



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 (GENERAL RISKS CONVENTION AND UNLAWFUL INTERFERENCE COMPENSATION CONVENTION)

ADVANCE PAYMENTS

General Risks – Article 6 Unlawful Interference – Article 20

(Presented by the Air Crash Victims Families Group)

1. BACKGROUND

1.1 The *Convention for the Unification of Certain Rules for International Carriage by Air* signed in Montreal on March 28, 1999 (MC99) introduced the concept of “Advance Payments” (Article 28) “without delay”... “if required by national law....”to meet their immediate economic needs”.

1.2 The *Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties* adopts essentially the language of Advance Payments in MC 99 (Article 6).

1.3 The *Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference* leaves Advance Payments (Article 20) “subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation and adds in Article 20 (2) another paragraph that other measures may be taken “to minimize or mitigate damage caused by an event”.

2. DISCUSSION

2.1 **The need to make advance payments** against final settlement or adjudication of damages incurred in an aviation related accident arose from the lengthy process to address and repair damages, either by settlement or adjudication:

2.1.1 **The difficulties to recover and identify victims remains:**

2.1.1.1 With ever larger planes flying in high altitudes crashing over land or over the seas either: no bodies, few bodies or only body parts are recovered that have to be identified by DNA (e.g. in the Korean Airlines Flight 007 of September 1, 1983 **none** of the 269 bodies of the passenger and crew have ever been accounted for. In the Swissair Flight 111 crash of September 2, 1998 body parts had to be recovered from the sea and/or sorted out from 2 ½ million pieces of wreckage. In the September 11, 2001 apocalyptic terrorist attack, less than half of the victims have been identified, so far).

2.1.2 **Without identification of the victim no death certificate can be issued.**

2.1.2.1 Without a death certificate wills cannot be probated, no executors for the decedents can be appointed by surrogate courts, no life insurance payments can be processed, no financial decisions can be made to preserve the estate. Bank accounts are frozen, credit cards are voided.

2.1.3 **The injured survivors lose their income and often their jobs.**

2.1.4 **Meanwhile the immediate financial obligations, both of injured and victims families continue without interruption – or payment extensions.**

2.1.4.1 Monthly payment of rent, mortgages, credit card, instalment loans, and other obligations, insurance premiums, and others.

2.1.4.2 Daily subsistence, educational expenses, etc.

2.1.4.3 **They are not able to make payments when due.** Victims are faced with default fines, loss of credit standing, foreclosures on their houses, repossession of their cars, etc.

2.2 **The process to address, settle and/or adjudicate damages incurred is a lengthy one.**

2.2.1 Determination of the probable cause of the tragedy,

2.2.2 Determination of the liable parties,

2.2.3 Determination of Jurisdiction,

2.2.4 Determination of applicable laws,

2.2.5 Determination of the damages,

2.2.6 Legal proceedings,

2.2.7 Claim settlement proceedings, etc.

2.3 **The language of Article 28 (MC), Article 6 (General Risk) and Article 20 (Unlawful Interference) is ambiguous and counterintuitive.**

2.3.1 Advance payments should be made “without delay”

2.3.2 but only if “required by national law”

2.3.3 in order “to meet *immediate* economic needs

2.3.4 **This ambiguity has led to wide ranging interpretations**

2.3.4.1 carriers’ insurers require proof of “economic need” before making advance payments – a time consuming bureaucratic process considering that the insurer and/or his agents are generally located far away from the victim and the time it takes to process the request. **This process defeats the requirement of advance payments without delay. Obvious immediate need clashes with the bureaucratic process** that victimizes the victims all over again – their injuries or loss of their loved ones, ensuing financial hardship – formal pre-requirements during a time of disarray and mourning.

3. CONCLUSION

3.1 Article 6 (General Risk) and Article 20 (Unlawful interference) be clarified and harmonized.

4. ACTION SUGGESTED for Article 6 (General Risk) and Article 20 (Unlawful Interference)

ADVANCE PAYMENTS

4.1 It is proposed that the following language be used:

4.1.1 **“The Operator (Article 6) and/or the “Supplemental Compensation Mechanism” (Article 20) shall make immediate Advance Payments in the amount of SDR 25,000 or the equivalent of one year of victims’ provable income, whatever is larger, to natural persons who may be entitled to claim compensation. Such advance payment shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator (Article 6) and/or “the Supplemental Compensation Mechanism” (Article 20).**

4.1.2 **Advance payments have to be made not later than fifteen days after the natural person entitled to claim compensation has made itself known to the operator.**

4.1.3 **Should the Operator (Article 6) and/or the Supplemental Compensation Mechanism (Article 20) be in default to make timely advance payment, the amount of advance payment shall be trebled and not be offset against any amount subsequently paid as damages by the operator (Article 6) an/or the “Supplemental Compensation Mechanism” (Article 20).**