



LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

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

(Presented by the Air Crash Victims Families Group (ACVFG))

1. The “Air Crash Victims Families Group” (ACVFG) has participated (by invitation) in – and supported the efforts begun in 2000, to modernize the 1933/1952 “Rome Convention on Damage Caused by Foreign Aircraft to Third Parties On the Surface” (with its 1938 Brussels and 1978 Rome Protocols) - as an extension of the “Montreal Convention of 1999” (statement by ICAO Council President Dr. Assad Kotaite – Legal Committee 32nd Session: item 2 – Opening Address at 2.3).

2. As a consequence of the apocalyptic terrorist attacks perpetrated by the means of four hijacked aero planes on September 11, 2001 - and after the failure to find acceptance for a global scheme for aviation war risk insurance (Globaltime)- the ICAO Council decided in 2004 to address this issue, within the framework of the already ongoing Modernization of the Rome Convention. (statement by ICAO Council President Dr. Assad Kotaite – Legal Committee 32nd Session: item 2 – Opening Address at 2.5).

3. The “Air Crash Victims Families Group” (ACVFG) participated in – and supported the extension of the modernization of the 1933/1952 Rome Convention into the field on damages caused by aircraft to third parties due to unlawful interference.

4. The aftermath of the apocalyptic terrorist attack in the United States, perpetrated by means of four hi-jacked aero planes on September 11, 2001, was promptly addressed through legislation (“Air Transportation Safety and System Stabilization Act – Public Law 107 -42 – Sept. 22, 2001), assuring uninterrupted air transportation services (domestic and international) and payment of provable damages to victims by providing:

4.1	Airline Stabilization:	\$ 5 bio loss compensation + \$10 bio credit lines,
4.2	Reimbursement of:	airlines’ increased insurance cost,
4.3	Deadline Extension of:	Excise Tax Deposits by airlines (protection of cash flow)

- 4.4 Victims Compensation – creation of: September 11th Victims Compensation Fund of 2001” – paid damages to about 6,000 injured or families of decedents in the amount of about \$7,5 bio in a thorough but expedited claims settlement process. Only 90 victims chose to pursue the resolution of their damages against the carriers by judicial means, of which 83 claims were settled and only 7 await adjudication
- 4.5 Government contribution to airline safety and security – \$3 bio.

Four of the five items above benefited the solvency, the insurability, airline safety and security to the tune of almost \$20 bio.

5. Because of other, non aviation related terrorist attacks or major catastrophes that happened over the last fifty years, some States have already established funds and mechanisms to repair the material and other damages caused by such major occurrences.

6. The ICAO Council decided in the Twelfth Meeting of the 182nd Session to convene the 33rd Session of the Legal Committee (item 3.(c)) in Montreal, with the Modernization of the 1933/1952 Rome Convention Drafts as its main subject. The Council requested that particular attention should be paid to:

- 6.1 possible ways of protecting the interest of victims in the most efficient way,
- 6.2 ensure the ratifiability of the revised Convention,
- 6.3 address the operability of the funding mechanism

when further debating the two MR Convention drafts (item 3 (e)).

7. The task to further discuss and adjust the Modernization of the 1933/1952 Rome Convention Drafts should not be too difficult because of the ICAO Council’s clear directions.

8. As far as **ratifiability** is concerned, the conferees can draw on the direction given by former ICAO Council President Dr. Assad Kotaite (see item 1 above) to consider the successful “Montreal Convention of 1999).

- 8.1 After forty four years of unsuccessful attempts to modernize the 1929 Warsaw Convention, the acceptance of a strict liability concept – first introduced with the IATA “Intercarrier Agreement of 1996” led to the adoption of Montreal 1999 by acclamation, put into force within four years (2003). Eighty six States have ratified “Montreal” so far.
- 8.2 Following the Montreal 1999 concept would also overcome the impediments that hobbled the 1933/1952 Rome Conventions. Fifty six years since its consensual adoption, only forty nine countries remain with “Rome” after three ratifying States denounced the Convention.
- 8.3 The ratifiability of a Modernized Rome Convention would be **enhanced** further if the conferees consider new developments in civil air transportation, since the extension of the SG-MR task in 2004, to include “unlawful interference”:

- 8.3.1 In 2007 the airlines introduced the next generation of wide body, long range aircraft weighing 650 tons, carrying 92,000 gallons of fuel, able to transport 1,000 passengers.
 - 8.3.2 An unintended accident of such a behemoth plane, crashing into a densely populated area - including assemblies of a large number of people, like a sports stadium - all lying within the flight paths in many cities worldwide, would create mayhem and cause damages equaling, or even surpassing, those created by acts of unlawful interference.
 - 8.3.3 At the time of an unintended accident caused by an aircraft weighing 650 tons and a fuel capacity of up to 92,000 gallons, the carrier's insurance coverage may not be sufficient to repair the damages incurred. It may seriously affect the finances of the operator and other liable parties.
 - 8.3.4 Victims from airplane crashes are the same, irrespective whether the incident resulted from "unlawful interference" or from civilian occurrence. The repair of their legitimate damages has to be assured – as mandated by the direction of the ICAO - in the most efficient way (see item 6 above).
- 8.4 Past experience has also shown that a Convention that tries to modify existing general liability rules will not be ratifiable in those countries that are most important to the viability and the success this particular Treaty.

9. The operability of the Fund:

- 9.1 When two airplanes crashed into World Trade Center Towers 1 and 2 on September 11th 2001 it was estimated that about 19,000 persons worked in this building complex. (Final Report of the Special Master for the September 11th Victims Compensation Fund of 2001” vol. 2 pages 110, 113, 114).
- 9.2 The Fund received 7,403 Claims: wrongful death 2,968, physical injuries 4,435.
- 9.3 The Fund awarded damages on 5,560 proven claims: 2,880 for wrongful Death and 2,680 for physical injuries.
- 9.4 The claims were received and processed within twenty four months.
- 9.5 The processing cost of the Victims Compensation fund was 1.2%.
- 9.6 The claims process was handled by an average of 200 persons.
- 9.7 The average processing time of from receipt of claim to pay out varied between 25 and 264 days.
- 9.8 Advance payments were made.

10. Funding of the Supplemental Compensation Mechanism (SCM)

- 10.1 The concept of “Supplemental Compensation” was introduced with the Guatemala Protocol, 1971 to amend the 1929/1955 “Warsaw-Hague Convention (Article 35A).
- 10.2 Passenger contributions were meant to pay for the Fund (Article 35A (d)).
- 10.3 The “Supplemental Compensation” concept was retained in Article IV of the Montreal Additional Protocol No. 3 of 1975.
- 10.4 Attempts to ratify the Montreal Aviation Protocols No.3 with a passenger funded “Supplemental Compensation Plan” attached, were not successful.
- 10.5 Legislation introduced in the United States Congress in 1992 to create a passenger funded “Supplemental Compensation Plan” was not successful either.
- 10.6 The “Montreal Aviation Protocol No. 3” never came into force.

- 10.7 Learning from past experiences, it cannot be expected that a passenger funded (even with freight forwarders participation) SCM would ever be ratifiable.
- 10.8 Other sources of funding the “Supplemental Compensation Mechanism” have to be considered, - and have been proposed.
- 10.9 The funding of the SCM has to be continuous – in order to accumulate sufficient reserves for the time the fund is called to contribute and/or be the sole provider to pay damages.
- 10.10 The fund needs a constant uninterrupted cash flow to assure the full payment of damages, should the reserves be depleted and/or to replenish expanded resources.
- 10.11 Proration of damages payments is neither practical nor acceptable.

CONCLUSION

The “Draft Conventions for Damages Caused by Aircraft to Third Parties in Case of Unlawful Interference (or from general Risks)” are desirable by extension of the Montreal Convention of 1999 - to continue the process of the Unification of Certain Rules Relating to International Carriage by Air.

Because many States have already domestic laws, institutions and processes to address effectively damages caused to third parties – especially in case of unlawful interference – this Convention is not essential to many countries - most especially if it attempts to modify already existing general liability rules, - if it detracts from strict and unlimited liability - and if it re-imposes caps or high ambiguous breakability thresholds (that would repeat the costly, lengthy, litigious environment of 1929 Warsaw)

Anything less than the damages resolution of the September 11th, 2001 apocalyptic terrorist tragedy would be undesirable, both to the carriers/insurers, the third parties and most especially to the victims and their surviving families.

Montreal 1999 was a success because all parties came together in its support.

While presently this coalition is missing in the Modernization of the Rome Convention process – there is no reason why such unity cannot be achieved, with sufficient good will - in the common interest.

Aside from representing our constituents, Governments, Industry, their representatives, or any other parties are all in this together: as human beings with or without families – often frequent world wide travellers - who need unified rules to address the needs of their loved ones (the widows, the children, the elderly the dependents, the injured) that may be innocently involved in an unwanted tragedy, caused by whatever means.

Forever optimists – we are not giving up and continue to be supportive on the Rome Convention modernization process.