



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

COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE

(Presented by Singapore and Sweden)

EXECUTIVE SUMMARY

This paper highlights the significant developments in the work of the ICAO Council Special Group on the Modernization of the Rome Convention of 1952 (SGMR). It urges ICAO to move forward expeditiously on the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference, so as to establish a third party liability and compensation system that can stand ready to protect both third party victims and the aviation industry before another 9/11-scale event occurs.

Action: The Assembly is invited to:

- to note the significant developments in the work of the Council Special Group on the Modernisation of the Rome Convention of 1952 and the Group's accomplishments;
- to welcome the broad majority support in the Council Special Group for the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in the case of Unlawful Interference, and the agreement in the Group that it is sufficiently mature to advance to the Legal Committee for its consideration; and
- to request the Council to further advance the work on the draft Conventions on compensation to third parties, and in particular, in the case of unlawful interference, by placing it on the Agenda of the next Session of the Legal Committee and convening the next Session as early as possible in 2008.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective F as it provides information on the development of an international air law instrument.
<i>Financial implications:</i>	No additional resources required.
<i>References:</i>	Assembly Resolution A33-20, <i>Coordinated Approach in providing aviation war risk insurance</i> A36-WP/11, <i>Progress Report on Compensation for Damage Caused by Aircraft to Third Parties Arising from Acts of Unlawful Interference or from General Risks</i>

1. INTRODUCTION

1.1 ICAO has since 2001 been actively engaged in developing a legal framework to address air carrier liability and compensation for third party victims in cases especially where the aircraft damage results in catastrophic losses. As indicated in the Assembly Working Paper A36-WP/11, this effort originated as an effort to modernise the Rome Convention of 1952.

1.2 After the catastrophic losses of 11 September 2001 (9/11) and the impact and response of the aviation insurance market, however, ICAO quickly focused its effort on cases where the aircraft is unlawfully and deliberately used to inflict maximum possible damage and the insurance available to protect the air carrier concerned from such liability (which is strict in many jurisdictions and unlimited in most jurisdictions) is wholly inadequate or even unavailable. This work has thus advanced with the twin objectives of ensuring adequate compensation for third party victims and ensuring the continued existence of the air carrier concerned and the financial viability of the industry as a whole.

1.3 The cumulative result of this work by the ICAO Secretariat (specifically the Legal Bureau), the Secretariat Study Group and the Council Special Group on the Modernization of the Rome Convention of 1952 (SGMR) are two draft Conventions, one dealing with liability and compensation in the case of unlawful interference and the other dealing with liability and compensation in the case where there is no unlawful interference. Singapore and Sweden have actively participated in this work in the SGMR and would like to highlight certain significant developments in the SGMR's work on the draft Convention in the case of unlawful interference for the Assembly's attention and consideration.

2. SIGNIFICANT DEVELOPMENTS

Breaking away from Montreal Convention 1999

2.1 A significant development relates to the question of whether the liability limits in the third party liability regime should emulate the passenger liability regime of the Montreal Convention of 1999. In view of its highly successful conclusion and acceptance by States, the Montreal Convention 1999 was used as a benchmark when the SGMR commenced its work. Further, it was considered that, as a matter of fairness or equity, the compensation regime for third party victims should not be less favourable than that for passenger victims since third parties do not assume the risks of air travel as passengers do.

2.2 For death and personal injury claims, 100 000 SDRs seemed the obvious 1st tier liability limit per person based on the Montreal Convention 1999 limits. However, unlike passenger victims, third party victims on the ground could also sustain damage to homes and property used for business or livelihood. Compensating such property damage would require the 1st tier liability limits to be increased above 100 000 SDRs (an amount which could be very difficult to agree upon). Even without increasing this limit, claims from the third-party victims in a 9/11 type occurrence would far exceed the insurance available. Adopting the Montreal Convention 1999 regime, and in particular, the 2nd tier of unlimited liability, could thus clearly result in insolvency for the air carrier concerned — a result air carriers find untenable as air carriers would almost certainly be among the victims in the case of unlawful interference occurrences. The SGMR thus assessed and recognised that the third-party liability regime could not mirror the passenger liability regime of Montreal Convention 1999. This was a significant development.

No limits on individual claims but a global limitation on air carrier liability

2.3 An even more significant development followed when the SGMR eventually agreed that limits would not be set on the compensation for individual third party victims. This means that the draft Convention envisages accepting all third party victim claims to the full extent of proven damages suffered. This is a bold development given the unavailability of insurance to cover all third party claims and its potential consequences on the air carriers as indicated in the preceding paragraph. This bold development radically shifts the challenge to how to prevent air carrier insolvency and to obtain sufficient funds to meet all the compensation needs when the catastrophic losses are of a 9/11-scale.

2.4 Air carriers' principal source of funds to meet their liability and compensation claims from victims of a catastrophic scale is from the insurance market. However, as mentioned, the availability of insurance for unlawful interference risks (covered in the aviation insurance market by "war risks" insurance) is limited. Thus, it is obvious that a global limit on air carrier liability (which liability, it must be recalled, is imposed, under the draft Convention, on a strict, i.e. without fault, basis) is a fundamental necessity. Further, it needs to have reference to the insurance cover limits available in the market. This global limit is to protect an air carrier when it is itself a victim of an unlawful interference act (but not, of course, an air carrier which has intentionally carried out the act).

Supplementary Compensation Mechanism

2.5 This brings us to the next significant development in the work of the SGMR. Given that the funds for compensating all third party victims to the extent of their proven losses is unlikely to be met by funds from the air carrier liability-backed by insurance mechanism, the SGMR has proposed a supplementary compensation mechanism (SCM) modelled to some extent on the International Oil Pollution Fund (IOPF). The SCM is envisaged as providing a second or additional source of funds (to be made up of contributions from passengers and cargo shippers – the direct ultimate users of the air transport system) after the first source (the air carrier liability-backed by insurance source) has been exhausted. A third source, if the SCM funds are insufficient, which is not specifically provided for in the draft Convention but contemplated by the SGMR, is to comprise voluntary contributions from the world community on the basis of international solidarity. Again, this is a significant and bold development representing an attempt to go beyond the difficulties and limitations to find a global and shared-solution to a global problem, founded on mutual risk-management and cooperation.

An integrated approach for the whole industry

2.6 No less significant a development in the SGMR's work is the inclusion of other entities involved in aviation (e.g., manufacturers, air navigation service providers and airport operators) in the third party liability and compensation framework for unlawful interference cases. It is based on the recognition that, in such cases, these entities (which are integral players in the air transport system) have the same exposure to potential financial ruin that air carriers face. Not including them could also undermine the protection afforded to air carriers by the draft Convention due to their potential recovery against the air carrier concerned through interlocking indemnities¹ as well as subrogation and other related recovery means. The SGMR has proposed integrating them through channelling all claims to the air carrier and the SCM with provision to seek recourse from any of these entities that intentionally carries out the act of unlawful interference causing the damage. This proposal could also help to sustain the availability of war risks insurance as it will reduce or contain the potential overall insurance losses arising from a catastrophic occurrence.

¹ The interlocking commercial indemnities are standard in the aviation industry. If the other entities are not protected by the draft Convention, and are therefore available to be sued by victims, air carriers will be dragged back into liability and litigation over and above their responsibility in the draft Convention.

Very broad support

2.7 These significant developments were supported by the broadest majority at the sixth meeting of the SGMR. The same majority also agreed that the text of the draft Convention on Compensation for Aircraft Damage to Third Parties, in the case of Unlawful Interference was mature enough to be considered by the Legal Committee.

3. MOVING FORWARD

3.1 To sum up, the above developments have contributed considerably to the SGMR's construction of a framework dealing with air carrier liability and compensation to third party victims in cases of unlawful interference that comprises a two-fold system:

- a) a strict liability system to enable third party victims to obtain compensation speedily through an easily identified air carrier (who is, in effect, taking on the responsibility to pay) without the need to identify the actual perpetrator and without the need to prove fault or liability; and
- b) a funding system comprising two identified sources of funds, namely, insurance and the SCM (with the possibility of accessing a third source) to provide the necessary funds to meet all the potential compensation claims.

3.2 Almost six years have gone by since the effort to construct a liability and compensation framework to meet the challenge of compensating victims of an act of unlawful interference of the 9/11-scale began. The security threats against aviation remain undiminished and strict and unlimited liability for air carriers in many jurisdictions have not changed while "war risks" insurance remains very limited. The framework and draft Convention as developed by the SGMR are indeed sufficiently mature for taking to the next level in the ICAO air law-making process. We urge ICAO to move forward expeditiously on the draft Convention to establish a third party liability and compensation system that can stand ready to protect both third party victims and the aviation industry before another 9/11-scale event occurs.

4. ACTION BY THE ASSEMBLY

4.1 The Assembly is invited:

- a) to note the significant developments in the work of the Council Special Group on the Modernisation of the Rome Convention of 1952 and the Group's accomplishments;
- b) to welcome the broad majority support in the Council Special Group for the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in the case of Unlawful Interference, and the agreement in the Group that it is sufficiently mature to advance to the Legal Committee for its consideration; and
- c) to request the Council to further advance the work on the draft Conventions on compensation to third parties, and in particular, in the case of unlawful interference, by placing it on the Agenda of the next Session of the Legal Committee and convening the next Session as early as possible in 2008.