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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

EXONERATION OF OTHER SERVICE PROVIDERS

(Presented by Germany)

1. INTRODUCTION

1.1 At its 182nd session the Council has decided to submit the Draft Convention on Compensation for Damage caused by Aircraft to Third Parties, in Case of Unlawful Interference to the 33rd session of the Legal Committee and requested that the Legal Committee takes into account the concerns raised by Germany in C-WP/13087 and pays attention to possible ways of protecting the interests of victims most efficiently and ensures the ratifiability of the revised Convention and the operability of the funding mechanism. One of the issues raised by Germany in C-WP/13087 concerns the vast exoneration of other service providers.

2. THE CURRENT DRAFT: VAST EXONERATION DISREGARDS INTERESTS OF VICTIMS AND AIRCRAFT OPERATORS

2.1 The Draft provides in Article 27 that the claim against the operator under the Convention is an exclusive remedy and therefore shields other entities, which could have contributed to the damage, from their liability. Additionally, Article 25 excludes almost any recourse of the operator liable for third party damage to anybody else who contributed to the damage. This complete exclusion of liability is granted to the other entities without obliging them to contribute to the SCM and regardless of the basics of tort and contract law. In consequence victims may well remain uncompensated, e.g. if the SCM is exhausted, whereas those who have contributed to the damage are protected by the Convention and continue to operate.

2.2 This “channelling” of claims onto the operator is especially critical concerning entities that are involved in operational areas of air traffic and therefore constitute severe risks for the operators’ safety, such as air navigation service providers, airports, security providers and ground handling service

providers. In cases where the other entity has acted with fault and has thus contributed to the damage it is not justifiable that it benefits from the exclusion of liability – without even having contributed to the SCM – whereas the victims risk not receiving any compensation if the resources of the SCM are exhausted. The other entity however is perfectly able to effect payments. Up to that point it has not touched its financial means since the first layer is borne by the operator's insurance and the second layer by the passengers, who have contributed to the SCM.

Additionally, it can hardly be considered fair if the operator, who is held strictly liable in case of an incident, should not have a right of recourse against those who actually caused or contributed to the damage.

Another issue to be taken into account is that the current exoneration concept does not set incentives to improve security measures and in the worst case could prompt service providers to reduce security measures as well as the costs spent on those measures, since there would be no liability in case of damage.

Apart from that, it cannot be neglected that such a general exclusion of liability would encompass manufacturers of aircraft as well. This however contradicts European Community law on product liability and must prevent EC Member States from ratifying the Convention.

The vast exoneration of entities and persons contributing to the damage in connection with the limited liability of the airlines puts the victims at a disadvantage that is by no means justifiable, clearly contradicts the aim of the Convention and makes it impossible for policymakers to implement such a system.

3. THE PROPOSAL

3.1 Therefore Germany proposes to grant exoneration only to those entities who are not involved in the operational process, such as owners of aircraft or lessors and financiers of aircraft, but to maintain exposure to liability of those who are involved in the operational process and therefore can contribute to damage. Furthermore, Germany proposes to grant the right of recourse according to national law to the operator and to the SCM.

To this end Germany recommends the following changes:

– Article 27 should be deleted.

– A new Article 4 *bis* should be inserted, reading as follows:

"Without prejudice to Articles 3, 4, 5 and 25 owners, lessors and financiers of aircraft shall not be obliged to pay compensation for damage covered by this Convention."

– Finally, Article 25 paragraph 1 and 2 should be deleted and replaced by the following wording:

"1. Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any person. The right of recourse is subject to the full compensation of all third parties.

2. Nothing in this Convention shall prejudice the question whether the Supplementary Compensation Mechanism has a right of recourse against the any person. However, the Supplementary Compensation Mechanism shall only have a right of recourse against the operator, if the limits of Article 4 paragraph 1 do not apply. The right of recourse of the Supplementary Compensation Mechanism is subject to the full compensation of all third parties."

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