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Paper for the House Committee meeting on 9 December 2005

Report of the Bills Committee on Civil Aviation (Amendment) Bill 2005

Purpose

This paper reports on the deliberations of the Bills Committee on Civil Aviation (Amendment) Bill 2005.

Background

2. Provisions relating to civil aviation are provided under the Civil Aviation Ordinance (Cap. 448) (the Ordinance). Section 8(2) of the Ordinance 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 by the negligence of the person suffering the loss or damage. Section 8(4) provides that the term “owner” includes “the person having the management of the aircraft for the time being”. The strict liability applies irrespectively of whether the owner has the management of the aircraft. This imposes an undue burden on owners who are not involved in the management or operation of the aircraft (hereafter referred to as “passive owners”), notably financiers who purchase and own aircraft and then lease them to airlines. Given that many other jurisdictions with a developed aviation industry, such as the United States, United Kingdom, New Zealand, Australia and Singapore, have relieved passive owners from the strict liability, the Administration proposes to amend the Ordinance to bring the existing regulatory framework in line with the common practices overseas.

The Bill

3. 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 Bills Committee

4. At the House Committee meeting on 17 June 2005, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Margaret NG, the Bills Committee has held five meetings. The membership list of the Bills Committee is given in **Appendix I**.

Deliberations of the Bills Committee

5. To exempt passive owners of aircraft from the strict liability, the Bill proposes to introduce a new section 8(5) such that a person is not the owner of an aircraft if, at the time the material loss or damage 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.

6. Members of the Bills Committee generally have no objection to the policy intent of the Bill to exempt passive owners of aircraft from strict liability in relation to loss or damage suffered by third parties caused by aircraft. Mr Ronny TONG, in particular, points out that under the common law, the question of an aircraft owner's liability in relation to loss or damage suffered by a third party caused by his aircraft hinges not so much on the duration of lease but the extent of the aircraft owner's involvement in the management of the aircraft. Hence, there is a need to expressly define the term "management". Otherwise, an owner of an aircraft, who is responsible for the maintenance and repair of the aircraft, leases an aircraft to an airline without crew for a certain period (commonly known as "dry-lease") exceeding 14 days, will be successful in seeking an exemption of strict liability by arguing that "management" does not include "maintenance and repair", thereby compromising the level of legal protection to third parties. To address Mr Ronny TONG's concern, the Bills Committee has examined the feasibility of qualifying the term "management" to include "maintenance and repair".

7. According to the Administration, the guiding principle in formulating the legislative proposal is to strike a right balance between preserving the policy intent and minimizing possible diminution of the existing legal protection to third parties on land or water. As such, it is proposed that only passive owners will be exempted so as to preserve as far as possible the existing legal protection to third parties. New sections 8(5)(a) and (b) are introduced to cater for typical dry-lease arrangements between passive owners and airlines. To address the concern that an owner who retains some management functions in relation to the aircraft may still be exempted by fulfilling sections 8(5)(a) and (b), the Administration has introduced section 8(5)(c) to

serve as an additional safeguard to ensure that only genuine passive owners are exempted.

8. As regards the interpretation of “management”, the Administration’s explanation is that the term is used in the context of defining an operator of aircraft in other civil aviation legislation in Hong Kong. Similar provisions can be found in some UK civil aviation legislation. The term is however not further defined in any relevant Hong Kong and UK legislation. Researches into court cases in Hong Kong and other common law jurisdictions also cannot locate any direct judicial authority on the interpretation of the term. 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 provide an exhaustive definition without the risk of leaving out certain areas that would be open to dispute. Besides, the rapid development of the aviation industry, the adoption of new operation modes and the impact of the advance of technology on the nature of aviation business would render any definition established today outlived by changing circumstances.

9. On the suggestion of qualifying “management” to include “maintenance and repair”, the Administration advises that 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) (the Order), 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 section 8(4) of the Ordinance, 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 section 8(4). Making specific reference to “maintenance and repair” would give rise to the question as to whether other management functions not mentioned would be excluded from the meaning of the term. The ambiguity 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. Given that final interpretation on whether a party has the management of an aircraft at a particular time rests with the court, the Administration considers it prudent to leave this matter to the evolvement of case law.

10. Some members point out that while the trade does not object to the policy intent of the Bills to exempt passive owners from strict liability, maintenance and repair organizations are concerned that they may be held strictly liable if the term “management” is expressly defined to include “maintenance and repair”. Other members however hold the view that the Bill as presently drafted will invite litigations as it is unclear about what constitutes “management”. To tackle the problem from a different perspective, the Bills Committee has examined the feasibility of the idea of holding “operator” of aircraft strictly liable.

11. According to the Administration, the intention of the Bill is to impose strict liability on operators and owners who have management of the aircraft. As it is difficult to expressly define the term “management”, a negative approach is adopted under section 8(5) to carve out those owners who will not be held liable. Therefore, the proposal of holding only “operator” liable is a major departure from the policy intent of Bill. If only operators are held strictly liable, all owners will enjoy the exemption from strict liability. This represents a substantial diminution of legal protection to third parties on land or water. Besides, the term “aircraft operator” in most of the aviation-related legislation in Hong Kong is defined as “person having the management of the aircraft” and the term “management” is again not defined. In light of members’ concern, the Administration has reviewed section 8 of the Ordinance and found that the absence of an express reference to “operator” may have inadvertently deprived readers of a useful parameter when construing the meaning of “person having the management of aircraft”. In this connection, the Administration will move a Committee Stage amendment (CSA) to modify section 8(4) to state expressly that “owner” includes “operator”, and that “operator” means “person having the management of the aircraft”. The proposed change will bring section 8 in line with other civil aviation legislation, preserve the existing scope of the parties being held strictly liable, and at the same time put in perspective the possible interpretation of the term “management”.

12. To address members’ concern on whether section 8(5)(c) is clear enough to hold owners who retain repair and maintenance responsibility strictly liable, the Administration notes that under a typical lease arrangement, the responsibility to ensure the airworthiness of the aircraft (i.e. that the aircraft is fit to fly or in good working order) is vested upon the lessee. There are also universally accepted international standards, as reflected in the Order, governing airworthiness which covers a wide spectrum of aspects including -

- (a) certification concerning aircraft design, construction, workmanship, materials, equipment carried and results of flying tests;
- (b) regular overhaul, repair and modification of aircraft (including equipment and parts thereof) and the maintenance schedule relating to the aircraft;
- (c) maintenance of aircraft by qualified personnel; and
- (d) keeping of technical log for the aircraft.

It can be seen that proper repair and maintenance is squarely part and parcel of airworthiness. As such, the Administration proposes to move a CSA to section 8(5)(c) to the effect that a lessor will be exempted if, under the lease arrangement, the lessee has assumed the responsibility of ensuring the airworthiness of the aircraft. The effect of the revised criterion is such that only genuine passive owners would be exempted from the strict liability while the lessee who is responsible for airworthiness would be held strictly liable. It achieves the policy objective of the Bill without diminution of protection to third parties.

Committee Stage amendments

13. A copy of the Committee Stage amendments to be moved is in **Appendix II**.

Recommendations

14. The Bills Committee recommends the resumption of the Second Reading debate on the Bill on 11 January 2006.

Advice sought

15. Members are requested to support the recommendation of the Bills Committee in paragraph 14 above.

Prepared by
Council Business Division 1
Legislative Council Secretariat
8 December 2005

**Bills Committee on
Civil Aviation (Amendment) Bill 2005**

Membership list

Chairman Hon Margaret NG

Members Hon CHAN Kam-lam, SBS, JP
Hon SIN Chung-kai, JP
Hon Howard YOUNG, SBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Ronny TONG Ka-wah, SC

(Total : 6 Members)

Clerk Miss Becky YU

Legal Adviser Miss Kitty CHENG

Date 8 July 2005

CIVIL AVIATION (AMENDMENT) BILL 2005

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Economic Development and Labour

Clause

Amendment Proposed

- 2 By deleting paragraph (a) and substituting -
- “(a) by repealing subsection (4) and substituting -
- “(4) Subject to subsection (5), in
this section -
- (a) “owner” (機主), in relation
to an aircraft, includes
the operator of the
aircraft; and
- (b) “operator” (經營人) means
the person having the
management of an aircraft
for the time being or, in
relation to a time, at
that time.”;”.
- 2(b) (a) In the proposed section 8(5)(a) -
- (i) by adding “(“the lessor”)” after “such
person”;
- (ii) by adding “(“the lessee”)” after “any

other person".

(b) By deleting the proposed section 8(5)(b) and (c) and substituting -

"(b) under the lease or arrangement, the lessee was responsible for ensuring the airworthiness of the aircraft; and

(c) no member of the crew of the aircraft was in the employment of the lessor.".