



**WORKING PAPER**

**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 CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE**

**REDUCED COMPENSATION – ARTICLE 23 WITH  
CONTRIBUTIONS TO THE SUPPLEMENTARY COMPENSATION  
MECHANISM – ARTICLE 12 AND  
AGGREGATE LIMIT ON COLLECTION OF CONTRIBUTION – ARTICLE 13**

(Presented by the Air Crash Victims Families Group)

**1. BACKGROUND**

1.1 The “*Draft Convention on Compensation for Damage Caused by Aircraft To Third Parties, In Case of Unlawful Interference*” under discussion, limits the operator’s *Liability (Chapter II – Compensation – Article 4 (a-j)*

1.2 Chapter III – “The Supplementary Compensation Mechanism” of the above Draft Convention stipulates in Article 12 the mandatory contributions to the Fund and

1.3 institutes an aggregate limit on the collection of contributions (Article 13). This aggregate limit is addressed in:

1.4 Article 19 (2) - Compensation – with a bracketed maximum amount per event, that should be available to pay compensation if the total damages exceed the operator’s liability limits stated in Article 4 (a-j)

1.5 Article 23 – describes “Reduced Compensation”: “*if the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and 19 the total amount shall be awarded preferentially to meet **proportionately** the claims in respect of death and bodily injury in the first instance*”.

1.6 Article 25 – Right of Recourse – stipulates that the “*Supplementary Compensatory Mechanism*” has a qualified right of recourse against third parties with the stipulation that the amount

recovered shall be used to provide compensation for damages resulting from the event, (*Article 25 (3)*) - in addition to the operator's liability (*Article 4*) and the Funds' per event bracketed amount.

1.7 Article 25 (2) limits the enforcement of such claim "until all claims have been completed".

## 2. DISCUSSION

2.1 Anybody who has become a victim of an act of unlawful interference perpetrated – in this Convention – by the means of an aircraft is entitled to full, undiminished payment of the proven damages which have been awarded either by settlement or adjudication (*Liability of the operator – Article 3*).

2.2 This Draft Convention is designed to unify certain rules on compensation for damage caused by aircraft to third parties, in case of unlawful interference.

2.3 Considering the substantial socio-economic differences worldwide as well as the varying legal systems – the Draft Convention has to be broad in concept, conditions and language to be acceptable – ratifiable preferably by all – but at least by those countries from whom most of the contributions would be made – so that this Convention can function – and can work for all parties concerned.

2.4 To proceed with the assumption (or even specific knowledge) that this Convention is not ratifiable in important countries – but could be put into force by a sufficient number of others - is to revert back to the 1933/1952 Rome Convention – which after fifty six years has only forty-nine adherent States.

2.5 To re introduce specific limits and caps without openings to the next step (whatever the next step might be) is to revert back to the time when the 1929 "Warsaw" regime could not be modernized in forty-four years

2.6 A Draft Convention may be acceptable – ratifiable – by all/or most States if it simply establishes

2.6.1 The liability of the operator/insurer – with/without jointly liable third parties (either by agreement or adjudication) – to the extent of his mandatory insurance coverage (s) and

2.6.2 then shifts over to a "Supplementary Compensation Mechanism", to complete the payments of damages awards.

2.6.3 If there is no liable party – the SCM would be the sole provider to pay damages.

2.6.4 The SCM is financed through contributions the source of which is still debated, and

2.6.5 Progresses to the respective State Party if and when the incident is of such magnitude where the totality of the damages incurred exceeds the accumulated reserve and the incoming contributions/cash flow of the SCM.

2.7 Reduced Compensation (*Article 23*) is neither practical nor enforceable because:

2.7.1 In order to determine the totality of the number of damages claims filed one would have to wait for the expiration of the Period of Limitation (*Article 32*) which is at least two years (in the Draft Convention three years).

2.7.1.1 The month to month graph of claims filings under the “September 11th Victim Compensation Fund of 2001” (VCF) shows that in the period between December 2001 and the expiration of the statute of limitations in June 2004 over half of the claims were filed after November 2003 (*VCF Report vol. 1 page 113* attached).

2.7.2 Filing of claims is not tantamount to awarding damages – which process takes additional time beyond the two + years of Statute of Limitation (*VCF Report vol. 1 page 113* attached).

2.7.3 Meanwhile, under the provisions of this Draft Convention nobody would know if the available funds from the first layer plus the second layer contributors are sufficient to pay in full all damages until the period of limitation expired (2.7.1).

2.7.4 Courts would not recognize deferment of damages judgment delay in execution, most especially not for widows with children, the elderly, the infirm, the injured, the dependents.

2.7.5 Claimants would have no incentive to settle their damages knowing that payment may be reduced by an unknown amount of proportionate distribution. They would just bring their cases to court (getting pre-, post judgment interest and enforcement) at great, unnecessary and unjustified expense to the liable parties).

2.7.6 Victims would also be harmed by settling claims with deferred payment because of the uncertainty that payout could be reduced by an unknown percentage and additionally that the purchasing value (Present day value) would be substantially lowered by the increases of the Cost of Living index between the time the claims settlement was agreed on and the actual reduced payout occurs.

2.8 State Parties are already involved in any incident that causes damages to third parties, in many ways – and have informative and logistical obligations as stated in Article 17 – Duties of States Parties.

2.9 If the damages caused by air craft to third parties are of such magnitude that they exceed the resources of the operators/insurers, with/without possible jointly liable parties/insurers, plus the SCM, they are tantamount of a “national emergency” when – in each country - the State would be the initial contributor (see 911 legislation) at least of last resort (see September 11, 2001 and other major catastrophes).

2.10 By opening the way to the third level – Article 23 would become moot.

### 3. CONCLUSION

3.1 The present construction in this Draft Convention deprives the victims and any other rightful claimants of timely disposition of their damages – so that they can rebuild their health and their lives.

3.2 The present construction of this Draft would be an impediment to its ratifiability in many States.

3.3 The present Draft would discourage settlements of claims – and drive the process into the courts – resulting in lengthy, costly procedures, painful for the victims.

3.4 The problem could be solved by extending Article 17 (or wherever appropriate) – Duties of State Parties - to state that the Government is the contributor of last resort.

3.5 Inasmuch as the States are the ratifiers and have already obligations under Article 17.

3.6 They are already involved – and responsible. The SCM is a convenient cushion that takes a considerable burden of – and delays State’s involvement in damages resolution, reducing its financial involvement.

#### 4. ACTION

4.1 Article 13 – **STRIKE** – The contributions create a constant cash flow that needed to meet the obligations of the SCM to pay damages in full when called to do so.

4.2 Article 19 (2) **STRIKE (maybe with retention of second sentence).**

4.3 Article 17 or where appropriate otherwise: **ADD**

**“When the funds available to the Supplementary Compensation Mechanism to pay damages are exhausted, the State party (ies) will assume the responsibility to pay any balance due in full.”**

4.4 Article 23 – **STRIKE** - The constant cash flow of the SCM should assure full payments. in case of the need for additional funds – the way to State support – step 3 – is still open and most likely in such a cataclysmic occurrence (see 4.2).

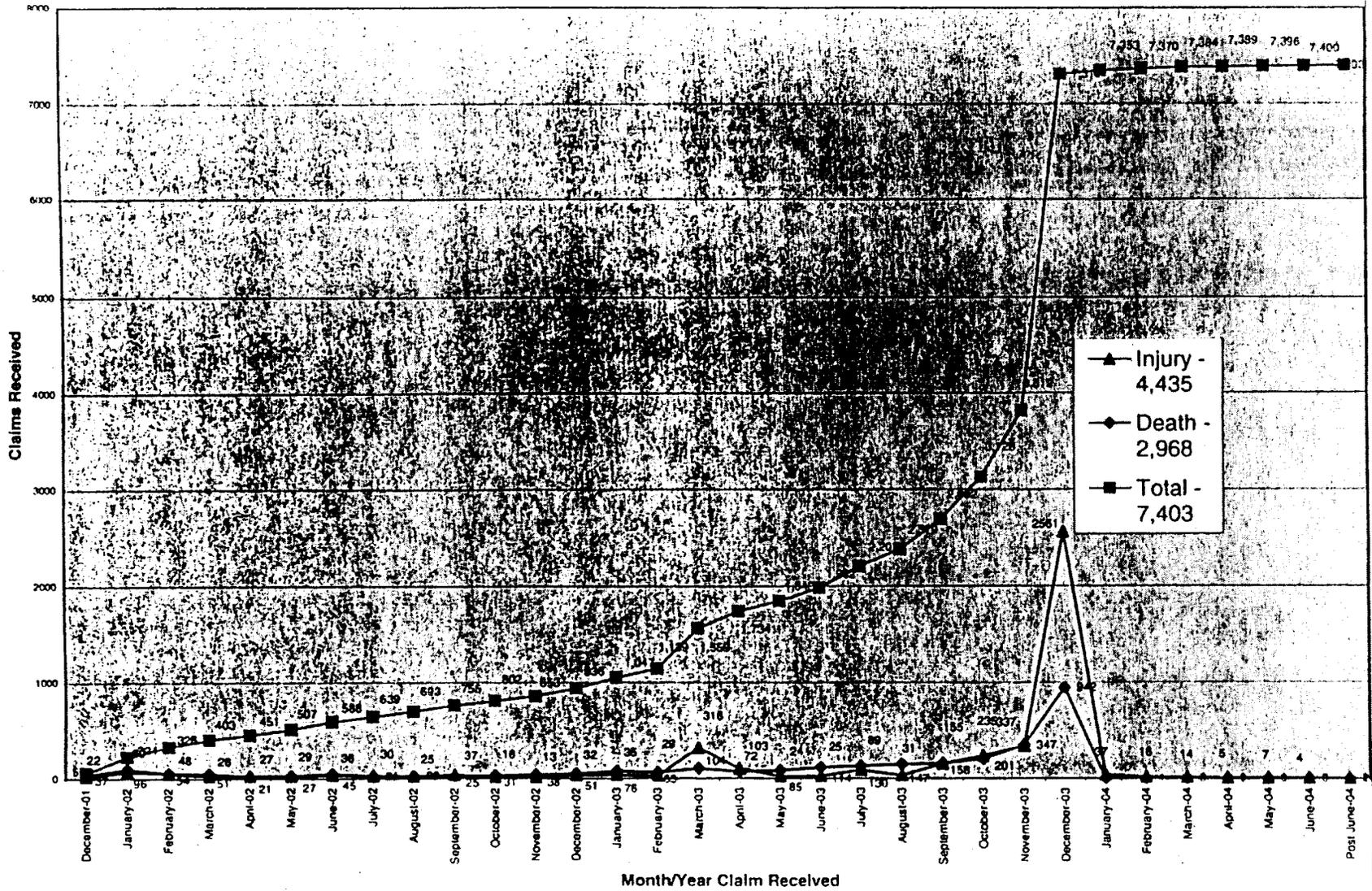
4.5 Article 25 (2) **STRIKE – the restriction on enforcement of claim** – language is ambiguous. If third parties become jointly responsible with the operator and/or have to contribute towards damages they have to pay once their participation is agreed or adjudicated, there and then.

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APPENDIX

Receipt of Claims Timeline\*

TABLE NO. 14



\*Of 108 claims received after the 12/22/03 deadline, 11 were accepted as timely based on a finding by the Special Master that the Claimant had taken sufficient action prior to the deadline to effect a timely filing. All others were denied.

CLAIMS  
PROCESSING STATISTICS

TABLE NO. 15

	Overall Average No. of Days for processing	Overall High Average	Overall Low Average
<b>REGULAR CLAIMS</b>			
COMPENSATION FORM RECEIVED TO SUBSTANTIALLY COMPLETE	128	275 12/1/01 - 5/31/02	80 12/23/03 - Current
SUBSTANTIALLY COMPLETE TO FINAL AWARD DETERMINATION	58	68 6/1/03 - 11/30/03	35 12/23/03 - Current
COMPENSATION FORM RECEIVED TO FINAL AWARD DETERMINATION	186	323 12/1/01 - 5/31/02	114 12/23/03 - current
FINAL AWARD DETERMINATION TO PAYMENT AUTHORIZATION*	20	42 6/1/02 - 11/30/02	15 12/23/03 - current
COMPENSATION FORM RECEIVED TO ELIGIBILITY DENIAL	84	358 12/1/01 - 5/31/02	43 12/23/03 - current
COMPENSATION FORM RECEIVED TO PAYMENT CONFIRMED	261	472 12/1/01 - 5/31/02	183 12/23/03 - current
<b>DEBARRED CLAIMS</b>			
COMPENSATION FORM RECEIVED TO SUBSTANTIALLY COMPLETE	97	195 12/1/01 - 5/31/02	57 12/23/03 - Current
SUBSTANTIALLY COMPLETE TO FINAL AWARD DETERMINATION	75	83 6/1/03 - 11/30/03	47 12/23/03 - current
COMPENSATION FORM RECEIVED TO FINAL AWARD DETERMINATION	172	245 12/1/01 - 5/31/02	102 12/23/03 - current
FINAL AWARD DETERMINATION TO PAYMENT AUTHORIZATION	25	57 6/1/02 - 11/30/02	17 12/23/03 - current
COMPENSATION FORM RECEIVED TO ELIGIBILITY DENIAL	169	418 6/1/02 - 11/30/02	87 12/23/03 - current
COMPENSATION FORM RECEIVED TO PAYMENT CONFIRMED	259	472 12/1/01 - 5/31/02	177 12/23/03 - current
<b>CURRY CLAIMS</b>			
COMPENSATION FORM RECEIVED TO SUBSTANTIALLY COMPLETE	162	385 12/1/2001	87 12/23/03 - Current
SUBSTANTIALLY COMPLETE TO FINAL AWARD DETERMINATION	39	46 12/1/01 - 5/31/02	31 12/23/03 - current
COMPENSATION FORM RECEIVED TO FINAL AWARD DETERMINATION	201	431 12/1/01 - 5/31/02	118 12/23/03 - current
FINAL AWARD DETERMINATION TO PAYMENT AUTHORIZATION	15	15 12/1/02 - 5/31/03	14 12/23/03 - current
COMPENSATION FORM RECEIVED TO ELIGIBILITY DENIAL	81	357 12/1/01 - 5/31/02	40 12/23/03 - current
COMPENSATION FORM RECEIVED TO PAYMENT CONFIRMED	264	472 12/1/01 - 5/31/02	184 12/23/03 - current

The Act requires the Special Master to authorize payment of a claim within 20 days of the final determination. See Act §406(a). However, in certain cases, the claimant waived his/her right to this requirement, typically to allow the claimant additional time to make alternative payment arrangements (e.g., structured payments, payments into court-appointed trusts). Due to the complexity of these arrangements, it generally took longer than 20 days to authorize these payments.