



**ASSEMBLY — 36TH SESSION**

**LEGAL COMMISSION**

**Agenda Item 45: Progress report on 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”. Following the 32nd Session of the Legal Committee, the Special Group established by the Council to further advance work on this item held six meetings, and developed the texts of two draft conventions: one dealing with compensation for damage caused by aircraft to third parties, in case of unlawful interference; and the other one with compensation for damage caused by aircraft to third parties. The main provisions of these two drafts are summarized. The Council is expected during its 182nd Session to decide on the steps to be taken for further development of these texts, including the possibility of convening a session of the Legal Committee in 2008.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective F as it provides information on the preparation of international air law instruments.
<i>Financial implications:</i>	No additional resources required.
<i>References:</i>	C-WP/12756 A35-WP/18

## 1. INTRODUCTION

1.1 The 35th Session of the Assembly considered A35-WP/18 (Progress Report on the Modernization of the Rome Convention of 1952). A35-WP/18 recalled that the 31st Session of the Legal Committee (Montreal, 28 August to 8 September 2000) had included in its Work Programme the subject: “Consideration of the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952,” with priority No. 4. A Study was made by the Secretariat, based on replies to a questionnaire sent to States in 2001. On 5 June 2002, the Council agreed to establish a Secretariat Study Group, which held four meetings and produced a draft Convention on Damage Caused by Foreign Aircraft to Third Parties. In March 2002, Mr. M. B. Jennison (United States) was appointed as Rapporteur of the Legal Committee on the subject. On 25 November 2002, the Council raised the priority of the subject to No. 3 in the General Work Programme of the Legal Committee. This was the main subject considered by the 32nd Session of the Legal Committee (Montréal, 15 to 21 March 2004), which concluded that more work was needed on the modernization of the Rome Convention. On 31 May 2004, having considered the Report of the Committee, the Council decided to establish a Special Group on the Modernization of the Rome Convention of 1952 to advance the work.

1.2 At the 35th Session of the Assembly, there was strong support for the process of modernizing the Rome Convention; the Assembly indicated that ICAO should rapidly proceed with the work, leaving the details as to the best approach to be taken for consideration by the Special Group.

1.3 The 35th Session of the Assembly also decided to raise the priority of this item to No. 2.

## 2. DEVELOPMENTS SINCE THE LAST SESSION OF THE ASSEMBLY

2.1 On 29 November 2005, the Council accorded this item priority No. 1 in the General Work Programme of the Legal Committee; on 6 December 2006, the Council amended the title of this item to read: “Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks”.

2.2 The Special Group held two meetings in 2005, three meetings in 2006 and one in 2007.

2.3 At its first meeting, the Group reached certain General Points of Agreement, among them being:

- 1) Victim protection ought to be at least as good as under the 1999 Montreal Convention.
- 2) Adequate protection for the air transport system, including air carriers, ought to be provided, which especially addresses the problems of “catastrophic losses” which lead to large scale damages involving many victims.
- 3) Any system upholding the principles of victim protection and protection for the air transport system needs to be set up in the light of the availability of insurance cover in the market or other mechanisms.

- 4) Terrorist attacks are the major threat to the air transport system with regard to the issues at hand, especially if they lead to catastrophic losses.
- 5) It will not be possible to reconcile the two goals of providing both adequate victim compensation and appropriate protection for the civil aviation sector within the present scope of the compensation system.
- 6) A supplementary funding mechanism for compensation could bridge the gap between what is an adequate level of victim protection and an appropriate protection for the civil aviation sector and ensure the durability of the system.

2.4 At its third meeting, the Group agreed on a “Compromise Package on Central Issues”. In particular, it agreed that the draft Convention emanating from the 32nd Session of the Legal Committee would be split into two conventions, one dealing with general risks and one with terrorism-related risks. There would be no link between the two conventions and States shall have the possibility to become a party to one or the other, or to both. The provisions on a Supplementary Compensation Mechanism would be an integral part of the convention on terrorism-related risks.

2.5 The Group subsequently developed the texts of two draft conventions, namely:

- a) Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference (commonly referred to as “the Unlawful Interference Compensation Convention”); and
- b) Convention on Compensation for Damage Caused by Aircraft to Third Parties (commonly called “the General Risks Convention”).

The full texts of these two drafts are available in the Legal Bureau. The core provisions are highlighted below.

## 2.6 **Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference**

2.6.1 Under Article 2, paragraph 1, the Convention would apply to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight as a result of an act of unlawful interference when the operator has its principal place of business or, if it has no such place, its permanent residence, in another State whether or not a party. This Article ensures that damage in any State Party would be compensated, whether or not the operator is from a State Party. The Convention would also apply to damage in a State non-Party under certain circumstances: where an operator from a State Party causes damage in a State non-Party, a Conference of Parties (COP) to be established may decide to provide financial support to the operator (Article 26).

2.6.2 While there is an international element in paragraph 1, it was felt in the Group that there should be a possibility also for application in essentially domestic situations. Consequently, paragraph 2 of Article 2 provides that at the option of a State Party, the Convention would also apply to such damage which occurs in the territory of that Party when the operator has its principal place of business or, if it has no such place, its permanent residence, in that State Party. The Group was mindful of the potential financial contributions in relation to domestic flights to a Supplementary Compensation Mechanism (SCM) to be established.

2.6.3 The liability of the operator is strict, that is, without the necessity of proof of fault. It would be liable for damage sustained by third parties on condition only that the damage was caused by an aircraft in flight (Article 3). However, such liability is capped, based on the weight of the aircraft; certain figures are provided in the text in square brackets, indicating that they are included for discussion purposes (Article 4). This cap may only be broken in exceptional circumstances (Article 24).

2.6.4 In general, only the operator is liable. The draft convention contains in Article 27 an exclusive remedy provision by virtue of which any action for compensation for damage due to an act of unlawful interference can only be brought against the operator; no claims shall lie against any other person for compensation for such damage. This provision, however, does not apply to an action against an individual who has intentionally committed an act of unlawful interference.

2.6.5 Article 5 provides an international mechanism for third parties suffering damage on board an aircraft involved in a mid-air collision to claim compensation from the other carrier. The text envisages the joint and several liability of the operators involved.

2.6.6 Under Article 8, it is envisaged to create an independent organization called the Supplementary Compensation Mechanism, with the principal purpose to pay compensation to persons suffering damage in the territory of a State Party, and to provide financial support as described above in paragraph 2.6.1. Compensation shall be paid by the SCM to the extent that the total amount of damages exceeds the Article 4 limits (Article 19). 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 SCM 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.

2.6.7 In general, the maximum amount of compensation that would be available from the SCM is currently set for discussion purposes at 3 billion Special Drawing Rights (SDRs) for each event (Article 19).

2.6.8 The SCM would comprise a COP which would be the principal policy-making organ, made up of all State Parties, and a Secretariat headed by a Director. The COP would, *inter alia*, establish regulations of the SCM, Guidelines for Compensation, Guidelines on Investment, fix the contributions to be made to the SCM, and decide the cases where financial support should be given to the operator as described above in paragraph 2.6.1. A full list of the powers and duties of the COP is provided in Article 9.

2.6.9 By virtue of Article 12, “[t]he contributions to the Supplementary Compensation Mechanism shall be the 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 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. The operator shall collect the mandatory amounts and remit them to the Supplementary Compensation Mechanism.”

2.6.10 Article 15 envisages initial 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, and also in respect of passengers and cargo departing on flights covered by the domestic opt-in declaration under Article 2, paragraph 2. Also, contributions shall be fixed to achieve within four years a certain percentage of the maximum limit of compensation by the SCM (pre-funding).

2.6.11 Where an operator fails to remit contributions, the Director of the SCM shall take appropriate measures for recovery of the amount due (Article 16, paragraph 2). Each State Party shall ensure that certain statistical and other data is provided to the SCM; failure to do so could result in the liability of the State Party (Article 17).

2.6.12 Procedural provisions are found in Chapter VII. It should be noted that, generally, actions for compensation may be brought in a single forum, namely, before the courts of the State Party where the damage occurred (Article 30, paragraph 1). Also, judgements 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 judgement may be refused under certain specified circumstances (Article 32).

## 2.7 **Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties**

2.7.1 It applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight other than as a result of an act of unlawful interference when the operator has his principal place of business or, if he has no such place, his permanent residence, in another State Party. As in the case of the Unlawful Interference Convention described above, there is also an opt-in provision for domestic flights (see Article 2).

2.7.2 By virtue of Article 3, the liability of the operator is strict, up to a certain threshold, tentatively set at 250 000 to 500 000 SDRs. Beyond that, the operator is liable for all damages unless it proves that such damages were not due to its negligence or that the damages were solely due to the negligence of another person. In other words, there is no cap on the liability of the operator. This two-tier system is similar to that found in the Montreal Convention of 1999.

2.7.3 Similar to the Unlawful Interference Convention, there is a provision on mid-air collisions (Article 4).

2.7.4 Under Article 9 *bis*, neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, shall be liable for damages under this Convention or the law of any State Party. This Article is currently in square brackets as the Group did not take a final position on its inclusion.

2.7.5 The procedural articles are similar to that found in the other draft convention. In particular, in general, actions for compensation may only be brought before the courts of the State Party where the damage occurred.

2.7.6 The provisions relating to the SCM and compensation thereunder do not operate under this Convention, as the operator is potentially liable for the full amount of damages caused.

## 3. **FUTURE WORK**

3.1 At the conclusion of its sixth meeting (26-29 June 2007), there was broad agreement in the Special Group that it had completed its work, and it decided to recommend to the Council to convene a session of the Legal Committee to further develop the texts of the two draft conventions. The Council, at its 182nd Session in November/December 2007, will consider a report on the sixth meeting of the Group and will decide on the future course of action, including whether to convene the 33rd Session of the Legal Committee, possibly in the first half of 2008.

#### 4. **SUMMARY**

4.1 The Special Group established by the Council held six meetings and developed the text of two draft conventions: one dealing with compensation for damage caused by aircraft to third parties, in case of unlawful interference; and the other one with compensation for damage caused by aircraft to third parties. It is expected that the 182nd Session of the Council will take a decision on the process to further develop these texts, which might include the convening of a session of the Legal Committee in 2008.

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