

SIXTY-FIRST MEETING OF THE FACILITATION WORKING GROUP

(Videoconference, 13-14 April 2021)

Agenda item 5: Immigration matters**PROGRESS REPORT ON THE STUDY GROUP ON THE AIRCRAFT CARRIER LIABILITY**

(Presented by the Chair of the Sub-Group on Immigration)

SUMMARY

This paper presents the context of the discussions on aircraft carrier liability within Facilitation Sub-Group on Immigration as a basis for further discussion at the meeting of the Facilitation Working Group. Aircraft carrier liability is analysed as laid out in ICAO Annex 9 and existing text in ECAC Doc 30, Part I. The Facilitation Group is invited to provide their view on the extent of aircraft carrier liability relating to health-related documents.

ACTION TO BE TAKEN

The Facilitation Working Group is invited to:

- a) Note the information provided in this paper relating to the provisions of ICAO Annex 9 and the existing legal framework;
- b) Give their view on the level of aircraft carrier liability with regard to the checking of health-related documents and health-related information within their countries;
- c) Discuss the importance of further guidance and the timing of a possible update of ECAC Doc 30, Part I, and possible items to be included.

Introduction

1. This paper provides an overview of the ongoing debates concerning the accountability that should be placed on aircraft operators with regard to the check of health-related documents and health-related information. These debates have been sparked in reaction to measures adopted by States in response to the recent COVID-

19 pandemic. States' measures often put a responsibility on aircraft operators to check and verify nationally required health documents. This situation is unprecedented and requires a legal, internationally harmonized position. Within ICAO a Taskforce has been formed to discuss and amend where necessary the existing health related articles of Annex 9. The Taskforce is, among other subjects, discussing the standards regarding the responsibility of aircraft operators in checking health-related documents and health-related information.

2. The legal background of aircraft carrier liability as regulated in ICAO Annex 9 is presented in this working paper. The new situation is placed in relation to both this legal framework and the ongoing discussions within the ICAO Taskforce to amend the existing legal framework. The aim is to stimulate a debate within ECAC about the level of accountability that should be placed on aircraft operators with regard to the checking of health-related documents and health-related information. The outcome of this debate is input for the position of ECAC States within the taskforce, the Facilitation Panel and for incorporation in ECAC Doc 30, Part I at a later stage.

3. A working paper was presented in the previous meeting of the Sub-Group on Immigration (FAL-IMMIGRAT-SG/51, videoconference, 9 February 2021) with the legal background and the existing practice. The sub-group agreed on the need to develop more guidance on air carrier liability and considered the option to present possible material at ICAO level later this year (e.g., at the ICAO Facilitation Panel or the ICAO High Level Conference, subject to approval of the European Coordination Group on Facilitation and Directors General). The sub-group agreed to further develop the working paper and guidance material in the study group, based on the comments made at today's meeting. In particular a flow chart should be included, to visualise liabilities and responsibilities in the aviation system. This would then be presented to the next meeting of the Facilitation Working Group.

4. The guidance to be developed should be sustainable and follow, to a sufficient extent, the position incorporated by other appropriate international bodies, such as the ICAO Health Issues Outbreak in Aviation Task Force (HIOATF). The final report of the HIOATF, reflecting their position on the issue of aircraft carrier liability, was planned to be finalised in March, however this deadline has been extended. Therefore, the outcome of those discussions is still pending. Hence, the study group is of the opinion that a proposal to amend ECAC Doc 30, Part I regarding aircraft carrier liability is premature, as it is very likely that they would have to be amended at a later stage. Nevertheless, ECAC States should have a reasoned position about the matter during the ICAO Facilitation Panel, planned for July 2021. This working paper is meant to stimulate the debate necessary to develop this position.

Background Information

5. The basis of the aircraft carrier liability regulated in ICAO is Article 13 of the Chicago Convention. Article 13 of the Chicago Convention relates to the Entry and the laws and regulations of a contracting State:

"Clearance regulations as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from or while within the territory of that State."

6. Apart from this "coat-hanger" article in the Convention, further details on aircraft carrier liability can be found in Annex 9. "Aircraft carrier liability" is a term used for the responsibility which the aircraft operators have been given by the collective legislators in the early 1980s. Increasing numbers of attempts at illegal migration by air led to the adoption of new Standards and Recommended Practices

(SARPs) in Annex 9. These SARPs included preventive measures against illegal migration, immigration procedures, and the repatriation of so-called "inadmissible persons". Standard 3.34 of ICAO Annex 9 states

"Aircraft operators shall take necessary precautions at the point of embarkation to ensure that persons are in possession of the documents prescribed by the States of transit and destination for control purposes as described in this chapter."

7. This Standard 3.34 is placed in Chapter D, named "Travel Documents". ICAO Annex 9 further defines 'travel documents' as:

*"A passport or other official **document of identity** issued by a State or organization, which may be used by the rightful holder for international travel."*

8. Necessary precautions are further defined as:

"Verifications carried out by the aircraft operator at the point of embarkation, in order to ensure that every person holds a valid travel document and, where applicable, the visa or residence permit required to enter the State of transit and/or receiving State. These verifications are designed to ensure that irregularities (e.g. obvious document alteration) are detected."

9. Standard 3.34 articulates a responsibility for the aircraft operator, and is connected to responsibilities of States regarding the support of aircraft operators when checking documents:

Standard 3.32: *Contracting States shall assist aircraft operators in the evaluation of travel documents presented by passengers, in order to deter fraud and abuse.*

Standard 5.14 *Contracting States shall not fine aircraft operators in the event that arriving, and in-transit persons are found to be improperly documented where aircraft operators can demonstrate that they have taken necessary precautions to ensure that these persons had complied with the documentary requirements for entry into the receiving State.*

10. Following these standards and definitions, the responsibility of airlines is directed at a check of *identity documents and applicable visas*. When airlines do not perform this responsibility in a correct manner, they have the responsibility to transport the inadmissible person(s) back and a State may fine an airline for not taking necessary precautions. Airlines also have the responsibility of custody and care of the inadmissible person when the person is improperly documented.

11.

12. There are other reasons a person can be found inadmissible, for example when a person is without sufficient financial means, has a criminal record, or when a person is not vaccinated according to the receiving State (e.g. yellow fever¹). These cases have never in practice required action by the aircraft operator, even though the aircraft operator has the responsibility for returning the inadmissible person(s). One might argue that this fact is enough reason for an airline to mitigate their risk-based accountability of returning inadmissible passengers by checking before departure the requirements *when they are able to do so*.

¹ In cases of vaccination this was often solved by a possibility to be vaccinated in the receiving country before being admitted anyway.

13. In cases involving identity documents there is an action-based responsibility on the carrier (including costs of custody and care and possible fines unless necessary precautions have been made); while with other reasons for non-admittance the costs of custody and care are for the State: there are no fines but there is a risk-based accountability for the airlines to transport the inadmissible passenger back.

Standardisation of identity documents

14. Identity documents that aircraft operators have to check are standardized based on ICAO Document 9303. Identity documents have certain formats with specified data and are machine readable. Even with this standardisation, airlines have to be provided with help from States to identify possible fraud (Standard 3.32) and, when they have performed their duties and taken necessary precautions to check them, shall not be fined.

The practice of checking health-related documents

15. In practice, neither health-related documents nor their issuers are standardized. Therefore, airlines cannot, manually or otherwise, check the validity or registration of a test lab nor the validity of the document and results provided. Some States have developed a State-governed portal where information can be uploaded by passengers, while other States have put a direct responsibility to the aircraft operator to check (paper) documents. In practice airlines are often required to check:

- Digitally: Confirmation of a State that the passenger has provided a health declaration and/or valid test in the required timeframe (by an OK to board or by reading a QR code) or;
- Manually: Confirmation based on check paper/digital health declarations and/or test certificates:
 - o Name according to test and relating to passport information;
 - o Type of test as required by the national health authorities;
 - o Result of test (e.g. negative/ positive); and
 - o Timeframe according to national regulations (48h or 72h prior to departure or arrival time).

16. In addition to the above, some States require aircraft operators to check whether or not passengers have a booking in a quarantine hotel or a home address at arrival, and/or demand the aircraft operator to request a fee for testing on arrival.

Challenges with regard to checking health-related documents

17. With the recent pandemic, governments and aircraft operators alike are faced with a new situation and new processes regarding the checking of documents for health reasons are coming into place. Many States' interpretation is that airlines have responsibility to check nationally required health documents based on Article 3.34 of ICAO Annex 9, incorporated in their national or regional border legislation, but often without the full context and related articles. The related articles refer to a limit of the carriers' liability and an obligation for States to help airlines with the required checks. There is a precedent in Annex 9 where an item that airlines must check is not easily recognisable. Though Standard 3.51 applies to visas, it is an indication of the responsibility of a State to *enable* an airline to perform checks:

3.51 Contracting States that issue visas for a limited number of entries shall indicate in an appropriate, clear and non-derogatory way, every instance the visa is used, in order that its holder, any aircraft operator or the public

authorities of a State may determine its validity quickly and without the use of any special means.

Update ICAO Taskforce on Health-related Issues

18. Standard 3.34 was added to the work program of Working Group 2 (WG2) of the ICAO HIOATF. WG2 highlighted that even though the identity documentary check is the responsibility of the operator, it must be understood that operators do not always have all the information and expertise required to succeed in a check of other documents. Therefore, the Working Group noted that the responsibility of an aircraft operator, with regard to the checking of identity documents, is linked to additional existing standards with appropriate responsibilities of States to assist and a consequential provision which limits the accountability of aircraft operators when they have taken necessary precautions.

19. It is arguable, as noted above, that Standard 3.34 and its related articles are also applicable to the check of health-related documents and health-related information. Two positions on the matter are represented within WG2 of that Taskforce, on the one hand experts have argued that it might be the sole duty of border authorities and health authorities to check these health-related provisions. On the other hand, a part of the working group supports the current practical situation that has developed where States adopt and implement procedures relating to aircraft carrier liability for the check of health-related documents and health-related information. One possible outcome might be that aircraft operators will have to check the presence of the health-related documents, but do not have the responsibility to verify the documents and information. The definite position of the ICAO Taskforce on the matter of aircraft carrier liability remains unclear.

20. It is important to explore how checks of health-related documents and health-related information fit into the existing legal framework as described, considering there are no specific SARPs or standardisation relating to these documents and the legal responsibilities of the parties. Standardisation includes both the data and format of the documents. The data on the health-related documents are based in part on regional and international discussions (e.g., EC e-health network, EASA, CAPSCA/ICAO etc.). Despite coordination efforts, the standardisation on the data and final format of health documents is the responsibility of the WHO. A format for a vaccination certificate is expected at the end of 2021, but a format for a test certificate is not expected to be realized by the WHO in the near future.

ECAC provisions relating to health matters

21. ECAC has recently proposed to incorporate two relevant provisions to be included in Doc 30, Part I:

Means of collecting information – [...] Each Member State should ensure that contactless and/or other digital means are used for collecting public health information and data from a passenger.

Communications plan - Each Member State should develop a communications plan for communicating with the travelling public and with airport operators, air carriers and other entities operating in the State. [...]

Discussion items

1. Regarding the development of recommendations for ECAC Doc 30, Part I, , might include, but are not limited to:

- Information on the difference between risk-based and action-based responsibility;
- The conditions when airlines should be omitted from fines and/or penalties when they have taken necessary precautions;
- Further guidance on digital means to provide health related information directly from passengers to States.

Action to be taken

22. The Facilitation Working Group is invited to:
- a) Note the information provided in this paper relating to the provisions of ICAO Annex 9 and the existing legal framework;
 - b) Give their view on the level of aircraft carrier liability with regard to the checking of health-related documents and health-related information within their countries;
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