



**SPECIAL GROUP ON THE MODERNIZATION OF THE
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(Presented by the Secretariat)

**DRAFT CONVENTION ON DAMAGE CAUSED
BY FOREIGN AIRCRAFT TO THIRD PARTIES**

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

- a) “State Party” means a State for which this Convention is in force.
- b) “State of the Operator” means any State Party other than the State of Registry on whose territory the operator has its principal place of business or, if it has no such place of business, its permanent residence.
- c) “Operator” means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was 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.
- d) “Person” means any natural or legal person, including a State.
- e) “Third Party” means a person other than the operator, passenger or shipper of cargo; in the case of a collision, “third party” also means the operator, owner and crew of the other aircraft and the passenger or shipper of cargo on board the other aircraft.
- f) “Damage” means death, bodily injury or damage to property.*
- g) An aircraft is considered to be “in flight” while it is in motion for the direct purposes of a flight, either in the air or on the ground.
- h) “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, or any amendment or Protocol thereto which is in force between the State Parties concerned.

* An appropriate limitation on mental injury should be included.

Article 2 — Scope

1. This Convention shall apply to damage to third parties in the sense of Articles 3 and 4 of this Convention, caused in the territory of a State Party by an aircraft in flight registered in another State Party, or by an aircraft in flight, whatever its registration may be, the operator of which has its principal place of business or, if it has no such place of business, its permanent residence in another State Party. [It shall also apply to damage caused in the territory of a State Party by an aircraft in flight registered in that State Party or by an aircraft in flight the operator of which has its principal place of business or, if it has no such place of business, its residence in that State Party].
2. For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Chapter II

General Provisions on Liability

Article 3 — Liability of the Operator

1. The operator is liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight or by any person or object falling therefrom.
2. Subject to paragraph 3 of this Article, for damages arising under paragraph 1 of this Article not exceeding [100 000] Special Drawing Rights for each such third party, the operator shall not be able to exclude or limit its liability.
3. The operator shall not be liable for damages arising under paragraph 1 of this Article to the extent that they exceed for each such third party [100 000] Special Drawing Rights if the operator proves that:
 - a) such damage was not due to its negligence or other wrongful act or omission or that of its servants or agents; or
 - b) such damage was solely due to the negligence or other wrongful act or omission of another person.
4. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the incident 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.
5. Nothing in this Convention shall prevent compensation for environmental damage, if and insofar as such compensation is provided for under the law of the State in the territory of which, or under the jurisdiction of which, the damage occurred.
6. In any action under this Convention, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Chapter III

Special Provisions on Liability Relating to Acts of Unlawful Interference[, including Terrorist Acts]

Article 4 — Limit of Liability

1. Where the damage is caused by an act of unlawful interference, the liability of the operator shall not exceed for each aircraft and event:

- a) [] Special Drawing Rights for aircraft having a maximum mass of [1 000]** kilogrammes or less;
- b) [] Special Drawing Rights plus [] Special Drawing Rights per kilogramme over [1 000] kilogrammes for aircraft having a maximum mass of more than [1 000] but not exceeding [6 000] kilogrammes;
- c) [] Special Drawing Rights plus [] Special Drawing Rights per kilogramme over [6 000] kilogrammes for aircraft having a maximum mass of more than [6 000] but not exceeding [25 000] kilogrammes;
- d) [] Special Drawing Rights plus [] Special Drawing Rights per kilogramme over [25 000] kilogrammes for aircraft having a maximum mass of more than [25 000] kilogrammes but not exceeding 200 000 kilogrammes;
- e) [] Special Drawing Rights plus [] Special Drawing Rights per kilogrammes over [200 000] kilogrammes for aircraft having a maximum mass of more than [200 000] kilogrammes but not exceeding [500 000] kilogrammes;
- f) [] Special Drawing Rights plus [] Special Drawing Rights per kilogramme over [500 000] kilogrammes for aircraft having a maximum mass of more than [500 000] kilogrammes.

2. “Maximum mass” means the maximum certified take-off mass of the aircraft authorized by the certificate of airworthiness for take-off, excluding the effect of lifting gas when used.

3. In case of an act of unlawful interference giving rise to damage, the lawful operator shall not lose its status as operator by virtue of the fact that another person commits such act of unlawful interference.

4. The limits of liability in paragraph 1 shall not apply when damage results from an act or omission of the operator or its servants or agents, done with intent to cause damage [or recklessly and with knowledge that damage would probably result, or from an act of non-compliance with applicable security regulations].

** Figures in square brackets are indicative figures for discussion purposes only.

[Article 5 — Suspension of Liability Rules]

[1. Where an act of unlawful interference severely disrupts or may severely disrupt the availability of aviation insurance, the Council of the International Civil Aviation Organization may recommend to States Parties to suspend their rights and obligations under this Convention. Such suspension shall be declared by a notification to the depositary and shall become effective immediately.

2. If more than one third of the States Parties follow the recommendation of the Council, the Council shall convene as soon as possible a meeting of the States Parties to this Convention to review the situation and take further decisions on this matter.]

Chapter IV

Extent of Liability

Article 6 — Exoneration

If the operator proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, 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 the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a person compensation is claimed by another person, the operator shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the dead or injured person. This Article applies to all the liability provisions of this Convention.

Article 7 — Reduced Compensation

If the total amount of the compensation to be awarded exceeds the limit of liability applicable under the provisions of Chapter III, the following rules shall apply:

- a) if the compensation is exclusively in respect of death or bodily injury or exclusively in respect of damage to property, such compensation shall be reduced in proportion to the respective amounts;
- b) if the compensation is both in respect of death or bodily injury and in respect of damage to property, the total sum shall be awarded preferentially to meet proportionately the claims in respect of death and bodily injury in the first instance. The remainder, if any, of the total sum distributable shall be awarded proportionately among the claims in respects of damage to property.

Article 8 — Right of Recourse

[Subject to Article 10 *bis*,] [n]othing 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 other person.

Article 9 — Two or More Operators Liable

1. Whenever two or more operators are liable for the damage, they are liable jointly and severally. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability. Where an action is brought against two or more operators under this Convention, the person who suffers damage shall not be compensated in excess of the highest liability limit, if any, which is applicable to any one of the operators under this Convention.

2. If two or more operators are liable, the recourse and its extent depend on their proportion of responsibility which contributed to the damage.

3. Paragraphs 1 and 2 apply accordingly whenever one or more operators and one or more other persons are liable for the damage.

Chapter V

Exercise of Remedies and Related Provisions

Article 10 — Exclusive Remedy

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 and such limits of liability as are 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. This rule shall not apply to any person who is guilty of a deliberate act or omission done with intent to cause damage.

[Article 10 *bis* – Exoneration of Status 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.]

Article 11 — Conversion of Monetary Units

1. 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 of a national currency, in terms of the

Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare the sum as prescribed in paragraph 2 of Article 3 is fixed at a sum of [] monetary units in judicial proceedings in their territories; and [] monetary units respectively, for the sums prescribed in Article 4, paragraph 1, This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 3 and 4 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 12 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Articles 3 and 4, shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year its entry into force, 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 the 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 paragraph 1 of Article 11.

2. If the review referred to in the preceding paragraph concludes that the inflation fact has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 13 — Insurance

States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. An operator may be required by the State Party into which it operates to furnish evidence that it maintains [such] adequate insurance or guarantee. [In doing so, the State Party shall not apply different criteria to operators of other State Parties than it applies to its own operators].

Article 14

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Article 15 — Forum

Actions under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred.

Article 16 — Arbitration

1. The claimants and defendants may also agree to submit disputes to arbitration in any State Party.
2. The arbitrator or arbitral tribunal shall apply the provisions of this Convention.
3. The provisions of paragraph 2 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

[Article 17 — Primacy of Proceedings in State of Occurrence]

[No proceedings under Article 16 shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred.]

Article 18 — Execution When Limits of Liability Apply

If two or more persons having suffered damage bring actions in jurisdictions situated in different States Parties, the defendant may, in each jurisdiction, submit a statement of the total of the claims and moneys due, with a view to preventing the limit of liability from being exceeded. The court seized of the case in each such jurisdiction shall take account of such statement, so as to ensure that the limits of liability are not exceeded.

Article 19 — Recognition and Enforcement of Judgements

1. Where any final judgement, including a judgement by default, is pronounced by a court competent in conformity with this Convention, on which execution can be issued according to the procedural law of that court, the judgement shall be enforceable upon compliance with the formalities prescribed by the laws of the State Party or of any of its constituent subdivisions, such as States, Republics, territories or provinces, where execution is applied for:

- a) in the State Party where the judgement debtor has his residence or principal place of business or,
- b) if the assets available in that State and in the State where the judgement was pronounced are insufficient to satisfy the judgement, in any other State Party where the judgement debtor has assets.

2. Notwithstanding the provisions of paragraph 1 of this Article, the court to which application is made for execution may refuse to issue execution if it is proved that any of the following circumstances exist:

- a) the judgement was given by default and the defendant did not acquire knowledge of the proceeding in sufficient time to act upon it;
- b) the defendant was not given a fair and adequate opportunity to defend his interests;
- c) the judgement 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, under the law of the State where execution is sought, is recognized as final and conclusive;
- d) the judgement has been obtained by fraud of any of the parties;
- e) the right to enforce the judgment is not vested in the person by whom the application for execution is made.

3. The merits of the case may not be reopened in proceedings for execution under paragraph 1 of this Article.

4. The court to which application for execution is made may also refuse to issue execution if the judgement concerned is contrary to the public policy of the State in which execution is requested.

5. If, in proceedings brought according to paragraph 1 of this Article, execution of any judgement is refused on any of the grounds referred to in sub-paragraphs (a), (b) or (d) of paragraph 2 or paragraph 4 of this Article, the claimant shall be entitled to bring a new action before the courts of the State where execution has been refused. The judgement rendered in such new action may not result in the total compensation awarded exceeding the limits applicable under the provisions of this Convention. In such new action the previous judgement shall be a defence only to the extent to which it has been satisfied. The previous judgement shall cease to be enforceable as soon as the new action has been started.

6. The right to bring a new action under the preceding paragraph shall, notwithstanding the provisions of Article 21 be subject to a period of limitation of [one] year from the date on which the claimant has received notification of the refusal to execute the judgement.

7. Where a judgement is rendered enforceable under this Article, payment of costs recoverable under the judgement shall also be enforceable. Nevertheless the court applied to for execution may, on the application of the judgement debtor, limit the amount of such costs to a sum equal to ten per centum of the amount for which the judgement is rendered enforceable. The limits of liability prescribed by this Convention shall be exclusive of costs.

8. Interest may be allowed on the judgement debt according to the law of the court seized of the case.

9. An application for execution of a judgement to which paragraph 1 of this Article applies must be made within [two] years from the date when such judgement became final.

Article 20 — Execution

A court to which application for execution is made shall refuse execution of any judgment rendered by a court of a State other than that in which the damage occurred until all the judgments rendered in that State have been satisfied.

Article 21 — Period of Limitation

1. Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

2. The grounds for suspension or interruption of the period referred to in paragraph 1 of this Article shall be determined by the law of the court trying the action; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage.

Article 22 — Death of Person Liable

In the event of the death of the person liable, an action in respect of liability under the provisions of this Convention shall lie against those legally representing his or her estate.

Article 23 — Advance Payments

The operator shall, if required by [its national law] [the law of the State where the damage occurred], make advance payments without delay to natural persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 24 — Contract or Workmen's Compensation Applicable

This Convention shall not apply to damage if liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's compensation applicable to a contract of employment between such persons.

Article 25 — State Aircraft

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.

Article 26 — Nuclear Damage

No liability shall arise under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or Protocol thereto which is in force.

[Final Provisions to be inserted]