

1962

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Recommended Citation

Gerd Rinck, *Damage Caused by Foreign Aircraft to Third Parties*, 28 J. AIR L. & COM. 405 (1962)
<https://scholar.smu.edu/jalc/vol28/iss4/12>

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LEADING ARTICLES

DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PARTIES*

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I. INTRODUCTION

TWO problems are of particular importance in civil air law: the rights of the passenger or consignor and the compensation of persons who did not use an aircraft but nevertheless suffered damage on the surface as a result of the operation of the aircraft. The rights of the user are covered by the Warsaw Convention of 1929 as amended and supplemented by the Hague Protocol of 1955 and the Guadalajara Convention of 1961. Especially the Warsaw Convention offers a fair and adequate solution and has met with world-wide recognition. However, the endeavours to enact a world-wide convention on damage caused to third parties on the surface have failed. The Rome Convention signed October 7, 1952¹ came into force, it is true, on February 4, 1958, but up to now (October 1961) it has been ratified or adhered to by only ten states.² The states which stand out in the field of civil aviation have all refrained from putting the convention into force. It appears therefore that the second problem in civil air law remains unsolved.

Nearly ten years after the Rome conference, the time has come to ascertain the fate of that convention and to attempt a prediction. This article undertakes to uncover the reasons why the overwhelming majority of all the states in aviation shrank from this convention. Inevitably linked to this are some considerations on how far one compromise or the other might be developed, thus perhaps promising better reception to a revised convention.

II. THE NATIONAL LAWS

Some information on the principles of liability is found in the appendix. It offers only rough statistics, but it evidences the general trend among the states active in aviation. Liability irrespective of fault, the so called "absolute liability" prevails in 41 out of 47 states. This far-reaching right of compensation is unlimited in the majority of the legal systems. The combination of absolute liability in certain kinds of cases and limited liability in other cases—as evolved in the Rome Convention—is to be found only in a minority of states, 15 out of 47.

Legal philosophy is certainly not a matter of statistics or majorities. It should be noted, however, that the United States delegation stood virtually alone in advocating a liability based on fault only. In evaluating their outspoken opposition against the convention, it should be remembered that

* On the Revision or Ratification of the Rome Convention.

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¹ Official text in English, French and Spanish: ICAO Doc. 7379 — LC/34, Montreal, April 1953, Conference on Private International Air Law, Rome, (hereafter Prot.) vol. 2, p. 247; English text: 19 J. Air L. & Com. 447 (1952); French text: 1952 Revue Francaise de Droit Aérien 423 (hereafter RFDA).

² For references see column 1 of the appendix.

even inside the United States the law is far from uniform.³ It is true that liability based on fault exists, but a considerable number of states have adopted the uniform state law for aeronautics without amendment. Section 5 of that law provides for absolute liability.⁴

One substantial shift in the grouping of states may result if the Soviet Union should switch over to a system of limited liability. The Aviation Code promulgated by the Soviet Union on December 29, 1961 contains no provisions relating to our problem (which the Aviation Code of 1935 did). Therefore Article 404 of the Soviet Civil Code dated October 31, 1922 will apply. According to that Code absolute and unlimited liability attaches to all damage caused by dangerous things such as aircraft. The Civil Code, however, is likely to be replaced by a new one in 1963 which will then rule one way or another on aircraft damage caused to third parties. It can be anticipated that many of the Eastern states will follow suit. If that Code adopts unlimited liability it is rather likely that the Soviet zone of Germany, for example, will adopt the same system, while up to now the law has been an absolute but limited liability in accordance with the Rome Convention of 1933 (as is the case in the Federal Republic of Germany). The adoption of the new Rome Convention has been under consideration since 1960 within the Council for Mutual Economic Aid,⁵ so that the Eastern countries will probably all ratify or (what seems more likely) all reject the Rome Convention.

The present status of the Rome Convention and the national laws are shown in a simplified manner in the appendix. This survey does not fully explain the apparent failure of the convention for there were four main controversies during the Rome conference—all of which had to be resolved by a majority vote—far from a substantial compromise. The four problems are:⁶ (1) The alternative between an absolute liability and a liability for fault only; (2) The limits of liability; (3) National control over foreign security (insurance) for an operator's liability; (4) The single forum in respect of actions for damages. The question before us now is whether or not new arguments or new bases for compromise have appeared after the lapse of ten years.

III. THE CONTROVERSIAL POINTS IN THE ROME CONVENTION

A. *Absolute Liability*

At Rome there was always the same solid and overwhelming majority of states which wanted the operator to be liable regardless of fault. Only the United States delegation fought and voted for a liability based on a presumption of fault.⁷ It was not supported by others.⁸ In the years after, official and semi-official statements in the United States denounced the absolute liability provisions of the convention.⁹ It cannot be denied, however, that the principle of absolute liability is recognized by most of the

³ See note, 28 J. Air L. & Com. 315 (1961-62).

⁴ *Ibid.*; 2 Prot. 74.

⁵ COMECON, founded 1949 to counterbalance the Western OEEC.

⁶ Garnaut, 1954 RFDA 10.

⁷ This seems also the preference of the aviation-insurers, see Wimmer, 1954 Zeitschrift für Luftrecht, 107 (hereafter ZLR).

⁸ 1 Prot. 15.

⁹ Nunneley, 20 J. Air L. & Com. 89, 91 (1953).

participants in the Rome conference, in the actual national laws and even in a considerable number of states within the United States. And that system appears only fair and adequate, for the "third party" on the surface did not assume any aviation risk. He deserves better protection than the user of an airplane. In order to relieve the operator, one might consider, if anything, allowing him the defence of *force majeure*. More specifically, the representatives of Anglo-Saxon law pleaded in Rome that there should be no liability, if the damage was caused by an outsider, *i.e.*, a person not belonging to the crew. For example, if somebody smuggles an infernal machine aboard an aircraft and as a consequence the aircraft crashes causing damage on the surface, the operator should not be held liable. The same should be the law if a passenger tries to capture the aircraft or otherwise causes damage. The convention of 1933 allowed a defence on that line and provided in Article 2, paragraph 2, subparagraph b, that there should be no compensation:

in the case of an act unconnected with the management of the aircraft committed intentionally by a person not being a member of the crew, and without the operator, or his servants or agents having been able to prevent it.¹⁰

The United States, the United Kingdom and Australia tried in vain to have this defence allowed in the convention.¹¹ It is in this connection that the head of the United States delegation blames the conference for being single-minded to the detriment of the operator.

Acts of outsiders are but a rare and highly unusual instance of causation utterly out of control of the operator. The basic problem is, whether or not the operator shall pay damages even in cases of *force majeure*. The conference discussed that plan several times but rejected it always as being incompatible with the principle of absolute liability.¹² This, however, is not an inevitable conclusion. It all depends on the definition of *force majeure*. Every damage connected with the typical risk of aviation should be justly compensated by the operator by reason of his endangering other people by operating an aircraft. An infernal machine or a hurricane, on the other hand, cannot be counted among the typical risks of aviation. The specific qualities of an aircraft will perhaps increase the damage, but the first and principal cause for the damage is always the criminal attempt or the thunderstorm, neither of which may be attributed to the operator. Therefore it might be considered fair and sensible to let the operator be exempt from liability if he proves *force majeure*, or in common law language, acts of God. The decisive point is to define this defence so that all of the aerodynamical or technical sources of damage would fall on the operator and only the atypical causes, which nobody could foresee or prevent, would relieve him from liability. This principle is already the law in quite a number of national statutes relating to automobile liability. It could be formulated along these lines:

There shall be no compensation if the damage was caused by an unavoidable event other than a defect of the airplane or a breakdown of its engines or devices. An event is deemed to be unavoidable, especially

¹⁰ Shawcross & Beaumont, *Air Law*, p. 508, No. 1131 (1951).

¹¹ de Juglart, *La Convention de Rome du 7 Octobre 1952*, p. 57 (1955).

¹² 1 Prot. 53, 57, 85.

- (a) if caused by the person injured, or by another person not employed in operating the aircraft or by a animal, and
- (b) if the operator as well as the pilot have administered all care as demanded by the circumstances.

The burden of proof falls on the operator. Thus, an absolute liability mitigated by the defence of *force majeure* seems justified for reasons of ethics as well as technical development. It might open the way for a compromise even with legal conceptions in the United States.

B. Damages By Noise

The convention denies compensation "if the damage results from the mere fact of passage of the aircraft through the air space in conformity with existing air traffic regulations!" This bestows a remarkable privilege on aviation. If the market value of real estate goes down because there is a new air corridor and nobody likes to live underneath it, or if silver foxes are frightened and suffer damages, the operator of the aircraft will in no way be responsible.¹³ This rule has met with serious objections but it appears to be in harmony with most of the national legislations. The owner of real property must tolerate airplanes flying over his land and no action in respect of trespass or nuisance may be taken provided the pilot complies with the air traffic regulations, *e.g.*, as to the height above the ground.¹⁴ If the passage is allowed, then the usual and unavoidable noise and interference cannot be objected to either. Our problem begins where unusual or unexpected damage beyond the normal interference occurs. If the owner created the circumstances from which the unusual consequences originated (*e.g.*, by breeding over-sensitive silver foxes) then it is up to him to bear the damages himself. That is at least how some courts have ruled. If, on the other hand, it was the pilot who brought about unusual circumstances (*e.g.*, a sonic boom), then he must pay compensation.

Such is the problem of the Rome Convention. The members of the conference intended, in truth, to deny compensation even for unusual noise, for the British proposal referring to "normal" noise was rejected.¹⁵ In the case of unusual noise it can hardly be said that an eventual damage was caused by "the mere fact of passage of the aircraft." The operator will be liable, therefore, without regard to Article 1, paragraph 1, phrase 2 of the Rome Convention.¹⁶ Indeed, the convention is rather obscure on two points: on unusual noise originating from an otherwise normal passage and on the accumulated noise in the vicinity of airports, especially in the waiting areas near an airport.¹⁷ Since the convention was signed in 1952 new technical standards have developed. It was several years later that the sonic boom turned out to be a potential danger.¹⁸ It could not have been considered in Rome. Damage caused by the sonic boom therefore falls outside the privilege granted in Article 1, and consequently makes the operator liable under the broad principle of the same article.

The convention apparently denies any compensation for damages re-

¹³ For details see Rinck, 1954 ZLR 88.

¹⁴ Shawcross & Beaumont, 1951, p. 399 (No. 422), p. 430 (No. 467).

¹⁵ Wilberforce, 1 Prot. 400.

¹⁶ Kistler, *Roemer Haftungsabkommen*, Thesis, Zurich 1959, p. 49.

¹⁷ de Juglart, 1953 *Revue Générale de l'Air* 353 (hereafter RGA).

¹⁸ Roth, 25 J. Air L. & Com. 68 (1958).

sulting from concentrated noise in the vicinity of an airport. That is the wording and such was the intention of the conference. The United States delegation, however, doubted even this and was afraid that the operator might be overburdened with damage by noise. The United States proposal for laying down rules on the liability of the airport operator would encounter great difficulties since the legal status of airports varies greatly from state to state. Generally speaking, the concise rule on noise, now in Article 1, paragraph 1, phrase 2, is acceptable and indispensable. Nevertheless it should be clarified by interpretation or revision that would take into account or include unusual noise and the sonic boom. All the legal implications connected with noise originating from an airport and its waiting areas could stand outside the realm of the convention and be left to the discretion of the national legislatures.

C. Limits Of Liability

Any debate on the justification and merits of limits of liability could be infinite. It is not so much a matter of legal arguments as of legislative discretion. The basic premise could be easily contested by asking whether limits are justifiable at all. The third party on the surface did not assume any risk, nevertheless he may lose his life or his health. Under such circumstances should he be denied full compensation? In international air law the consideration is generally accepted that limited liability is a *quid pro quo* for the absolute liability imposed on the operator. This, however, is not a corollary, as shown by the mere fact that twenty-four states have made absolute liability the law without any limits as to the compensation due. However, the system of limited liability has been recognized in air law conventions since 1929 but will not be discussed here.

The debate over the level of the limits on liability is heated. The United States delegation considered the *per capita* limit on each person injured to be too low, as well as the overall limit,¹⁹ although those limits were approved by other nations and writers.²⁰ During the conference in Rome two big coalitions—so to speak—had formed. One comprised nearly all the states where big airlines and leading insurers are domiciled. The member-states of this coalition went all out to keep the limits low and especially to fix a rigid ceiling irrespective of the weight of the aircraft. The model for this was Article 8, paragraph 2 of the 1933 Rome Convention. The opposition coalition proved stronger. The first object of all those states which had joined forces was the protection of the victims.²¹ The idea of a rigid ceiling was thus rejected. The bigger the aircraft, the higher the overall limit. The maximum compensation provided for each person was limited to 500,000 gold francs as opposed to 200,000 francs in the 1933 convention. The debate over the extent of the limits is not really that important. The statistics show that each year damage to third parties on the surface is very rare and that the risk created by railways, especially at grade level crossings, is several hundred times higher than the risk in aviation.²² Higher limits could not therefore greatly affect the premiums for insurance against third party risks. There is really no serious objection against levelling up the limits.

¹⁹ Nunneley, *supra* note 9, at 91.

²⁰ Le Goff, *Manuel de Droit Aérien privé* 249 (1961).

²¹ Garnault, 1953 RFDA 9.

²² For statistics see Rinck, 1958 ZLR 300.

D. Forfeiture Of Limits

More deeply rooted is the antagonism over the forfeiture of limits. Under what circumstances shall the liability of the operator become unlimited, if at all? Article 12, paragraph 1 of the convention provides for an unlimited liability only "if the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage. . . ."

However careless and utterly negligent the person may have been, there should be only limited liability. Even if the pilot foresaw that damage might result and even if he took the risk and just hoped for the best, there could be limited liability only in the case of *dolus eventualis*. The wording of Article 12 creates some difficulty for countries outside the common law tradition. Some of the countries—amongst them Germany—differentiate between intent (French: *intention*, German: *Vorsatz*) and purpose (French: *dessein* or *malveillance*, German: *Absicht*).²³ Intent—as understood in those legal systems—means that the person foresaw the result and approved of it. Purpose on the other hand denotes a stronger psychic engagement. It means that the action was motivated by the desire to create damage. European jurists especially think that only in the latter case of purpose and motivation should there be unlimited liability,²⁴ and since such a case will hardly ever be proved the liability remains limited even in case of criminal negligence. This is felt to be unjustifiable,²⁵ but it would be more easily acceptable to a European legal mind if translation and construction make clear that the damage must have been intended but need not have been the object and motive of the operator or his agents. This was the understanding during the Rome conference. The wording was adopted in order to make sure that in all cases of negligence or wilful misconduct, the liability should remain limited,²⁶ while unlimited in the case of criminal acts.²⁷

The main concern of the conference was to avoid the rule of *res ipsa loquitur* as established in common law countries. According to precedents "intent" can be implied in the deliberate and reckless decision of the operator or his pilot. Intent may also be proved by way of presumption created by the fact that the pilot took off in spite of his knowledge that something was wrong with the engine or that some equipment was missing.²⁸ In these cases, it is true, only limited liability was in the minds of the delegates. Since the rule of *res ipsa loquitur* applies only in civil cases, whereas full proof of intent is required in criminal cases, it is safe to say that within the Rome Convention the law of evidence would be the same as in penal law. Even before common law courts, intent of the operator or his servants and agents must be fully proved.²⁹ This is what the delegates had in mind.³⁰ A start in violation of safety regulations or

²³ Schnitzler, *Vergleichende Rechtslehre* 620 (2d ed. 1961).

²⁴ de Juglart, *supra* note 10, at 103, 107; Kistler, *supra* note 16, at 60; Rinck, 1954 ZLR 100; 1958 ZLR 304.

²⁵ Riese, 1952 ZLR 125; Kistler, *supra* note 16, at 60.

²⁶ Leonel, Brazil, 1 Prot. 76; Friendly, IATA, 1 Prot. 82.

²⁷ Poulton, Australia, 1 Prot. 79.

²⁸ Hesse, *The Aircraft Operator's Liability*, Thesis, Institute of Int'l Air Law, Montreal, 1953, p. 119.

²⁹ *Id.* at 120.

³⁰ Poulton, Australia, 1 Prot. 80.

with knowledge of some engine trouble gives rise to only limited liability.

This rule is not in harmony with Article 25 of the Warsaw Convention as amended at the Hague. There the passenger gets unlimited indemnification if the damage resulted from an act "done with intent to cause damage or recklessly and with knowledge that damage would probably result." Thus the user receives full compensation on proof of recklessness and knowledge (for which the Roman law term is *luxuria*). On the other hand, the third party, who did not agree to bear any risk, is in a poorer position before the court and has to prove intent of the operator or pilot. It is neither fair nor logical to favour the person who assumed a risk.³¹

A certain consolation may be drawn from the fact that the Rome limits are so high that in most cases the victim is not interested in unlimited liability at all. The principle, however, remains shocking—at least to a European legal mind—and compromise could be easily reached by adopting the Hague formula. The third party deserves at least the same legal position as the user of an aircraft. Unlimited liability should therefore be the law if the damage was caused recklessly and with knowledge that damage was likely to result.

E. *Single Forum*

The problem of jurisdiction was the most controversial issue at Rome. Eventually the majority decided that actions may be brought before the courts of only the contracting state where the damage occurred.³² This is probably the main reason for the failure of the convention as a whole.³³

In determining the forum, two interests are clearly opposed to each other. The victims prefer action in their home country and can point to the undeniable advantage that all evidence is most easily obtainable there. The operator, opposed to that, has a natural interest to be sued in his own nation, if at all. It should be considered, however, that he undertook transportation in a foreign country and thus, with respect to those activities, he submitted himself to the jurisdiction of that foreign country.³⁴ To give a choice of several forums would have the big disadvantage that the observation of the limits could not be relied upon. In different countries judgments might easily be given, the total of which would exceed the limits. How could a court, on the other hand, consider or comply with a judgment pronounced abroad or a claim still before a foreign court, or even future actions?

The conference discussed at length a proposal to permit an additional jurisdiction provided that operator and victim had agreed to it and that both were of the same nationality.³⁵ This would open the possibility for the parties to conclude an agreement to the disadvantage of, or even in fraud of, other victims. This proposal was therefore rejected by a large majority.³⁶ Retained was a clause that an agreement as to an additional jurisdiction is allowed if the proceedings cannot have the effect of prejudic-

³¹ Garnault, 1 Prot. 85; Rinck, *Gefährdungshaftung* 29 (1959).

³² Art. 20, para. 1.

³³ Nunneley, *supra* note 9, at 91, 100.

³⁴ Toepper, *Comments on Article 20 of the Rome Convention of 1952*, 21 J. Air L. & Com. 420, 422 (1954).

³⁵ Alten, Norway, 1 Prot. 190.

³⁶ Poulton, Australia, 1 Prot. 193, 195.

ing in any way the rights of persons who bring action under the original jurisdiction. This proviso makes the agreement practically pointless.³⁷

The sole competence of courts in the country where the damage occurred obliges the operators to respond to proceedings abroad and abroad only, for the convention does not apply to damages which occurred in the operator's own country.³⁸ The consequence is that foreign judgments are to be enforced in the operator's country. It inevitably follows that foreign judgments must be recognized and enforced to some extent. Article 20, paragraphs 4 through 12 establishes comprehensive but complicated rules for that. Foreign judgments must be enforced unless—broadly speaking—one of four exceptions is proved: first, if the defendant was not given a fair opportunity to defend his interests;³⁹ second, if there was a final and conclusive judgment in respect of the same cause of action;⁴⁰ third, if the judgment has been obtained by fraud;⁴¹ fourth, if the foreign judgment is contrary to the *ordre public* of the other state.⁴² These rules for the enforcement of foreign judgments and the detailed provisions connected therewith correspond in full with Article 2 of the United Nations sponsored convention on the recognition and enforcement of judgments concerning alimony and maintenance of children, signed at the Hague on April 15, 1958. The international obligation to recognize foreign judgments is still more extensive in the field of transport by rail.⁴³ National laws as a rule allow the enforcement of foreign judgments under the same provision with the addition that reciprocity be guaranteed. That will always be the case in the states which are parties to the Rome Convention. Thus far the Rome Convention is in line with national and international law. Moreover and generally speaking the recognition of foreign judgments is the modern trend in legal development and favours the unification of law.⁴⁴ The rules on the enforcement of foreign judgments can therefore hardly be an obstacle to the ratification of the Rome Convention.

The single forum remains the main obstacle. Searching for a better rule on this point, two solutions are suggested. Besides the forum where the accident happened, another jurisdiction might be recognized in the state where the operator is domiciled. That was the rule in Article 16 of the 1933 convention. The same two forums were recently agreed upon by the ICAO Legal Committee's Subcommittee on Aerial Collisions.⁴⁵ The drawback is that judgments pronounced under different jurisdictions may, taken together, exceed the limits. This undeniable disadvantage may be overcome by following a proposal once submitted by the United Kingdom and Italy. Several courts may be competent according to that solution. However, the defendant-operator who alone is interested in the limits, may plead that all the law suits be transferred and concentrated before one court. This plea must be allowed if the operator deposits with

³⁷ Alten, Norway, 1 Prot. 489.

³⁸ Art. 23, para. 4.

³⁹ Art. 20, para. 5, litt. a, b.

⁴⁰ *Id.* at litt. c.

⁴¹ *Id.* at litt. d.

⁴² Art. 20, para. 7.

⁴³ Art. 55, para. 1 of the two conventions of transport of persons (CIV) and goods (CIM) by rail, signed at Berne on Feb. 15, 1956.

⁴⁴ Smirnoff, 1956 RGA 20.

⁴⁵ Art. 14 of the draft. ICAO Doc. LC/SC/Aerial Collisions, No. 71, App. A dated 3/27/61.

the chosen court a security equivalent to the limits. The moment the security is deposited the jurisdiction of all other courts comes to an end. This is rather attractive for the claimants because they are now sure to receive compensation up to the limit—if they win the action—and need not enforce judgments abroad.

This proposal was rejected in a subcommittee for the apparent reason that it is without precedent and perhaps because the subsequent withdrawal of jurisdiction hurts the national prestige of some states.⁴⁶ Hardships and unnecessary actions can be avoided by establishing a time limit for the defendant's deposit and plea. Thus the Anglo-Italian suggestion offers the easiest practical compromise between the antagonistic interests of operator and victim. This or a similar compromise means a revision of the Rome Convention and should indeed be considered. As long as the unique jurisdiction remains, countries of Anglo-Saxon legal tradition are unlikely to ratify the convention.⁴⁷

F. *Liability Insurance*

The system of liability becomes worthless the moment the operator turns out to be insolvent. That is why practically all states require the operator to be insured with respect to his liability for damage to third parties.⁴⁸ Certain other securities may replace the insurance. This is also the law under Article 15 of the Rome Convention.

Here the last of the great controversies over the Rome Convention arose. This, we are happy to observe, does not involve disputes over legal ethics or philosophy. From the several kinds of securities provided for under Article 15, paragraph 4, the operators generally choose liability insurance and contract with an insurance company in their home country. The policy issued by the insurer must be passed on by all contracting states as adequate security, provided that the insurer was authorized under his national law and, furthermore, that his financial responsibility has been verified by his state of domicile. This verification was highly controversial. Many states, first of all the United States, claimed the right to verify for themselves the solvency of each foreign insurance company.⁴⁹ It was but a feeble majority that voted for a weak compromise according to which each state must recognize, for the time being, the verification of the insurer's national authorities. The state overflowed may, however, contest the verification and eventually bring the dispute before an arbitral tribunal or the Council of ICAO. In spite of this contest the state is bound by the foreign verification until the tribunal or the Council gives its opinion.⁵⁰ This compromise must be credited to the French delegation.⁵¹ However, to this day the United States has not come around to accepting it and has even questioned the status of the ICAO Council as an arbitration authority.⁵² It is submitted that these objections do not carry much weight. If a state enters a bilateral agreement and thus grants commercial rights to another state, it puts some faith in the other state and

⁴⁶ de Juglart, *supra* note 10, at 153.

⁴⁷ Nunneley, *supra* note 9, at 101.

⁴⁸ Le Goff, *supra* note 20, at 239; de Juglart, *supra* note 10, at 112.

⁴⁹ de Juglart, *supra* note 10, at 133.

⁵⁰ Art. 15, para. 7.

⁵¹ Garnault, 1953 RFDA 12; de Juglart, *supra* note 10, at 137.

⁵² Kistler, *supra* note 16, at 79 rejects these objections on good grounds.

in its airlines and the first state may also be expected to extend that faith and confidence to insurance companies in the second country. Passage of foreign aircraft from states which have not signed a bilateral agreement will be rare, so that one need not worry too much about their insurer's solvency.

A new solution might be found by obliging the insurers to join one or the other of the international pools. The insurance pool could then guarantee the company's solvency in favor of the victims. The licensing of such a pool and the control over its conditions of guarantee should be vested in the Council of ICAO. This license would, however, grant a monopoly or something similar. The ICAO Council would have to intervene in the insurance business and keen competition and jealousy would arise amongst insurers and interested pools. This system would therefore suffer from weaknesses as does the present system of foreign verification under Article 15, paragraphs 5 and 7. The obligation to recognize such verification for the time being is hardly sufficient reason to reject the convention as a whole.

The liability insurance brings up another much debated problem, namely the restriction of defences that may be put up against a victim by the insurer. Under certain circumstances the insurer is liable to the victim although he is not liable to the insured operator.⁵³ Here a problem arises in the case of intentional wrong done by the operator. Under liability insurance the insurer is not bound to indemnify the operator if he caused damage intentionally. That is the national law or is provided for in the conditions of insurance. Under the Rome Convention that defence is denied the insurer in an action brought by the victim. In that respect the convention makes the insurer liable to a larger extent than the national law does.⁵⁴ This divergence, considerable as it seems, is of little practical importance. It will rarely be the insured operator himself who causes damage by intent. It will usually be his pilot or another of his servants and agents, and in such a case the insurer must pay even under national law.

The insurer may not avail himself of any grounds of nullity or any right of retroactive cancellation with regard to the policy underwritten. He is liable up to a point even if the damage occurred outside the territorial limits or after the insurance expired. These rules were felt to be acceptable by the insurers with respect to the Brussels Protocol of 1938 as well as to the convention of 1952.⁵⁵ Here the United States delegation did not raise objections.⁵⁶ Therefore, this carefully balanced system should no longer be questioned. Summing up this chapter it is safe to say that the rules in the convention covering security for the operator's liability seem to present no insurmountable obstacles to ratification and do not need revision.

IV. SUMMARY: WEIGHING THE INTERESTS

Surveying the reasons for the apparent failure of the Rome Convention and leaving minor objections aside, four main weaknesses of the convention evolve:

⁵³ Art. 16.

⁵⁴ Wimmer, 1954 ZLR 110.

⁵⁵ *Id.* at 113, 148.

⁵⁶ Nunneley, *supra* note 9, at 100.

Absolute liability, chiefly objected to in the United States. A compromise might be reached by allowing the operator to set up the defence of *force majeure* (not including specific aviation risks).

Damage by noise. Here the convention is not clear. It should be specified that damage caused by a sonic boom must be compensated, while the operator is not liable for noise caused during taking off, landing and waiting above an aerodrome.

Unlimited liability for intentional damages only. Here the opposition comes mainly from European Continental legal thinking. A compromise might easily be reached on the basis of the Hague formula: recklessly and with knowledge that damage was likely to result.

The *single forum* where the damage occurred. This is hard for Anglo-Saxon legal systems to accept. Another jurisdiction might be admitted according to the domicile of the defendant-operator. If the latter deposits a sum with the court covering the limits, then this court alone shall be competent to hear the case.

There are other objections. They could be met by increasing the limits established under Article 11 and by providing that liability insurance be guaranteed by some international insurance pool. These and others are minor objections which really should not prevent ratification or adherence.

Confronted with this convention a legislative body could do one of three things: it could ratify the convention, it could pursue its revision or it could wait and see what other states will do. Weighing the financial interests it is immediately evident that the interests of plain citizens as possible victims are strongly opposed to the interests of the big airlines. The state will protect its citizens best if it does not ratify the convention. Then the legislator may establish absolute or other liability, may put up limits or no limits, and require securities as he thinks adequate. This national law will undoubtedly apply to all foreign aircraft causing damage. The victim can be best protected if the convention is not applied.

The airlines and other operators are interested in ratification. In the large majority of countries absolute liability without limits is the law. A state can protect its airlines from unlimited liability, if at all, only by ratifying the convention. Ratification makes sense only if the big partner-states in aviation also ratify. Up to now they have not. Should the legislator therefore decide to wait and see? Nearly ten years have passed since the convention was signed in 1952. There seems to be no indication of new ratifications in addition to the nine already effected. There is no hope for a sudden change in policy or legal conviction within the big states. Therefore we can see no point in waiting longer than ten years. Two solutions remain before the legislator: to undertake a revision, or to give up hope for a convention at all. Apart from publications in the United States practically all legal writers who ventured to write on this subject have recommended ratification.⁵⁷ But there is not much to be said in favor of ratification as long as the other states—and especially the United States—refrain from so doing.

Practical considerations as well as the ideal of unification of law favor the third approach—the revision of the convention. After the frustrated

⁵⁷ Garnault, 1954 RFDA 15; de Juglart, *supra* note 10, at 176; Le Goff, *supra* note 20, at 251; Kistler, *supra* note 16, at 107, Legal Committee of the German scientific society for aviation, 1954 ZLR 145.

endeavours of 1933, 1938 and 1952, governments and specialists will be reluctant to take up the same problems again. But some consent has been reached in the meantime and new solutions are outlined above. The time for re-opening the debate might well be chosen now, for the preparatory work for a collisions convention has been advanced.⁵⁸ Also that convention makes no sense unless the Rome Convention or a new Rome Convention is ratified at the same time and by the same states as the convention on aerial collisions. Best of all, both conventions could be moulded into one. The gloomy picture given here about the frustration of the Rome Convention is based mainly on papers and books, while the considerations of many states, *e.g.*, of the United Kingdom and the Scandinavian countries, were not published. In order to create a reliable and comprehensive basis on which to make decisions and possibly to initiate revisions, the Council of ICAO should send a questionnaire to all member states (and the USSR). The states should be asked whether or not they intend to ratify the Rome Convention and, if not, to state their reasons for refraining from doing so.

The danger to third parties caused by aviation is too serious a problem and the need for unification of law is too high an ideal for us to resign ourselves to languishing under the doom of the Rome Convention.

V. APPENDIX

Liability for Damages to Third Parties on the Surface*

Country	Ratified Convention		Liable For			Liability		Date of Relevant Law
	1952	1933	No Fault	Presumed Fault	Proved Fault	Unltd	Limited	
1. Argentina				X		X		
2. Australia	X		X				X	
3. Austria			X				X	12/2/1957
4. Belgium		X	X				X	9/11/1936
5. Bolivia			X			X		1/10/1939
6. Brazil		X	X				X	6/8/1938
7. Bulgaria			X			X		1948
8. Canada	X				X	X		
9. Ceylon	X		X			X		1950
10. Chile			X			X		10/14/1925
11. Colombia				X ?				5/26/1958
12. Costa Rica			X					1949
13. Czechoslovakia			X			X		9/24/1956
14. Denmark			X			X		5/1/1923
15. Dominican Rep.			X					1/28/1949
16. Ecuador†	X		X ?			X ?		9/12/1936
17. Finland			X			X		5/25/1923
18. France			X			X		11/30/1955
19. Germany			X				X	1/10/1959
20. Guatemala		X	X				X	1949
21. Haiti	X		X				X	3/24/1961
22. Honduras	X		X				X	3/17/1950

⁵⁸ ICAO Doc. LC/SC/Aerial Collisions No. 71, dated 3/27/61.

* So far as more recent data were not available, this résumé is based on ICAO Doc. 7379-LC/34, Rome Conference, (April 1953) vol. II p. 63-75.

† Defence of *force majeure* applied to landing and take-off.

Country	Ratified Convention		Liable For			Liability		Date of Relevant Law
	1952	1933	No Fault	Presumed Fault	Proved Fault	Unlt'd	Limited	
23. Hungary			X			X		12/31/1922
24. Iceland			X			X		1929
25. Iraq			X			X		1939
26. Ireland			X			X		1936
27. Italy			X				X	4/21/1942
28. Lebanon			X			X		1/11/1949
29. Luxembourg	X		X				X	
30. Mexico			X				X	12/27/1949
31. Netherlands					X	X		1/15/1958
32. New Zealand			X			X		1948
33. Norway			X			X		6/17/1932
34. Pakistan	X		X				X	
35. Poland				X		X		3/14/1928
36. Rumania		X	X				X	1953
37. Spain	X	X	X				X	7/21/1960
38. Sweden			X			X		6/6/1957
39. Switzerland			X			X		12/21/1948
40. Thailand‡			X			X		1938
41. U. of South A.			X			X		5/21/1923
42. UAR (Egypt)	X		X				X	
43. United Kingdom			X			X		1949
44. United States			X	X		X		
45. Uruguay			X				X	1942
46. U.S.S.R.			X			X		12/29/1961
47. Venezuela					X	X		10/31/1922
48. Yugoslavia			X ?			X		6/3/1944
Total	10	5	42	4	3	29	16	

‡ With reference to damage caused on aerodromes, a rebuttable presumption of fault is applied as against the operator.