

LEGISLATIVE COUNCIL BRIEF

Civil Aviation Ordinance (Chapter 448)

CIVIL AVIATION (AMENDMENT) BILL 2005

INTRODUCTION

At the meeting of the Executive Council on 10 May 2005, the Council ADVISED and the Acting Chief Executive ORDERED that the Civil Aviation (Amendment) Bill 2005, at Annex A, should be introduced into the Legislative Council to exempt aircraft owners who were not involved in the management of their aircraft from the statutory strict liability towards third parties.

Annex A

JUSTIFICATIONS

Aircraft Strict Liability Regimes in Hong Kong and Other Jurisdictions

2. Section 8(2) of the Civil Aviation Ordinance (Cap.448) imposes strict liability on the owner of an aircraft for loss or damage caused to persons or property on land or water by the aircraft, unless such loss or damage was caused or contributed to by the negligence of the person suffering the loss or damage. The strict liability applies regardless of whether the owner plays any role in the management of the aircraft. A copy of the relevant provisions in section 8 is at Annex B.

Annex B

3. Aviation is a highly capital-intensive industry. It is a common practice that airlines acquire aircraft through leasing arrangements with financiers. Under such arrangements, the financiers purchase and own aircraft and then lease them to airlines. While financiers are the legal owners of the aircraft, they generally do not retain management or operational control over them. As a matter of principle, strict liability should be borne by parties having the actual management, instead of ownership, of an aircraft. Therefore, in many other jurisdictions with a developed aviation industry (such as the US, UK, New Zealand, Australia and Singapore), the financier owners are relieved of the strict liability.

Need for Changing Hong Kong's Aircraft Strict Liability Regime

4. The existing provision governing an aircraft owner's strict liability, introduced to Hong Kong by a UK Order in 1969, is outdated and not consistent with the practice commonly adopted in other jurisdictions. It is undesirable for the following reasons -

- (a) it is unfair to hold owners strictly liable for aircraft operations which are not under their management;
- (b) although financiers may seek indemnity from airlines against any loss or costs they suffered, such indemnity does not offer sufficient protection against the strict liability under the law. The financiers would also need to undergo costly litigations to prove that the loss falls within the scope of such indemnity. This would entail higher lease rates or stricter restrictions in leasing arrangements for Hong Kong airlines. Hence, the existing legal framework does not present a very business-friendly environment for aircraft financing and leasing business;
- (c) the circumstances noted in (b) above has put Hong Kong airlines in a less favourable position in respect of financing/leasing aircraft, thus undermining the competitiveness of Hong Kong's aviation industry; and
- (d) there is a possibility, however remote, that in time of crisis, financiers may choose to prevent aircraft under their ownership from operating to Hong Kong to avoid the strict liability. Should that happen, it would have serious adverse effects on Hong Kong's air services and overall economy.

Proposed Amendment

5. In view of the above, we propose amending the existing legislation to bring our strict liability regime in line with common practice overseas. Specifically, we propose to exempt an owner who has leased out an aircraft without crew (commonly known as "dry-lease" in the industry) and who does not have the management of the aircraft from the strict liability imposed by section 8(2) of the Ordinance. To qualify for the exemption, the owner has to fulfil the following criteria at the time of the incident causing the loss or damage -

- (a) the aircraft was bona fide demised, let or hired out for a period exceeding 14 days;
- (b) no member of the crew of the aircraft was in the employment of such owner; and
- (c) the owner did not have management of the aircraft.

6. The proposed amendment seeks to exempt only those owners who have leased out the aircraft and assume no management of the aircraft. Parties having the management of an aircraft, e.g. the operating airlines, would continue to be subject to the strict liability. The proposed 14-day qualifying period is consistent with the Civil Aviation (Births, Deaths and Missing Persons) Regulations (Cap. 173A), under which an aircraft owner is exempted from certain legal responsibilities when the aircraft concerned has been leased out for a period exceeding 14 days. The same qualifying period is also adopted in the relevant UK and Singapore legislation for exempting aircraft owners from strict liability.

THE BILL

7. The Bill provides that the strict liability does not apply to an aircraft owner if, at the time the loss or damage was caused, the aircraft had been leased for a period exceeding 14 days, no member of the crew of the aircraft was in the employment of the owner, and the owner did not have the management of the aircraft. It further specifies that the amendment has no retrospective effect.

LEGISLATIVE TIMETABLE

8. The Bill will be gazetted on 20 May 2005 and introduced into the Legislative Council for First Reading and commencement of Second Reading debate on 1 June 2005.

IMPLICATIONS OF THE PROPOSAL

9. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the Ordinance. It has no financial, civil service, productivity, environmental or sustainability implications.

Economic Implications

10. The proposal would improve the competitiveness of Hong Kong airlines, and thus Hong Kong's aviation industry, in respect of their plans for fleet upgrading or expanding. It would bring our regulatory framework in line with common practice overseas. It would also present a much more favourable environment for aircraft financing business in Hong Kong and eliminate the possible risk of disruption to our air services in time of crisis. This is conducive to enhancing Hong Kong's status as an international and regional aviation centre. The proposal is supported from the competition policy point of view.

PUBLIC CONSULTATION

11. The Legislative Council Panel on Economic Services, the Aviation Advisory Board, the airline industry and the financial industry have been consulted. They all support the proposal.

PUBLICITY

12. A press release will be issued on 18 May 2005. A spokesman will be available to respond to enquiries.

ENQUIRIES

13. Any enquiries on this brief can be addressed to Mr Darryl Chan, Principal Assistant Secretary for Economic Development and Labour (Economic Development) at 2810 2687.

Economic Development and Labour Bureau
18 May 2005

A BILL

To

Amend the Civil Aviation Ordinance to exempt certain persons from the strict liability imposed by the Ordinance for loss or damage caused by an aircraft to any person or property on land or water.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Civil Aviation (Amendment) Ordinance 2005.

**2. Liability in respect of trespass,
nuisance or surface damage
in certain circumstances**

Section 8 of the Civil Aviation Ordinance (Cap. 448) is amended –

(a) in subsection (4) –

(i) by repealing “In this section” and substituting “Subject to subsection (5), in this section”;

(ii) by repealing “對飛機有管理權” and substituting “管理飛機”;

(b) by adding –

“(5) A person is not the owner of an aircraft within the meaning of this section if,

at the time the material loss or damage mentioned in subsection (2) was caused –

- (a) the aircraft had been bona fide demised, let or hired out by such person to any other person under a lease or other arrangement for a term exceeding 14 days;
- (b) no member of the crew of the aircraft was in the employment of such person; and
- (c) such person did not have the management of the aircraft.”.

3. Savings

Where a material loss or damage mentioned in subsection (2) of section 8 of the Civil Aviation Ordinance (Cap. 448) was caused by an incident occurring before the commencement date of this Ordinance, that section as in force immediately before that date shall continue to apply in relation to the loss or damage as if this Ordinance had not been enacted.

Explanatory Memorandum

The purpose of this Bill is to amend section 8 of the Civil Aviation Ordinance (Cap. 448) so that the owner of an aircraft who has hired out the aircraft without crew for a period exceeding 14 days and who does not have the management of the aircraft is

exempted from strict liability for loss or damage to person or property on land or water caused by the aircraft. The amendment seeks to bring Hong Kong's aviation legislation in line with common practices overseas.

Chapter:	448	CIVIL AVIATION ORDINANCE	Gazette Number	Version Date
Section:	8	No liability in trespass or nuisance in certain circumstances		30/06/1997

(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight so long as such of the provisions of orders made under section 2A, of regulations made under section 3 or of an enactment specified in section 13(6) which are applicable in the particular case are complied with and there has been no breach of section 4. (Amended 66 of 1997 s. 6)

(2) Subject to subsection (3), where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft.

(3) Where material loss or damage is caused as described in subsection (2) and in circumstances in which-

- (a) damages are recoverable in respect of the said loss or damage by virtue only of subsection (2); and
- (b) a legal liability is created in some person other than the owner of an aircraft to pay damages in respect of the said loss or damage,

such owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage.

(4) In this section "owner" (機主) includes, in relation to an aircraft, the person having the management of the aircraft for the time being or, in relation to a time, at that time.

(Enacted 1994)