



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

ISSUES TO BE ADDRESSED WITH RESPECT TO THE PROCEDURES FOR LIMITATION OF THE OPERATOR'S LIABILITY

(Presented by Japan)

1. OVERVIEW

1.1 The Government of Japan is of the opinion that, in order to ensure quick and proportionate compensation payments by an operator, the framework of the 1992 International Convention on Civil Liability for Oil Pollution Damages (the “CLC”), as summarized below, should be adopted with respect to the procedures for limitation of the operator's liability:

- a) for the purpose of availing himself of the benefit of limitation of liability, the operator must constitute a fund for the total sum representing the limit of his liability with the court or other competent authority;
- b) the fund must be distributed among the claimants in proportion to the amounts of their established claims; and
- c) no person having a claim for the damage arising out of the event is entitled to exercise any right against any assets of the operator other than the fund in respect of such claim.

1.2 Please note that the “fund” referred to herein is different from the “Funds” (with capital F) established with the Supplementary Compensation Mechanism.

2. ISSUES TO BE ADDRESSED

2.1 In order to ensure proportionate compensation payments when the total amount of the damages exceeds the amount to be paid by the operator, the damages to be paid to each person must be limited proportionately at the stage of either a) when the damages are awarded to each person by courts or b) when each person seeking compensation exercises his/her right against the operator's assets. Otherwise the compensation by the operator would be made on a “first come, first served” basis, meaning some people could be fully compensated by the operator without bringing actions against the Supplementary Compensation Mechanism while the others might be required to rely on the Supplementary Compensation Mechanism and, in the worst case scenario, they might not be compensated in the full amount of their damages even though they dully filed actions within the period of limitation

(i.e. 3 years after the event) because the total amount of the damages exceeds the amount to be paid by the Supplementary Compensation Mechanism. On the other hand, it would be possible that the operator may lose assets by paying more than the amount representing the limit of its liability because the operator would have no legal basis to dully prevent the people from exercising their rights on the operator's assets.

2.2 Under the draft Convention, it seems that, by limiting the forum to the courts of the State Party where the damage occurred (see Article 30), the damages to be paid to each person are supposed to be limited proportionately when the damages are awarded to each person by the court (i.e. the above approach a)). However, it is quite doubtful that this approach is workable in practice because of the following reasons:

- i) when actions are brought before more than one court in the State Party where the damage occurs, each court is required to find the total amount of the damages in order to award proportionate compensation at the stage of delivering judgment. However, it is generally difficult for each court to find the total amount of the damages because claimants other than the plaintiffs of the pending cases have not necessarily established their amount of damages at that stage; and
- ii) the total amount of the damages cannot be fixed within 3 years (see Article 34) because any action filed within 3 years will probably take additional years before the definitive judgments are made for those actions. Accordingly, the compensation cannot be made in a timely manner if the operator needs to wait until the definitive judgments are made for all actions against the operator.

3. **FRAMEWORK OF THE CLC**

3.1 For the above reasons, it is appropriate to take the approach of limiting the damages to be paid proportionately when the compensation is actually made (i.e. when each person exercises right against the operator's assets) (see 2 b) above). However, this approach does not work either if each person is allowed to exercise his/her right individually against any assets of the operator in accordance with the full amount of his/her damages awarded.

3.2 The Government of Japan strongly believes that adopting the framework of the CLC is the easiest way to solve the above problems and achieve the purpose of this Convention (i.e. quick and proportionate compensation to the victims). Under this framework:

- a) for the purpose of availing himself of the benefit of limitation of liability, the operator must constitute a fund for the total sum representing the limit of his liability with the court or other competent authority;
- b) the operator's fund must be distributed among the claimants in proportion to the amounts of their established claims. For the Legal Committee's information, to fully meet this requirement, the Japanese national law implementing the CLC provides that a trustee appointed by the court will be engaged in this distribution on behalf of the operator. Under the same national law, the trustee is required to reserve a portion of the fund necessary to meet the claims still pending at court when the distribution is made; and

- c) no person having a claim for the damage arising out of the event is entitled to exercise any right against any assets of the operator other than the fund in respect of such claim. Because of this restriction, no person can seek extra compensation other than the proportionate compensation from the operator.

3.3 The text of the proposed provisions to adopt this framework is attached hereto as an annex. Those provisions are modelled on paragraphs 3 and 4 of Article V and paragraph 1 of Article VI of the CLC together with Article 23 of the draft Convention. The Government of Japan would like to stress that the proposed provisions are quite neutral, i.e. they are fully consistent with the other provisions of the draft Convention and do not put any negative impact on its current framework.

4. **ACTION BY THE LEGAL COMMITTEE**

4.1 The Government of Japan requests that the Legal Committee consider adopting the provisions contained in the Appendix attached hereto together with any other related provisions in order to ensure quick and proportionate compensation payments by the operator.

APPENDIX

PROPOSED PROVISIONS

To add new paragraphs 2 and 3 in Article 4 as follows:

Article 4 - Limit of Operator's Liability

2. For the purpose of availing himself of the benefit of limitation provided for in paragraph 1, the operator shall constitute a fund for the total sum representing the limit of his liability with the court or other competent authority of the State Party in which an action is brought under Article 30 or, if no action is brought, with the court or other competent authority in the State Party in which an action can be brought under Article 30. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the State Party where the fund is constituted, and considered to be adequate by the court or other competent authority.
3. Where the operator, after an event, has constituted a fund in accordance with paragraph 2, and is entitled to limit his liability:
 - a) no person having a claim for the damage arising out of that event shall be entitled to exercise any right against any other assets of the operator in respect of such claim; and
 - b) the court or other competent authority of any State Parties shall order the release of any aircraft or other property belonging to the operator which has been arrested in respect of a claim for the damage arising out of that event, and shall similarly release any bail or other security furnished to avoid such arrest.

To revise Article 23 as follows:

Article 23 – Reduced Compensation

1. In the first instance, the fund constituted under Article 4, paragraph 2 shall be distributed preferentially among the claimants to meet the established claims in respect of death and bodily injury or, if the total amount of the above claims exceeds the fund, in proportion to the amounts of the above claims. The remainder, if any, of the fund shall be distributed among the claimants to meet the established claims in respect of other damage or, if the total amount of the above claims exceeds the remainder, in proportion to the amounts of the above claims.
2. In the first instance, the total amount to be paid by the Supplementary Compensation Mechanism shall be distributed preferentially among the claimants to meet the established claims in respect of death and bodily injury or, if the total amount of the above claims exceeds the amount to be paid by the Supplementary Compensation Mechanism, in proportion to the amounts of the above claims. The remainder, if any, of the amount to be paid by the Supplementary Compensation Mechanism shall be distributed among the claimants to meet the established claims in respect of other damage or, if the total amount of the above claims exceeds the remainder, in proportion to the amounts of the above claims.