

Liability of Aviation security service providers and Responsibility of States

ABSTRACT

Following the events of 9/11, dramatic changes have been implemented in aviation security standards. Along with the changes in public regulation, there was an entity newly emerged in the eyes of public - the aviation security service providers.

This article elaborates on the responsibility and liability of aviation security service providers and suggests several options for aviation security service providers to protect the business itself from unlimited third party liability in case of an act of terrorism. Then it inquires into the responsibility of states in this regard.

I. INTRODUCTION

9/11 marks the date on which security and antiterrorism have become the new focal points of air travelers, government, and the international community. The implementation of aviation security legislations at both the international and national levels should be welcomed except for one missing element: the liability of the aviation security service providers (hereinafter referred to as “ASPs”¹) has not been included in this scheme; nonetheless, they are exposed to the risk of incurring third party liability for losses arising from terrorist attacks.

Within a broader context, ASPs are the branch of private security providers² that are part of ‘public-private partnership’,³ that is, a private entity is conducting tasks that have been considered historically as the domain of governments. In doing so, ASPs have taken on a range of roles — from assisting passengers to passenger profiling — which varies depending on kinds of services they

¹ This is not yet a common term or an official abbreviation for aviation security service providers. By the term ‘aviation security service providers’, the author intends to denote private security companies that provide related aviation security services to airport and airlines under the contract of services. This article leaves out the liability of security activities under sole auspices of public authorities or of companies exporting only the security equipments. Where the aviation security duties are performed directly by a government body, there is no problem of liability since administrative law is applicable and the government immunity may be available. For companies selling aviation security related equipments, the liability arises out of the inherent flaw of the machine which is mainly the domain of property law and strict liability.

² The private security business is constantly growing in numbers and gaining its importance to the security of modern society. Businesses sell their services to governments for a profit by claiming that they are more cost-effective than government agencies. See, Yee-Kuang Heng, Ken Mcdonagh, *Risk, Global Governance and Security: The Other War on Terror* (2009) at Chapter 5 (Aviation Security) at 109; See also Dean C. Alexander, *Business confronts terrorism*, (2004) at 13 [Public-Private Partnership in Combating Terrorism] for broader implication of public-private partnership on aviation security.

³ It is cooperation between governments, airports and airlines for aviation security measures. The distribution of security responsibilities by governments to the industry is part of Public-Private Partnership. Governments issue aviation security rules and distribute such responsibilities in believing that the industry is in best position for fulfilling the everyday security responsibilities.

promised for their clients.⁴ Often ASPs operate with significant impact on both the process and outcome of aviation security. A plain characterization of ASPs would be “a certified private agency which is under contract to perform security services for the airline and/or airport.”⁵ ASPs have become integral to the security systems of airlines and airports alike.

Traditionally aviation security was considered as an additional part of ground operations of air carriers. In the beginning, air carriers subcontracted ASPs as a small number of specialized providers and experimented with in-house security while the airports provided security tasks as almost wholly in-house. ASPs have been less directly regulated, although subjected to the requirements of the various government bodies which regulated its clients.⁶ In this period, ASPs were more to act in accordance with the needs of the market than to fulfill public functions.

In the mid-1970s, ASPs were at the juncture of two major challenges faced by the civil aviation industry; terrorism and liberalization.

The vulnerability of civil aviation against terrorism started to emerge;⁷ and following the several incidents,⁸ governments established security measures to deter unlawful interference with civil aviation.⁹ Besides the emergence of security measures in response to the threat against civil aviation, the deregulation process in 1978 spread the outsourcing among airlines and airports. As a result of the liberalization which moved the aviation industry beyond intense competition,¹⁰ the industry was forced to be cost-efficient.

While obliged to achieve higher security, airlines were constrained by economical curbs. In the light of the airlines’ strong incentives to reduce the expenditure on airport security tasks, they started to outsource the security duties to private security firms.¹¹ As outsourced ASPs became favorably compared with their in-house counterparts and as the aviation industry craved ways to cut costs under the pressure of stringent security procedure, both airlines and airports increasingly choose to utilize ASPs.

Now in the post-9/11 era, however, ASPs stand in between public concern, that is, an escalating expectation for perfect security and increased business risk originated from the exposure to unlimited

⁴ The execution of everyday security activities, regardless under which entity it is carried on, is mainly ‘airport security’, the preventive measures are conducted at the airport before the aircraft takes off. Airport security tasks are specifically aiming at preventing terrorists or prohibited articles thereto from getting on board the aircraft.

⁵ Alessandro Volpe, *Aviation Security Dictionary* (2008) at 40

⁶ Thus, for example, ASPs providing services to US air carriers have only been required to ensure that their services conformed to the regulations of the relevant US administrations – historically the Federal Aviation Administration (the “FAA”) and now the Department of Homeland Security (the “DHS”) via the Transportation Security Administration (TSA). Similarly, security providers in the UK were not regulated directly by Government, but were required to ensure that their services conformed to the regulations of the Department of Transport (DfT), Transportation Security Division (Transec).

⁷ Aviation security first became an issue in 1930, when Peruvian revolutionaries seized a Pan American mail plane with the aim of dropping propaganda leaflets over Lima. For more detailed history of airport security measures; see, Alexander T. Wells, Seth Young, *Airport planning & management* (2004) at 280

⁸ *Ibid.* Between 1930 and 1958, a total of 23 hijackings were reported. The world’s first fatal aircraft hijacking took place in July 1947 when three Romanians killed an aircrew member.

⁹ For example, it was not until 1978 that the United States made the first airport security regulations effective. Federal Aviation Regulation Part 107: Airport security; airport operators were required to submit to the FAA a security program. See also Alexander T. Wells (2004), *supra* note 7 at 281

¹⁰ Max H. Bazerman, Michael Watkins, *Predictable surprises: The disasters you should have seen coming, and how to prevent them* (2004) at 18

¹¹ Industry leaders of private security market started aviation security business in this period. For instance, Securitas, which is one of the largest security companies in the world, started aviation security service in 1985 and ICTS was in 1982.

liability. Current dilemma raises a question; what would be the responsibilities and liabilities of ASPs in the event of terrorism?

II. RESPONSIBILITY OF ASPs AND REGULATORY ISSUES

ASPs are contracted out to perform the duties and responsibility assumed to airlines and airports¹² via international and national regulations. These regulations, especially the ones that are legally binding, can be used in courts to assess ASPs' negligence and standard of care owed to third party claimants since the duties and obligations imposed upon airlines extend to ASPs.¹³ Those standards could become tied into civil suits against ASPs following unlawful interference with civil aviation. Under the legal doctrine of negligence per se, violation of a statutory security requirement is generally a basis for presuming fault against the violated party at least when that violation results in an injury to someone whom the law was intended to protect.¹⁴

1. *Distribution of responsibility for aviation security by states*

Under the framework at international level,¹⁵ each government implements its own security standards. National regimes related to ASPs are directly applicable to ASPs operating at an airport within the state's jurisdiction. This chapter takes an in-depth look at the present legal systems and laws of various states that define the hierarchy of responsibilities and requirements pertinent to aviation security and ASPs.

At the risk of oversimplifying, two main distribution systems of aviation security duties exist at the national level;¹⁶ government either retains the primary responsibility for main security tasks via a government body (centralized model), or the government acts only as a supervisor while the airport authorities provide main security activities (decentralized model).¹⁷

¹² For instance, the ICAO Security Manual Document 8973¹² states: "Basic responsibility for the security of aircraft rests with the operator."¹² Likewise, EU Regulation 2320/2002¹² requires each member state to ensure airports and air carriers providing service from that state to establish and implement security programmes to meet the requirements of the national civil aviation security programme of that State.¹² Each airline is obligated to comply with international civil aviation rules, the local regulations and the regulations of country where it has principal place of business.

¹³ See, e.g., *Tremaroli v. Delta Airlines*, Av. Cas. (CCH) P18,293, 294 (Civ. Ct. N.Y. 1983). No disputes arose on this issue.

¹⁴ See, generally, Michael D. Greenberg, Peter Chalk, Maritime Terrorism: risk and liability, *The RAND Center for Terrorism Risk Management Policy* at 63; available from www.rand.org

¹⁵ For example, Annex 17 of the Chicago Convention incorporates several of the requirements set forth in the Tokyo, Hague, and Montreal Conventions. The Standard and Recommended Practices, or SARPs, covers operational and technical aspects of international civil aviation security and requires each member state to have a national civil aviation security program and to create a governmental institution to develop and implement aviation security regulations.

¹⁶ See, e.g., *Study on civil aviation security financing*, Summary of final report, September 2004 at 10 http://ec.europa.eu/transport/security/studies/doc/2004_09_study_financing_aviation_security_en.pdf

¹⁷ It should be noted, though, that there are countries do not allow outsourcing aviation security responsibilities to private entities; such as in Denmark, the responsibility for screening lies with the airport operator, who is also the only entity allowed to execute screening. Outsourcing is not allowed by Danish legislation. Also In Cyprus, screening is currently being executed by the Police. Another point should be mentioned here is that the responsibility is not always aligned with financial cost-i.e. both models, the costs of security service provision may be shared between the airport authorities and the State. These activities could either be provided by the airport directly or outsourced to ASPs.

In a centralized model, the government holds primary responsibility for aviation security tasks through the relevant governmental bodies, for instance, Civil Aviation Authority (CAA),¹⁸ Ministry of Transport (MOT)¹⁹ or the police force. These organizations emit tenders for airport security from the centralized office.

Germany uses the centralized system where the responsibility for all screening activities lies with the regional departments of the German Border Police (BGS), part of the Ministry of Interior (BMI) which inherited the primary responsibility of security activity from the German government. The BMI emits the tenders,²⁰ while the German Federal Police is responsible for preventing security breaches on airports.

Similarly in Spain, all significant Spanish airports are owned and operated by AENA,²¹ a centralized government body.²² Responsibility for screening is shared between AENA and the Ministry of Interior while the execution of screening is under the supervision of the Guardia Civil, the Spanish police force.²³

Among 200 airports in Canada regularly served by scheduled airlines,²⁴ roughly half of these are owned or operated by the government, including ten international fields. These airports are managed by the Air Administration of the Department of Transport (DOT). Other jurisdictions having a centralized system of aviation security are Austria,²⁵ Italy,²⁶ Norway,²⁷ Portugal,²⁸ and Sweden.²⁹

¹⁸ Civil Aviation Authority of UK. For more information; see, <http://www.caa.co.uk/>

¹⁹ A governmental body responsible for matters relating to transportation. For instance, there are MOT of Japan and MOT of Canada.

²⁰ Except in the region of Bavaria, where the regional government is responsible.

²¹ Aeropuertos Españoles y Navegación Aérea, <http://www.aena.es/>

²² In accordance with Article 82 of Law 4/1990 of 29 June, regarding the State Budget for 1990, in the wording specified by Law 62/2003 of December, AENA is entrusted with the power of disposition, management, coordination, operation, maintenance and administration of public civil airports, The development of order and safety services in the facilities under its management, as well as the participation in specific training related to air transport and subject to the granting of an official license; see the website of Aena, *Ibid*, at 'the functions'.

²³ Legislations relevant to aviation security are; Ley 23/1992, de seguridad privada 30 July 1992. Also there is a specialized law for ASPs called; Plan nacional de seguridad para la aviación civil (4 Dec 2007).

²⁴ Airport and airline security in Canada is the responsibility of the Minister of transport and is governed by regulations issued under the *Aeronautics Act*. The Act and the regulations impose obligations on federal aviation authorities and on air carriers to observe specified security standards. Recent amendments to the Act will strengthen the Minister of Transport's powers to prescribe and enforce security standards and to satisfy himself that they are being followed. Canadian security standards meet or exceed those established by the International Civil Aviation Organization (ICAO).

²⁵ In Austria, the responsibility for screening resides at the Austrian Ministry of Interior (BMI), who also emits the tenders from a centralized office.

²⁶ In Italy, only small airports currently outsource screening to private providers, whereas the larger airports have their own security departments. Since a Ministerial Decree of 1998, responsibility for screening resides with the airport operators, although the execution of screening is always under the supervision of the Police.

²⁷ A large majority of main airports in Norway is owned and operated by Avinor, a centralized government body. Responsibility for screening resides with the airport operators (mostly Avinor), who also emit the tenders. Sandefjord Airport (TRF) is the only sizeable Norwegian airport that is independent from Avinor – Torp airport is owned and operated by Sandefjord Lufthavn AZ (owned by local municipalities)

²⁸ All large Portuguese airports are owned and operated by ANA (Aeropuertos de Portugal (ANA) is the Airport Authority of Portugal; <http://www.ana.pt/>), a centralized government body, except FNC (Funchal Airport) which is operated by ANAM (ANAM - Aeropuertos e Navegação Aérea da Madeira, ANA has a 70% participation in ANAM, the remainder belongs to the region of Madeira 20% and the Portuguese State 10%). Legislations related to aviation security are; Despacho no. 16 303/2003 (21/08/2003) and PINSAC 4/12/2001 (23/12/2003) Decreto Lei.

²⁹ In Sweden, the largest airports are owned and operated by LfV, the Swedish Civil Aviation Authority. The LfV Group consists of the State enterprise (Luftfartsverket) and its subsidiaries and associated companies. LfV

On the other hand, the decentralized model appoints the airport authority to provide the main security activities under the supervision of the relevant government authority.³⁰ This is broadly the current situation in France; the responsibility for screening resides with the airport operators, who also emit the tenders.³¹ Responsibility for passenger and hand baggage screening lies with the airport operator and the airlines are responsible for hold baggage screening who often delegate the task to the airport operator via an Airport Operating Committee (AOC).³²

Also the Netherlands governs ASPs via the national legislation related to private security companies³³ and more specifically through the Security plan of Amsterdam Airport, Schiphol under the National Aviation Security Plan which developed according to the EU Regulation 2320/2002. On April 1st 2003, responsibility for security screening in the Netherlands was transferred from the Royal Marechaussee (The Dutch Border Police) to the airport operators.

In Greece, the decentralization of aviation security duties is in progress. All screening activities are currently being outsourced at Athens International Airport and the responsibility for screening has gradually been decentralized from the state to the airport operators, in turn, ASPs are increasingly executing the screening activities.³⁴

Once the government arranges the delegation of duties and when it is decided to utilize ASPs; ASPs go through various steps to be qualified as an aviation security provider and to perform security services at airports, such as in Turkey. After founded as an aviation security service company, an ASP is must be acknowledged by Turkish Civil Aviation Authority (TCAA). Then it can start providing aviation security services at Istanbul Atatürk Airport, for instance, after having C Group license from the Ministry of Transportation and State Airports Administration.³⁵ It also needs the Private Security Operating Company license from the Ministry of Interior. ASPs shall maintain a “service license” from Ministry of Transport, TCAA individually for each international airport, in addition to regular service license obtained from Ministry of Interior.

2. *National legislations in terms of the liability of ASPs*

Despite many states facilitate ASPs within their aviation security system; few of them explicitly encompass the problem of ASPs’ potential exposure to the unlimited liability in case of terrorist attacks. The attempts of those few could be found from states with centralized security system since the responsibility lies with the government instead of airlines. In general, ASPs become an agent of the government; an entity that performs public duties that were originally a state is responsible. Accordingly the state may be vicariously liable for actions of ASPs on airport security activities or the

operates 16 airports and is responsible for air navigation services in Sweden. Responsibility for screening resides with the airport operator. For different legislations are relevant to ASPs, namely Lagen om luftfartsskydd(2004:1100), 5 § lagen (1974:191) om bevakningsföretag, Rikspolisstyrels föreskrifter RPFSS 2006:15 FAP 579.2 (2Feb07) and Bestämmelser för Civil Luftfart – Luftfartsskydd (BCL-SEC). For more information, see <http://www.lfv.se/sv/>

³⁰ As mentions previously, CAA, MOT, Police force, etc. See *supra* notes 18 and 19

³¹ The two airports that are operated by Aéroports de Paris (ADP), CDG and ORY, represent more than 60% of all departing traffic from France. Most of the remaining mid-sized French airports are owned and operated by regional Chambers of Commerce.

³² The Law of 1983 specifies the security mission & industry while Law of 2003 specifies mission of Airport Security under Aviation rules.

³³ Wet Particuliere Beveiligingsorganisaties en Recherchebureaus (Law Privately-owned Security Companies and Investigation Organizations) April 1st 1999

³⁴ National Civil Aviation Regulation governs aviation security activities in Greece and specifically, Law 2518/97 is relevant for the ASPs’ operation.

³⁵ Act number 2920 on 16.05.1997

state recognizes its part of responsibility and protects ASPs against greater sum of civil liability covered by the insurance.

France comprises the liability exposure of ASPs within its legal frameworks based on the legal system on liability in general with a strong interference from the Civil Aviation Code (C.A.C).

To begin with, the French state carries the overall responsibility for security through its police authorities (Préfet).³⁶ The 'Préfet' carries on 'mission of police', that is, aviation security tasks for airports with assistance from the airport operators and ASPs. According to the C.A.C, this assistance should always be "under the authority of the Préfet" when it is organized in application of Regulation CE N°2320/2002; the core legal text for aviation security. As long as the Préfet supervises an execution, any entity can perform among the airport operators, airlines and ASPs, depending on the nature of tasks.

The French government and the airport operator have two legal arrangements. One is that the airport holds a so-called 'concession' to operate. Another is, the operator becomes an assistant to the Préfet, i.e. it acts on behalf of Préfet (the state representative). Similarly, ASPs formulate a security service contract with the airport operator while having another legal connection with the Préfet as an assistant to the Préfet.

Direct claims against ASPs are not allowed when ASPs were executing the mission of police.³⁷ Only administrative courts handle these claims which would only retain the liability of the state. It is essential to prove that the ASPs had instructions from the police (were not a simple agent of the airport operator) to refute the claim. ASPs can prove this via legislative texts or direct instructions of the Préfet.

In addition, the recourse action taken by the state against ASPs would only be successful if the act caused damage qualifies as a 'detachable fault', that is, a fault that has no relation to the mission of police. Even in such a particular case, ASPs could defend itself by stating that the state neglected its responsibility to supervise.

Furthermore, the recourse action by an airport operator against ASPs is improbable since most of the times, as an agent of the state, an airport operator would not be held liable. If the airport operator is nevertheless liable, recourse should only be available when the act caused damage qualified as a breach of contract. Yet the breach of contract would be hard to argue since complying with legislative texts or instructions from the Préfet is sufficient for ASPs to prove that it made no breach. Same as a previous case, ASPs can argue that the airport operator neglected its responsibility to supervise.

On the other hand, the government of the United States took one step further to protect anti-terrorism businesses, in order not to deter developing and commercializing their products under the threat of liability exposure.³⁸ The Homeland Security Act of 2002³⁹ contains tort reform measures one of which is the SAFETY Act (the Act).⁴⁰ Under the legislation, ASPs operating in the United States may obtain liability protection from the government given that it is certified as "qualified anti-terrorism technologies".⁴¹ Qualified anti-terrorism technologies have been very broadly defined to include any qualifying product, service or technology in prevention of terrorism,⁴² thus, it encompasses the security services provided by ASPs.

³⁶ Préfet: Officier de Police judiciaire (judiciary police officer), that is the high commissioner of police

³⁷ Which means that ASPs were acting as assistants to the Préfet. In addition, victims would find the legal basis for claims against ASPs under French tort law

³⁸ See, <https://www.safetyact.gov/>; see also *supra* note 41 SEC. 862 (b)(4)

³⁹ Homeland Security Act of 2002, P.L. 107-296

⁴⁰ Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (hereinafter referred to as SAFETY Act)

⁴¹ Subtitle G of SAFETY Act. *Ibid.* SEC. 862 (b)

⁴² *Supra* note 40, SEC. 865. (1)

Once the ASPs are designated as a qualified anti-terrorism technology, the Act limits liability of ASPs against tort claims arising out of, or resulting from a terrorist act in which their services have been deployed.⁴³ In addition, the Act creates a Federal cause of action, exclusive jurisdiction over all such actions⁴⁴ and prohibits punitive damages⁴⁵ or other damages not intended to compensate the plaintiff for actual losses.⁴⁶ Non-economic damages may be recovered only in an amount directly proportional to the responsibility of a defendant.⁴⁷

Furthermore, qualified ASPs obtain a rebuttable presumption of the “government contractor defense” which applies in cases for claims relating to an act of terrorism when such services have been deployed in defense and such claims would result in loss or potential loss to the seller.⁴⁸ Sellers of qualified technologies cannot in any circumstance be liable for an amount greater than the limits of liability insurance coverage required to be maintained.⁴⁹

In sum, the SAFETY Act provides an overall certainty for qualified ASPs against third party liability claims in the event of terrorism. It is a positive model that optimally allocates responsibilities and liability arising from an act of terrorism. The US government recognized its responsibility towards security of its citizens and also recognized that an act of terrorism is actually aiming at the government; hence, the public-private partnership between the government and private entities providing anti-terrorism measures should not be limited only to the delegation of responsibility; rather the liability risks must be shared as well.

Nonetheless this is not a common practice throughout the countries. Majority of states do not have such a liability system which protects ASPs or other private entities that assist states in protecting citizens by participating in the aviation security. States either leave the problem of liability to be decided by individual courts or even limit state’s liability by legislation in case of a terrorist act. For instance, a recent amendment to the Austrian law⁵⁰ on the prevention of criminal acts against the security of civil aviation has reduced state liability for failure to provide for adequate safety measure to the amount of one million euros as compared to unlimited liability before.⁵¹ This liability limitation is truly not enough to cover even a portion of damages from a terrorist attack.

Thus, it is necessary to examine how the courts have dealt with the liability of ASPs since most of the times existing legal frameworks would not cover the problem.

III. LIABILITY OF AVIATION SECURITY SERVICE PROVIDERS

The international carriage by air raises, first of all, the question of the carrier’s liability to the passengers. Moreover, it gives rise to the question of ASPs’ liability to third parties – passengers or victims on the ground – in tort; which does not fall principally under a service contract⁵² or a contract of carriage.⁵³ However, if ASPs incur a liability to third parties while acting within the scope of the airline, it may recover the amount of liability in a recourse action against the carrier or may invoke various mechanisms available to the carrier including the liability limitations under international

⁴³ James J. F. Forest *Homeland Security: Critical infrastructure* (2006) at 71

⁴⁴ District courts have original and exclusive jurisdictions. *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* Under the risk management system; see SEC. 864.

⁵⁰ BGBI I 104/2002. See also Bernhard A. Koch (ed.), *Terrorism, tort law and insurance* (2004) at 22

⁵¹ *Ibid.*

⁵² Between the carrier and ASPs.

⁵³ Between the passenger and the carrier.

conventions.⁵⁴ Therefore, third party claims in relation to the aviation security activities in international air transportation might be covered by the contract of carriage and, in turn, the relevant international conventions.⁵⁵

1. Applicability of the Warsaw and Montreal Conventions

The text of Warsaw Convention (hereinafter, “the Convention”) in its original form makes a number of references to the carrier’s servants and agents.⁵⁶ However, in the absence of the definition of the term ‘carrier’, the Convention has been applied to an entity other than the air carrier including ASPs, when it satisfied the specific criteria for liability promulgated in the Convention. Applicability of the Convention has of much broader importance including liability limits imposed by Article 22.⁵⁷ An agent or servant of the carrier will not be subject to the regime of presumed fault, nor will the jurisdiction and time limitation in Articles 28 and 29 be available to him,⁵⁸ and specific defenses in Articles 20 and 21 will be lost.⁵⁹ On all these points, choice of law questions will be presented.⁶⁰

Attempts to stretch these shields to agents or to independent contractors of air carrier were discussed at The Hague in 1955, and more explicitly, under a new Article 25A.⁶¹ Montreal Convention 1999 also made a similar effort.⁶² What makes uncertain ASPs’ legal position is, however, the remaining sovereignty of individual courts in defining the *relationship* between the entity and the carrier – when it becomes an agent or servant of the carrier. What would be the legal elements ASPs must fulfill in order to acquire liability limitations available to carriers?

First, it is a prerequisite for ASPs to enjoy protections as an agent that the carrier must be held liable. Under Article 17 of the Warsaw Convention, the airline is liable if; (1) the passenger is involved in international air transportation;⁶³ (2) the accident occurred during the course of embarkation, disembarkation or on board the aircraft;⁶⁴ and (3) the accident causes a bodily injury to the passenger.⁶⁵ Thus, the security search – the primary activity of ASPs under the service contract – has to be proven to be the part of ‘operations of embarking’ under the meaning of Article 17 of the Convention.

Secondly, after affirming that the security search is indeed a part of embarkation, the next question must be answered; whether ASPs were acting as an agent of the carrier. In order to grasp the extension of a contractual arrangement between the airline and passenger to ASPs, this chapter analyzes the processes by which the court identifies or devises them focusing on ASPs’ point of view.

⁵⁴ Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter referred to the Warsaw Convention); ICAO Doc. 7838, 9201; (1933) 137LNTS 11. Also; Montreal Convention 1999 for the Unification of Certain Rules for International Carriage by Air; ICAO Doc. 9740 (hereinafter cited as the Montreal Convention 1999)

⁵⁵ *Ibid.*

⁵⁶ Warsaw Convention 1929 *supra* note 54. Arts. 16(1), 20(1), 20(2) and 25(2). See also Shawcross and Beaumont; Air Law Vol.1 at no. 1076

⁵⁷ *Ibid.* Art. 22

⁵⁸ *Ibid.* Arts. 28 and 29

⁵⁹ *Ibid.* Arts. 20 (all necessary measures) and 21 (contributory negligence)

⁶⁰ Shawcross and Beaumont; *supra* note 5656 at no. 1076

⁶¹ Warsaw Convention 1929, as amended at The Hague. Art. 25A. And by Montreal Protocol No. 4. Art. 25A. See also *Ibid.*

⁶² Montreal Convention 1999, *supra* note 5454. Art. 30.

⁶³ *Ibid.* Article 1

⁶⁴ *Ibid.* Article 17

⁶⁵ *Ibid.*54

1.1. The process of embarking

In particular relevance to ASPs, a passenger must prove that an accident caused a bodily injury occurred while he or she was 'in the process of embarking'.⁶⁶ A passenger in the course of embarkation normally takes various steps to get on board; including security search. Courts have relied on several indicators in determining the liability of a carrier and whether the security search is a part of the process of embarking under the Convention.

The test set forth in *Day v. Trans World Airlines, Inc.*,⁶⁷ was employed to resolve whether the passenger was 'in the process of embarking' at the time of accident.⁶⁸ This case arose from the terrorist attack occurred while the passengers were standing in line to be searched, prior to get on board a flight from Athens to New York at Hellenkion Airport. The *Day* court analyzed three factors; (1) the activity of the passenger (2) the extent of control over the passenger by the airline, and (3) the location of the passenger at the time of the accident.⁶⁹

The court interpreted the phrase "in the course of any of the operations of embarking" as it did not refer to the particular place where the plaintiffs were standing when the accident occurred, but rather actions in which the passenger was engaged must have been "a part of the operation or process of embarkation."⁷⁰ The airline would prohibit anyone who did not perform each of the eleven actions⁷¹ from getting on board, hence, the passengers were (1) in a location waiting for the *security search* as one of the necessary prerequisites prior to boarding the airplane,⁷² (2) engaged in passenger identification and clearance,⁷³ and (3) not free agents who could move around the terminal, but instead were under the direction of the airline's agents.⁷⁴ For these reasons, the court found that the victims were within the scope of the term "in the course of embarking", therefore, the airlines is liable.

Likewise, the court in *Evangelinos v. Trans World Airlines, Inc.*,⁷⁵ found that the passengers had almost completed the steps necessary for boarding while standing 250 meters away from the aircraft; had been acting at the direction of agents of the carrier; and had been segregated into a group that is separated from passengers of other flights.⁷⁶

To briefly note the decision of the court in *El Al Israel Airlines, Inc. v. Tseng*,⁷⁷ even though the main issue was the issue of exclusivity, the routine security search to which Tseng was subjected, was

⁶⁶ *Ibid.*

⁶⁷ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (1975)

⁶⁸ The plaintiff must prove that the accident occurred while he or she was on board the aircraft or "embarking" or "disembarking" within the meaning of the Warsaw Convention. See, Warsaw Convention, *supra* note 54, art. 17; this test is widely followed by other courts. See, e.g., *Martinez Hernandez v. Air France*, 545 F.2d 279, 282 (1st Cir.1976), cert. denied, 430 U.S. 950 (1977); *Jefferies v. Trans World Airlines, Inc.*, No. 85 C 9899, 1987 WL 8168 (N.D.Ill. Mar. 17, 1987)

⁶⁹ *Day v. Trans World Airlines, Inc.*, *supra* note 67 at 33

⁷⁰ *Ibid.*

⁷¹ Here, travelers had to go first through a passport check and down into the passenger lounge. From there, they were directed to the departure gate where they were searched by Greek police. The attack occurred while the passengers were standing in line to be searched, prior to boarding the airplane. *Day v. TWA*, *Ibid.* at 32

⁷² *Ibid.* emphasis added.

⁷³ *Ibid.* at 33

⁷⁴ *Ibid.* at 32

⁷⁵ *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 164 (3d Cir.1977)

⁷⁶ *Ibid.* at 153-54, 156. See also M. Veronica Pastor, Absolute liability under article 17 of the Warsaw Convention: Where does it stop? 26 *Geo. Wash. J. Int'l L. & Econ.* 575 (retrieved from Westlaw academia on 23 June 2009)

⁷⁷ *El Al Israel Airlines, Inc. v. Tseng*, 525 U.S. 155 (1999)

a 'routine' part of international air travel⁷⁸ and was in conformity with standard El Al pre-boarding procedures.⁷⁹

Similarly in *Baker v. Lansdell Protective Agency, Inc.*⁸⁰ and *Kabbani v. International Total Services*,⁸¹ the courts have held that the course of embarking had commenced when the carry-on objects are placed on the conveyor belt for a security check which means that the security check is one of the processes of embarkation.

In *Buonocore v. Trans World Airlines, Inc.*,⁸² the court declined to find the airline liable for the death of a ticket holder from a terrorist attack when the ticket holder had *not* gone through *security inspections*. Hence, it can be concluded that the process of embarkation generally includes the period of time during which the passenger or the baggage is searched for security reasons by ASPs.

1.2. Agent - 'The indemnification clause' and 'in furtherance of contract'

Having determined that a security search constitutes a part of embarkation; thus the carrier is liable provided that other elements of Article 17 have been met, the next question to is whether the ASPs acted as an agent of the carrier within the meaning of the Conventions⁸³ when damage occurred.

In *Reed v. Wiser*,⁸⁴ where the claim was brought against the president of TWA and the vice-president of audit and security for their alleged negligence in failing to maintain adequate security controls and to prevent the terrorist attack which killed 79 passengers and 9 crew members.⁸⁵ The airline was not sued by the plaintiffs. The Court of Appeal made a thorough analysis of the wording of the Warsaw Convention and the proposed Hague Convention which provided that any servant or agent of the carrier shall "be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22,"⁸⁶ and reasoned that if the liability limits of the Convention were not available to employees of the carrier,⁸⁷ it would have to indemnify its employees which will end up increasing the cost of air transport. The *Reed* court held the defendant's act in question is covered by the Convention thereby they can assert the liability limitation. This founding offers a guide for applying the Convention to an action against an agent of the carrier. For the purpose of our discussion, however, it bears mentioning that the defendants in *Reed* were in charge of security of TWA as employees not as independent contractors.

For independent contractors like ASPs, courts have formed another guideline to consider in determining their status under the Conventions.⁸⁸ The agent within the scope of the Convention is an entity performing services in 'furtherance of the contract of carriage'.⁸⁹

⁷⁸ *Ibid.* at 103

⁷⁹ *Ibid.* The security search in question comprised a period when a security guard questioned Tseng about her destination and travel plans; a female security guard then searched Tseng's body outside her clothes by hand and with an electronic security wand.

⁸⁰ *Baker v. Lansdell Protective Agency, Inc.* 590 F.Supp. 165, US District Court, SDNY, 1984. 19 Avi. 18193 (D.C.N.Y. 1985)

⁸¹ *Kabbani v. International Total Services*, 805 F.Supp 1033 (D.D.C. 1992)

⁸² *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990)

⁸³ The Warsaw Convention or the Montreal Convention; *supra* note 54

⁸⁴ *Reed v. Wiser*, 555 F.2d 1079, 1082-92 (2d Cir. 1977)

⁸⁵ *Ibid.* See also, Daniel E. Murray, The Extension of Damage and Time Limitations of the Hague, Warsaw, and Lausanne Conventions to Agents and Independent Contractors of Ship Lines and Air Lines, *Transportation Law Journal* (1997) at Chapter III. 25 Transp. L. J. 1 *retrieved from* LexisNexis Academia on 13th of June 2009.

⁸⁶ *Reed v. Wiser*, *supra* note 84. at 1086 note 9

⁸⁷ *Ibid.* at 1089.

⁸⁸ The Warsaw Convention or the Montreal Convention; *supra* note 54

⁸⁹ See e.g., *Julius Young Jewelry Manufacturing Co. v. Delta Air Lines* 414 N.Y.S.2d 528 (App. Div. 1979) [The court extended the holding in *Reed* to contractual agents "performing functions the carrier could or

In *Baker v. Landsdell Protective Agency*,⁹⁰ the passenger sued the security agency, alleging that an item was stolen from her carry-on bag during the security check. The security agency in question was employed by the carrier which was *required by law* to execute the security search of passengers and their carry-on luggage prior to boarding. The ASPs could avail itself of the limitations because it was performing the tasks the carrier was otherwise required to do.⁹¹

The court in *In Re Air Disaster at Lockerbie*⁹² delivered similar decision that an independent contractor performing security was an agent of the carrier and could be covered by the Convention. Alert Management Systems, Inc., (Alert) is a wholly owned subsidiary of Pan Am created to be responsible for conducting security measures, hence, the court refused to treat Alert as a single entity and to separately determine the liability of Alert from the carrier.

On the other hand, in some cases involved domestic flights, despite of the fact that the Conventions were not applicable; the courts still determined the relationship between carriers and ASPs. The fundamental issue for ASPs in such cases was the extension of liability limitation stated in tariffs.⁹³

In the case of *Gin v. Wackenhut Corporation*,⁹⁴ in which a passenger's baggage containing valuables has allegedly been stolen while passing through security checks, the court found that although the air carrier had employed the security agency, it was an independent contractor and not an agent of the air carrier; thus the security service could not claim the benefit of the carrier's limitation of liability. The court found that the ticket was for a wholly domestic flight which the Warsaw Convention does not apply, and even the carrier's tariff or ticket failed to mention the security service or to incorporate similar languages of the Convention extending liability limits to the carrier's agent. Moreover, the carrier exercised little, if any, control over security operations of Wackenhut. Hence the tariffs could not reasonably be construed to extend to checkpoint operators, i.e. the Wackenhut.

However, the carrier's duty towards passengers was extended to ASPs even when the flight was domestic. ASPs were co-defendant in *Tremaroli v. Delta Airlines*⁹⁵ where the passenger's bag was lost after passing through the security checkpoint which was required by Delta Airlines and operated by its agent, Ogden Security, Inc. The court held that "defendants had control of claimant's hand baggage while said baggage went through the security check", thus, while the airline owed a duty to the passenger, the security agency did have the same duty to safeguard the passenger's hand baggage during their security procedures as well. In its findings, a passenger in general is warned not to pack valuables in checked luggage, instead valuables are encouraged to be packed in hand baggage to be kept within the passenger's control. Yet, the passenger and his hand baggage had to be separated during the required security checks. The court further held that the security company was obliged to indemnify the airline for the loss according to terms in its security agreement.⁹⁶

would...otherwise perform itself]; *McCaskey v. Continental Airlines, Inc.* (S.D. Texas 2001) 159 F.Supp.2d 562, 578-579 [agents and subcontractors can claim the protection of liability limitation provision if the services provided were in the furtherance of the contract of carriage]; *Croucher v. Worldwide Flight Services, Inc.* (D.N.J. 2000) 111 F.Supp.2d 501, 504-505 [independent contractors are covered if services are provided in furtherance of carriage].

⁹⁰ *Baker v. Landsdell Protective Agency supra* note 80

⁹¹ *Julius, supra* note 89, 414 N.Y.S.2d at 530.

⁹² *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 776 F. Supp. 710 (D.C.N.Y.1991), 928 F.2d 1267 (2d Cir.1991), cert. denied 112 S. Ct. 331 (1991)

⁹³ *Tremaroli v. Delta Airlines*. 117 Misc. 2d 484, 458, N Y S 2d 159; *Gin v. Wackenhut Com.*, 741 F. Supp 1454 (D Hawaii 1990); *Wackenhut Com. v. Lippert*, 591 So 2d 215 (Fla, Dist Ct App 1991), rev'd, 609 So 2d 1304 (Fla 1992)

⁹⁴ *Gin v. Wackenhut Corp.*, 741 F Supp 1454 (D Hawaii 1990)

⁹⁵ *Tremaroli v. Delta Airlines et al*, 17 Av. Cas. (CCH) P18,293, 294 (Civ. Ct. N.Y. 1983)

⁹⁶ *Ibid.*

Yet another case involved the passenger claiming stolen jewels in her purse while she was passing through the metal detector at the air carrier's subcontractor's security checkpoint. In *Kabbani v. International Total Services*,⁹⁷ the alleged theft happened when the passenger's carry-on bag was in the charge of the subcontractor, who served as the carrier's agent in performing tasks legally required of the carrier by federal law. The court granted the subcontractor an agent status and held that the Convention was applicable to the facts at issue. The *Kabbani* court stated:

The subcontractor was "providing legally mandated security services in furtherance of the contract of carriage, which the airline otherwise would have been required to provide and for which the airline would have been liable."

The court's opinion was rather focused on the fact that the security check was required by federal law than the precise nature of the parties' agreement.⁹⁸

In sum, the main issues in determining the applicability of the Warsaw or Montreal Conventions to ASPs were whether; (1) the accident happened during the course of embarkation; (2) the conduct or service was required by the law; (3) the action was in furtherance of a contract of carriage; (4) the carrier exercised control over ASPs or (5) the tariff or the ticket contains terms that resemble the wording of the Conventions or mentions ASPs.⁹⁹

However, the outcome of litigation is largely dependent upon facts of individual cases. The recent finding of the court in *Dazo v. Globe Airport Security Services*¹⁰⁰ confirms this point. Ms. Dazo was an alleged victim of a carry-on bag theft from a security checkpoint managed by Globe Airport Security Services (Globe).¹⁰¹ Globe was acted as the non-exclusive agent of three different airlines that utilized its screening services.¹⁰²

The district court in *Dazo* dismissed subsequent claims of the plaintiff holding that they were preempted by the Warsaw Convention because the theft occurred while the plaintiff was in the process of embarking. But the U.S. Court of Appeals reversed the district court's finding and noted that Globe's services were not in furtherance of the contract of carriage of an international flight since it rendered security services to both international and domestic passengers. Globe and the three airlines argued that the bag disappeared while it was in the exclusive custody of the airlines; therefore, Dazo was in the "course of embarking," within the meaning of the Warsaw Convention.¹⁰³ The court disagreed and held that the services rendered by Globe were basic airport services; therefore, Dazo was not in the "course of embarking and Globe was not a 'carrier' within the meaning of the Convention."¹⁰⁴ In addition, the Ninth Circuit noted that since the federalization of the passenger-

⁹⁷ *Kabbani v. International Total Services*, *supra* note 81

⁹⁸ *Ibid.* See also *Baker supra* note 90

⁹⁹ The Warsaw or Montreal Convention *supra* note 54

¹⁰⁰ *Dazo v. Globe Airport Security Services* 295 F. 3d 934 (9th Cir. 2002)

¹⁰¹ See also Franklin F. Bass and Adrienne N. Kitchen, Ground handling services and the Warsaw and Montreal Conventions; available at http://www.wilsonelser.com/files/Publication/6c953a8f-0b1d-487c-b80d-065a6d3317d5/Presentation/PublicationAttachment/650e13b0-c1e2-466a-b837-23a1a0f65b03/GroundHndlngSvc_Oct2005.pdf

¹⁰² *Dazo v. Globe Airport Security Services supra* note 100 at 936-37. See also *Ibid.*

¹⁰³ Airline Appellees' Brief at 5-8, *Dazo* (No. CV 99-20548-JW); Globe Airport Security Services' Brief at 7-9, *Dazo* (No. CV 99-20548-JW); For the opinion against the findings of the court in *Dazo*, see Christa Brown, Case note, The ninth circuit of the United States Court of Appeals hold the Warsaw Convention does not apply to an entity acting as an agent to more than one principal: see, *Dazo v. Globe Airport Security Services*, 68 *J. Air L. & Com.* 639; retrieved from Lexis Nexis Academic on 8th July 2009.

¹⁰⁴ See *Dazo, supra* note 100; see also Christa Brown, *Ibid.*

screening function performed by Globe reinforced the point that airport security and passenger screening are part of a "national program wholly independent of the Warsaw Convention."¹⁰⁵

Within a practice in which courts routinely fashion doctrinal tests to implement vague languages of the Warsaw and Montreal Conventions; *Dazo*¹⁰⁶ represents a newly discovered base line of interpreting the scope of applicability of Conventions to ASPs. It was decided that the ASP serving more than one air carrier at the same gate will not be considered as an agent and thus, will not benefit from the liability limitation. As the dissent by Judge Diarmuid F. O'Scannlain suggests; 9/11 may have changed the political and social perceptions towards ASPs.¹⁰⁷

Moreover, decisive factors, for instance, the agreed scope of airline's control over ASPs or an indemnification clause in the contract, change continuously and are distinct for each case. These variances may lead individual courts not to uniformly grant the agent status to ASPs even they are performing aviation security tasks on behalf of the carriers. Accordingly, ASPs would not always be able to benefit from the extension of the carriage of contract and be subject to third party liability.

Therefore, ASPs rendering security services under the contractual relationship with air carriers are exposed to unlimited liability, especially in case of an act of terrorism.

2. Third party liability

2.1. General conditions of liability in Tort

Tort liability is the liability towards a non-contractual party in case of damage that governs the liability for harm sustained to the interest of others. For damage claims arising out of civil aviation, international conventions may influence part of the outcome such as the amount of monetary compensation; yet consequently, the rest is in the hands of national courts to decide and entirely up to the court if the damage was inflicted to a third party without having the international conventions applicable. It is significant, hence, to examine the general conditions of tort liability since with no applicable international legal instruments, the liability of ASPs will be governed by general tort law of individual jurisdictions.

Largely, four elements required for negligence liability are duty, breach, damage, and causation. To establish *duty*, the complaining party must prove that the ASPs had a legally recognized duty. Next it must be shown that the ASPs *breached* that duty and it suffered some *harm* or *damage*. Finally, it must show that such a breach of ASPs of its legal duty *caused* the harm or damage.

The third and fourth elements - damages and causation - are dependent upon facts of individual cases, hence, will not be listed here. In case of legal duties, however, one can identify three major sources of legally recognized duties of ASPs' under (1) contractual obligations imposed by service contracts; (2) aviation security regulations and standards at international and national levels and (3) a general duty of care towards the public. These sources will be dealt with reference to examples of the EU and the US.

2.1.1. Duty of care and contractual obligations

¹⁰⁵ See *Dazo Ibid.* at footnote 3.

¹⁰⁶ *Dazo v. Globe Airport Security Services*, *supra* note 100

¹⁰⁷ *Ibid*; see the dissent opinion of Judge Diarmuid F. O'Scannlain.

In principle, obligations under a contract are only effective between the parties.¹⁰⁸ Thus, if one fails to perform a contractual duty, he or she is liable for another party. Nevertheless, security service contracts of ASPs are different - the ASPs' contractual duties are deemed to affect third parties, i.e. the public, hence, potential claimants may use ASPs' breach of contractual obligations to show negligence in inadequate security. This kind of contractual relationship is assumed in German law as "Verträge mit Schutzwirkung zugunsten Dritter" which means that the protective scope of the contract comprises third parties who are affected by the contractual duties ASPs obliged to perform.¹⁰⁹ The passengers and airport visitors may therefore claim against ASPs directly if ASPs failed to deploy adequate security as could have been expected.¹¹⁰

The first element - 'scope of work'-¹¹¹ is stipulated in each service contract ASPs have with individual airports, airlines and government bodies. Normally, a separate document specifically stipulates what should be the scope of work for relevant ASPs. For example, an airport within the EU, the specification document imposes security responsibilities on ASPs to control crew and surveillance with a brief description of tasks, such as an access control screening for crew entering the security restricted areas. It sets out the strategic context, organization of security tasks, including reference to the EC Regulations.¹¹²

The scope of work is important in that it outlines the everyday duties that ASPs are obliged to perform and it is the basis of the next major source of the duty of care, which is whether ASPs in question have met international and national security standards when the terrorist act happened.

2.1.2. Duty of care and Critical Performance Indicator

After the scope of work has been established, the 'Critical Performance Indicators' (CPI) is used to measure the performance delivery of ASPs. CPI is set by airport operators to meet their legal obligation under the National Civil Aviation Security programme (NCASP), and this affects the government in respect of the state meeting the EU Commission Regulations.¹¹³

The airport conducts tests and audits on the performance of ASPs to measure compliance with the required CPI. ASPs will be further tested as part of inspections conducted by the government authorities and EC inspections. If the current CPI has been set at 80% for all security tasks, this can reasonably lead to the conclusion that the airport, the government and the EC Commission, all recognize that it is not possible to achieve 100% aviation security and recognize that an 80% compliance is currently acceptable.

In other words, it is possible to fail to detect 20% (1 out of 5 tests) on the tasks listed in the CPI, and by extension, recognition that a 20% failure in detection performance is acceptable to the government and the EC, even if it leads or contributes to a terrorist acts. This is not necessarily a breach of duty under national regulations relevant to ASPs. Within the accepted failure rate, ASPs

¹⁰⁸ International Institute for the Unification of Private Law (Unidroit), UNIDROIT Principles Art. 1.6(2) at 10; available at <http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf>

¹⁰⁹ See, Bernhard A. Koch (ed.), *Terrorism, tort law and insurance* (2004) at 289

¹¹⁰ *Ibid.*

¹¹¹ This term has been referred to as, 'a scope of employment', 'within the scope of the carrier', 'mission of the police' all of which used by courts to determine an agent-principal relationship between ASPs and its employer.

¹¹² European Parliament and Council Regulation 2320/2002 of 16 December 2002 establishing common rules in the field of civil aviation security, [2002] OJ No L 355/1, 30.12.02 (EC Reg. 2320/2002); for details, see John Balfour, EC Aviation Scene, *Air and Space Law*. (No.2;2003)106 at 111. Also Regulation (EC) No. 300/2008 of the European Parliament and of the Council, of 11 March 2008 on Common rules in the Field of Civil Aviation Security [repealing Regulation (EC) No. 2320/2002]

¹¹³ *Ibid.*

will only be exposed to unlimited liability risks when an act of terrorism was caused by blatant failure on the part of ASPs.

Nevertheless, foreign courts might not recognize the acceptable failure rate of other states. CPI is an important indicator in determining the liability of ASPs and can be used as a defense against recourse actions by airport operators; yet the problem of third party liability still seems grave since the duty of ASPs extends to third parties.

The last question to ask regarding a duty of care is whether ASPs' duty extends to the people on the ground – the people who even the airlines do not have any legal relationship prior to the accident. The answer to this question coincides with our examination on ASPs' general duty of care towards public.

2.1.3. Duty owed to people on the ground

The most recent and significant case dealing with the duty of ASPs owed to the people on the ground arose out of the event of 9/11. *In re 9/11 Litigation*¹¹⁴ illustrates the extent of potential liability of ASPs with respect to unlawful interferences with civil aviation. The victims' pleadings were consolidated into five master complaints; and they alleged that the airlines, airport security companies, and airport operators negligently failed to satisfy their security responsibilities, and consequently, allowed the terrorists to hijack the airplanes.

The court has ruled that airlines and airport security companies did have a duty to prevent potential terrorists from getting onboard the aircraft; and this duty is extended to ground victims.

The airlines and ASPs had argued that they owed a duty of care only to the crews and passengers while arguing that the attacks were unprecedented and therefore unforeseeable. But the court disagreed, saying that the crash of terrorists' hijacked aircraft was within the class of foreseeable damage resulting from negligently performed security tasks and could be predicted. It also stated that imposing a duty on the aviation industry best allocates risk to ground victims suffering as a result of inadequate screening.¹¹⁵

Thus, the duty of ASPs can be extended to third parties, i.e. passengers or people on the ground, who suffered damage under the influence of terrorist attacks. The liability of ASPs will not stay within a frontier of one state; rather it is highly probable that various jurisdictions would be involved whereas no legal regime explicitly governs the problem of a legal status of ASPs worldwide.

IV. UNLIMITED THIRD PARTY LIABILITY AND POSSIBLE SOLUTIONS

As a result, ASPs are potentially exposed to unconstrained liability following terrorist act. In addition to no international legal instrument currently exists that uniformly and explicitly protects ASPs, governments generally put the problem of liability of ASPs aside as they concentrate more on imposing security requirements on the industry.¹¹⁶ As it is not possible to forecast what the financial impact of a single act of terrorism or multiple terrorist attacks will be, the financial liability may be uncapped, that is, the liability will be unlimited for ASPs.

The limitation on third party liability is particularly important for ASPs since its duties are closely linked to the damage caused by an act of terrorism which would likely exceed the entire asset of one

¹¹⁴ *In re 9/11 Litigation*, 280 F. Supp. 2d 279

¹¹⁵ *Ibid.* The Judge stated in her findings that; “[w]e live in the vicinity of busy airports, and work in tall office towers and depend on others to protect us from the willful desires of terrorists to do us harm. Some of those on whom we depend for protection are ... private companies.” It denotes that ASPs are responsible for the risks arising out of unlawful interference with civil aviation.

¹¹⁶ *Ibid.*

business entity. In addition, such risks might deter ASPs from developing and enhancing more proficient security measures as the idea behind the SAFETY Act of the United States indicated.¹¹⁷

Based upon earlier discussions, four possible solutions can be found through which ASPs may limit its liability for damage arising out of an act of terrorism;

- (a) A cross-indemnification clause under which the courts allows ASPs to assert liability limitation available under the international conventions;¹¹⁸
- (b) The operational solution, i.e., fulfilling the criteria of performance, for instance, CPI of 80% to meet the national standard and the standard of the airport it operates;¹¹⁹
- (c) Insurance policy that covers unlimited liability exposure; or
- (d) Governmental protections announced in national regimes.

1. Cross-indemnification clause

One specific contract clause has emerged in the eyes of courts when they limit the liability of ASPs. The first option is the cross-indemnification clause within a security service contract between ASPs and airlines or airport operators. As the court in *Reed* stated;

"[t]he plain language of the original Convention...tends to support appellants' contention that its liability limits were intended to apply to a carrier's employees."¹²⁰ Also, "most carriers, at their employees' insistence, provide their employees with indemnity protection."¹²¹

The cross-indemnification clause provides a two-tiered protection for ASPs against passenger claims. First, it directly protects ASPs from unconstrained liability with an action of recourse against its contractual party - the carrier or the airport operator. Under the clause, the airline or the airport is obliged to indemnify the ASP for its part of negligence or any additional liability occasioned to ASP above the agreed level. Secondly, it offers ASPs liability limits under the Warsaw and Montreal Conventions through a court's decision. Courts usually grant ASPs an agent status since victims can circumvent constraints of the Conventions¹²² by suing the carrier's agents. Because it must indemnify its agent or servant for the exceeding sum above the liability limitation agreed upon by parties, the carrier would end up with liability above the limits of the Conventions.¹²³

However, the current trend of security service contract within the aviation industry indicates the opposite. The impact of the 9/11 incidents have caused airlines and airports to review their risk exposure from future terrorist attacks. They now try to mitigate or at least dilute their financial liability in the event of terrorist attacks, particularly those airports or airlines that contract out all or part of their security activities to private entities. It is becoming the trend for airports, airlines and even governments¹²⁴ that they try to dilute their own liability by passing as much of their financial liability as possible onto their service provider through specific clauses within the contract. The agreement for the airport security contract in today's form would include;

¹¹⁷ See *supra* note 38 (aim of the SAFETY Act).

¹¹⁸ The Warsaw or Montreal Conventions, *supra* note 54 and cases in Chapter III of this article.

¹¹⁹ *Supra* Chapter III. 2.1.2 of this article.

¹²⁰ *Reed v. Wiser supra* note 84 at 1087.

¹²¹ *Ibid.* at 1090.

¹²² The Warsaw or Montreal Conventions, *supra* note

¹²³ *Ibid.*

¹²⁴ As we have seen from the Austrian example; *supra* Chapter II of this article.

Liability and indemnification: the security company is liable for *any* damage caused to the airport operator as a result of an imputable shortcoming. Also the security company must have adequate insurance coverage for *at least* €100,000,000 to cover 'any damage resulting from any terrorist acts'

Hence the ASPs' liability is not capped for any damage caused by terrorism especially in the case of a proven imputable shortcoming.

Another example can be drawn from the case of *Tremaroli v. Delta Airlines*.¹²⁵ The airline filed a cross-claim against the security company for indemnification of the passenger's loss. Claimant is awarded \$ 950 against both defendants. However, Delta, as most airlines, had a security agreement with Ogden Security, Inc.¹²⁶ while the agreement entered into by Delta Airlines and Ogden Security, Inc. provided that;

"Ogden Security shall be *solely* liable for *any* actions, claims, losses, liabilities or expenses arising out of any injury to persons or damages to property incurred *in connection with* the services to be performed under this agreement which have been caused by the negligence of Ogden Security and Ogden Security shall indemnify client from *any and all* such actions, claims, losses, liabilities and expenses".

In accordance with the terms of the security agreement, Delta had a recourse action against Ogden Security, which consequently indemnified Delta for its loss.

This is becoming a standard feature in ASPs' security service contracts and now it is considered as a necessary part of doing business in private aviation security market. In other words, ASPs who are not prepared to accept such conditions will be removing themselves from the aviation security market.

This trend seems more evident from the fact that all tenders currently demand unlimited third party liability for ASPs. As a result, if a service provider cannot provide unlimited coverage, it will not be allowed to participate in any tender process. Concrete examples are tenders opened for ASPs in Madrid-Barajas airport, Aéroports de Paris, Athens Airport or Arlanda airport in Stockholm.¹²⁷ Besides, ASPs are obliged to adhere to the contracts proposed to them unilaterally by the relevant authorities without being able to introduce any modifications to the insurance contracts if they wish to participate in the tender.¹²⁸

Therefore, the industry practices in general show that ASPs do not have negotiable power to influence contractual terms or to limit their liability proportionately to their responsibilities. The first option seems no longer available and should be removed from the list of possible solutions.

2. Operational excellence

The second suggestion for ASPs is to attain operational excellence within the accepted rate of deficiency under the regional and national standards. For instance, if CPI 80% is acceptable for airports and government authorities, ASPs may aim at CPI 85% to minimize their exposure to

¹²⁵ *Tremaroli v. Delta Airlines et al*, 458 N.Y.S.2d 159, 1983 N.Y. Misc. LEXIS 3174, January 5, 1983. The court in this case stated that Delta had a security agreement with Ogden Security as most airlines do.

¹²⁶ Ogden Security Inc. is an independent security company which was responsible for the operation of all security systems including the scanning operation for the hand baggage under the service contract with Delta Airlines in this case.

¹²⁷ ASSA-I(Aviation Security Service Association – International), *Third Party Liability Questions & Answers* (restricted)

¹²⁸ *Ibid.*

unlimited liability. However, this option does not seem enough to diminish the risk exposure for two main reasons.

First, ASPs are *private* entities performing public functions. In order to carry out security measures to the highest standard, ASPs must continuously improve various measures within its security system from recruiting security personnel to training, enhancing more advanced technologies and supervising the overall performance. What these improvements would actually cost is not easy to calculate, though it would presumably increase the price of ASPs' services.

However, not all of the competitors within the market strive for such perfection. It would be reasonable to assume that ASPs will try to maintain the price of service within a reasonable range, especially when there is no obligatory guideline binding on airlines or airports in choosing which ASPs they are going to facilitate.

Secondly, even if several ASPs decided to invest in improving their security measures, it does not guarantee an escape from future terrorist attacks and third party liabilities thereto for those who have met the highest standard. This is what Kunreuther names as "the problem of interdependent security",¹²⁹ that is, not one entity assures security of civil air transportation; rather, "the whole chain of aviation security cooperates to prevent terrorists from attacking civil aviation."¹³⁰ There would be no economic incentives for one ASP investing in security measures if others fail to meet the similar degree of proficiency since failures of others could cause damage to ASPs with a higher standard.¹³¹ This interdependent risk across entities involved in the security chain may lead all of them to decide not to invest in protection.¹³²

3. Insurance that covers unlimited liability

Since investing one's own aviation security system does not provide ASPs with a guaranteed limitation against third party liability claims concerning an act of terrorism, ASPs must find insurance policy that covers 'unlimited' amount of liability exposure. This is simply not possible to achieve since there is no such policy available in the insurance market.

V. AVIATION SECURITY AS STATE RESPONSIBILITY

In order to examine our last option, the position of government within aviation security chain must be brought to the fore. Before answering the question whether governments would be able to ease the burden of unlimited liability on ASPs, this chapter concentrates on the contention that aviation security is the responsibility of state.

¹²⁹ Howard Kunreuther, Erwann Michel-Kerjan, *Insurability of (Mega-) terrorism risk: Challenges and Perspectives*, Report for the OECD Task Force on Terrorism Insurance. Paris: Organization for Economic Cooperation and Development.; See also Organisation for Economic Co-operation and Development, *Terrorism risk insurance in OECD countries* (2005) at 121

¹³⁰ *Ibid.*

¹³¹ *Ibid.* For instance, in the crash of Pan America's flight 103 over Lockerbie, Scotland in December 1988 that killed 259 people on board and 11 other on the ground illustrates this point. The explosion was caused by a bomb loaded at Gozo, Malta on Malta Airlines where there were poor security systems, transferred at Frankfurt Airport to a Pan Am feeder and then loaded onto Pan Am 103 at London's Heathrow Airport. The bomb was designed to explode only when the aircraft flew higher than 28,000 feet, which would normally not occur until the plane started crossing the Atlantic to its final destination, New York. The terrorists who placed the bomb knew exactly where to check the bag. They put it on Malta Airlines, which had minimum-security measures, and Pan Am was helpless. Hence the terrorists took advantage of the weakest link in a chain of interdependencies.

¹³² *Ibid.*

The concept of state responsibility under international law arises when a conduct attributable to that state constitutes a breach of an international obligation.¹³³ State responsibility is, thus, created once such a breach has occurred. A legal obligation must exist under international law as the prerequisite requirement before one can invoke state responsibility on its failure to discharge an obligation to implement adequate aviation security measures.

Annex 17 to the Chicago Convention¹³⁴ links responsibility of state and aviation security by demanding each member state “to have as its primary objective the safety of passengers ... the general public in all matters related to safeguarding against acts of unlawful interference with civil aviation.”¹³⁵ As reaffirmed from the High-Level Ministerial Conference on Aviation Security in 2002,¹³⁶ states are responsible to ensure compliance with the SARPs and to make contributions and to cooperate with each other for more integrated aviation security system. Therefore states have duty to take measures to prevent unlawful interference with aircraft engaged in civil aviation.¹³⁷

Nevertheless, this responsibility of a contracting state does not automatically transform into a legal obligation under international law. Some argued that the contracting states will bear liability under international law if they fail to comply with the provisions of Annex 17;¹³⁸ but both the Chicago Convention and state practices¹³⁹ have not been aligned with such arguments. Moreover Annexes to the Chicago Convention do not have the same legal status as the Convention itself.¹⁴⁰

Compared to the Chicago Convention of which the scope is limited to contracting states, I would like to introduce a deeper source of state responsibility in order to argue that states in general have a responsibility towards its citizens to make an initiative in implementing aviation security measures based on its sovereignty.

At the core of state responsibility there are the doctrines of state sovereignty and equality of states¹⁴¹ in that a state can enjoy its sovereignty as far as it respects rights of other states.¹⁴² The Chicago Convention reaffirms complete and exclusive sovereignty of every state, not only those of contracting states, over the airspace above its territory.¹⁴³ The ICAO Council also has continued to uphold this core principle.¹⁴⁴ Yet a new light has been shed on the concept of sovereignty¹⁴⁵ which is important for our discussion on aviation security as state responsibility.

¹³³ Malcolm Nathan Shaw, *International law* (2003) at 694

¹³⁴ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (Chicago Convention)

¹³⁵ *Ibid.* Chicago Convention; Annex 17. 2.1.1.

¹³⁶ AVSEC-Cof/02.

¹³⁷ Michael Milde, *International Air Law and ICAO* (2008) at 246; See also UN General Assembly Resolution 56/88, ‘Measure to Eliminate International Terrorism’, adopted at the Fifty-Sixth Session of the United Nations, which calls upon states to take every possible measure in eliminating international terrorism. A/RES/56/88, 24 January 2002.

¹³⁸ Sakeus Akweenda, Prevention of Unlawful Interference with Aircraft: A Study of Standards and Recommended Practices, *International and Comparative Law Quarterly*, 35 (1986) at 439; see also A. Yonah Alexander, Eugene Sochor, *Aerial Piracy and aviation security* (1990) at 11

¹³⁹ Michael Milde (2008) *supra* note 137 at 165

¹⁴⁰ A specific legal reason for the Paris Convention failed to achieve universal acceptance, is that the USA did not ratify because of that provision giving Annexes same legal status the provision giving to the Annexes the same legal status as the Convention itself while leaving their amendment within the mandate of the Commission – thus the ratification would be in fact signing a ‘blank cheque’ and automatically accepting any future amendments without exception. Milde (2008) *ibid.* at 12

¹⁴¹ Malcolm Nathan Shaw (2003) *supra* note 133 at 694

¹⁴² Island of Palmas, Permanent Court of Arbitration, 4 April 1928, 2 RIAA II at 829.839; See also Lucas Bergkamp, *Liability and environment* (2001) at 156

¹⁴³ Article 1 of the Chicago Convention confirms “every state has complete and exclusive sovereignty”

¹⁴⁴ A. Yonah Alexander, Eugene Sochor, *Aerial Piracy and aviation security* (1990) at 5

The report of the International Commission on Intervention and Sovereignty¹⁴⁶ recognized that ‘sovereignty as responsibility’ implies “that the state authorities are responsible for the functions of protecting the safety and lives of citizens,”¹⁴⁷ also it suggested that “the national political authorities are responsible to the citizens internally and to the international community through the UN.”¹⁴⁸ States have, thus, a clear duty to protect the security of its citizens and to maintain an adequate security level since the failure of one state to ensure the security in aviation might harm citizens of other states.¹⁴⁹ Such responsibility should not be limited to proscribing terrorist acts in its criminal law system; a state must also undertake a thorough inspection on aspects of terrorism¹⁵⁰ and its implementation within its policy and legal system.¹⁵¹ Aviation security is one of the prominent means of thwarting acts of terrorism and it would be reasonable to say that state responsibility to protect its citizens extends to aviation security matters as well.

Another point offers a strong support to this argument. It is the interpretation of ‘the right to life’ under Article 2¹⁵² of the European Convention and Human Rights and Fundamental Freedoms of 1950.¹⁵³ According to this Convention,¹⁵⁴ the state must put in place laws, security personnel and security measures such as can secure a reasonable amount of protection for all citizens.¹⁵⁵ This duty has been reinforced domestically in some countries, for instance, in UK the protection by the state is a legitimate demand in domestic law under the broad reach of the Royal Prerogative¹⁵⁶ also under the Human Rights Act 1998.¹⁵⁷

However, it may be true that the mere occurrence of terrorist acts will per se lead to liability of the state¹⁵⁸ and even these broad normative considerations would translate into legal duties of states under international law.¹⁵⁹ But no doubt should exist that a state has a responsibility towards its citizens and international community and, indeed, the aviation security is primarily a responsibility of a state. Even though states are now relying on private sectors, as previously noted, to enhance aviation

¹⁴⁵ In response to the call upon the international community on the challenge of reconciling sovereignty with the defense of human rights, in 1999 and again in 2000 by UN Secretary-General Kofi Annan, the Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS). After an extensive discussion throughout the world, the commission issued its report titled “The Responsibility to Protect.” See Mark R. Amstutz, *International ethics* (2005) at 135

¹⁴⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. (Ottawa: International Development Research Center, 2001) available at www.iciss-ciise.gc.ca;

¹⁴⁷ *Ibid.* at 13

¹⁴⁸ *Ibid.*

¹⁴⁹ International Council on Human Rights Policy, *Talking about terrorism* (2008) at 40

¹⁵⁰ A view from the Special Rapporteur, Ms. Kalliopoi K. Koufa, working paper, E/CN.4/Sub.2/1997/28; see Peter J. van Krieken, *Terrorism and the international legal order* (2002) at 207

¹⁵¹ *Ibid.*

¹⁵² Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950; Article 2 Right to life; para. 1. Everyone’s right to life shall be protected by law.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *McCann, Savage and Farrell v. United Kingdom*, (1995) Application no. 18984/91, Series A volume 324, The Times, 9 October 1995; [1996] 21 *European Human Rights Reports* (EHRR), 97. See Bernhard A. Koch (ed.), *Terrorism, tort law and insurance* (2004) at footnote 127. and texts thereto; see also at 168 of the same book.

¹⁵⁶ *Ibid.* at 168. Calvin’s case (1609) English Reports (ER), 377; *Mutasa v. Attorney General* [1980] Queen’s Bench reports (QB), 114; R (*Abassi and another*) v. *Secretary of State for the Home Department*, *The Times*, 8 Nov 2002.

¹⁵⁷ *Ibid.*

¹⁵⁸ Bernhard A. Koch Bernhard A. Koch (2004) *supra* note 109 at 287

¹⁵⁹ *Ibid.* at 168

security measures, the importance of the role of states on the subject of aviation security cannot be over-emphasized.¹⁶⁰

Nonetheless a majority of states do not have a liability system that protects ASPs or other private entities deploying aviation security measures. The problem of third party liability is largely under the scrutiny of individual courts. Therefore, the last hope for ASPs to securely develop and operate aviation security failed to protect ASPs from the threat of unlimited third party liability.

VI. CONCLUSION

Compared to the rapid growth of duties imposed upon ASPs, the problem of liability of ASPs has been overlooked by legislators and academia at both international and national levels; nonetheless they are exposed to the risk of incurring unlimited third party liability in case of unlawful interference with civil aviation. International civil aviation with minimized risk of terrorism would fail if the question of ASPs' responsibility and liability is not taken into account. Tying the ASPs' legal position to existing legal frameworks related to aviation security, thus, would serve as the foundation upon which we may securely build a sustainable aviation security system.

ASPs recognize the essential role that they play in protecting citizens and their property from perils of man-made disasters. If the contention that international society relies on ASPs' security services is indeed true, then liability limits and protections available for air carriers should find little reason to be different for ASPs. ASPs would not be able to operate or develop life-saving measures with the unforeseeable consequences of everyday security tasks that might lead to an instant bankruptcy whereas neither operational nor legal solutions seem possible. This can be result in having a weak link in aviation security chain which is not acceptable for safe and secure development of civil aviation and more importantly, the overall prosperity of the international community.

Indeed, the optimal distribution of responsibility and liability among all players of aviation security is significant in preventing the event like 9/11 from happening again. It is the author's conclusion that governments must move beyond the current situation in the provision of liability for ASPs, toward a more balanced and protection-oriented regime. It is now up to the states themselves to consider how they could contribute to ASPs' efforts in this regard.

¹⁶⁰ R.I.R. Abeyratne, Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offense of Unlawful Interference with Civil Aviation, *University of Denver Transportation Law Journal*; 25 *Transp. L. J.* 115, Spring (1998) at 16