to occur in the future there is a very high likelihood that governments would similarly intervene again. However, though soft comfort can be achieved to some extent from the reasonable anticipation that governments will intervene, it is not the basis for sound financial policy and planning. The industry requires rules, on which parties may rely, which deal specifically with what will occur in these situations. Carriers, manufacturers, owners, financiers and lessors need a predictable model of how risks are borne and apportioned so as to be able to run their businesses more efficiently.

### **Is liability justified if there is intervening criminal activity?**

2.9 On basic legal principles, it is difficult to see the justification for operators, manufacturers, financiers and owners/lessors being liable for the independent criminal acts of a terrorist over whom they had no control. This proposition does not have support in Anglo Saxon case law where it is generally provided that a party whose property is used to cause criminal damage is not responsible for that damage if it is caused by an intervening criminal act perpetrated by another. That property owner might only be liable for that damage if (i) a special relationship existed between him and the criminal and (ii) the damage was foreseeable. It is highly unlikely that such criteria could be satisfied in the case of liability for a terrorist act. Against this background it is difficult to see why manufacturers, lessors and financiers should face claims for terrorist activities.

## **The effect of limiting one party's liability**

2.10 Rules and regulations that limit or relieve one party's liability while remaining silent on the liability of another (such as the relief of the liability of the airlines only), do not solely impact the entities which are thereby relieved. As multi-party litigation scenarios currently show, these systems (i) increase the uncertainty, costs and risks to all other potential litigants, and (ii) provide an incentive for plaintiffs to take legal action against remote parties. The basic point is that relieving one potential party to litigation has consequences for other (unrelieved) parties and cannot be viewed in isolation. Any treaty or body of law that deals with this area must therefore deal with the potential liability of all industry participants.

## **3. SUBMISSIONS ON KEY CLAUSES OF CURRENT DRAFT OF THE CONVENTION**

### **Lessor/Financier Liability**

3.1 For the reasons given in section 2 above, AWG supports the addition of express wording in Article 10 (Exclusive Remedy) to exclude the liability of owners, lessors and financiers. Drafting amendments are required, however, to achieve that objective. In addition to deleting the square brackets around the words "the owner, the lessor, the financier retaining title or holding the security of an aircraft" removed (along with the square brackets around the word "their"), AWG believes that it is necessary to add the words "*Neither the owner, the lessor or the financier as aforesaid shall be liable under the laws of any State Party for any such matter.*" as a new penultimate sentence to the Article.

### **Manufacturer Liability**

3.2 For the reasons given in section 2 above, and in the Common Position submitted separately, AWG believes that the following text should be inserted (as an additional paragraph at the end of Article 10):

*"Neither the manufacturer of an aircraft (or a component part thereof), nor its servants or agents, shall be liable under the Convention or the laws of any State Party for damage on the surface caused by an aircraft in operation or any person or object falling therefrom to the extent that:*

- (a) *the damage is caused by an act of unlawful interference;*
- (b) *such person has complied with applicable regulations, if any, designed to prevent that act; and*
- (c) *such person is not guilty of a deliberate act or omission done with the intent to cause damage."*

To the extent that a manufacturer was unable to satisfy sub-condition (b) above, the AWG would wish to see wording incorporated into the Convention, capping the liability of the manufacturer, whether that liability be direct to third parties or by way of recourse from a person who was directly liable to third parties.

## **Internationality Requirement**

3.3 AWG believes that the square brackets surrounding the sentence in Article 2 “*It shall also apply to damage caused in the territory of a State Party by an aircraft in flight registered in that State Party...[etc]*” should be removed. Absent that, the Draft Convention (Article 2) would apply only where damage is caused in the territory of a State Party by an aircraft registered in another State Party. It would not cover ‘domestic’ incidents where damage is caused by an aircraft registered in the jurisdiction where the damage occurs. Most notably, the Draft Convention would not cover events similar to those of September 11<sup>th</sup>.

3.4 The traditional view, with respect to international treaties, is that such treaties should not interfere with domestic law making but should simply provide rules for reciprocal and fair treatment by participating States of non-nationals. We would submit that this is no longer the appropriate way in which to deal with aviation incidents caused by war or terrorist acts. In order to support an environment that creates a ‘level playing field’ for all those involved, there should not be different liability rules applicable to domestic and international flights. Had some of the aircraft hijacked on September 11th been registered in Europe, it would have been difficult to justify application of two differing sets of liability rules, one for US registered aircraft, the other for European registered, when the accidents and victims were in the same place.

3.5 In addition, we see the availability and quantum of insurance available at commercially reasonable rates to airlines as an important feature to take into account in the Draft Convention. Airlines place insurances on a fleet basis, and do not distinguish between whether individual aircraft are operating domestically or internationally. Were countries to place liability limits on domestic flights that differed from liability limits in an international convention (which hitherto has not been the case, this effectively would nevertheless require airlines to insure at the highest limits). There might also be a distortive competitive effect for airlines flying internationally which had domestic operations in ‘high limit’ jurisdictions. Forum.]

3.6 The practical effect of the Article 15 (Forum) requires further analysis prior to its finding acceptance, as may be modified. Issues include the potential for splitting claims arising from a single incident, the prospects of inconvenient fora, and from section 2 thereof (even following drafting clarifications), the fragmenting of litigation which may be adverse to the just resolution of claims.

## ANNEX A

### COMPARATIVE STUDY OF LIABILITY OF AIRCRAFT OWNERS/LESSORS IN VARIOUS JURISDICTIONS

Please be aware that the information in this table is for reference purposes only. It is not intended to be comprehensive nor a substitute for a full explanation of liability issues for which separate legal advice should be sought in the relevant jurisdiction.

Relief by Registration: This column highlights the jurisdictions in which an owner/lessor can transfer its liability to the lessee/operator by registering with the relevant Aviation/Government Authority.

Liability of financial institutions with security over aircraft (but no title retention) will generally be lower than that of an owner/lessor.

#### 1. No liability save for fault by the owner/lessor.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Algeria		X			Local law of Civil Airlines Regulations in 98 06 dated 27th June 1998 modified and adopted by Law no 2000-05 dated 8th November 2000.
Antigua and Barbuda		X			
Argentina	X				Aeronautical Code, Law 17.285m, Articles 66, 67, 68, 155 and 157.Civil Code, Article 1113.
Austria	X				Austrian Aviation Act s.146 Para 1.
Bahamas	X				Bahamian Civil Aviation Act 1976, Part V, ss.9 and 11.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Bahrain	X				Bahrain Civil Aviation Law (Decree 6 of 1995) Articles 99 and 100.
Barbados		X			
Belgium	X	X			Belgium Supreme Court, Court de Cassation, Cass Sept 11 1980, Arr.Cass, 1981, 36.Belgium Civil Code Article 1384.
Cayman Islands		X	Both the lessor and lessee will be independently liable in negligence in relation to the aircraft arising as a result of their own acts or omissions. However such liability may be restricted or excluded by suitable contractual provisions.		
Colombia	X		All liability related to the operation of the aircraft is assigned by statute to the aircraft's operator (i.e. lessee). There is no express statutory protection for Owners/lessors but evidence would have to be submitted to prove a breach of its duty of good faith, gross negligence,		Colombian Commercial Code, Articles 1827, 1880 and 1890.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			wilful act or lack of diligence, as may be the case.		
Ethiopia	X				Ethiopian Commercial Code, Articles 630 and 631.
Hungary	X				s.345 of Act IV of 1959 on the Civil Code Republic of Hungary.
India		X			
Italy	X				Articles 380, 878 of the Italian Navigational Code Providential Decree no.224 of 24 May 1988 Article 2049 of the Italian Code.
Jamaica	X				Civil Aviation Act 1966 s.15.
Kazakhstan	X		The Special Part of the Civil Code July 1999 s.931 provides that if the Lessee operates the aircraft without a validly executed lease agreement but with the permission of Lessor, the Lessor will be held liable for damages incurred by third parties.		Civil Code of the Republic of Kazakhstan, Dec 1994 provides that in all cases of transfer of possession of aircraft under a duly executed lease, the owner/lessor will be exempt from liability. Furthermore the owner/lessor has a defence to acts of terrorism under the code as the “object has left the control of the holder though illegal means”.
Macedonia	X				Law on Obligations and the Basic Material-Legal Relations in the Civil Aviation (Official Gazette of the

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
					Republic of Macedonia no. 22/77) Articles 131 and 141.
Mexico	X				Aviation Law Article 70.
Mozambique	X				Strict liability may only be imposed by specific statutory legislation; currently there is no legislative provision to this effect.
Netherlands					
Netherlands Antilles		X			General principles of tort requiring culpability or construed culpability.
Pakistan	X	X			Common law position supported by statutory obligation cast by Pakistan's Aviation Rules, 1994.
Panama	X				Civil Code, Fourth book, "Obligations in General and Contracts": Articles 986, 1644, 1645.
Portugal	X				Civil Code, i.a, Articles 483 and 503.
South Korea	X				Korean Civil Code.
Spain	X				Spanish Civil Codes Articles 1902 et seq.
Sweden	X		No liability absent fault subject to the agreement between owner and the lessee	X	Damage Caused to Third Parties by Air Carriage 1992:382.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			is drafted in proper form and registered with the Swedish Civil Aviation Administration.		
Switzerland	X				Swiss Code of Obligations (“CO”) Article 41.
	X			X	
	X			X	
Trinidad and Tobago		X			
Tunisia		X			Code des Obligations et des Contrats.
Turkey	X	X			Financial Lease Law Articles 13 and 26.Code of Obligations Articles 41-47, 55 and 58.19th Chamber of Supreme Court E.1995/9166.Supreme Court in Full Session 1998/I 9-36 K.1998/357.E.2000/1 0-1789 K. 2001/6.
Ukraine		X			Decision of the Plenum of the Supreme Ct of Ukraine (27 March 1992) “On Court Practice in Civil Cases on Compensation of Damage”.
Vietnam	X		Law on Civil Aviation of Vietnam Article 86.2 states that where a lease has not	X	Law on Civil Aviation of Vietnam Article 86.2 states that where a lease has not been registered in the Registration Book, the owner of the aircraft shall be

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			<p>been registered in the Registration Book, the owner of the aircraft shall be liable for the compensation as aircraft operator. However, this provision conflicts with the Vietnamese Civil Code Article 627, which provides strict liability for sources of extreme danger. Despite an apparent intention to transfer liability to an operator, Article 627 leaves open numerous issues: could an owner be liable if the operator does not comply with regulations? Can the operator claim compensation from the owner? What would constitute unlawful possession or use of the aircraft by the operator?</p>		<p>liable for the compensation as aircraft operator.</p>

**2. Liability if the owner/lessor is in effective control of the aircraft.**

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Australia	X		The pre-September 11 position of strict and unlimited liability for an owner/lessor of an aircraft has now been amended and there is an exception for owners where:(a) they did not have an active role in the operation of the aircraft, and (b) there were leasing or financial arrangements in place under which a person other than the financier or lessor had exclusive right to use the aircraft.		The Damage by Aircraft Act 1999 s.10 (as amended) by the Insurance and Aviation Liability Legislation Amendment Act 2002
Bangladesh	X	X	Under Bangladeshi law actual fault or privity would have to be proved for the owner to be held liable; otherwise strict liability does not apply to an owner/lessor of aircraft for the actions of a lessee or in respect of the operation of the aircraft by the lessee.		Civil liability in tort would be governed by the principles of English common law.
Brazil	X		Whenever the name of the operator is registered with the	X	Brazilian Aeronautical Code (Law No.7.565 of 19th Dec 1986) Articles 124 and 132.Brazilian Code of

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			Brazilian Aeronautical Registry (“RAB”), the owner of the aircraft is excluded from liability with respect to the operation of the aircraft. Brazilian law has a concept of joint liability with respect to environmental damage; however there is a valid argument that registration will protect the owner/lessor from liability.		Consumer Protection Articles 12 and 17.
Canada	X	X	“No fault liability” does not exist in Canada except in certain limited circumstances, such as federal and provincial environmental legislation. There is no liability attaching to a passive owner/lessor for acts or omissions of the lessee, or arising out of the operation of the aircraft, absent operational interference with the airline operations, except in certain limited circumstances such as environmental legislation and possibly in connection with certain minor		Aeronautics Act (Canada). Any tortious liability that may attach to an owner/lessor in Canada will be found in the common law.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			offences based on the interpretation of the term “registered owner” in the Aeronautics Act (Canada).		
Chile	X		The owner of an aircraft is not jointly and severally liable with its operator if the act or contract that transfers its operation is registered. It is however, unclear whether a foreign air carrier may be able to obtain such registration. Affected parties may seek damages under general tort rules contained in the Civil Code, which require evidence of negligence or wilful misconduct.		The Chilean Aeronautical Code of 1990 Article 100 The Civil Code 172
Cyprus	X		There is no strict liability provided that the aircraft has been leased for more than 14 days to the operator and the owner does not supply the crew.		English Civil Aviation Act 1949, s.49(1), paragraph 12 of the First Schedule to the Colonial Civil Aviation (Application of Act) Order, 1952.
Czech	X		There is no strict liability provided that the aircraft has		s.427, Czech Civil Code No. 40/1964 Coll., as amended in connection with ss.4 and 5 of the Czech

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Republic			been leased for more than 14 days to the operator and the owner does not supply the crew.		Act on Civil Aviation No. 49/1997 Coll., as amended.
Egypt	X		A lessee holding possession is fully responsible for any damages caused to any third party due to his act, omission or negligence unless the lease compromises the aircraft and lessor's crew as well.		Egyptian Civil Law.
France	X		If the owner of a non-registered aircraft has taken the appropriate steps with the relevant civil aviation registry to ensure that the lease with the operator has been recorded (or indeed if such registry only shows the operator of the aircraft), the owner's liability would, under the Civil Aviation Code, be limited to situations where the owner itself has committed a fault. A lessor may be liable, under the Product Liability provisions of the French Civil Code, for any	X (partial)	French Civil Aviation Code, L141-4, 2nd paragraph. French Civil Code, Articles 1386-1 to 1386-18.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			damage or injury caused by a defective product if the lessor has imported the aircraft into the European Union (although defences may apply).		
Germany	X		The operator is liable for any damage to persons or property that arises through ‘the operation of’ the aircraft even if he can show that the accident was caused by force majeure. Usually the Lessee will be regarded as the operator. Pursuant to the German Product Liability Act, the lessor would be liable for any damage or injury caused by a defective part of the aircraft if the lessor has imported the aircraft into the European Economic Area (although defences may apply).		German Air Traffic Act, s.33.German Product Liability Act (in force since 1 January 1990).
Iceland	X		The owner of the persons on whose account the aircraft is operated shall be liable for damages.		Icelandic Aviation Act No.60 June 1998 Article 128

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Indonesia	X		No laws regulating strict liability but a person may be held vicariously liable for the tortious acts of those under their supervision. This would be unlikely as the owner/lessor could only be held vicariously liable if the monitoring activities of the owners/lessors constituted direct supervision of the lessee's day-to-day affairs		Indonesian Civil Code Article 1367.
Ireland	X		Strict liability on owners for material damage or loss caused to any persons or property on land or water by, or by any person in, or any article or person falling from, an aircraft while in flight, taking off or landing. This liability can be rebutted: (i) to the extent the damage or loss was caused or contributed to by the negligence of the person by whom the same was suffered; and/or (ii) to the extent a legal liability is created in some other person to pay damage or		Air Navigation and Transport Act 1936, s.21. The legislation deals with the Irish position only regarding damage or loss caused on Irish territory.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			loss, then the owner shall be entitled to be indemnified by such other person in respect of such loss or damage; and (iii) provided that the aircraft has been leased for more than 14 days to the operator and the owner does not supply the crew.		
Israel	X		There is no strict liability provided that the aircraft has been leased for more than 14 days to the operator and the owner does not supply the crew.		First Schedule to the Order in Council Regarding Aviation in the Colonies (Application of Laws) 1937, incorporating s.9 of the English Air Navigation Law, 1920.
Japan			Possible liability whereby a lessor as owner of the aircraft authorises the lessee to represent the lessor and where the lessor specifically instructed or directed the lessee to take certain actions or refrains from taking certain actions.		No concept of strict liability in Japanese Law except where a statutory provision provides for such liability. There are currently no provisions relating to operation of aircraft.
Kenya	X		There is no strict liability provided that the aircraft has		Kenya Aviation Act, s.12.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			been leased for more than 14 days to the operator and the owner does not supply the crew.		
Malaysia	X		After the first 14 days of the aircraft lease, there is no strict liability upon the owner/lessor.		Civil Aviation Act, 1969 (Act 3) s19
New Zealand	X	X	There is no strict liability upon the owner/lessor so long as the aircraft has been hired out for more than 28 days.		Civil Aviation Act 1990 s93(3) and s93(7) Goldman v Hargrave [1967] 1 AC 645 Sedleigh-Denfield v O'Callaghan [1940] AC 880
Nigeria	X		If the lease is analogous to a time charter then the lessee/operator will bear liability. If the lease is analogous to a voyage charter, then the owner/lessor will be liable.		No strict liability under common law.
Russia	X		No liability on the assumption that the owner/lessor of the aircraft does not possess it at the time the harm is caused to the third party.		Article 1079 of the CMI Code of the Russian Federation (Fart II) No 14-FZ dated 26 Jan 1996 and Article 116 of the Air Code of the Russian Federation No 60-FZ dated 19 March 1993.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
South Africa	X	X	There is no strict liability under common law or statute provided that the aircraft has been leased for more than 14 days to the operator and the owner does not supply the crew.		1) As a general principle under law of delict (tort).2) Aviation Act No 74 1962 s.11 (b).
United Kingdom	X		There is no strict liability under common law. Under Statute, there is no liability under the Civil Aviation Act 1982 provided that the aircraft has been leased for more than 14 days to the operator on a dry lease basis. Under the Consumer Protection Act 1987, a lessor may be liable for any damage or injury caused by the aircraft or by a defective part of the aircraft if the lessor has imported the aircraft into the European Economic Area (although defences may apply).		Civil Aviation Act 1982 s.76 (4)
USA	X		The Federal Aviation Act provides that an aircraft owner/lessor is liable for injury or property damage “on land or		Federal Aviation Act.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			<p>water” only when it has “actual possession or control” of the aircraft. However, several states impose absolute liability on aircraft owners/lessors. However, since these statutes appear to be directly in conflict with the federal statute (and, indeed, the history of the federal statute suggests it was enacted to protect aircraft lessors from liability under such statutes imposing strict liability), it is believed that any such statute is pre-empted. There has been a New Jersey case that rejected the argument of an aircraft owner that the state’s strict liability statute should not apply where the aircraft has been stolen. The Court held that such an exception should be left to the legislature.</p>		
Venezuela	X		<p>There is a strict liability regime, however, an exemption is established in Article 153 of the Civil Aviation Law, which</p>		Civil Aviation Law Articles 142, 143 and 150.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			sets forth that the owner of an aircraft, which is under the modality of financial leasing, shall not be liable for any damages caused by the operation of such aircraft.		

**3. Strict liability regime.**

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
Denmark	X		Strict liability attaches to “the owner, respectively to that person for the accounts of which the aircraft is used”. Although the word “respectively” has given rise to some uncertainty, the logical interpretation would be that strict liability attaches to the owner only when he also operates the aircraft. The Danish courts are yet to try this question, however, so it would be more accurate to say that the current position is that		Danish Aviation Act 1927 Article 127.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			strict liability has a broader application.		
Greece	X		Operator and owner are jointly and severally liable for damages caused to third parties on the surface. The above may be exonerated from their strict liability, or their liability reduced, if they prove before the court that such damages were caused or due to the negligence of the person that suffered these damages and/or his servants or employees. The owner's liability is limited to an amount equivalent to the market value of the aircraft.		Greek Civil Aviation Code ("CAC") Articles 117 and 119.
Hong Kong	X	X	Legislation provides for the strict liability of the lessor/owner of an aircraft in the absence of contributory negligence by the injured person (even if the lease is long term). The lessor/owner is entitled to a full indemnity from the lessee if the lessee is liable to the injured party under		Hong Kong Civil Aviation Ordinance s.8.Civil Aviation (Overseas Territories) 1969 Order, Sched.2, cl. 9.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			the general principles of tort. The lease may contain an express provision for a full indemnity in favour of the lessor.		
Norway	X		Strict liability for owners for damages to third parties. There are two exceptions, however, as these exceptions are exceptions from strict liability the owner may be liable also in these circumstances if he has acted negligently;1) Damage to another aircraft, or persons or objects in such aircraft, including damage to persons and objects, for example caused by aircraft crashing with each other, in the air or on the ground; and2) Damage to persons or objects comprised by the operator's liability as stated in the Aviation Act (including damages on the operator's passengers and goods). This operator's liability involves damages in relation to the death and injury		The Norwegian Aviation Act 1993 s.11-1.

Country	Statute	Common Law	Owner/Lessor Liability	Relief by Registration	Legal Basis
			<p>of passengers on board the aircraft (ss.10-17) and to the passenger's luggage (ss.10-18). The operator's liability is limited and does not apply if the operator establishes that the damage is caused by an act of war or armed conflict ss.10-19 no 3.</p>		

## ANNEX B

### SUMMARY OF THE LIABILITY OF AIRCRAFT MANUFACTURERS IN THE EU, UK, FRANCE, GERMANY AND USA

The prospects of success for any action brought against an aircraft manufacturer will depend upon the law and procedure governing the claim. It is submitted that, while any plaintiff would face significant obstacles in succeeding in such a claim, liability cannot be ruled out.

#### The EU

Council Directive 85/374/EC of 25 July 1985 (on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products) (the *Directive*) created a strict product liability regime across the EU<sup>1</sup>. The Directive obliges Member States to introduce national laws providing that the "producer" of a product must pay cash compensation to an injured consumer plaintiff if (a) the plaintiff can show that the product in question was "defective" and that there was a causal relationship between the defect and the injury or loss and (b) the producer cannot invoke any of the Directive's exhaustive list of defenses. The behaviour or culpability of the producer is not in issue; it is sufficient that a defect in the product caused loss to a consumer. Any plaintiff bringing a claim would do so under the implementing law of the applicable Member State. National law and procedure will also govern key concepts under the Directive, e.g. burden of proof, causation and the types of damage for which recovery is permitted.

Manufacturers of aircraft or their component parts and any finance lessor who is the "first importer" of an aircraft into the EU will fall within the Directive's definition of "producer", whether they are based in the US, EU or elsewhere. Aircraft themselves are "products" for the purposes of the regime. An aircraft will be regarded as defective if it "does not provide the safety which a person is entitled to expect, taking into account all the circumstances". The concept of "defect" is broader than mere fitness for use, but should exclude misuse (9th recital to the Directive). There is no "statutory pre-emption" defense, unless compliance with relevant regulation has itself caused the defect in question<sup>2</sup>. Other defenses do not appear to be applicable to the present scenario.

A number of questions arise in assessing the strength of claims against a manufacturer for a 'defect' relating to counter-terrorism design (e.g., cockpit security or anti-missile technology) judged in light of the Directive. These include:

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<sup>1</sup> Options for reform proposed by the European Commission in a 1999 Green Paper (COM(1999) 396 final) would make the Directive even stricter. These options included: shifting the burden of proof to producers across the Member States in Directive regime cases (to enable plaintiffs to bring their claims more easily); removing the "development risks" or "state of the art" defense; extending the 10-year longstop limitation period; introducing US-style market share liability across the EU; introducing class or representative action procedures in respect of product liability claims; and obliging producers to obtain product liability insurance.

<sup>2</sup> This defense will apply where the "defect is due to compliance of the product with 'mandatory regulations' issued by public authorities" (Art 7(d)).

- whether a ‘defect’ is present. This question is genuinely unresolved, given the arguable change in consumer expectations since September 11, 2001;
- causation questions – under applicable national law, did the unlawful interference or the design cause the damage;
- the relationship between foreseeability, misuse, and the concept of at large safety (in the definition of ‘defect’); and
- whether the current state of aircraft regulation constitutes ‘mandatory regulations’, and, if so, whether compliance therewith is an absolute defense where it can be shown that such compliance led to the safety issue (and thus the defect) in question.

The Directive does not apply to service provision. While aircraft/component manufacturers and first importers are potentially liable under the EU regime, the carriers themselves are not.

Although all 15 Member States of the EU have now transposed the Directive into their national laws, they have done so with varying degrees of fidelity to the original text<sup>3</sup>. Additionally, the Directive permits the maintenance of pre-existing national liability regimes<sup>4</sup> and consumer access to justice, and the probable success of a claim, may also be influenced by national procedural rules and the willingness of the courts to push a pro-consumer agenda<sup>5</sup>. It follows that, despite the best efforts of the European Court of Justice to harmonize Member States' implementation of the Directive, a producer's potential product liability exposure still varies greatly from one jurisdiction to the next. For this reason, the specific liability regimes of the UK, France and Germany are briefly examined below.

### United Kingdom

The UK's Consumer Protection Act 1987, as interpreted by the English courts, is in some ways stricter than the Directive. For example, the courts refuse to consider the availability or feasibility (on a cost-benefit basis) of measures to mitigate the safety issue in question as relevant to the analysis of "defect" (such that a product may still be defective even if the producer could, practically, have done nothing to prevent the safety risk from arising) (*A and others v National Blood Authority* [2001] 3 All ER 289). Although there has been no case law specifically on this point, UK legal authorities are agreed that actions in respect of air accidents may be brought against manufacturers. It is more questionable, due to the presence of certain defenses under the UK's implementing regime, whether finance lessors fall within its scope. Transport service providers emphatically do not. Plaintiffs in the UK may be aided by the availability of "no win-no fee" funding arrangements and US-style class action mechanisms. Damages awards tend to be higher than in other European jurisdictions.

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<sup>3</sup> The Directive also forms part of the "*acquis Communautaire*", i.e. the package of laws which the ten new Accession States joining the EU in May 2004 must likewise adopt. Producers will soon, therefore, be exposed to strict liability in 25 Western and East European countries, with a combined population of around 500 million.

<sup>4</sup> Including as regards liability for defective service provision.

<sup>5</sup> The courts of Germany and the UK, for example, take an extremely strict and policy-driven approach to liability under the Directive.

## France

France implemented the Directive in 1998 (Law n. 92-389 of 19 May 1998), codified in French Civil Code Art 1386-1 to 1386-18. While the ECJ ruled in *Sanchez/Commission v France* (22 April 2002) that French implementation did not fully comply with the Directive, any such non-compliance does not affect the current analysis. Consideration of the implementing provisions by French courts has, thus far, been limited. There is no bar to bringing action against a manufacturer asserting defective design, based on theories of no fault product liability (produits défectueux) or tortious act (faute), in connection with the failure to install counter-terrorism devices. However, such claims are, as yet, untried and plaintiffs may have difficulty in proving the necessary causal link, as well as the presence of a 'defect', within the meaning of the no-fault regime, or, fault, in the case of the tort regime. The relationship between a foreseeable misuse and causation remains unclear (cf. *Bejon/Sté Corporation Pakistan Airlines*, 7 July 1988, aff'd 19 November 2002), and is complicated by 9.11 and other recent events. There is no regulatory compliance defense available, so a manufacturer is not absolved of liability by compliance with applicable regulation, unless that compliance led directly to the defect. The product liability regime in France is moving in a pro-consumer direction, and, with the new Directive mandated rules, is expected to heighten potential exposure of manufacturers, even in this special context.

## Germany

Germany implemented the Directive in 1989 (Produkthaftungsgesetz, BGBI I, 1989, last modified 19 July 2002, BGBI I, 2002), and, in so doing, capped a manufacturer's liability at Euro 85 million per incident (for personal injury, but not property damages). While no comparable case has been brought, German courts, having taken a strict view of the liability regime instituted by the Directive, would give serious consideration to the question of whether the absence of certain counter-terrorism devices would represent a design defect in an aircraft. As in French law, causation questions will challenge plaintiffs, but, unlike French courts, German courts tend to infer causation between defect and damage once the former is established. Manufacturer liability may also potentially arise under the parallel negligence regime, Sec 823 German Civil Code (Bürgerliches Gesetzbuch), although proving fault in this context may be difficult. However, pro-consumer provisions of German procedural law – such as the reversal of the burden of proof – as well as (unlike the strict liability regime) the absence of any liability limit may assist plaintiffs. As under French law, no regulatory compliance defense is available, unless compliance led directly to the defect (cf. *German Federal Courts* in BGH, NJW 1998, 2005, 2006, aff'd. by OLG Celle, NJW 2003, 544, 2545), raising questions as to the utility of the 'mandatory regulations' defense. Finally, an increasingly active plaintiffs' bar together with permitted recovery for pain and suffering may, with time, produce more complex litigation dynamics with implications for all potential defendants.

## The USA

The plaintiffs' claim against Boeing in the *Re September 11, 2001* case is based on three legal theories:

- the strict liability regime (whereby a plaintiff will succeed if he can prove that the defendant's product caused or materially contributed to his injury; that the product was defective, i.e. unreasonably dangerous as at the time of injury; that the defect

existed at the time that the product left the defendant's hands; and that the product was the proximate, or legal, cause of the injury);

- the negligence regime (pursuant to which the plaintiff must prove the above elements and that the defendant knew, or should have known, of the alleged product defect); and
- breach of warranty (whereby a plaintiff must show that the defendant expressly and/or impliedly warranted that the product and its component parts and systems were, for example, airworthy, of merchantable quality and safe for the purposes for which they were designed).

Legal heads of liability, and prospects of success, will vary from one US state to another. It is noted that Boeing has advanced a variety of defenses to these allegations (e.g. that commandeering the aircraft was not an intended use of the same; that the risk/utility analysis that forms part of US strict liability law in many States works in its favour; that the attack was not foreseeable and that there was, therefore, no proximate cause). While it is impossible to predict the eventual outcome of this litigation, it is submitted that - due to the state of consumer awareness and expectation in the wake of September 11 - many of these defences may now be more difficult to run in the future. Ultimately, here - as in the EU jurisdictions analysed above - the success or otherwise of any such lawsuit may turn on policy considerations . The very existence of this claim and the failure of initial strike-out motions brought by the defendants do, however, suggest that aircraft manufacturers may face potential legal exposure in the US.

It is noted that such potential exposure extends to foreign, as well as US, manufacturers. This is because US federal and state courts may exert long-arm jurisdiction over foreign manufacturers, if the requisite connection exists between the trial jurisdiction and the defendant's activity.