



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

DRAFT TEXT OF THE PROTOCOL TO THE TOKYO CONVENTION OF 1963 PROPOSED BY THE LEGAL COMMITTEE

PROPOSALS FOR AMENDMENTS TO THE REFERENCE TEXT

(Presented by the Germany)

1. ARTICLE III (ARTICLE 3 OF THE CONVENTION)

1.1 Amendment:

1.1.1 The Legal Committee's current draft should be changed as follows to an optional provision for the State of landing and the State of the operator:

a) Article 3 paragraph 1 and 1 bis shall be deleted.

b) Paragraph 2 shall become paragraph 1¹

c) Paragraph 2 bis and 2 ter shall be replaced by the following²:

“2. Each Contracting State may also take such measures as may be necessary to establish its jurisdiction over offences [or acts] committed on board aircraft in the following cases:

a) as the State of landing, when the aircraft on board which the offence [or act] is committed lands in its territory with the alleged offender still on board;

b) as the State of the operator, when the offence [or act] is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State;

[c) when an offence [or act] is committed on board an aircraft by or against a national of that State.]”

¹ Germany would prefer to delete the words “and acts” in square brackets.

² Germany would prefer to delete the words “or acts” / “or act” in square brackets.

1.2 Explanatory Statement

1.2.1 Germany does not consider the establishment of a mandatory jurisdiction of the State of landing and the State of the operator acceptable. This would mean a substantial expansion of the existing provision (State of registration) and a renunciation of the generally accepted connecting factors in public international law, such as the personality principle and the principle “aut dedere aut judicare” (“extradite or prosecute”). This is all the more relevant with regard to offences which can be classified as less severe on the severity scale, especially with regard to “acts” (see the scope of the Tokyo Convention in Article 1 paragraph 1 a) and b)) in respect of the principle of proportionality. In addition, it seems to be problematic that the jurisdiction of the State of the operator is linked to a legal relationship determined by civil law and that the jurisdiction of the State of landing depends on the travel route or even the decision of the aircraft commander.

1.2.2 This substantial expansion is neither appropriate nor necessary. A legislative gap does not exist with regard to the jurisdiction of the State of registration. An enforcement gap for the State of registration has not been proven so far (the IATA survey (see LC/35-WP/2-3) does not contain any questions about criminal or administrative proceedings by the State of registration). Even if there was such an enforcement gap, it is questionable whether the establishment of new jurisdictions would be a proper means of solving this problem (e.g. with regard to legal assistance), or whether this supposed enforcement gap would be remedied by applying the new jurisdictions.

1.2.3 The State of landing and the State of the operator do not appear to be more effective in terms of dealing with the typical cases of unruly behaviour than the State of registration. This is because of the probably very large number of cases of unruly behaviour where the crew, the offender and the witnesses live in different countries and also not necessarily in the State of landing.

1.2.4 Under German law, the cases of unruly behaviour referred to would in most instances – for example because of the principle of proportionality – not justify the issue of an arrest warrant (e.g. in the case of an insult) or not even constitute criminal offences (e.g. in the case of a refusal to follow a lawful instruction given by the aircraft commander for the purpose of protecting the safety of the aircraft or the persons therein). Therefore it would not necessarily be possible to arrest the unruly passenger even if German law were to be applicable. Furthermore, the jurisdiction of the State of landing will not necessarily bring improvements in respect of criminal proceedings. Crew members and other passengers who might be able to give testimony will often be under time constraints. Depending on the severity of the alleged unruly behaviour it might not be proportional to oblige crew members and other passengers to miss a connecting flight or to change their travel arrangements because they have to remain available to give testimony. Nor are there any advantages concerning the court hearing. The offender and all the witnesses that are considered necessary by the court (who all might not have any connections to the State of landing and live abroad) would be summoned to appear in front of the court of the State of landing.

1.2.5 Therefore, the establishment of new jurisdictions could lead to additional problems and expenses (i. e. more cases of legal assistance, translations) also with regard to concurrent jurisdictions - quite apart from the fact that the competent jurisdiction would be unforeseeable for the unruly passenger.

1.2.6 We would therefore suggest that Art. 3 of the Tokyo Convention be left as it is. Germany could – as proposed above – accept a non-binding provision (like option 2 in the previous draft) for the jurisdictions of the State of landing and the State of the operator – provided that the word “may” is used in Article 2 *bis*. Additionally, in order to avoid any misunderstandings concerning the scope of the provision, paragraph 1 and paragraph 1 *bis* should be deleted. The wording “is (also) competent to exercise jurisdiction over offences and acts committed on board” could lead to the misunderstanding that all the jurisdictions that are mentioned there are mandatory in contrast to paragraph 2. The actual meaning of paragraph 1 – namely that the States are able to establish these jurisdictions – is self-evident and therefore not part of other international conventions.

1.3 **Alternative proposal**

1.3.1 If however a mandatory provision for the State of landing is deemed absolutely necessary by the majority, we would propose a different wording, which would be more in line with the internationally recognized principle “aut dedere aut judicare”, and which reads as follows:

“Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence committed on board an aircraft if the act is a criminal offence in the territory where it was committed or if that territory is not subject to any criminal law jurisdiction, and if the offender was delivered to the authorities of the State of the first landing and, although extradition would be generally possible for such an offence, is not extradited.”

1.3.2 This provision should – in particular – satisfy the concerns raised by IATA (and the Hong Kong Court of Appeal, see footnote 2 to 2.3 of the working paper LC/35-WP/2-2) in respect of criminal offences, because this clause would mean that extradition would – unlike in many other States – not be a precondition to prosecute the case in the State of landing. A further advantage would be that the provision would only be applicable to criminal offences, as extending the jurisdiction to cases of unruly behaviour that do not even constitute criminal offences seems disproportionate.

1.3.3 The proposed jurisdiction of the State of nationality could be accepted as an optional provision, or the provision could be deleted.

2. **ARTICLE VIII (ARTICLE 15BIS OF THE CONVENTION)**

2.1 **Amendment**

The words “or property” in Article 15 *bis* para 1b shall be deleted.

2.2 **Explanatory Statement**

2.2.1 We welcome the fact that Article 15 *bis* no longer contains the wording “shall ensure”, but now contains the wording “is encouraged”. In our opinion this means that the provision is only optional, not obligatory.

2.2.2 Nonetheless, when providing for sanctions the legislator has to make sure that the principle of proportionality is adhered to. This is a constitutional requirement for us and means that only acts that endanger the safety and security of the aircraft or of a person on board the aircraft can lead to a sanction. In contrast, mere inconveniences and disturbances cannot lead to either a criminal sanction or an administrative sanction. In particular, this principle must be respected when selecting the separately listed acts in Article 15 bis that are deemed to serve as examples.

2.2.3 Refusal to follow a lawful instruction given by the aircraft commander for the purpose of protecting the safety of the property in the aircraft in Article 15 b) is, in our opinion, – in respect of the principle of proportionality – not weighty enough to justify the initiation of criminal or administrative proceedings. In particular, the initiation of proceedings and the imposition of sanctions only to protect the property in the aircraft seem to be disproportionate in cases where refusal to follow a lawful instruction for the purpose of protecting the safety of the property does not also endanger the safety of the aircraft or the persons on board. Therefore we propose deleting the words “or property” in Article 15 bis para 1b.

3. ARTICLE X (ARTICLE 18BIS OF THE CONVENTION)

3.1 Amendment:

The following shall be added as Article 18 bis of the Convention:

“In case of measures pursuant to the provisions of Articles 8 and 9 claims as to recover according to national law from the disembarked or delivered person any damage incurred as a result of such disembarkation or delivery shall not be precluded.”

3.2 Explanatory Statement

3.2.1 Germany welcomes in general the proposal of the Legal Committee on compensation claims in cases of measures pursuant to the provisions of Articles 8 and 9 and recommends to add two particular elements:

- a) It should be clarified that the national law is the relevant legal framework.
- b) The entitled persons should not be listed definitely (“operator of the aircraft”). Germany favors a passive wording. Thus, it will be possible to rely on this provision as well in cases with further elaborated models of operatorship of the aircraft.