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INTERNATIONAL REVIEW

THE ICAO DRAFT CONVENTION ON AERIAL COLLISIONS

By RENÉ H. MANKIEWICZ†

I. INTRODUCTION

TWO aspects of liability arising from accidents in international aviation are presently covered by international conventions. The 1929 Warsaw Convention as amended at The Hague in 1955 and supplemented in 1961 by the Guadalajara Convention deals with the liability of the air carrier towards passengers and consignors of goods. Damage caused at the surface by foreign aircraft is governed by the 1952 Rome Convention which supersedes the 1932 Rome Convention concluded under the auspices of CITEJA.

There is a third aspect, namely liability arising from aerial collisions, which is not yet subject to international rules. CITEJA had studied that problem since 1930 and prepared various draft conventions in 1934, 1935 and 1936, but World War II interrupted further progress.¹ When ICAO established its Legal Committee, the question of an international convention on aerial collisions became a subject of its general Work Programme.²

A subcommittee and a rapporteur were appointed by the ICAO Legal Committee³ to study the subject prior to 1954 when the Legal Committee itself framed a first draft convention on aerial collisions.⁴ The Legal Commission of the ICAO Assembly noted in 1959 "that, since the draft convention on aerial collisions had been drawn up by the Legal Committee in 1954, there have been many new problems in aviation affecting this subject."⁵ It was, therefore, considered desirable to have the draft convention reexamined. This was done by the Legal Committee at its Thirteenth Session held in Montreal in September 1960. On this occasion the Committee made the basic decision that "the convention on aerial collisions should not include provisions regulating the liability of air traffic control agencies."⁶ It further agreed on certain other principles which should be incorporated in a draft convention, and established a new subcommittee to prepare a draft. The text drafted by that subcommittee in 1960⁷ was

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¹ The 1936 draft had been submitted to the Fourth International Conference on Private Air Law held in Brussels in 1938 which decided to postpone its consideration.

² ICAO Doc. 4635 LC/71 Annex A.

³ A subcommittee was established in 1947 (ICAO Doc. 4635 LC/71 Annex B) and submitted a report to the Second Session of the Legal Committee; see ICAO Doc. 6014 LC/111 Annex IV. Prof. S. Iuul was appointed rapporteur in 1949 and presented its report to the Fifth Session of the Legal Committee: see ICAO Doc. 6029 LC/126 p. 249.

⁴ ICAO Doc. 7601 LC/138—Vol. II, p. 5.

⁵ ICAO Doc. 8010—A12-LE/1, para. 13.

⁶ ICAO Doc. 8137—LC/147-1, p. XXVII, para. 3.

⁷ ICAO LC/SC/Aerial Collisions WD No. 71; for commentary of the draft prepared by the ICAO Secretariat, see LC/SC/Aerial Collisions WD No. 72.

presented to and revised by the Fifteenth Session of the Legal Committee held in Montreal from 1-19 September 1964.

It should be noted from the outset that the Legal Committee decided that the new draft convention on aerial collisions is not a final one for submission to a diplomatic conference. Some delegates felt that the draft was defective insofar as it avoids dealing with the liability of air traffic control agencies for aerial collisions⁸ while having, at the same time, the effect of limiting recourse actions by such agencies against the operators of aircraft, even in case of fault of the latter. Other delegates considered that some of the draft articles were not sufficiently precise or would not achieve the desired result. Having regard for the urgency of an international regulation of liability for aerial collisions, the Legal Committee has kept that subject on its general Work Programme, with first priority. It will be for the Council of ICAO to decide when further work on that subject should be undertaken.

The following is an outline of the major features of the new draft convention formulated by the Committee during the Fifteenth Session.⁹

II. SCOPE OF THE CONVENTION

A. General Purpose

The aim of the draft convention is to provide rules and to establish limits for the liability of operators of aircraft involved in a collision for damage caused to the other aircraft and to passengers and goods thereon, except where the collision is a purely domestic matter, *i.e.*, occurring between aircraft of the same nationality over the territory of the State of registration. Liability of the operator for damage to passengers and goods on its own aircraft and his liability for surface damage were excluded because they are covered by the 1929 Warsaw Convention as amended in 1955 and supplemented in 1961, and by the 1952 Rome Convention, respectively or, if no international element is present, by national law.

For the purposes of the convention, interference with or by other aircraft is considered a collision. The draft convention does not define the expression "interference," but the Legal Committee, when discussing that subject, agreed that "interference" covers at least the following events: (1) near misses; (2) turbulence set up by another aircraft; (3) radio interference by another aircraft.

B. Geographical Scope¹⁰

The convention applies to any collision or interference which involves at least one aircraft registered in a Contracting State, provided that the event occurred over the territory of another Contracting State. Furthermore, if two or more aircraft registered in different Contracting States are involved, the convention applies irrespective of the place of occurrence, *i.e.*, it covers, under these conditions, collisions or interferences occurring

⁸ The Legal Committee had established a subcommittee to study the question of liability of air traffic control agencies. That subcommittee had met in April 1964 and submitted a first report to the Fifteenth Session of the Legal Committee in LC/SC/LATC No. 19.

⁹ The text of that draft convention is appended hereto.

¹⁰ Art. 7.

over a non-contracting State, the high seas, or a territory not under the jurisdiction of any State.

The Committee had considered the possibility of dispensing with the criterion of registration of aircraft for the purpose of defining the scope of the convention, and of making the convention applicable to collisions or interferences occurring during an "international flight." Several definitions of the expression "international flight" were examined. None appeared satisfactory to the majority because they all had the major defect that, on one hand, they would make the convention applicable to collisions which the Committee felt should be excluded while, on the other hand, they would exclude collisions which should be covered.

C. Interchange Of Aircraft And Aircraft Not Registered On A National Basis

The Legal Committee also rejected a proposal to substitute the nationality of the operator for that of the aircraft—a proposal which would have accommodated the case of interchange of aircraft and that of aircraft operated by a multinational airline and not registered in a State. It decided, however, to adopt a special provision (Article 21) to take care of the latter case, namely, aircraft operated by a multinational airline that are not registered on a national basis.¹¹ Those aircraft are deemed to be registered in each of the States which are parties to the agreement setting up the multinational airline, except that if the collision or interference occurs over the territory of any such State the aircraft is deemed to be registered in that State.

The result of this rule in combination with Article 1 is that the convention applies to collisions which occur over the territory of a State Party to the multinational airline, or of any other State, or over the high seas, between aircraft of such airline and aircraft registered in a Contracting State that is not a Party to that airline. The convention applies also to a collision between several aircraft of the multinational airline if it occurs over the territory of a Contracting State that is not Party to the airline. However, with regard to the present wording of Article 21, it appears that a collision over the high seas involving only aircraft of the multinational airline would remain outside the scope of the convention. This,

¹¹ Several groups of States are presently considering the establishment of common airlines whose aircraft are not to be registered on a national basis, as it is done presently with the aircraft operated by SAS. The case of aircraft operated by joint air transport operating organizations or international operating agencies is contemplated by Article 77 of the Chicago Convention on international civil aviation. The question of the implementation of the said article has been considered successively by the ICAO Air Transport Committee and by the ICAO Council; see our paper on "Aéronefs internationaux" in the 1962 *Annuaire français de Droit international* 685 ss. (698 ss.). It is to be studied by the Legal Committee of ICAO as soon as a request for a determination by the ICAO Council under that article is received; see Report of the Legal Commission of the Fourteenth Session of the ICAO Assembly; ICAO Doc. 8279 A14-LE/11, para. 14. Meanwhile, the Tokyo Conference which formulated the Convention on Offences and Certain Other Acts Committed on Board Aircraft (14 September 1963) inserted therein Article 18 which deals with aircraft operated by organizations or agencies mentioned in Article 77 of the Chicago Convention. Article 18 of the Chicago Convention reads as follows:

"If Contracting States establish joint air transport operating organizations or international operating agencies which operate aircraft not registered in any one State, those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention."

it is noted, would not amount to a lacuna if application of the relevant national laws is or will be extended to the high seas and to territories that are not under the jurisdiction of any State.

D. Collisions In Flight

The convention applies only to collisions of or interferences by aircraft which are "in flight." The definition of the expression "in flight" appearing in Article 1(2) of the draft convention is identical with the definition of that expression in Article 1(2) of the 1952 Rome Convention which is based on the definition of the expression "Flight time" in Chapter I of Annex 6 to the Chicago Convention on international civil aviation. It takes into account the case of VTOL and lighter than air aircraft. It should be noted that the French version of that expression in the draft convention on collisions differs from the one appearing in the Rome Convention. The change was made in order to clarify the meaning of the definition which intends to exclude taxiing aircraft. The corresponding text in the French version of the Rome Convention might not necessarily be construed in this way.

E. Inclusion Of State Aircraft

The convention applies to all aircraft, whether civil or State aircraft. However, Article 16 permits a Contracting State to exempt all or specific classes of State aircraft from the scope of the convention and to provide that actions for damage caused by its State aircraft covered by the convention can be brought only before its own courts; the latter being an exception to the provisions on jurisdiction in Article 14 about which more will be said later.

As had been the case at the Tokyo Conference which formulated the Convention on offences and certain other acts committed on board aircraft (1963), there was again a lengthy discussion of the question whether State aircraft should be defined in accordance with Article 3(b) of the Chicago Convention. It is well-known that that Article 3(b) lends itself to various interpretations. One of the main questions is whether its listing of State aircraft is exhaustive. Many national legislations consider any aircraft used for a government service as a State aircraft, even though it is not actually used in "military, customs and police services." Pending a revision of Article 3(b) of the Chicago Convention, the ICAO Legal Committee agreed that the draft convention on aerial collisions should define State aircraft in the same way as the Chicago Convention. The meaning of that definition, however, was clarified for the purposes of the draft convention in sub-paragraph 4 of Article 16 which states that State aircraft "engaged in the carriage of passengers, cargo and mail for remuneration or hire" are not to be considered as State aircraft, except when being used "exclusively for governmental purposes."

F. Personal Scope

1. Persons Liable

While the convention regulates primarily the liability of the operator of the aircraft involved,¹⁸ it also covers, for the reasons given below, cer-

¹⁸ Art. 2(1). The operator, for the purpose of the Convention, is defined in Article 2, para. 2.

tain aspects of the liability of his servants and agents and that of the owner of the aircraft and of his servants and agents.¹³ However, the Committee agreed not to deal in this convention with the liability of other persons, particularly air traffic control agencies, manufacturers, maintenance agencies, etc.

2. *Claimants*

The draft convention does not define the persons entitled to claim damages under its provisions. Instead, it specifies the damages which fall within its scope. Consequently, an action under the convention can be brought by any person who has suffered such damage, provided that under the applicable national law there is a causal relationship between the collision and the damage suffered by the claimant. In addition, the draft convention applies to all persons who bring recourse actions against an operator of any of the aircraft involved, for an operator is entitled to invoke in such recourse actions the limits of liability and the defences provided for his benefit in the draft convention.¹⁴

G. *Damages Covered*¹⁵

The convention applies solely to damage caused to the other aircraft and to the persons and goods thereon, as follows:

- (1) Damage caused to the other aircraft:
destruction, loss, damage to, delay or loss of use of the aircraft, including its equipment and accessories, and of any other property on board that aircraft;
- (2) Damage to persons:
death, injury or delay;
- (3) Damage to property not being the property of the operator:
destruction, loss, damage, delay or loss of use.

H. *Damages Not Covered*¹⁶

As already mentioned, damages suffered by the passengers or owners of goods on board the operator's own aircraft are outside the scope of the convention because they are supposed to be covered by the Warsaw Convention or, if the carriage was not international, by national law. Nor does the convention apply to damage suffered by third persons on the surface, which is the subject matter of the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface and, if it was caused in the State of registration of the aircraft, governed by the law of that State.

III. RULES OF LIABILITY

A. *Principles*

The basic principle of liability is that the operator of an aircraft involved is liable for damage caused by collision or interference only if and to the extent that the occurrence has been caused by his fault.¹⁷

¹³ Art. 12.

¹⁴ Art. 8.

¹⁵ Art. 4.

¹⁶ Art. 3.

¹⁷ Art. 4.

The fault of the operator's agents and servants acting within the course of their employment, whether or not within the scope of their authority, is attributed to the operator.¹⁸ In certain cases, the fault of the operator must be proved, elsewhere it is presumed.¹⁹ The concurrent fault of the injured person, including the operator of another aircraft involved, may result in complete exoneration or in a proportional diminution of the liability of the defendant operator.²⁰

The above principles apply irrespectively of whether the operator is sued in a direct action by a person having suffered damage from the collision, including damage to the aircraft, or in a recourse action by any of the operators or by a person having paid compensation to a victim of the collision. In the case where there are two or more operators liable for damage to persons or goods carried under an agreement of carriage the principles apply with the proviso that if the fault of none of the operators involved has been proved, the damage will be borne by each of them in proportion to the weight of the respective aircraft.²¹

The following paragraphs deal successively with the rules of liability applicable to the various claims for damage and, thereafter, with the maximum amounts of compensation fixed for each category of claims.

B. *Liability For Damage Caused To Passengers And Goods Carried On Board The Other Aircraft Under An Agreement Of Carriage*²²

If an action is brought against the operator of an aircraft for damage caused to passenger or goods on board the other aircraft and provided such passenger or goods were carried under an agreement for carriage, the fault of the defendant operator is presumed in accordance with the principles established by the Warsaw Convention, as amended by The Hague Protocol. It follows therefrom that the operator is liable unless he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures and, that if the *lex fori* so permits, he may be exonerated of liability wholly or partly if he proves that the damage was caused or contributed to by the negligence of the person who has suffered the damage.²³ Under the draft convention, these rules which are taken from the Warsaw Convention as amended at The Hague, apply whether or not the actual carriage of the passenger or goods concerned was governed by that Convention.

C. *Liability For Damage Caused To Any Other Person Or Property On Board The Other Aircraft And To The Other Aircraft Itself*²⁴

The operator is liable only if his fault is proved, the fault of his servants or agents, acting in the course of their employment (whether or not within the scope of their authority) being considered at the operator's own fault.

¹⁸ Art. 9.

¹⁹ Art. 5.

²⁰ Art. 6, art. 7 (1) and (2). The contributory negligence of the injured person can also be invoked in actions brought by any other claimant for damages suffered by the injury or death of that person.

²¹ Art. 7(2).

²² Art. 5.

²³ If the action is brought by one person to recover damages arising from the death or injury of another person, the fault of such other person, or his servants or agents, will have the same effect; see Article 6.

²⁴ Art. 4.

D. *Liability For Damage To Persons And Goods On Board The Operator's Aircraft And To Third Parties On The Surface*

It is recalled that the basis and limits of the liability with respect to these damages are outside the purview of the draft convention. However, if compensation for such damage is claimed in a recourse action, the operator is entitled to avail himself of the limits and defences he could have invoked in a direction action.²⁵

IV. LIMITS OF LIABILITY

A. *Damages Covered By The Draft Convention*

They have been listed under II., G above.

B. *Damage Caused To The Other Aircraft*

In case of destruction, loss, damage to or delay of the aircraft, including its equipment and accessories, and of property of the owner, operator or crew thereon, compensation is limited to the lower of the following amounts: value at the time of the collision or cost of repairs or replacement of each item.²⁶ In addition, ten per cent of the amount so determined can be claimed for loss of use of each of the items specified above.²⁷

As already mentioned, if the fault of the plaintiff, including the fault of his servants or agents, has contributed to the damage, then the compensation might be reduced in proportion to his fault if and to the extent permitted by the applicable law. However, in actions where the plaintiff is the operator of another aircraft involved in the collision, the sharing of the damage attributable to contributory negligence is made mandatory by the draft convention as follows: in proportion to the degrees of fault and, if the respective degrees of fault cannot be ascertained, in equal parts.²⁸

C. *Damage Caused To Passengers And Their Property Carried Under An Agreement For Carriage*²⁹

The limits established by the Warsaw Convention as amended at The Hague apply as follows:³⁰ death, injury or delay of a passenger, 250,000 gold francs; property which a passenger had in his charge, 5,000 gold francs; and registered luggage and other goods, 250 gold francs per kilogram.³¹

Contributory negligence of the injured passenger is taken into account if and in the manner permitted by the law of the court.³² In recourse actions among operators, the rule stated in III., A. above, applies.

D. *Damage Caused To Other Persons And Property (Not Carried Under An Agreement For Carriage) On Board The Other Aircraft*

The liability of the operator is not limited for damage to passengers. However, damage to property is limited as stated under B. above. Con-

²⁵ Art. 8.

²⁶ Art. 10(1) (a).

²⁷ Art. 10(1) (b).

²⁸ Art. 7(1).

²⁹ Whether or not the agreement was governed by the Warsaw/Hague acts; see above under "Rules of Liability."

³⁰ Art. 10(1) (c)-(e).

³¹ The gold franc is defined as in the Warsaw/Hague acts.

³² Art. 6; see also note 23 *supra*.

tributory negligence of the injured person may be taken into account if and in the manner permitted by the law of the court³³ and, in recourse actions among operators, in accordance with the rule stated in IV., A. above.

E. *Limitations Inapplicable*

None of the described limitations is applicable in the following cases: (1) wilful misconduct³⁴ of the operator, his servants or agents, acting in the course of their employment, whether or not within the scope of their authority; (2) the person liable has wrongfully taken and made use of the aircraft without the consent of the person entitled to permit its use.³⁵

F. *Claims Against Several Operators*

While the injured person may have a cause of action against several operators involved in a collision or interference, the draft convention prevents the claimant from obtaining a total amount in excess of the stipulated limits.³⁶

G. *Overall Limit And Its Effect On Recourse Actions For Damages Covered By The Draft Convention*

Where limitations apply to claims for damage, the aggregate liability of the operator and any liability of the operator and their respective servants and agents cannot exceed the respective limits described above, including the value of the aircraft, its equipment and accessories, as determined in accordance with the above mentioned rules of the draft convention.³⁷

This principle applies also in recourse actions against the operator inasmuch as they cannot result in imposing on him payments in excess of the limits provided by the draft convention.³⁸ Hence, where a person not covered by the convention, *e.g.*, an air traffic control agency, manufacturer, etc., has paid full compensation to a person injured by a collision within the scope of the convention, he cannot recover in a recourse action against the operator more than the amount which the injured person could have claimed from that operator in a direct action under the convention.

H. *Recourse Actions Generally And Contributions Among Operators*

Some of the defences available to an operator in recourse actions have already been described. It should now be added that whenever the operator is entitled to invoke in a recourse action the limits established by the draft convention, he can also avail himself of the defences provided therein which diminish or abolish his liability as described above, *e.g.*, contributory

³³ See *supra* note 32.

³⁴ Wilful misconduct is described as in Article 25 of the Warsaw Convention as amended at the Hague.

³⁵ Article 11(1) and (2) which combines the cases of unlimited liability provided for by the Warsaw and Rome Conventions respectively.

³⁶ Art. 13(2). Since the draft convention extends also to some aspects of the liability of the owner of the aircraft involved and of the servants and agents of the operator and the owner, the above rule against cumulation of indemnities applies also in actions against such persons. The proposal to permit the claimant to obtain payment of the amounts specified in the amended Warsaw Convention, namely from both his carrier and from the operator of the other aircraft, was rejected by the Legal Committee.

³⁷ Art. 13(1).

³⁸ Art. 8.

negligence of the claimant or of the victim and their respective servants and agents.³⁹ Moreover, in recourse actions for recovery of compensation paid by a third party to persons on the surface or carried on board his own aircraft, whether or not under a contract of carriage, each operator is entitled to invoke the limits established by the draft convention, or any other international convention, *e.g.*, the Warsaw and Rome Conventions, as well as all defences and benefits provided therein.⁴⁰ In other words, no recourse action against the operator of an aircraft can result in imposing upon him a higher or more severe liability than would have been his in a direct action by the person having suffered damage from the collision or interference.

There remains to be discussed the case where more than one operator are liable for damage falling within the scope of the convention but only some of them have suffered damage or paid compensation. The draft convention permits the latter to bring a direct action against the other operators involved in order to obtain a contribution under the principles of contributory negligence, as follows:⁴¹ The total damage will be borne by all the operators at fault in proportion with the gravity of the fault of each of them; but if the fault of each operator cannot be ascertained, the damage is shared equally.

The application of this rule is subject to the above mentioned limitations which an operator can invoke with respect to damage to persons and property on board his own aircraft or on the surface.⁴²

Identical rules apply to contributions among operators with respect to damage to persons or goods carried under an agreement of carriage and to damage which is not covered by the convention whenever they are liable therefor "under the convention or under any one legal rule." However, if none of the operators liable for such damage has been proved to have been at fault, they share such damage in proportion to the weight of the respective aircraft.⁴³

V. LIABILITY OF THE OWNER OF THE AIRCRAFT, AND OF THE AGENTS AND SERVANTS OF SUCH OWNER AND OF THE OPERATOR OF THE AIRCRAFT

The liability of these persons would be governed in principle by the applicable national law, including its rules of conflict of laws, but the draft convention modifies these laws. Servants and agents of the operator, when acting within the scope of their employment (whether or not within their authority) shall be liable only upon proof of their fault. If their fault is proved, they enjoy the same benefits as are accorded to the servants and agents of the carrier under Article 25A of the amended Warsaw Convention, *i.e.*, they can avail themselves of all the defences and the limits of liability accorded to the operator by the convention, except where they were guilty of wilful misconduct.⁴⁴

³⁹ This results from Article 8 and the combination of Articles 13(1) and 6.

⁴⁰ Art. 8.

⁴¹ Art. 7(1).

⁴² Art. 8.

⁴³ Art. 7(2).

⁴⁴ Art. 12(1).

The same rules apply under the draft convention to the owner of the aircraft and to his servants and agents.⁴⁵

The reason that servants and agents of the operator and the owner of the aircraft are covered by the convention—to the exclusion of other persons who might be responsible for the collision or interference—is that they are in a contractual relationship with the operator. If the owner of the aircraft or the agents and servants of the operator are sued by a person who has suffered damage, they may be liable without limits under the applicable national law. Consequently, if the operator had agreed to hold them harmless for any amount paid pursuant to such damage action, then the whole system of limited liability established by the convention for the benefit of the operator could be bypassed by instituting direct actions against his servants and agents or against the owner of the aircraft. Therefore, these persons had to be brought within the scope of the convention.

The owner's servants and agents have been brought within the scope of the convention in order to avoid increasing the owner's liability under the convention as a result of a direct action against them, in situations where the owner had agreed to indemnify them for compensation paid with respect to damage caused in the course of their employment. As regards the liability of the owner himself, it is noted that the provisions of the draft convention not only accord him the benefit of limited liability which he may not enjoy under the applicable national law, but they also modify those rules which may impose liability on him for collision damage irrespective of his fault or proof thereof. The convention indeed provides that he shall be liable only if his fault is proved.

VI. ANCILLARY PROVISIONS

The draft convention stipulates that all actions under the convention can be brought only before the courts of a Contracting State in which the collision or interference occurred or in which the defendant has his domicile or principal place of business.⁴⁶ It authorizes such courts to require the claimant to provide guarantees in order to insure observance of the above mentioned overall limit and the rule against cumulation of damages.⁴⁷ The draft convention also sets out periods of limitation on actions and rules with respect to suspension and interruption of these periods.⁴⁸

Finally, Article 19 contains a saving clause with respect to both the Warsaw Convention, as amended and supplemented, and the Rome Convention, while Article 20 provides for the survival of claims in case of death of the person liable.

⁴⁵ Art. 12(1) and (2).

⁴⁶ Art. 14. But *see* also II., E. above for actions arising from damages caused by State aircraft.

⁴⁷ Art. 13(3).

⁴⁸ Art. 15.

TEXT OF THE DRAFT CONVENTION ON AERIAL COLLISIONS

ARTICLE 1

1. The provisions of this Convention apply when damage contemplated by the Convention results from a collision or interference between two or more aircraft in flight:
 - (a) if the collision or interference occurs in the territory of a Contracting State and at least one of the aircraft involved is registered in another Contracting State, or
 - (b) if two or more of the aircraft involved are registered in different Contracting States, irrespective of where the collision or interference occurs.
2. An aircraft is deemed to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" relates to the period from the moment it becomes detached from the surface until it becomes attached thereto.
3. For the purposes of this Convention, the State aircraft of a State shall be deemed to be registered in that State.

ARTICLE 2

1. Liability for the damage contemplated in this Convention shall, subject to the provisions of the following articles, attach to the operator.
2. For the purposes of this Convention the term "operator" shall mean 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 is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

ARTICLE 3

Except in the case of recourse actions between the operator of an aircraft, his servants or agents, and the operator of another aircraft, his servants or agents, this Convention shall not apply to the liability of an operator, his servants or agents, in respect of persons or property on board his aircraft or of persons or property on the surface.

ARTICLE 4

The operator of each of the aircraft involved shall, if it is proved that a collision or interference was caused by his fault, be liable:

- (a) for destruction, loss, damage or delay to, or loss of use of, any of the other aircraft or the equipment or accessories thereof;
- (b) for destruction, loss, damage or delay caused to, or loss of use of any other property on board such other aircraft except property specified in Article 5;
- (c) for death, injury or delay caused to persons on board such other aircraft other than the persons specified in Article 5.

ARTICLE 5

1. The operator of each of the aircraft involved in a collision or interference shall be liable:
 - (a) for death, injury or delay caused to persons carried under an agreement for carriage on board any of the other aircraft;
 - (b) for destruction, loss, damage or delay caused to, or loss of use of, property carried under an agreement for carriage on board such other aircraft.
2. The operator shall not be liable for damage contemplated in the preceding paragraph if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

ARTICLE 6

If the operator proves, in an action brought against him by a person who is not the operator of one of the aircraft involved, that the damage was caused, or contributed to, by the fault of the person who suffered the damage or of his servants or agents, or of the person whose death or injury gave rise to the action or of his servants or agents, the court shall, if its law so permits, and in accordance with the provisions of such law, exonerate the operator wholly or partly from his liability.

ARTICLE 7

1. If the collision or interference was caused by the fault of more than one operator, compensation for damage contemplated in Article 4 shall be borne by such operators in proportion to the degrees of fault respectively committed, and if the respective degrees of fault cannot be ascertained then the damage shall be shared equally between the operators involved.
2. If a collision or interference gives rise to liability under this Convention or under any other legal rules of two or more of the operators of the aircraft involved for damage other than damage contemplated in Article 4, the liability for such damage shall, as between the operators liable, be borne in proportion to the degrees of fault respectively committed, or, if the degrees of fault cannot be ascertained, in equal parts, or if none of the operators has been proved to have been at fault, in proportion to the weight of the respective aircraft.
3. "Weight" means the maximum weight of the aircraft for take-off, excluding the effect of lifting gas when used, authorized by the appropriate authority of a Contracting State and evidenced
 - (i) by the certificate of airworthiness, in the case of an aircraft for which such certificate is required;
 - (ii) by any other valid means of proof, in the case of an aircraft which is permitted by such authority to fly without a certificate of airworthiness.

ARTICLE 8

Notwithstanding the provisions of Article 7, an operator shall not be liable in any action in recourse by another operator or by any other person for the payment of any sum which would result in his liability exceeding

any applicable limits of liability under this Convention or any other international convention or depriving him of any defence or benefit which he would be entitled to invoke under such conventions in respect to persons or property on the surface or carried on his aircraft.

ARTICLE 9

For the purposes of this Convention, the fault of a servant or agent acting in the course of his employment, whether or not within the scope of his authority, shall be deemed to be the fault of the operator.

ARTICLE 10

1. Subject to the provisions of Articles 8 and 11, the liability of the operator of an aircraft involved in a collision or interference shall, with respect to damage caused to another aircraft or to persons or property on board thereon, be subject to the following limits:

- (a) for destruction, loss of or damage to that aircraft, the equipment and accessories thereof or to any property thereon other than property specified in Article 5: the value at the time of the collision or interference or the cost of repairs or replacement, whichever is the least;
- (b) for delay caused to, or loss of use of, that aircraft or the equipment or accessories thereof or the other property to which subparagraph (a) above applies: 10% of their respective values as determined under subparagraph (a);
- (c) for death, injury or delay caused to a person on board carried under an agreement for carriage: 250,000 francs for each such person;
- (d) for destruction, loss, damage or delay caused to, or loss of use of, all the objects which a person on board carried under an agreement for carriage had in his charge: \$5,000 francs per person;
- (e) for destruction, loss, damage or delay caused to, or loss of use of, any other property on board the aircraft if such property is carried under an agreement for carriage: 250 francs per kilogram.

2. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.

ARTICLE 11

The limits of liability provided in the preceding Article shall not apply:

- (a) if it is proved that the damage resulted from an act or omission of the operator, his agents or servants, done with intent to cause damage, or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of an agent or servant, it is also proved that he was acting in the course of his employment, whether or not within the scope of his authority; or
- (b) if the person liable has wrongfully taken and made use of the aircraft without the consent of a person entitled to permit its use.

ARTICLE 12

1. If any action arising out of damage to which this Convention relates is brought against a servant or agent of an operator or a servant or agent of the owner of an aircraft, such servant or agent, if he proves that he acted in the course of his employment, shall not be liable except upon proof of fault and shall also be entitled to avail himself of all the provisions of this Convention which are applicable to the operator himself.
2. If any action arising out of damage to which this Convention applies is brought against the owner of the aircraft who is not also its operator, he shall not be liable except upon proof of fault, and shall be entitled to avail himself of all the provisions of this Convention which are applicable to the operator.

ARTICLE 13

1. The aggregate liability of the operator and any liability of the owner of any one aircraft and their respective servants and agents for damage contemplated in this Convention shall not, except as provided in Article 11, exceed the respective limits prescribed in paragraph 1 of Article 10.
2. Except as provided in Article 11, a claimant may not recover more than the maximum amounts specified in paragraph 1 of Article 10 in the cases therein referred to, regardless of whether the claim is brought against one or more of the operators or owners liable or their servants or agents.
3. The Court trying the case may require the claimant to provide such guarantees for ensuring observance of the provisions of this Article as the Court may consider necessary.

ARTICLE 14

Actions under the provisions of this Convention must be brought, at the option of the plaintiff, before a competent court of any Contracting State in which the collision or interference occurred or in which the defendant has his domicile or principal place of business.

ARTICLE 15

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 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.
3. In the case of actions in recourse, the period provided for in paragraphs 1 and 2 shall be prolonged so as to allow to any person desiring to exercise his right of recourse a period of six months in which to do so, reckoned from the date of the final judgment rendered or the final settlement made with respect to his liability under the original claim.

ARTICLE 16

1. Any State may at the time of its ratification of or adherence to this Convention make the following reservations or any of them:

- (a) that this Convention shall not apply to all or specified classes of its State aircraft,
 - (b) that an action with respect to damage caused by all or specified classes of its State aircraft shall be subject only to the jurisdiction of its own courts.
2. Any State making a reservation as aforesaid may at any time withdraw it in whole or in part.
 3. For the purposes of this Article, aircraft used in military, customs and police services shall be deemed to be State aircraft.
 4. For the purposes of this Article, aircraft which are engaged in the carriage of passengers, cargo or mail for remuneration or hire, other than those being used exclusively for governmental purposes, shall not be deemed to be State Aircraft.

ARTICLE 17

Contracting States will, as far as possible, facilitate payment of compensation under the provisions of this Convention in the currency of the State of residence of the claimant if he so desires.

ARTICLE 18

If legislative measures are necessary in any Contracting State to give effect to this Convention, the Secretary General of the International Civil Aviation Organization shall be informed forthwith of the measures so taken.

ARTICLE 19

Nothing in this Convention shall affect any of the provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw on 12 October 1929 or of the Protocol to amend the said Convention, done at The Hague on 28 September 1955, or of the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, done at Guadalajara on 18 September 1961, or of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, done at Rome on 7 October 1952, in a case where any of these instruments is applicable.

ARTICLE 20

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 responsible for his obligations.

ARTICLE 21

If Contracting States establish joint air transport operating organizations or international operating agencies which operate aircraft not registered in any one State, such aircraft shall, for the purposes of this Convention, be deemed to be registered in any one of the said States. However, if an aircraft of the organization or agency is involved in a collision or interference occurring in the territory of one of such Contracting States, that aircraft shall be deemed, for the purposes of this Convention, to be registered in that State.