



DANGEROUS GOODS PANEL (DGP)

TWENTIETH MEETING

Montréal, 24 October to 4 November 2005

GUIDANCE FROM THE LEGAL BUREAU ON VARIOUS DANGEROUS GOODS RELATED MATTERS

(Presented by the Secretary)

1. Promulgation of addenda or corrigenda to the *Technical Instructions for the Safe Transport of Dangerous Goods by Air (Doc 9284)* or other related material

1.1 The standard contained in 2.2.1 of Annex 18 makes reference to the Technical Instructions being “approved and issued periodically” and to amendments “which may be published during the specified period of applicability”. It has been noted by some members that, in their State, reference can only be made to an “issued” document. During the last biennium, amendments to the Technical Instructions were approved by Council on two occasions. In the past, dissemination of the information has required a formal addendum to be issued, printed and distributed by ICAO.

1.2 It is now queried whether alternative text such as “promulgated” could replace the word “issued”. It is further queried whether the placing of such material on the ICAO website is a legally acceptable way of disseminating such information, keeping in mind that such addenda frequently are approved for reasons of safety and that by insisting on printed documents, safety could be compromised.

LEB response

1.2.1 It is queried whether alternative text such as “promulgated” could replace the words “issued” or “published” in case of periodical issuance or amendments to Technical Instructions (TIs) as referred to in paragraph 2.2.1 of Annex 18 to the Chicago Convention. While the rationale for such a proposal for amendment of a Standard is not indicated, it should be duly considered that use of the term “promulgated” could be considered as granting to the TIs a status that it does not qualify for as, strictly speaking, they do not constitute *per se* rules of law. As indicated in their Foreword and as discussed previously, TIs are approved by Council, not adopted under Article 90 of the Convention. SARPs in Annex 18 are complemented by the TIs to which the Council desired to grant a more stringent effect than guidance material, by referring to them in Annex 18. The words “issued” and “published” are therefore found as more consistent with the TIs’ status.

1.2.2 It is queried whether addenda to TIs could be disseminated through the ICAO website in lieu of issuing printed documents. You may wish to question ADB on principles of publications which could apply to this matter in terms of electronic publishing and/or in terms of document processing for the sake of early issuance of addenda/corrigenda through adequate prioritizing of such task. Otherwise, I am of the view that, in principle, addenda and corrigenda to a document should eventually be issued the same way as the document itself, so as to avoid doubts on their status as well as on the homogeneity and integrity of the document. In any case, taking into account that such material is not subject to the procedure in Article 90 of the Convention, it should be considered as applicable upon approval unless indicated otherwise. Hence, nothing should prevent ICAO from addressing advance notices of publication of amendments to TIs, including copy thereof, such as through the website. In this context, I also note that paragraph 2.2.3 of Annex 18 includes a Recommended Practice acknowledging that there may be delays in implementation by a State of amendments to TIs declared immediately applicable.

2. Variations and differences

2.1 Clarification is sought regarding (a) the status of State variations; (b) the responsibilities of States with regard to notifying ICAO of operator variations; and (c) the status of differences.

2.2 With respect to (a), contrasting interpretations have been given - that where variations are considered to be part of the Instructions and therefore have legal status versus that where variations are of an advisory nature, informing States of different requirements in those States. The first interpretation is supported by 2.5.1 of Annex 18 which requires States to notify ICAO of variations "for publication in the Technical Instructions" which suggests they are part of the Instructions. The second interpretation is supported by the Foreword to the Technical Instructions, which refers to "variations which have been notified by States are listed in Attachment 3" which suggests they are simply attached to the Instructions. It would be also be helpful if clarification could be given regarding the status of any material appearing in an attachment.

LEB response

2.2.1 Clarification is sought regarding the status of State variations, as referred to in paragraph 2.5.1 of Annex 18. Variations are not *per se* part of the TIs which are rules approved by Council, but are notifications by States published by ICAO as per paragraph 2.5.1 of Annex 18 (alike differences from SARPs are published in Annexes in the form of Supplements as per Article 38, last sentence, of the Convention). As to the effect of the notification of such variations, it should be understood that, in any case, pursuant to Article 11 of the Convention, any Contracting State is entitled to establish laws and regulations applicable to international air navigation through its airspace, provided that such laws and regulations are non-discriminatory and not inconsistent with the terms of the Convention. This provision reflects the principle of sovereignty enshrined in Article 1 of the Convention. Accordingly, even if a State notified a variation *vis-à-vis* a TI, its operators will have to comply with such TI as fully implemented in any State which would not have notified such a variation. For other material in attachments to the TIs, it is noted that Attachment 1 does not specify anything about the status of its contents, while Attachment 2 specifies that material therein is for information purposes only, alike Supplements to TIs (see Foreword). Also, Attachments to Annexes of the Convention constitute guidance material and are not granted the status of SARPs. It would be useful to specify on the cover page of Attachment 1 to the TIs what is the status of its contents, particularly if there was any intent to grant them a status different from guidance or information material.

2.3 With respect to (b), it is noted that 2.5.2 contains a recommendation for States to notify ICAO when an operator adopts more restrictive requirements than those specified in the Instructions. Clarification is sought regarding the responsibilities of States on the basis that the majority of operators adopt more restrictive requirements by virtue of using the IATA Dangerous Goods Regulations - should States report all such operator variations?

LEB Response

2.3.1 Clarification is sought about any expected notification by States of any more restrictive requirements adopted by operators than those in the Instructions. Paragraph 2.5.2 of Annex 18, which is a Recommended Practice, actually clearly provides that more restrictive requirements adopted by operators should be notified to ICAO as variations for publication in the TIs. The fact that such higher variations would originate from compliance with IATA documents has no impact on the scope of applicability of such Recommended Practice which remains unaffected. On the other hand, paragraph 2.5.2 provides that States should “ensure” that such notification is made, i.e. could avoid doing it by themselves, for instance by tasking operators to do so directly.

2.4 With regard to (c), differences of interpretation by States have been noted when responding to questions contained in the comprehensive safety oversight system questionnaire; specific difficulties were noted in understanding what is meant by a difference as distinct from a variation. Clarification is sought on the status of each, both from a domestic and from an international perspective.

LEB Response

2.4.1 Clarification is sought concerning the status of differences from SARPs *vis-à-vis* variation from TIs. As stated in point 1 above, variations are not differences in the meaning of Article 38 of the Convention as they constitute national requirements varying from Technical Instructions, not from SARPs adopted under the Article 90 procedure. It must be noted that, pursuant to Articles 37 and 38, a Standard in an Annex has a conditional binding force, i.e. is legally binding to the extent that the State concerned has not duly notified any difference thereto.