

立法會 *Legislative Council*

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Bills Committee on Civil Aviation (Amendment) Bill 2005

Background brief

Purpose

This paper gives a summary of discussion by the Panel on Economic Services (the Panel) on the proposals to amend the Civil Aviation Ordinance (Cap. 448) (the Ordinance) to exempt aircraft owners from strict liability in relation to loss or damage suffered by third parties caused by aircraft owned but not managed by them.

Introduction

2. Section 8 of the Ordinance imposes a 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 irrespective of whether the owner has the management of the aircraft.

Problems

3. According to the Administration, it is a common practice that airlines acquire aircraft through leasing arrangements with financiers who are often the legal owners of the aircraft but have no management or operation control over them. It is therefore unfair to hold owners strictly liable for aircraft operations which are not under their management. 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 strict restrictions in leasing arrangements for Hong Kong airlines and put them in a less favourable position in respect of financing/leasing aircraft, thus undermining the competitiveness of Hong Kong's aviation industry. There is also a remote possibility that in time of crisis, financiers may choose to prevent aircraft under their ownership from operating to Hong Kong to avoid the strict liability. This would have serious adverse effects on Hong Kong's air services and overall economy.

The Bill

4. The purpose of the Bill is to amend section 8 of the Ordinance 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 exemption is similar to that provided in the United Kingdom (UK) and New Zealand. The proposed amendment will bring the strict liability regime in Hong Kong in line with international practice.

Major issues raised by the Panel

5. The Panel received a briefing on the proposed amendment on 16 March 2005.

6. Members noted the problems with the existing strict liability regime as set out in paragraph 3 above. They however enquired if these problems could be addressed through private contracts between aircraft owners and airlines instead of legislative amendment. According to the Administration, while it was feasible to make contractual arrangements to facilitate aircraft owners to seek indemnity from airlines against any loss or costs they suffered, such indemnity did not offer sufficient protection against the strict liability under the law. Besides, it was a common practice in other jurisdictions to release aircraft owners from the strict liability provided that certain prescribed conditions were met. If Hong Kong did not update its legal framework to provide similar protection for aircraft owners, financiers would be less interested in conducting their financing business in Hong Kong and/or would tend to impose higher lease rates or stricter restrictions in the leasing arrangements for Hong Kong. These would not be conducive to maintaining Hong Kong's aviation hub status. Amending the legislation to update the legal framework was hence a preferred approach and was in line with international practice.

7. Concern was raised on the effect of aircraft subletting on the entitlement of the aircraft owner for exemption from the strict liability under the proposed amendment. The Administration's explanation was that irrespective of whether there was any subletting involved, the aircraft owner had to fulfill the following criteria at the time of the incident causing the loss or damage in order to qualify for the exemption –

- (a) the aircraft was bona fide demised, let or hired out for a period of exceeding 14 days; and
- (b) no member of the crew of the aircraft was in the employment of such owner.

The proposed amendment would not have the effect of releasing airlines, as the parties having management of the aircraft, from their legal liabilities in respect of the third parties. As regards the 14-day qualifying period, members noted that this was similar to the relevant legislation in UK and consistent with the existing Civil Aviation (Births, deaths and Missing Persons) Regulation (Cap. 173A), under which an aircraft owner was exempted from certain legal responsibilities when the aircraft concerned had been leased out for the same period.

8. A member however pointed out that under the common law, the question of an aircraft owner's liability in relation to loss or damage suffered by a third parties caused by his aircraft hinged not so much on the duration of lease but the extent of the aircraft owner's involvement in the management of the aircraft. By way of illustration, an aircraft owner who was responsible for the maintenance and repair of the aircraft, even in bare plane charter situation, still had liability. According to the Administration, the lease period was one of the criteria for the aircraft owner to qualify for exemption from the strict liability. The management aspect was also an important factor. Under section 8(4) of the Ordinance, an "owner" in relation to an aircraft included the person having the management of the aircraft. The proposed amendment was intended to provide exemption only for those aircraft owners who were not involved in the management of the aircraft concerned at all. To address the member's concern on the need to define the term "management", the Administration has provided the supplementary information paper in **Appendix I**.

9. The relevant extracts from the minutes of the Panel meeting on 16 March 2005 are at **Appendix II**.

Appendix I

Tel No 2810 2043
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16 June 2005

The Hon Ronny Tong Ka-wah, SC
Member, Legislative Council
Room 601 Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Mr Tong,

Civil Aviation (Amendment) Bill 2005

At our meeting of 8 June, we discussed the proposed exemption criteria under the above Bill. You indicated that you have no objection, in principle, to both the policy intent and drafting of the Bill except that you would request the Government to consider amending one of the exemption criteria by **stating expressly** that the “management of the aircraft” includes, among other things, “the maintenance and repair of the aircraft”. We understand your concern to be that as the term “management” is not defined under the law, a legal owner of an aircraft, who is responsible for the maintenance and repair of the aircraft concerned but has dry-leased the aircraft to another person for a period exceeding 14 days, would be successful in seeking an exemption of strict liability by arguing that “management” does not include “maintenance and repair”. You also noted that if the term “management of the aircraft” under the proposed new s.8(5) of the Bill were qualified, similar qualification should be introduced to s.8(4).

We have carefully considered your suggestions and consulted both Director-General of Civil Aviation and Department of Justice and come to the view that your suggestion may not be necessary and, if adopted, might possibly create more problems than it intends to cure.

On the definition of “management”, we have looked into relevant aviation-related case laws but cannot identify any direct judicial authority. This may be one of the reasons why the term was not defined in the first place when s.8(4) of the Civil Aviation Ordinance was enacted. Similarly, the term “management” is used but **not** defined in the corresponding UK aviation legislation. Final interpretation rests with the court. In practice, “management” of aircraft covers a wide spectrum of functions ranging from technical and safety to commercial aspects. It is therefore virtually impossible to define it conclusively without the risk of leaving out certain grey areas that would be open to dispute. Moreover, given the rapidly developing scene of the aviation industry, the adoption of new operation modes, and the impact of the advance of technology on the nature of the aviation business, any definition established today (even assuming that this could be done) would very soon be outlived by the changing circumstances.

In aviation terms, “maintenance and repair” are crucial to ensuring aviation safety and thus fall squarely within the meaning of “management”. According to the Air Navigation (Hong Kong) Order 1995 (Cap. 448C), an aircraft shall not fly unless it is airworthy. It is also an international practice promulgated by the International Civil Aviation Organization that the maintenance and repair function is a determining factor concerning the airworthiness of an aircraft. Hence, under s.8(4) of the law, any person who has the responsibility for the maintenance and repair of an aircraft cannot reasonably argue that he/she is not involved in the management of the aircraft concerned and hence not caught by the definition of owner in s.8(4). By the same token, we do not see how such a person could, under exactly the same circumstances, be successful in seeking exemption from the strict liability under our proposed new s.8(5), particularly when the two sub-sections concerned adopt exactly the same terminology.

On the contrary, if we were to qualify the term “management” by inserting the words “including maintenance and repair” as suggested, we could envisage the following possible problems –

- (a) making specific reference to “maintenance and repair” would beg the question as to whether other management functions not mentioned would be excluded from the meaning of the term. As explained above, we are particularly wary of our inability to list exhaustively all such management functions which deny exemptions. The ambiguity thus created would unnecessarily introduce some uncertainties into the prospect of any victim of

an aircraft incident seeking compensation from the owner or operator of the aircraft which we are minded to avoid; and

- (b) the term “ management” also appears in two other sections of this Ordinance. Qualifying the term in one particular section could possibly create unnecessary ambiguity in the interpretation of the same term in other sections within the same Ordinance.

We are most grateful for your taking the interest in this matter and offering your invaluable observation and advice on the drafting of the Bill. We are more than happy to meet with you again to discuss our considerations above and to answer any further queries you may have.

Yours sincerely,

(Wilson Fung)
for Secretary for Economic Development and Labour

cc Ms Kitty Cheng, Assistant Legal Adviser, LegCo Secretariat
DoJ (Attn : Ms Rickie Chan & Ms Grace Leung)
DGCA (Attn : Mr Stephen Kwok)
PSED

Extracts from the minutes of the
Economic Services Panel meeting on 16 March 2005

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V Amendment to the Civil Aviation Ordinance to release certain aircraft owners from strict liability

(LC Paper No. CB(1)1062/04-05(04) - Information paper provided by the Administration)

32. PS/EDL said that the proposed amendment to the Civil Aviation Ordinance to release certain aircraft owners from strict liability was initiated by the aircraft financiers and airlines, and was conducive to strengthening the international aviation hub status of Hong Kong. The Deputy Secretary for Economic Development and Labour (Economic Development) (DS/EDL) briefed members on the proposed legislative amendment as set out in the Administration's information paper.

33. In reply to the Chairman's enquiry about the relevant practices in other jurisdictions, DS/EDL advised that in many other common law jurisdictions such as the United Kingdom (UK), New Zealand and Australia as well as in Mainland China and the United States, there were statutory provisions to exempt aircraft owners from strict liability in relation to loss or damage suffered by third parties caused by aircraft owned but not managed by them. The proposed 14-day qualifying period was consistent with the Civil Aviation (Births, Deaths and Missing Persons) Regulations (Cap. 173A), under which an aircraft owner was exempted from certain legal responsibilities when the aircraft concerned had been leased out for that same period. The same qualifying period was also adopted in the relevant UK legislation governing aircraft strict liability.

34. Mr CHAN Kam-lam enquired about the effects of aircraft subletting on the entitlement of the aircraft owner for exemption from the strict liability under the proposed legislative amendment. DS/EDL replied that irrespective of whether there was any subletting involved, to qualify for the exemption, the aircraft owner had to fulfill 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; and
- (b) no member of the crew of the aircraft was in the employment of such owner.

He added that the proposed legislative amendment would not have the effect of releasing airlines, as the parties having management of the aircraft, from their legal liabilities in respect of third parties.

35. In reply to Mr CHAN Kam-lam's queries about the proposed 14-day qualifying period, DS/EDL said that whilst the qualifying period varied among different jurisdictions, the proposed 14-day qualifying period was similar to the relevant legislation in UK and consistent with another piece of local legislation on civil aviation as mentioned earlier on. He further said that there was no hard and fast rule in defining the proposed 14-day qualifying period. It was however important that the proposed qualifying period should be consistent with the existing legislation governing matters of a similar nature.

36. In reply to the Chairman's enquiry about the extent of consultation on the proposed legislative amendment, DS/EDL advised that the Administration had conducted two rounds of consultation with the Aviation Advisory Board, local airlines and the financial services industry. They were first consulted on the objective and the framework of the proposed legislative amendment and then on the draft text of the proposed amendment. They had expressed support for the proposed amendment in both rounds of consultation.

37. Mr SIN Chung-kai asked whether the issues arising from the existing legislation in question could be addressed through private contracts between aircraft owners and airlines. DS/EDL said that whilst it was feasible to make contractual arrangements to facilitate aircraft owners to seek indemnity from airlines against any loss or costs they suffered, such indemnity did not offer sufficient protection against the strict liability under the law. Given that the common practice adopted in other jurisdictions was to release aircraft owners from the strict liability provided that certain prescribed conditions were fulfilled, if Hong Kong did not update its legal framework to provide similar protection for aircraft owners, financiers would be less interested in conducting their aircraft financing business in Hong Kong and/or would tend to impose higher lease rates or stricter restrictions in the leasing arrangements for Hong Kong airlines. These would not be conducive to maintaining Hong Kong's aviation hub status. Amending the legislation to update the legal framework was a preferred approach and was in line with international practice.

38. Mr SIN Chung-kai enquired about the legal implications in the case that an aircraft owner and an airline, in entering into an aircraft lease contract, agreed on certain contract terms which were at variance with the legislative provisions (amended as presently proposed) governing the aircraft owner's strict liability. For example, a shorter or longer qualifying period for the exemption was stipulated in the contract. DS/EDL responded that insofar as the legal protection for third parties was concerned, such contractual arrangements would not affect their right to take action to recover the loss or damage caused to them by aircraft from the aircraft owner and/or airline concerned as provided under the laws.

39. Mr Howard YOUNG said that the aviation sector in general supported the proposed legislative amendment as the legislative amendment could improve the legal framework for aircraft financing and leasing business. He was not aware of any concern expressed by the sector about the proposed 14-day qualifying period.

40. Mr Ronny TONG said that he had not undertaken civil litigation on aviation or shipping matters for over 10 years. When he undertook such cases some 10 years ago, he understood that under common law, the question of an aircraft owner's liability in relation to loss or damage suffered by third parties caused by his aircraft hinged not so much on the duration of lease as the extent of the aircraft owner's involvement in the management of the aircraft. For example, an aircraft owner who was responsible for the maintenance and repair of the aircraft, even in a bare plane charter situation, still had liability.

41. DS/EDL said that under the present proposal, the lease period was one of the criteria for the aircraft owner to qualify for exemption from the strict liability. The management aspect was also an important factor. Under section 8(4) of the Civil Aviation Ordinance (Cap. 448), an "owner" in relation to an aircraft included the person having the management of the aircraft. The proposed legislative amendment was intended to provide exemption only for those aircraft owners who were not involved in the management of the aircraft concerned at all.

42. Mr Ronny TONG noted the Administration's explanation and said that as Members still had the opportunity to scrutinize the proposed legislative amendment after the relevant Bill was introduced into the Legislative Council, the issue could be further examined at the Bills Committee.

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