



## **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 (GENERAL RISKS CONVENTION)**

(Presented by the International Air Transport Association – IATA)

#### **1. BACKGROUND**

1.1 The Special Group on the Modernization of the Rome Convention of 1952 (SG-MR) has held six meetings to develop a draft Convention on Compensation for Damage Caused by Aircraft to Third Parties (the “General Risks Convention”). The SG-MR also developed another draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference (the “Aviation Terrorism Convention”). This Working Paper only intends to address the General Risks Convention.

1.2 In its 182nd Session the ICAO Council agreed to convene the 33rd Session of the Legal Committee from 21 April to 2 May 2008 in Montreal. It also decided to include the draft General Risks Convention in Agenda Item 3. Furthermore, the ICAO Council expressly instructed the Legal Committee to accord the same level of priority to both drafts.

#### **2. DISCUSSION**

2.1 Following the model established in the *Convention for the Unification of Certain Rules for International Carriage by Air* signed in Montreal on 28 May 1999 (“MC 99”), the draft General Risks Convention seeks to impose a strict liability regime for damage sustained by third parties, subject to the sole condition that the damage was caused by an aircraft in flight.

2.2 In principle, air carriers will be strictly liable for claims up to [250,000 - 500,000] Special Drawing Rights (“SDR”) per third party. The square brackets indicate that the actual level of strict liability is still subject to discussion. However, the Legal Committee will note that these proposed amounts are substantially higher than the liability limit contained in MC 99. No explanation has been given to support this divergence between the two regimes.

2.3 In a case where third party claims exceed the proposed liability limit discussed above, the air carrier may exonerate itself by proving either that the damage was not due to its negligence or that it was due solely to the negligence of another person.

2.4 As a general principle, the General Risks Convention is only applicable if damages occur in the territory of a State Party, and the carrier has its principal place of business in another State Party.

2.5 Another clear distinction from MC 99 arises from the fact that the draft General Risks Convention provides for compensation in the case of mental injury, provided that this is caused by a recognisable psychiatric illness that results either from a bodily injury or from a reasonable fear of exposure to death or bodily injury.

2.6 Unlike the concept adopted in the draft Aviation Terrorism Convention, which provides for a clear per incident limit, the draft General Risks Convention adopts a cap that is based on each potentially affected third party on the ground. Due to the fact that the number of such victims is impossible to predict, the total compensation that a carrier could potentially be obliged to pay per incident is simply limitless.

2.7 The idea that the MC 99 liability regime should be mirrored in the General Risks Convention, an international instrument addressing damages caused to third parties on the ground, is simply flawed. In a MC 99 scenario, the carrier's exposure is directly related to the number of seats offered to passengers. This fact, which appears to have been overlooked in the draft General Risks Convention, facilitates the underwriting of insurance in respect of potential liability to the passengers on board the air carrier's aircraft.

2.8 The Legal Committee's attention should also be drawn to the fact that the General Risks Convention may well give rise to unintended effects. It is clear that the draft will only contribute to the inability of air carriers to obtain insurance for third party risks. Furthermore, the proposed approach disregards long-standing aviation insurance practice to take into consideration the Maximum Take-off Weight of the aircraft as one of the determining elements.

2.9 If ever adopted by a Diplomatic Conference, the General Risks Convention will be a great step towards a significant increase in aviation insurance premiums. The resulting rise in the industry's operating cost will inevitably be passed on to the travelling public.

2.10 The draft General Risks Convention also disregards the fact that the domestic laws of countries adequately deal with major aviation incidents that involve damages to third party ground victims. The proposed draft does not provide any incentive to the air carriers to adopt the Convention over the liability regime in the domestic law of most ICAO Member States for this type of loss. Moreover, if adopted, insurance premiums may be so excessive such to threaten the financial viability of air carriers.

2.11 Regrettably, the draft General Risks Convention has not been given a significant level of real-world industry scrutiny or analysis. Nor has it gained any significant level of support. In short, industry stakeholders do not see any need for the adoption of the proposed Convention.

2.12 If, however, the Member States of the Legal Committee decide to pursue the consideration of the draft General Risks Convention, the two-tier liability regime which mirrors that provided for in MC 99 should, without doubt, be revised. In this regard, IATA respectfully proposes that the General Risks Convention adopts an overall liability cap based on the actual weight of the aircraft. This could easily mirror article 4 of the proposed Aviation Terrorism Convention.

2.13 For the avoidance of doubt, IATA would like to underline the fact that the above proposal contained in paragraph 2.12 should only be given consideration in the event that the Legal Committee does decide to pursue its work on the draft General Risks Convention.

### 3. **CONCLUSION**

3.1 In light of the foregoing, IATA does not see any merit in adopting the draft General Risks Convention in its current form. Thus, the Member States of the Legal Committee are strongly urged simply to suspend any further consideration of the draft.

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