



LC/38-WP/8
Addendum
1 April 2022

International Civil Aviation Organization

LEGAL COMMITTEE

38TH SESSION

Virtual, 22 to 25 March 2022

ADDENDUM

DRAFT REPORT

NOTE TO THE COMMITTEE: TO REVIEW ONLY PARAGRAPHS 4:3 AND 4:13 TO 4:15, AS ALL OTHER PARAGRAPHS WERE REVIEWED BY THE COMMITTEE ON 25 MARCH 2022.

Agenda Item 4: Amendment of the Rules of Procedure of the Legal Committee

4:1 The Secretariat introduced LC/38-WP/4-1, which presents two proposals for amendment of the Rules of Procedure of the Legal Committee. The first proposal, as set out at paragraph 2 of the working paper, is to amend the Rules of Procedure to use gender-neutral language pursuant to the Council's Declaration on Improving Gender Representation in ICAO's Governing and Technical Bodies adopted at the seventh meeting of its 222nd Session in March 2021. The second proposal, as set out at paragraph 3 of the paper, is to amend Rules 3, 14 and 15 to provide explicitly for the sessions of the Legal Committee, as well as meetings of its sub-committees and working groups, to be held in a fully virtual format as an exceptional measure.

Gender-neutral language

4:2 The Committee adopted the gender-neutral language changes to the Rules of Procedure as set out in the Appendix of the working paper by consensus.

Virtual format

4:3 A majority of the delegations who spoke expressed support for the amendments set out in the Appendix of the working paper, citing, in particular, the benefits of the Committee having the option to meet virtually. One delegation, while supporting the proposed amendments, recognized that both virtual and in-person meetings have their limitations, citing the economic and administrative difficulties for some States to attend in-person, and noting the large increase in attendance during this virtual meeting. This delegation emphasized the logic and relevance of amending the Rules to cover meetings in a virtual format, taking inspiration from the Council who has avoided paralysis in its work during the COVID-19 pandemic. One delegation, whilst acknowledging the increase in number of those who joined the meeting, indicated that there is a distinction between joining the virtual meeting and the ability to participate therein. This delegation indicated that many people may have joined but may have been unable to participate in the discussions due to technological challenges and, therefore, the number of those who joined should not be a determining factor. Another delegation averred that the Council would consider the best interests of the legal community when deciding to convene a virtual meeting of the Committee.

4:4 Several delegations, although supporting the proposed amendments, queried how certain procedures would be conducted virtually. Matters to consider included how to ensure that the rule of only one vote per State is maintained by, for example, raising of hands or roll call pursuant to Rule 39.

4:5 Two delegations proposed to add some wording to Rules 3, 14, and 15, as follows:

Rule 3: The sessions of the Committee shall be convened at such times and places as may be directed or approved by the Council. Sessions of the Committee may, as an exceptional measure, [for compelling reasons, such as public health or security] [for public health, security, or other compelling reasons,] be convened by the Council in a virtual format.

Rule 14: Sub-Committees shall meet either in conjunction with the Committee or, subject to the approval of the Council, at other times and places as the Committee or Sub-Committee may deem fit. Meetings of Sub-Committees may, as an exceptional

measure, [for compelling reasons, such as public health or security] [for public health, security, or other compelling reasons,] be convened in a virtual format, subject to the approval of the Council.

Rule 15: The Committee and Sub-Committees may create working groups. Such working groups may, as an exceptional measure, [for compelling reasons, such as public health or security] [for public health, security, or other compelling reasons,] meet in a virtual format.

4:6 A majority of delegations who spoke expressed a preference for the wording in the second set of brackets, with the Chairperson pointing out that this wording was based on a strong precedent in the form of the amendment to the Rules of Court of the International Court of Justice concerning virtual hearings.

4:7 Another delegation proposed the following amendment to Rule 15:

The Committee and Sub-Committees may create working groups. Such working groups may, as an exceptional measure, for public health, security, or other compelling reasons, meet in a virtual format. [The Chairperson of such a working group may decide that the working group will meet in a virtual format in consultation with the Chairperson of the Committee or Sub-Committee, as the case may be.]

4:8 Although most of the delegations who spoke recognized the need for virtual meetings in exceptional circumstances, some delegations recommended that the Rules remain unchanged for now and that any amendments should be adopted only in conjunction with applicable guidelines containing adequate safeguards dealing with the conduct of virtual meetings, after further study. One delegation suggested that the guidelines should be similar to those adopted by the Council for its virtual meetings. This delegation, echoed by others, emphasized the technical barriers faced by developing States and, in any case, noted that the current Rules do not prevent the Committee meeting virtually. While not opposed to such amendments, this delegation stressed that they must be adopted with safeguards in place to ensure that no States are disadvantaged by meeting in a virtual format.

4:9 A number of delegations mentioned technical barriers such as virtual connection delays and inability to hear or be heard, as well as the possibility of misunderstanding the discussion due to interpretation delays. One delegation queried whether the Council had adopted a similar rule in its Rules of Procedure and it was clarified by the Chairperson after consultation with the Secretariat, that the Council had adopted guidelines (and not amended its Rules) for the conduct of virtual meetings.

4:10 Although delegations did not all agree on the timing of adopting the proposed amendments in the working paper, most delegations agreed that appropriate guidelines should be developed for technical clarity.

4:11 In summarizing the discussion at that point, the Chairperson pointed out that the majority of States who spoke were in favour of the proposed amendments. She noted the concerns of developing States with respect to technical difficulties, as evidenced by some shortcomings during this Session which must be taken into consideration. The Chairperson recognized that most of the States supporting the adoption of the amendments as proposed in LC/38-WP/4-1, also agreed with the changes to the Rules set out in paragraphs 4:5 to 4:7 above.

4:12 Accordingly, the Chairperson proposed that the Committee agree to adopt the amendments as set out in paragraphs 4:5 to 4:7, with the proviso that guidelines for virtual meetings of the Legal Committee be developed after this Session by a Secretariat group. The Chairperson requested assistance in this group from the delegations, especially those who had spoken. One delegation, in expressing support for this way forward, suggested that the draft guidelines be submitted to the next Session of the Committee. Another delegation, whilst supporting the Chairperson's proposal, suggested that since technical advances were moving quickly, the difficulties experienced by developing States should dissipate. Therefore, any guidelines should be modelled on those developed by other bodies of the Organization.

4:13 One delegation, supported by others, strongly objected to the Chairperson's summary that a majority of delegations who had spoken had favoured the amendments as proposed and that was therefore the decision of the meeting. That delegation objected on the basis that the majority view was determined on the wrong question, and it did not take into account that there were some delegations who may have wished to speak but could not because of technological challenges. The delegation concerned, therefore, proposed two motions and requested that the delegations vote on them in order to ascertain the majority support for a particular decision. This delegation proposed that a link between the Rules and the guidelines would be necessary. In response, another delegation proposed an addition to the amendments in Rules 3, 14 and 15 to the effect that "best practices and guidelines available" should be taken into account. The Chairperson requested that the matter be stood over to allow her to work with the Secretariat on text to incorporate reference to guidelines in Rule 3 and to conduct informal consultations, to which all delegations were invited to participate by submitting views. An email address was also provided for that purpose.

4:14 Following the consultations, the Chairperson presented three options for the Committee's consideration with regard to the amendments for Rule 3, with relevant amendments (if any) to be made to Rules 14 and 15 accordingly, as follows:

Option 1 — Amendments to Rule 3 for the consultations

The sessions of the Committee shall be convened at such times and places as may be directed or approved by the Council. Sessions of the Committee may, as an exceptional measure, **for public health, security, or other compelling reasons**, be convened by the Council in a virtual format **and conducted consistent with guidelines as adopted by the Committee**.

Option 2 – Alternative amendment[s] to Rule 3 with an interpretive comment for consideration following from the consultations

The sessions of the Committee shall be convened at such times and places as may be directed or approved by the Council. Sessions of the Committee may, as an exceptional measure, **for public health, security, or other compelling reasons**, be convened by the Council in a virtual format **and shall be conducted consistently with such guidelines [as the Committee adopts] [as the Committee may adopt]**.

Interpretive Comment

Where the Council has directed that a session of the Committee be convened and the Council has decided that the session will be convened in a virtual format, that session must be conducted consistently with "such guidelines" (if any) as the Committee adopts, for that session.

If the Council directs that a session of the Committee be conducted virtually, but the Committee has not (yet) adopted guidelines for that session, the rule allows for the session to be conducted in the absence of any guidelines.

Option 3 – No amendment to Rule 3 for consideration following from the consultations

The sessions of the Committee shall be convened at such times and places as may be directed or approved by the Council.

4:15 The overwhelming majority of delegations supported option 3, i.e. no amendment to Rules 3, 14 and 15. One delegation supported option 1 and one delegation supported option 2. A number of delegations mentioned the need for further consideration of the matter by the Committee at a later date and for time to prepare guidelines before proposing any amendment to these Rules to the Committee. The Chairperson concluded that the Committee had overwhelmingly decided not to make any amendments to Rules 3, 14 and 15, although this did not mean there would be no amendment in the future. The Chairperson added that there was work to be done on the guidelines, taking into account the comments and concerns made during the discussion on this item.

Agenda Item 5: Election of Vice-Chairpersons of the Committee

5:1 On the basis of LC/38-WP/5-1 and in conformity with Rule 6 of the Rules of Procedure of the Legal Committee, the Committee proceeded to the election of its Third and Fourth Vice-Chairpersons. It was noted that this election was necessary because the offices of the First and Fourth Vice-Chairpersons (Mr. Norberto Luongo, Argentina and Mr. Bader AL Mubarak, Kuwait) had been vacated, as a result of which the Second and Third Vice-Chairpersons (Ms. Susanna Metsälampi, Finland and Ms. Ellen Manga, The Gambia), in accordance with Rule 6 (b) of the Rules of Procedure, automatically became First and Second Vice-Chairpersons respectively.

5:2 Mr. Mohammed Mansoor Ali Hamed Al-Ruqaishi (Oman) and Ms. Alice Serpa Braga Della Nina (Brazil) were nominated for election as the Third and Fourth Vice-Chairpersons, respectively, by the delegation of Australia. Those nominations were seconded by the delegations of the Dominican Republic, Ghana and the United Kingdom and supported by the delegations of Argentina and Qatar. Mr. Al-Ruqaishi (Oman) and Ms. Braga (Brazil) were elected by acclamation, and will hold office for the unexpired portion of the term until the end of the 39th Session of the Committee.

5:3 The Committee expressed its appreciation to Mr. Norberto Luongo and Mr. Bader AL Mubarak for their contributions to the work of the Committee as the First and Fourth Vice-Chairpersons of the Committee since its 37th Session in 2018.

Agenda Item 6: Date, place and agenda of the 39th Session of the Legal Committee

6:1 The Secretariat presented LC/38-WP/6-1 concerning the date, place and agenda of the 39th Session of the Legal Committee. Given that the new Item 1 of the General Work Programme might dictate the timing of the 39th Session, at the invitation of the Chairperson of the Committee, the Chairperson of the Working Group for the Review of the ICAO Rules for the Settlement of Differences (the Group) updated the Committee on the finalization of its work. Speaking from his own perspective, the Chairperson of the Group indicated that he anticipated at least two further meetings of the Group in order to finalize the work, with at a minimum, the final one being held in person. He expressed the hope that the next meeting of the Group would also be held in person, either at the end of 2022 or the beginning of 2023, subject to access to Canada and ICAO Headquarters, as well as the resources of the Legal Affairs and External Relations Bureau. He further stated that if those conditions were not met, a virtual meeting, although not ideal, would be a possibility. The Chairperson of the Group concluded that, subject to the preceding conditions being met, the Group should be able to submit its final report in the second half of 2023, so as not to delay the next Session of the Committee.

6:2 One delegation expressed the view that if it was not possible to hold an in person meeting of the Group in Canada, other States might offer to host the meeting. The Chairperson of the Committee agreed that might be an option if the meeting could not be held in Canada, adding that although not an impediment, it was to be noted that there would be additional costs given the Group has interpretation services. The Chairperson of the Committee commended the Group for the progress it had made, bearing in mind that although the Group had met six times, four meetings were held virtually, with each of those only comprising three half days.

6:3 The Chairperson indicated that the scheduling of the Committee was usually left for decision by the Council. The Committee then agreed to defer to the Council the decision on the date, place and Agenda of the 39th Session of the Legal Committee.

Agenda Item 7: Any other business**Situation in Ukraine**

7:1 Several delegations and one observer intervened on the situation in Ukraine, to state that, in their view, the Russian Federation has acted in violation of international law, including with respect to the *Convention on International Civil Aviation* (Doc 7300/9) (the Chicago Convention) (Articles 1, 18 and 31) as well as the *Convention on International Interests in Mobile Equipment* (Doc 9793) and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment* (Doc 9794). Those delegations expressed particular concerns about breaches of the Chicago Convention whereby foreign aircraft leased by Russian airlines are being registered on the Russian registry while still registered in other States, and are being operated while their certificate of airworthiness had been revoked or suspended by their State of Registry. The Chairperson concluded that the interventions were noted and that she took them as being raised under Item 7: Any other business. Three delegations noted that the matters raised were not on the agenda, and one of those delegations raised a point of order to that effect. In that delegation's view, the point of order should have been dealt with before the matter could proceed, and, in its view, it was not afforded that opportunity. The Chairperson recalled that the order of the Committee's agenda items may be modified for the better conduct of its work.

Privacy laws and international carriage by air

7:2 The Committee noted LC/38-WP/7-1 presented by the observer from IATA, which was concerned with privacy laws and international carriage by air. The observer informed the Committee that IATA's Privacy Law Working Group, composed of experts of all five IATA regions, had contributed to the preparation of the working paper. The observer mentioned that technological advances and societal changes such as social media have had implications for an individual's right to privacy and that the propagation of a patchwork of national privacy laws rendered it more challenging for an airline to comply with obligations regarding the collection, use and transfer of personal data. The observer recalled Assembly Resolution A40-9, which urged States to avoid unilateral measures that may affect the harmonious development of international air transport without taking due account of its special characteristics. Reference was made to Article 29 of the Chicago Convention in the context of an airline's need to process and transfer information flows from its home base to destinations abroad.

7:3 The observer specifically highlighted the inconsistent approach in regulatory frameworks in the context of COVID-19 related health information and mentioned that IATA intended to raise the matter of privacy law in international air transport in pertinent fora, including ICAO, with a view to facilitating a consistent industry responsive approach; the observer expressed the hope that legal experts from ICAO's Member States would play a key role in the process.

7:4 The Chairperson thanked IATA for having brought the item to the attention of the Committee and noted that the exchange of personal data in the context of COVID-19 related information to facilitate international travel has highlighted the relevance of this topic.

75th Anniversary of the ICAO Legal Committee

7:5 The Secretariat presented LC/38-WP/7-2, highlighting that the year 2022 marks the 75th anniversary of the establishment of the ICAO Legal Committee by the First Session of the ICAO Assembly in 1947. The working paper outlined that the Committee has prepared draft treaty texts, which led to the adoption of twenty-four international air law instruments in the fields of aviation safety and security, aircraft and air carrier liability and aircraft finance. In this regard, it was observed that, over the years, the Legal Committee has made a significant contribution to the development and codification of international air law. Moreover, the involvement of the Legal Committee with respect to the preparation of studies on specific issues pertaining to international air law as well as in the development of guidance material on diverse topics to support States in their implementation of air law was also cited. Additionally, the working paper stressed that the Legal Committee should continue to take a leadership role in the Organization with a view to studying new and emerging issues affecting air law and identifying the means to address legal issues arising from the challenges posed as well as the opportunities offered by the changing landscape and modern realities of air transport. Member States were encouraged to promote the Legal Committee's impact on their aviation industry and legal framework.

7:6 Delegations that took the floor commended the Legal Committee for its achievements and expressed the wish that the Committee continues its excellent work on behalf of the aviation community. One observer congratulated the Legal Committee for reaching its 75th anniversary and assured of its assistance when needed. The Chairperson mentioned that the presiding officials had set a strong foundation for their successors over the years and stressed the importance for the Committee to strengthen its legacy. She also mentioned that the outcome of the work achieved by the Legal Committee was benefiting the industry as a whole as well as all ICAO Member States. She further pointed out that despite challenges, the international air law community was united to uphold the rule of law and to promote the development of international air law. The Legal Committee, while applauding the important milestone, agreed to recommend that the ICAO Assembly issue a resolution to recognize the Committee's significant contribution to the development and codification of international law as well as to commemorate its 75th anniversary.

Legal seminar hosted by the Republic of Korea

7:7 The delegation of the Republic of Korea informed the Committee that its Government will be hosting a legal seminar, co-organized with ICAO, in Seoul from 12 to 14 April 2022. The legal seminar, which will be held in a hybrid format, is intended to update participants on the Work Programme of the Organization in the legal field.

Appreciation for Dra. Marina Donato

7:8 The Chairperson recalled the loss of Dra. Marina Donato from Argentina on 18 October 2021, and her active participation in, and eminent contribution to, the work of the Legal Committee and, thereby, to the work of ICAO in the legal field for so many years, including during the 37th Session of the Committee in September 2018.

7:9 The Chairperson said that those who have been participating in sessions of the Legal Committee would certainly remember the eloquent interventions of Dra. Donato coming from the front seats of the meeting room when she participated as a delegate from Argentina, or from the back seats when she participated as an observer for the Latin American Association of Air and Space Law (ALADA) of

which she was the Secretary General. When Dra. Donato took the floor, delegates and observers generally adjusted their hearing-phones to ensure that they would not miss a word of her pertinent comments and inputs they were accustomed to, fruit of her vast knowledge and experience of international air law, in particular, and international civil aviation in general.

7:10 The Chairperson further recalled that, while on this occasion the Committee wished to pay tribute to Dra. Donato for her valuable contribution to the work and prestige of the Committee, one should not lose sight of the fact that her contribution to international air law went far beyond, as she contributed thereto through many other ways, including multiple academic activities, training courses, membership of air law associations, participation in air law symposiums and conferences and multiple publications.

7:11 The Chairperson indicated that Dra. Donato, for her various high-level positions in the Argentinian aeronautical authority, in the Latin American Civil Aviation Commission and in ICAO, was a pioneer, a female demonstrating remarkable leadership and commitment within different areas of international civil aviation, in particular air law and policy. For the important achievements of Dra. Marina Donato, the Committee, at the invitation of the Chairperson, observed a minute of silence in her memory.

Appreciation for Dr. Jiefang Huang

7:12 On the occasion of the 75th anniversary of the establishment of the ICAO Legal Committee, the Chairperson, on behalf of the Committee, wished to express gratitude and recognition to former Director of the ICAO Legal Affairs and External Relations Bureau, Dr. Jiefang Huang, for his deep involvement in international air law with great passion and enthusiasm, for more than 25 years. His contributions have helped further the development and codification of international air law.

7:13 The Chairperson highlighted, in particular, Dr. Huang's involvement, as one of the main architects of the Beijing Convention and Protocol of 2010 and of the Montréal Protocol of 2014, as well as his contributions to the advancement of air law as a passionate scholar and through his specialized publications.

7:14 The Chairperson said that Dr. Huang, through all his endeavors, has remained true to his character, marked by respect, generosity and humanity; that his work and legacy are truly appreciated and that he will be remembered as a great speaker and teacher. She expressed confidence that Dr. Jiefang Huang will continue to contribute to international air law as a renowned professor, and wished him good health, happiness and success.

Concluding Remarks

7:15 The Chairperson proposed that the new parts of the draft report on Item 4 (together with the amendments of one delegation who had strongly requested that it be allowed to provide amendments to certain paragraphs to reflect its interventions), and the draft report for Items 5, 6 and 7, would be made available to the Committee for comment following the meeting. The Committee would then have two weeks to provide comments thereon after which the Chairperson would finalize the report on those items under delegated authority from the Committee. This way forward was agreed by all but one delegation. As the time allocated for the Session and for interpretation services had come to an end, and as not all those participating in the meeting consented to dispense with interpretation and continue only in English, the Chairperson brought the Session to a close and thanked and wished everyone well.