

Session II: ADDRESSING ISSUES OF CONCERN TO THE INTERNATIONAL AVIATION COMMUNITY THROUGH THE IMPLEMENTATION OF AIRE LAW

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Towards the balance of interests between victims and insurers

Air Crash Families' Victims' Federation International



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Thank you for this new opportunity to be in this forum. On behalf of The International Federation of Air Accident Victims and their Families, I bring a proposal to achieve the necessary balance of interests between victims and insurers. A goal that we proposed in the historic 1st ICAO International Symposium on Assistance to Victims and Families of Air Accidents, held in Spain, on the Island of Gran Canaria, on December 2021. A goal that we ratified in the legal seminar of ICAO held in Korea on April 2022. And a goal that, as I am going to present now, would benefit all international civil aviation as a whole.

As a pro-bono collaborating lawyer, occasionally, for the International Federation of Air Accident Victims and their Families in this ICAO Legal Forum, I will first talk about the Working Paper 434 that the Federation presented and was approved at the 40th ICAO General Assembly, based on the different experiences suffered by the families members of the International Federation of Victims in the management after the emergencies.

Secondly, I refer to the Working Paper 21 of the last 41th ICAO General Assembly, that refers to the 30 recommendations from the 1st ICAO International Symposium on Assistance to Victims that i quoted before. Among them, there is the need to review how a total level of compulsory compensation could be proportional to the insurance policies subscribed by aircraft operators. It was argued in that Symposium that, in many cases, compensation to families of victims amounts to less than three per cent of the total level of insurance coverage, resulting in the impression that compensation is far below the amount of insurance that is available for victims. It was recognized that there is a mismatch between the maximum limit of insurance cover held by an aircraft operator (which was based on a worst case scenario) and compensation in any given case.

The article twenty five of the Montreal Convention says clearly that the air companies may increase, without limits, their responsibility. So they can increase the coverage of the damages as much as they want or need. The problem is that if an airline applies article twenty five of the Montreal Convention, assuring the damages caused by its activity in millions of dollars per passenger, the final compensation will be only a very small percentage (2 or 3 percent) of that amount, regardless of the country where that compensation is due.

After my intervention, you will have the opportunity to listen to the arguments of representatives of the insurance sector. You will first listen to the opinion of my dear and admired colleague Mr. Robert Lawson. As is logical, and as the ICAO members were able to verify at the symposium held at the end of 2021 in Gran Canaria, Spain, or later at the Korean legal seminar in April 2022, insurance companies and their lawyers do not agree with these approaches. My dear Robert often says, repeatedly, that the victims want to "empty the pot" of the economic reserves of the airline insurers, which would lead to an economic bankruptcy of the sector. At no time has the International Federation defended that the victims should be compensated with the entire coverage. We have only said that it is necessary to find a balance so that, if the life of a passenger is insured for millions of dollars, the final compensation does not only mean a 2 or 3 percent of that figure. Otherwise, the feeling of the families is that a plane accident produces an unfair additional enrichment for the Insurance Companies.

That is why I assure you that emptying the reserves of insurers leading them to bankruptcy is not our approach, far from it. This is not a question of money, but of equity. Of Justice. This is not a contest or a war between victims and insurers. It is simply the request that, under the protection of ICAO, a debate of ideas must be developed to give the chance to a fairer treatment for the victims, but always preserving the economic sustainability of the international civil aviation sector.

And in the face of this debate, how can ICAO and its member countries know the truth, and act accordingly? Are there reasons to suspect that the imbalance between the very high coverage of the insurance policies and the derisory compensations to the victims has been implying an illicit enrichment for the insurers for decades? Or are right the fellow jurists who will later intervene by venturing that establishing any type of minimum proportionality between compensation and insurance coverage will be a disaster for the economic sustainability of aviation? ICAO is not characterized solely by its unifying role of leading the member countries in a common direction. It has also been the first pioneer to discover misalignments in the aviation sector, helping the member countries to solve them.

The mathematical formulas that rule these insurance contracts between the airlines and the insurance companies are extremely complex. It is necessary to take into account the risk, the number of insured, and many other factors. The problem is that these calculations are opaque to those who are really the most interested in the protection of the policy, the passengers. As is the reinsurance process that the insurance companies that obtain a contract with an airline carry out later in an obscure way and behind the scenes with other financial actors whose names are sometimes not even known. We have even heard of second or third reinsurances, always behind the back of the true protagonists of any commercial aviation air flight: its passengers.

So, I beg you that when you later listen to the statements of some of my fellow speakers, talking about an impending doom in the event that a minimum proportion is established between the compensation and the coverage of the policies, please ask yourselves: How can we know, if the data to know if the deal is fair is held exclusively by the airlines and insurers behind our backs?

The victims have the feeling that an illicit and unfair enrichment is taking place on the part of the insurers by covering a risk for an amount of millions of dollars, knowing in advance that if said risk occurs, the compensation will never exceed 5% of said coverage. And we do not believe, as the insurers maintain, that a balance between both parties: coverage and compensation, puts the stability of the thriving and highly profitable international civil aviation sector at risk.

The Montreal Convention has proven to be an effective instrument to unify all international civil aviation. The Convention protects us all by defining a minimum amount of insurance. A quantity that is updated periodically. With the same simplicity, the proportionality between coverage and compensation will avoid situations as unfair as those we have been denouncing for years. We have received a resounding no from the insurance sector, to any type of proportionality. but the basis of this refusal is based on data that only insurers know, and that passengers cannot analyze, to know if such a radical refusal is fair, or self-interested. There is an axiom in aviation that says: If safety seems expensive to you, try a plane crash. It also applies to the case we are discussing today.

I end by quoting the provisions of the recommendation 13 attached to the working paper 21 approved at the last ICAO assembly: Additionally, a total level of compulsory compensation is to be reviewed in proportion to the insurance policies subscribed by aircraft operators. ICAO should organize a specific ad hoc forum to deal with compensation and facilitating procedures for survivors and families of victims.

Lastly, from the International Federation of Victims of Air Accidents and their Families I convey the message of its president, Pilar Vera, who maintains that although right now it is simply an illusion, we must believe that the debate and exchange of these good practices can contribute effectively make it a reality sooner rather than later.

Everyone, regardless of our professional positions, we can become, if we fly, victims, let's do everything possible to try to solve this problem because it will be more than beneficial for the entire international civil air transport community moving towards a real balance between the interests of victims and insurers.

This is an issue deeply related to the human dimension of aviation and therefore of fundamental importance, as my compatriot and representative of Spain on the Council, Mr. Víctor Aguado, has rightly pointed out. So thank you very much for listening to us.