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LEGAL COMMITTEE – 35TH SESSION

(Montréal, 6 – 15 May 2013)

Agenda Item 7: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 35TH SESSION

The attached Appendix F relates to the draft Report of the Legal Committee.

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APPENDIX F

REPORT OF THE FRIENDS OF THE CHAIR WORKING GROUP ON IFSOS

The FC Working Group in charge of dealing with issues on the role and functions of IFSOs met on 8 and 11 May 2013. Delegates from 17 Member States took part to its work (Argentina, Canada, Chile, China, Colombia, France, Jamaica, Japan, Mexico, Lebanon, Mexico, Russian Federation, South Africa, Russian Federation, Singapore, United Arab Emirates, United States of America). The Group was chaired by France.

Rationale

The Group took note of the following points :

1. The wish of the delegations advocating the inclusion of provisions on IFSOs in the Tokyo convention is mainly 1/ to make explicit reference to them since they form a specific category apart from the aircraft commander, crew members or passengers and 2/ to grant them the same legal protection as crew members or passengers.
2. Amongst countries having an IFSO program, the work undertaken on airplanes by these agents may differ according to the law of each of these States.
3. The deployment of IFSOs is decided according to bilateral or multilateral agreements or arrangements.

The Group also noted that some countries had concerns with respect to both of the options considered by the Legal Sub-Committee, which would result in adding a new paragraph 3 to Article 6 of the Tokyo convention. Discussions within the Group showed that simpler solutions could be :

1. to align the power of the IFSO on that of the aircraft commander [(a) and (b)], except that it seems difficult to give to the IFSO the authority to deliver a person to competent authorities or to disembark him / her, such authority being provided to the aircraft commander under (c), (see option 1 below) ; *or*
2. to add the IFSO to the people listed in paragraph 2 (see option 2 below).

If either of these options were kept, the definition of IFSOs would have to be adjusted by :

1. making reference to the bilateral or multilateral agreements on the basis of which they operate *and*
2. *if necessary*, defining the purpose of their intervention on board the aircraft. If defining such purpose is necessary, the Group envisaged three options:
 - the IFSOs protect the aircraft and its occupants against acts of unlawful interference (see option A below);
 - the IFSOs protect the aircraft and its occupants against any act which is defined as an offence under Article 1 paragraph 1 (a) of the Tokyo convention, provided that all unlawful interferences are criminal acts (see option B below);

- the IFSOs protect the safety of that aircraft, or of persons or property on board (see option C below).

If these adjustments were made to Article 6 and if an appropriate definition of IFSOs was introduced, it would not be necessary anymore to add a new paragraph 3 to Article 6 of the Tokyo Convention.

Drafting recommendations

New provisions applying to IFSOs appear in **black** letters.

A - Definition of the role and functions of IFSOs : ARTICLE 6

1) Add a reference to IFSOs according to one of the two following options :

Option 1

1. The aircraft commander **or in-flight security officer** may, when he **or she** has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1 paragraph 1, impose upon such person reasonable measures including restraint which are necessary :

- (a) to protect the safety of the aircraft, or of persons or property therein; or
- (b) to maintain good order and discipline on board; or
- (c) to enable **the aircraft commander** to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.

3. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Option 2

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1 paragraph 1, impose upon such person reasonable measures including restraint which are necessary;

- (a) to protect the safety of the aircraft, or of persons or property therein; or

- (b) to maintain good order and discipline on board; or
- (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member, **in-flight security officer** or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

2) Delete draft paragraph 3 (both options).

Comments

All the members of the Working Group agreed that the draft protocol can acknowledge the existence of IFSOs.

The Working Group was divided on what is the most appropriate way to reach this goal.

A majority of the delegations expressed their preference for Option 2, because they regard such Option as consistent with existing ICAO rules and regulations under which the IFSOs are under the authority of the aircraft commander, and should always act according to the instructions given by him / her. They share the view that such Option is more consistent with Annex 17.

However other delegations consider that the draft protocol should go a step forward and provide the IFSOs with most of the powers provided to the aircraft commander. They therefore expressed their preference for Option 1.

B- LEGAL PROTECTION FOR IFSOs : ARTICLE 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, **any in-flight security officer**, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

Comments

There was general agreement within the Working Group that this wording matches well with either options (1 or 2) to be chosen under Article 6. The Group therefore recommends adopting it in any case.

C – DEFINITION OF IFSOs : ARTICLE 1

Add a definition of IFSOs following one of these three options :

1. This Convention shall apply in respect of:
 - (a) offences against penal law ;
 - (b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.
2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.
3. For the purposes of this Convention, ~~an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.:~~
 - (a) an aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until the competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board; [and]
 - (b) “in-flight security officer” means a [government employee]/[person] who is specially selected, trained and authorized by the government of the State of the operator [and]/[or] the government of the State of registration to be deployed on an aircraft, pursuant to a bilateral or multilateral [agreement (and/or) arrangement], with the purpose of

(Option A) protecting that aircraft and its occupants against acts of unlawful interference*.

(Option B) protecting that aircraft and its occupants against any offence or act contemplated in Article 1 paragraph 1.

(Option C) protecting the safety of that aircraft, or of persons or property on board.
4. This Convention shall not apply to aircraft used in military, customs or police services.

Comments

There was a pretty even expression of interest amongst the members of the Working Group in favour of either Option A or Option C. Few delegations favoured Option B.

Most delegations in favour of option A expressed the view that, if it was adopted, the expression “unlawful interference” should be defined. This would take the form of a reference to Annex 17 of the Chicago Convention. A delegation recommended to specify that, if the IFSO’s role is to protect the

aircraft and people on board against unlawful interference, a definition could be avoided provided that it is specified that he / she acts “according to the powers provided under such agreement or arrangement”. Another delegation regarded such definition as being unnecessary whatsoever, if such option is adopted.

A delegation noted that, if option 1 was adopted under Article 6, there would be some lack of consistency whatever option is chosen under Article 1 since neither of these three options include a reference to what the IFSO does to protect good order and discipline.

Some delegations expressed the view that there might be no need to define the purpose of the intervention of the IFSOs, since the scope of such intervention is specified by relevant agreements or arrangements. They therefore recommended to explore the possibility of dropping all the three options and to simply keep the “chapeau” as a definition of the role of the IFSOs, deleting the words “with the purpose of”.

Two delegations shared the view that the reference to agreements or arrangements would fit better into Article 6.

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