



A39-WP/464
LE/15
29/9/16

ASSEMBLY — 39TH SESSION
LEGAL COMMISSION

DRAFT TEXT FOR THE REPORT
ON
AGENDA ITEMS 44 & 45

The attached material on Agenda Items 44 and 45 are submitted for consideration by the Legal Commission.

Agenda Item 44: Annual Reports of the Council to the Assembly for 2013, 2014 and 2015

44:1 The Commission noted the chapters of the Annual Reports of the Council to the Assembly for the years 2013, 2014 and 2015 as well as the Supplement for the first half of the year 2016 which had been referred to it by the Plenary.

Agenda Item 45: Work Programme of the Organization in the legal field

45:1 The Committee considered this item on the basis of A39-WP/12, presented by the Council, A39-WP/77 (Revision No. 1), presented by Canada, Mexico, Nigeria and the United States; A39-WP/100, presented by the United States; A39-WP/101, presented by the United States; A39-WP/228, presented by the Republic of Korea; and A39-WP/375, presented by Egypt. The Commission noted Information Paper A39-WP/422, presented by Brazil, Canada, Ireland, Luxembourg, Norway, Singapore, Spain, United Kingdom and the United States.

45:2 A39-WP/12 provided information to the Assembly regarding the on-going work of the Organization in the legal field and an overview of the developments and relevant decisions taken by the Council and the Legal Committee since the previous session of the Assembly in relation to the items on the Work Programme of the Legal Committee, including the prioritization of items. Information on legal work in certain additional areas, namely, international interests in mobile equipment (aircraft equipment) and review of the application of ICAO treaties relating to conflict zones was also presented to the Commission.

45:3 With respect to “Study of legal issues relating to remotely piloted aircraft”, it was noted that consistent with the conclusions of the 36th Session of the Legal Committee (Montréal, 30 November to 3 December 2015) and the decision taken by the Council during the 7th Meeting of its 207th Session, the ICAO Legal Affairs and External Relations Bureau had on 29 August 2016 initiated a survey as a means of gathering information on national RPAS legislation for comparative purposes, and as a means to identify international legal issues that RPAS integration was presenting for States, in order to identify legal aspects of RPAS operations that still might need to be addressed. It was further noted that States have been asked to submit their responses to the survey by 31 October 2016. Substantive issues related to RPAS are taken up below, under Item 47.

45:4 Concerning the item “Consideration of Guidance on Conflicts of Interest”, the delegate of Canada, on behalf of the co-sponsors, presented A39-WP/77 Revision No.1, highlighting that conflicts of interest may hamper effective, independent and impartial regulation of civil aviation and thereby pose risks to the safety and security of international civil aviation; and calling for the adoption of an Assembly resolution to promote awareness of potential conflicts of interest in civil aviation as well as the need to take measures to avoid or mitigate risks from conflicts of interest to aviation safety and security. He drew the attention of the Commission to the associated financial implications of future work under this item, as reflected in the Executive Summary of the working paper, that the activities referred to in the Resolution would be undertaken subject to the resources available in the 2017-19 Regular Programme Budget and/or from extra budgetary contributions.

45:5 All delegations who took the floor expressed support for the working paper and the resolution. One delegation, noting that *Annex 19 – Safety Management* contained provisions calling for the establishment of guidance for the avoidance of conflicts of interest in the performance of safety oversight functions, suggested that reference be made to Annex 19 in the resolution. Several delegations highlighted the need to take into account the level of development and resources available to States in prescribing measures to deal with conflicts of interest and called for a balance to be drawn in that regard between the particular circumstances of States and the risks posed by conflicts of interest.

45:6 The Commission acknowledged that it would be appropriate to include supplementary text in the resolution to address the additional clarifications and proposals made by delegations.

The Commission then agreed to recommend to the Plenary the adoption of the following resolution:

Resolution 45/1: Conflicts of interest in civil aviation

Recognizing that conflicts of interest may hamper effective, independent and impartial safety regulation of civil aviation and thereby pose risks to the safety and security of international civil aviation;

Acknowledging the need for and the benefits of drawing upon the experience and expertise of qualified industry personnel to help ensure that important regulatory oversight functions can be provided;

Recalling that the item “Consideration of Guidance on Conflicts of Interest” was added to the General Work Programme of the Legal Committee by the 37th Session of the Assembly and subsequently was endorsed by the Legal Committee, the Council and the 38th Session of the Assembly, which elevated its priority;

Aware that under the United Nations Convention Against Corruption adopted by the General Assembly on 31 October 2003, States have the obligation to endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest;

Considering that Annex 19 – *Safety Management* and ICAO guidance material identify the need for States *inter alia* to establish a strategy to mitigate potential issues arising from conflicts of interest in civil aviation; and

Convinced of the need for States to share information concerning policies and measures used to detect, avoid, mitigate and manage conflicts of interest in civil aviation;

The Assembly:

1. *Urges* States which have not done so to consider establishing a formal legal framework to detect, avoid, mitigate and manage conflicts of interest in civil aviation;
2. *Invites* States:
 - a) to examine at the national level the adequacy of their domestic legal regimes on measures and practices to detect, avoid, mitigate and manage conflicts of interest in civil aviation, with a view to ensuring and improving transparency and accountability in civil aviation regulatory activities and to balancing their particular circumstances and ability to fulfil their oversight obligations with addressing the risks to aviation safety and security posed by conflicts of interest; and
 - b) where necessary, to enact legislation and establish systems, codes and practices which promote the awareness of potential conflicts of interest in civil aviation;

3. *Urges* States to ensure the enforcement of rules and measures to detect, avoid, mitigate and manage conflicts of interest relating to safety oversight in civil aviation;
4. *Mandates* the Council to facilitate the collection, analysis, dissemination and promotion of best practices addressing conflicts of interest for the benefit of Member States, taking advantage of existing expertise in the States and within the United Nations and other relevant international organizations;
5. *Requests* the Secretary General to continue to collect information from States and relevant intergovernmental organizations, concerning policies and measures used to detect, avoid, mitigate and manage conflicts of interest in civil aviation, in order to advance the study of this issue;
6. *Requests* the Secretary General to develop a reference document identifying all provisions in the Annexes and manuals relating to conflicts of interest;
7. *Mandates* the Legal Committee to keep the issue of conflicts of interests in civil aviation under regular review; and
8. *Calls upon* States to extend to the Secretary General their full support and assistance in the implementation of the present resolution, including the provision of expertise and information.

45:7 With respect to the subject “Acts or offences of concern to the international aviation community and not covered by existing air law instruments”, the Commission noted with satisfaction that further to the adoption of the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, the Task Force on Legal Aspects of Unruly Passengers was making process in updating ICAO Circular 288 (*Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*). It also noted the report in A39-WP/12 on the items “Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS) and the regional multinational organisms, of the establishment of a legal framework”, “Determination of the status of an aircraft – civil/State aircraft”, and “Safety aspects of economic liberalization and Article 83 *bis*”.

45:8 Concerning the “Promotion of the ratification of international air law instruments”, in its presentation of A39-WP/100, the delegate of the United States asked that a greater effort be made to urge ICAO member States which have not done so to ratify the Montréal Convention of 1999. He recalled some of the major provisions and innovations that are contained in the Convention, to wit: (1) it does away with the prior’s regime low levels of recovery in cases of a passenger’s injury or death by establishing a first tier of strict liability, with recovery of proven damages beyond that limit (currently set at 113,100 Special Drawing Rights) unless the air carrier can show that it was not at fault or if it can prove that a third party was at fault; (2) the Convention ensures that passenger recoveries are not unreasonably high by not allowing the imposition of punitive, exemplary or other types of non-compensatory damages; (3) the Convention allows a plaintiff to bring an action in his or her home country, a benefit often prevented under the previously applicable rules of the Warsaw Convention and the Hague Protocol; (4) the Convention establishes a clear allocation of liability in code share situations; and (5) the Convention accommodates an efficient document system with respect to the carriage of cargo. The delegate emphasized the need to do away with the confusing patchwork of parallel liability regimes in order to create a uniform framework with legal certainty. In light of the above, he invited the Commission to adopt the draft Resolution contained in working paper A39-WP/100.

45:9 In the ensuing consideration of this matter, all delegations and one observer expressed strong support for both the working paper and the draft Resolution. One of these delegations highlighted the positive influence of the Montréal Convention of 1999 on the element of assistance to relatives of victims of aircraft accidents. In his summary on this point, the Chairperson noted the wide support for the proposal contained in the working paper and, subject to a minor adjustment to be made by the Secretariat, the adoption of the draft Resolution. The Commission consequently recommended the following resolution for adoption by the Plenary:

Resolution 45/2: Promotion of the Montréal Convention of 1999

Recalling its Resolution A37-22, Appendix C, relating to the ratification of instruments which have been developed and adopted under the auspices of the Organization, and Resolution A38-20, *Promotion of the Montréal Convention of 1999*;

Recognizing the importance of achieving a universal regime to govern airline liability to passengers and shippers on international flights;

Recognizing the desirability of an equitable, fair and convenient system that allows full compensation for losses;

The Assembly:

Urges all Contracting States to support and encourage the universal adherence to the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montréal on 28 May 1999 (Montréal Convention of 1999);

Urges all Contracting States that have not done so to become Parties to the Montréal Convention of 1999 as soon as possible; and

Directs the Secretary General to provide assistance, as appropriate, with the ratification process if so requested by a Contracting State.

Declares that this resolution supersedes Resolution A38-20.

45:10 The United States further presented A39-WP/101, which recalled that the 37th Assembly, in Resolution A37-23, urged States to ratify the Beijing Convention and Beijing Protocol of 2010. Underlining the importance of these two instruments, which had broadened and strengthened the global civil aviation counter-terrorism framework, the delegation expressed the belief that the universal adoption of these instruments would significantly advance cooperation in the prevention of the full range of unlawful acts relating to civil aviation and the prosecution and punishment of offenders. Accordingly, the United States proposed that a new resolution be adopted to promote the ratification of these instruments.

45:11 Many delegations supported the draft Assembly resolution presented in A39-WP/101. One delegation mentioned that its region had indicated strong support for the promotion of the Beijing instruments, and its national legislative authority was in the final stage of completing the process of ratification. Other delegations also mentioned similar progress in their respective States. Some delegations mentioned that their State's had promptly ratified the two instruments and encouraged others to do the same.

45:12 Upon the suggestion by the Secretariat, the Commission agreed to fine-tune the draft resolution, and to mention that this new resolution would supersede the previous one. The revised text of the draft resolution is as follows:

Resolution 45/3: Promotion of the Beijing Convention and the Beijing Protocol of 2010

Recalling its Resolution A38-19 entitled Promotion of the Beijing Convention and the Beijing Protocol of 2010;

Recalling further its Resolution A37-22, Appendix C, relating to the ratification of instruments which have been developed and adopted under the auspices of the Organization; and

Recognizing the importance of broadening and strengthening the global aviation security regime to meet new and emerging threats;

The Assembly:

1. *Urges* all States to support and encourage the universal adoption of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing Convention of 2010) and the Protocol Supplementary to the *Convention for the Suppression of Unlawful Seizure of Aircraft* (Beijing Protocol of 2010);
2. *Urges* all States to sign and ratify the Beijing Convention and Beijing Protocol of 2010 as soon as possible;
3. *Directs* the Secretary General to provide assistance, as appropriate, with the ratification process if so requested by a State; and
4. *Declares* that this resolution supersedes Resolution A38-19.

45:13 Additional discussion concerning the ratification of international air law instruments was undertaken under Agenda Item 47.

45:14 A39-WP/228, containing an offer by the Republic of Korea to host a Regional Legal Seminar in 2018 to address legal matters of interest in the Asia-Pacific Region, was noted by the Commission with appreciation.

45:15 In the context of the international interests in mobile equipment (aircraft equipment), Egypt presented A39-WP/375, proposing that ICAO establish a Committee of Experts or a Working Group affiliated with the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) to assist developing countries with the implementation of the *Convention on International Interests in Mobile Equipment* (Cape Town Convention) and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment* (Cape Town Protocol), both signed at Cape Town on 16 November 2001. The delegation based this proposal on Resolution No. 4 of the Diplomatic Conference of 2001. In referring to the problems of implementation for developing States outlined at paragraphs 2.2 to 2.4 of the working paper, the delegation considered it imperative to benefit from the experience of developed States that have implemented the Cape Town

instruments, and opined that the establishment of a Committee or Working Group would be the appropriate mechanism in this regard.

45:16 One delegation, supported by two others, did not support the establishment of a Committee or Working Group, but rather considered that assistance with the implementation of the Cape Town instruments should more appropriately come from developed States, and from industry, and cited the Aviation Working Group (AWG) as very active in this area. This delegate, in his capacity as a member of CESAIR, also noted that Resolution No. 4 was limited to matters only related to the International Registry. One of the supporting delegations referred to A39-WP/422 (Information paper) which outlined the advantages associated with the ratification of the Cape Town instruments, and appreciated the complexity involved in their ratification and implementation, but further stressed that States and industry were better positioned to assist developing States. One observer, in supporting the position expressed by the three delegations, noted that the issues identified by the Egyptian delegation dealt with fundamental policy choices made by a State, core questions of property law, secured transactions, etc. and were outside the competence and expertise of CESAIR. One delegation, in supporting the working paper, stated that provision of developed States' expertise did not preclude assistance by ICAO. Another observer suggested that ICAO act as a clearing house by brokering expertise for interested States.

45:17 The Secretariat expressed appreciation for the difficulty faced by developing States with regard to the complexity of the Cape Town instruments. However, given the highly specialized area, it would appear that developed States with experience were in a better position to assist, although this issue could be re-visited in the future.

45:18 The Chairman of the Commission concluded the discussion on this working paper by citing merit in the proposal, while recognizing other more appropriate avenues of assistance.

45:19 The Commission noted A39-WP/422 (Information paper) presented by Brazil, Canada, Ireland, Luxembourg, Norway, Singapore, Spain, United Kingdom and the United States.

45:20 With respect to the subject "Review of the Application of ICAO Treaties relating to Conflict Zones", an observer mentioned that ICAO deserved credit for the important work achieved in this area, including the creation of a Task Force, following the downing of an aircraft in the Ukraine. However, it questioned the absence of this subject in the General Work Programme of the Legal Committee. It was recalled that in a similar event, namely the shoot-down of KAL 007 in 1983, ICAO acted swiftly to amend the Chicago Convention in the form of Article 3 *bis*. To this end, this observer was of the view that further consideration should be given to include this subject in the General Work Programme of the Legal Committee. The Commission noted this comment.