



ASSEMBLY — 37TH SESSION

LEGAL COMMISSION

Agenda Item 62: Progress report on the item “Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks”

PROGRESS REPORT ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE OR FROM GENERAL RISKS

(Presented by the Council of ICAO)

EXECUTIVE SUMMARY

This paper presents, for the information of the Assembly, a progress report on the item with priority No. 1 in the General Work Programme of the Legal Committee, entitled “Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks”. After the 36th Session of the Assembly, a session of the Legal Committee was convened to deal with this subject, followed by a Diplomatic Conference which adopted two Conventions: the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*; and the *Convention on Compensation for Damage Caused by Aircraft to Third Parties*. A summary of each Convention can be found in the Appendix hereto. The Conference also adopted two resolutions which are briefly described in this paper. Resolution No. 2 relates to the first Convention and the need by a Preparatory Commission to undertake necessary work before the Convention enters into force; certain information is provided on the work of the Commission.

Action: Following the consideration of a report on this item at its last session, the Assembly is invited to:

- 1) note the updated information in this paper; and
- 2) urge States to ratify the two Conventions.

<i>Strategic Objectives:</i>	This paper relates to Strategic Objective F as it provides information on the preparation and adoption of two international air law instruments.
<i>Financial implications:</i>	No additional resources required.
<i>References:</i>	Doc 9920, <i>Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft</i> Doc 9919, <i>Convention on Compensation for Damage Caused by Aircraft to Third Parties</i> <i>Final Act of the International Conference on Air Law</i> , (Montréal, 20 April to 2 May 2009)

1. INTRODUCTION

1.1 The 36th Session of the Assembly considered A36-WP/11 (Progress Report on Compensation for Damage Caused by Aircraft to Third Parties Arising from Acts of Unlawful Interference or from General Risks). It was recalled that on 29 November 2005, the Council had accorded this item priority No. 1 in the General Work Programme of the Legal Committee. The paper reported on the meetings of the Council Special Group on the Modernization of the Rome Convention of 1952, which dealt with this item. The Legal Commission agreed that the work was sufficiently mature to go to the Legal Committee. On 7 December 2007, the Council agreed to convene in Montréal the 33rd Session of the Legal Committee from 21 April to 2 May 2008. Having considered the Report of the Legal Committee, the Council on 23 June 2008 decided to convene a Diplomatic Conference from 20 April to 2 May 2009 at ICAO Headquarters to finalize and adopt the text of two draft conventions on the subject developed by the Council Special Group and the Legal Committee.

1.2 This item retains priority No. 1 in the Work Programme of the Legal Committee.

2. OUTCOME OF THE DIPLOMATIC CONFERENCE

2.1 Conventions

2.1.1 The Diplomatic Conference was attended by delegates from 81 States and observers from 16 international organizations and other entities. Following the conclusion of its deliberations, the Conference, on 2 May 2009, adopted the texts of the following instruments:

- a) *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* (commonly referred to as “the Unlawful Interference Compensation Convention”) (Doc No. 9920); and
- b) *Convention on Compensation for Damage Caused by Aircraft to Third Parties* (commonly referred to as “the General Risks Convention”) (Doc No. 9919).

2.1.2 Docs Nos. 9920 and 9919 can be found on the ICAO-NET at <http://www.icao.int/icaonet/>. Administrative packages to assist States in the process of their ratifications are available in the Treaty Collection on the ICAO website (www.icao.int).

2.1.3 The Unlawful Interference Compensation Convention has been signed by 7 States, and the General Risks Convention by 9 States. The lists of signatories are available in the Treaty Collection.

2.1.4 The Unlawful Interference Compensation Convention establishes an International Civil Aviation Compensation Fund (“the International Fund”) with a principal organ called the Conference of parties (COP), made up of the States Parties. Under Article 9 (p), the COP shall enter into arrangements on behalf of the International Fund with ICAO. Pursuant to Article 9 (q), the COP shall:

“request the International Civil Aviation Organization to assume an assistance, guidance and supervisory role with respect to the International Fund as far as the principles and objectives of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944, are

concerned. ICAO may assume these tasks in accordance with pertinent decisions of its Council;”.

2.1.5 A summary of the main provision of each Convention can be found in the Appendix hereto.

3.1 Resolutions

3.1.1 Two resolutions are contained in the Final Act of the Conference which was signed by 72 States. The Final Act can be found on the ICAO website at <http://www.icao.int/DCCD2009/>.

3.1.2 *Resolution No. 1* invites States to consider the possibility of ratifying the two Conventions and to deposit their instruments of ratification with ICAO. Further, the Secretary General of ICAO is invited to bring this Resolution immediately to the attention of States. This was done by State letter ref. LE 3/42, LE 3/43-09/82 dated 20 November 2009. At the second meeting of the 190th Session, on 19 May 2010, the Council decided to invite the Assembly to urge States to ratify the said two Conventions.

3.1.3 *Resolution No. 2* relates to the Unlawful Interference Compensation Convention and the need to undertake preparatory work regarding the International Fund to ensure that it is operational by the time the Convention enters into force. In this regard, the Conference decided to set up, pending the entry into force of the Convention, a Preparatory Commission for the establishment of the International Fund, composed of persons nominated by 16 States listed in the Resolution. Among its enumerated functions, the Commission must ensure that the International Fund be set up to become ready to be operational within two years from the adoption of the Convention, and at the latest by the time of the entry into force of the Convention.

3.1.4 The Commission is directed to formulate a request consistent with Article 9 (q) of the Convention, i.e. for ICAO's assistance, guidance and supervision as far as the principles and objectives of the Chicago Convention are concerned. No such request has been received by ICAO; any which is received will be submitted to the Council for consideration and decision.

3.1.5 The Resolution invites States participating in the Commission to organize and provide support as necessary to enable the Commission to carry out its functions.

3.1.6 The Commission held a preliminary meeting at ICAO Headquarters from 8 to 9 September 2009; its first meeting in Pretoria, South Africa, from 25 to 27 January 2010; and its second meeting in London, United Kingdom, from 21 to 23 June 2010. Additional meetings are planned. The Commission is working on a wide range of issues in fulfilment of its mandate, among them the Regulations of the International Fund; Recommendation on Period and Amount of Initial Contributions to the Fund; Guidelines for Compensation, Guidelines on Investment; and Guidelines on Assistance in Case of Events in States Non-Party.

4. CONCLUSION

4.1 The Diplomatic Conference which met at ICAO Headquarters from 20 April to 2 May 2009 was successful in finalizing and adopting the texts of the two draft conventions which had

been developed by the Council Special Group on the Modernization of the Rome Convention of 1952 and by the Legal Committee on the subject "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks". As regards the Unlawful Interference Compensation Convention, work is underway in the Preparatory Commission to ensure that the International Fund is operational by the time the Convention enters into force.

APPENDIX

A. Summary of the main provisions of the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft

1. Under Article 2, paragraph 1, the Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, as a result of an act of unlawful interference. This Article ensures that damage in any State Party will be compensated, whether or not the operator is from a State Party. In certain cases, the Convention can also apply to such damage that occurs in a State non-Party: where an operator from a State Party causes damage in a State non-Party, the Conference of Parties (COP) may decide to provide financial support to the operator (Article 28).

2. While there is an international element in paragraph 1, paragraph 2 of Article 2 provides for the possibility for application in essentially domestic situations. At the option of a State Party, the Convention will also apply to such damage that occurs in the territory of that Party which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.

3. The liability of the operator to compensate is strict. Article 3, paragraph 1, states simply that the operator shall be liable to compensate for damage upon condition only that the damage was caused by an aircraft in flight. There is no need for the claimant to prove fault. Damages due to death, bodily injury and mental injury are compensable, as is damage to property; environmental damage is also compensable, if such compensation is provided for under the law of the State where the damage occurred.

4. Under Article 4, the operator's liability is limited or capped, based on the weight of the aircraft, ranging from 750 000 Special Drawing Rights (SDRs) for the smallest aircraft to 700 000 000 SDRs for the largest aircraft. This liability cap may be broken in exceptional circumstances only (see paragraph 12 below).

5. Pursuant to Article 8, it is envisaged to create an organization called the International Civil Aviation Compensation Fund ("the International Fund"), with the principal purposes of paying compensation to persons suffering damage in the territory of a State Party, of providing financial support where an operator from a State Party causes damage in a State non-Party (as described above in paragraph 1) and of deciding whether to provide supplementary compensation to passengers on board an aircraft involved in an event. Compensation shall be paid by the International Fund to the extent that the total amount of damages exceeds the Article 4 limits (Article 18, paragraph 1). In other words, where there is damage for which the operator is liable, it will pay up to the level of its cap, and the International Fund will pay additional compensation above and beyond the level of the cap. It is expected that operators will be able to obtain insurance up to the amount of the cap. If insurance is unavailable, or is only available at a cost incompatible with the continued operation of air transport, the International Fund may pay the damages for which the operators are liable under Articles 3 and 4 (Article 18, paragraph 3).

6. In general, the maximum amount of compensation that would be available from the International Fund is set at 3 billion SDRs for each event (Article 18, paragraph 2).

7. The International Fund shall have international legal personality and shall comprise a Conference of Parties (COP) which will be the principal policy-making organ, made up of all

States Parties, and a Secretariat headed by a Director. The COP would, *inter alia*, establish Regulations of the International Fund, Guidelines for Compensation, Guidelines on Investment, fix the contributions to be made to the International Fund and decide the cases where financial support should be given to the operator in cases of events in States non-Party. A full list of the powers and duties of the COP is provided in Article 9. The COP shall meet once a year unless it decides otherwise.

8. By virtue of Article 12, the contributions to the International Fund shall be mandatory amounts collected in respect of each passenger and each tonne of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a domestic opt-in declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each tonne of cargo departing on a commercial flight between two airports in that State Party. Contributions in respect of each passenger and tonne of cargo shall not be collected more than once in respect of each journey, whether or not that journey includes stops or transfers. It is envisaged that the COP may specify amounts of contribution from general aviation. The operator shall collect the amounts and remit them to the International Fund. In general, the total amount of contributions collected by the International Fund within two consecutive years shall not exceed 9 billion SDRs (Article 14, paragraph 3).

9. Article 14 provides that the COP shall decide the period and rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. Initial contributions shall also be paid in respect of passengers and cargo departing on flights covered by a domestic opt-in declaration. Contributions shall be fixed so that the funds available amount to 3 billion SDRs within four years. If the funds available are deemed sufficient in relation to likely compensation or financial assistance to be provided in the foreseeable future and reach the 3 billion SDRs figure, the COP may decide to stop collecting.

10. Where an operator fails to collect or remit contributions, the Director shall take appropriate measures for recovery of the amount due (Article 15, paragraph 2). Each State Party shall ensure that certain statistics and other data are provided to the International Fund; failure to do so could result in the liability of the State Party for any resulting shortfall in contributions (Article 16).

11. Where the damage was caused, or contributed to, by the claimant, or the victim, the operator or the International Fund shall be wholly or partially exonerated from the liability to pay compensation (Article 20).

12. As mentioned in paragraph 4 above, the limits of liability of the operator may be broken in exceptional cases. Under Article 23, where the total amount of damages exceeds the limits of liability of the operator under Article 4, plus the amounts payable by the International Fund under Article 18, paragraph 2 (i.e. the amount of damages exceeds the first and second layers), a person who has suffered damage may claim additional compensation from the operator. To succeed, the person must prove that the operator or its employees have contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result. Where an employee has contributed to the damage, the operator shall not be liable for such additional compensation if it proves that an appropriate system for the selection and monitoring of its employees has been established and implemented. Paragraph 4 of Article 23 sets out the circumstances where the operator or its senior management shall be presumed not to have been reckless.

13. According to Article 24, the operator shall have a right of recourse against any person who has committed, organized or financed the act of unlawful interference; and also against any other person. Similarly, where the International Fund has made payments to claimants, it shall have a right of

recourse against any person who has committed, organized or financed the act; against the operator under the conditions established in Article 23; and against any other person (Article 25).

14. Article 26 sets out certain restrictions on the rights of recourse.

15. By virtue of Article 27, there shall be no right or recourse against an owner, lessor or financier of the aircraft which is not an operator, or against a manufacturer in certain circumstances.

16. Article 29 provides for an exclusive remedy. Essentially, any action for compensation for damage to a third party due to an act of unlawful interference can only be brought against the operator or the International Fund subject to the conditions and limits of liability in the Convention. No claims by a third party shall lie against any other person. However, the exclusive remedy provision does not apply to an action against a person who has committed, organized or financed the act.

17. Other procedural provisions are found in Chapter VII. Actions for compensation may be brought in a single forum only, namely, before the courts of the State Party where the damage occurred (Article 32, paragraph 1). Also, judgments entered by a court shall, when they are enforceable in the State Party of that court, be enforceable in any other State Party, although recognition and enforcement of a judgment may be refused under certain specified circumstances (Article 34).

18. Under Article 40, the Convention shall enter into force one hundred and eighty days after the deposit of the thirty-fifth instrument of ratification on condition that the total number of passengers departing in the previous year from airports in the States that have ratified is at least 750 000 000 as appears from declarations made by these States. A State which has made an opt-in declaration for domestic flights shall declare the total number of domestic passengers in the previous year and that number shall be counted toward the 750 000 000.

B. Summary of the main provisions of the Convention on Compensation for Damage Caused by Aircraft to Third Parties

19. The Convention applies to damage to third parties which occurs in the territory of a State Party by an aircraft in flight on an international flight, other than as a result of an act of unlawful interference. In other words, it covers all cases not falling under the other Convention. Article 2, paragraph 2, also allows the possibility for a State to declare that the Convention regime applies to its domestic flights.

20. Under Article 3, paragraph 1, the operator is liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight. This liability is both strict and fault-based. Damages due to death, bodily injury and mental injury are compensable, as is damage to property; environmental damage is compensable, if such compensation is provided for under the law of the State Party where the damage occurred.

21. Article 4 represents the most fundamental point of departure between the two Conventions. In case of damage caused as a result of acts of unlawful interference, in general the liability of the operator is capped, although there are some limited circumstances where the cap is breakable. There is no such cap in the General Risks Convention, at least where the operator is negligent or where the damage is not wholly due to the negligence of another person.

22. Under paragraph 1 of Article 4, the operator is strictly liable for each event based on the weight of the aircraft involved. The weight categories and amounts are identical to those found in Article 4 of the Unlawful Interference Compensation Convention. In effect, the overall strict liability of

the operator is capped. However, these limits only apply if the operator proves that it was not negligent or that the damage was solely due to the negligence of another person. The consequence of this potential unlimited liability of the operator is that the General Risks Convention does not provide for an International Fund and related provisions. The drafters felt that historically, damage to third parties from general risks has always been compensated, and does not pose a threat to the whole air transport industry.

23. The Exclusive Remedy provision (Article 12) is different from that found in the Unlawful Interference Compensation Convention. It states that any action for compensation for damage to third parties brought against the operator can only be brought subject to the conditions in the Convention. The provision is intended to prevent the claimant from invoking or relying on other sources of law to try to circumvent the provisions of the Convention such as those relating to liability. Article 29 of the Unlawful Interference Compensation Convention channels all claims to the operator and specifically states that no claims shall lie against any other person for compensation for such damage. There is no channelling under the General Risks text. It provides that claims against the operator can only be brought according to the conditions and limits of liability in the Convention, but it does not say that claims can be brought against the operator only. By virtue of Article 13, the owner, lessor or financier of an aircraft, not being an operator, is not liable under the General Risks Convention or under the domestic law of States Parties, so there would be no interest in bringing claims against these persons, but other potentially liable persons can be subjected to claims.

24. Procedural provisions such as those relating to Forum (Article 16) and Recognition and Enforcement of Judgements (Article 17) are identical to the comparable provisions in the other Convention.

25. By virtue of Article 23, the Convention shall enter into force sixty days after the deposit of the thirty-fifth instrument of ratification.

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