



INTERNATIONAL CIVIL AVIATION ORGANIZATION

A35-WP/97¹

LE/8

17/08/04

ASSEMBLY — 35TH SESSION

LEGAL COMMISSION

Agenda Item **35 Assistance in the field of aviation war risk insurance**
:

WAR RISK EXCLUSIONS

(Presented by the International Air Transport Association (IATA))

INFORMATION PAPER

SUMMARY

The aviation underwriting community has formally confirmed that it intends to exclude all hull, spares, passenger and third-party liability claims caused by the hostile use of a dirty bomb, electromagnetic pulse device, or biochemical materials. The prospect is that these exclusions will find an airline in breach of its State regulatory requirements. More importantly, an airline may determine that in the absence of adequate insurance, brought on by this market failure, it is not financially prudent and responsible to continue to operate. This paper urges States to grant government guarantees that will provide cover for hull, spares, passenger and third-party losses arising from State-targeted acts of terrorism. It further seeks to get underway the drafting of a limitation of liability regime for war and terrorism losses.

¹ All language versions provided by IATA.

1. BACKGROUND

1.1 The aviation underwriting community has formally confirmed that it intends to exclude all hull, spares, passenger and third-party liability claims caused by the following weapons of mass destruction:

- a) any hostile use of radioactive contamination or matter (e.g. dirty bombs);
- b) any hostile use of an electromagnetic pulse device; and
- c) any use of chemical or biological materials that are poisonous or pathogenic arising from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, etc.

1.2 The new exclusions will be covered by (b)(ii) through (iv) of a revised version of the standard War, Hijacking, and Other Perils Exclusion clauses, to be designated AVN48C. When these new clauses are published for writing they will be effective on all aviation insurance policies as they renew over the next twelve months. However, current war risk cover can be withdrawn subject to a seven-day notice at any time. Preliminary indications are that cover for the three risks mentioned will likely not be reinstated once withdrawn by the insurance industry.

1.3 All aviation insurance policies also exclude loss, damage or liability caused by 'hostile detonation of any device employing atomic or nuclear fission and/or fusion or other like reaction'. This exclusion was drawn up during the cold war era when nuclear holocaust arising from war between the major powers was the perceived threat. Post 9/11 the threat is not nuclear holocaust but nuclear terrorism with a limited strike capability. Industry and its customers need to be protected from State-targeted acts of nuclear terrorism in addition to the other weapons of mass destruction stated above.

1.4 It is clear that insurers are not prepared to bear the risk of accumulated losses that might occur, for example, in the event that any of the means of attack set out in 1.1 and 1.3 were deployed at an airport. The prospect is therefore very real that these exclusions would find an airline in breach of the regulatory requirements of its State of registry and of those States to which it operates.

2. REGULATORY COMPLIANCE

2.1 Indications are that most State regulatory authorities will require that an air carrier maintain adequate insurance to cover its liabilities for the purpose of maintaining an operating license. In addition, the 1999 Montreal Convention does not identify any risks for which an air carrier may not be held liable in respect of passengers, nor does it limit liability. States have the obligation (Article 50) to "... require their carriers to maintain adequate insurance covering their liability under [this] Convention." Furthermore, the new European Community Regulation 785/2004 requires air carriers and aircraft operators to observe minimum insurance requirements to cover their liability in respect of passengers and third parties for risks of war and terrorism.

2.2 Regardless of the regulatory requirement, from a corporate governance perspective, without the cover currently available, an airline could be faced with financial ruin in the event of the occurrences referred to in 1.1 and 1.3 and may therefore decide to curb its operations. The implication is that airline operations may be significantly curtailed in light of this market failure.

3. **IATA's POSITION**

3.1 IATA's position is that terrorist acts are directed at the States and that airlines and air transport infrastructure are merely used as a proxy. As such, governments need to provide the necessary guarantees of cover and/or indemnities in all cases of terrorist acts, whether the insurance market can provide such cover or not.

3.2 IATA and its Member airlines, as well as the underwriter and broker communities, have made governments aware of this problem for some time. It is now time for governments to take action on an issue that can severely compromise the development and financial sustainability of international civil aviation.

4. **ACTION BY THE ASSEMBLY**

4.1 In light of the uncertainty of the current situation, IATA invites the Assembly to:

- a) urge States, to grant government guarantees, either individually and/or collectively, that will provide cover for hull, spares, passenger and third-party losses arising from the State-targeted acts of terrorism contemplated by the aforementioned exclusions; and
- b) instruct the Council of ICAO to proceed, as a matter of urgency, with the drafting of a limitation of liability regime for the war and terrorism losses being contemplated. This can be achieved either through the Rome Convention modernization discussions that are currently underway by the Legal Committee, or by a separate fast track Convention if more expedient.

— END —