



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 CONVENTIONS ON COMPENSATION FOR DAMAGE CAUSED BY
AIRCRAFT TO THIRD PARTIES (GENERAL RISKS CONVENTION AND
UNLAWFUL INTERFERENCE COMPENSATION CONVENTION)**

EXCLUSIVE REMEDY

**General Risks – Article 10 *bis*
Unlawful Interference – Article 27**

(Presented by the Air Crash Victims Families Group)

1. BACKGROUND

1.1 During the early discussions prior to the 32nd Session of the Legal Committee the question arose whether the owner, lessor or financier should be exonerated from liability under this Convention.

1.2 The MR-SG first included, then rescinded and later reintroduced an exoneration from liability by the owners, lessor and financier in the *Draft Convention On Compensation for Damage Caused by Aircraft to Third Parties*, as a bracketed Exclusive Remedy [Article 10 *bis*].

1.3 In the *Draft Convention On Compensation for Damages Caused by Aircraft to Third Parties, In Case of Unlawful Interference*, Article 27 – Exclusive Remedy: “*action for compensation for damage. can only be brought against the operator*” and that “*no claims shall lie against any other person for such damage*”.

2. DISCUSSION

2.1 The Draft General Risks Convention proposes in brackets [Article 10 *bis*] to exonerate from liability the owner, lessor and financier from liability under this Convention.

2.2 The Draft Unlawful Interference Compensation Convention proposes (without brackets) to limit exclusive liability to the operator alone – exonerating **all** other possible parties (Article 27).

2.3 The possibility for a defendant to exonerate himself when proving that somebody else has caused and or is jointly responsible for the damage is one of the structural elements of liability.

2.4 The present Draft Conventions provide exactly the opposite:

- 2.4.1 shielding either a specific group (Article 10 *bis* - General Risks).
- 2.4.2 or exonerating **all** other possible parties (Article 27 – Unlawful Interference).
- 2.5 The following consequences may arise:
 - 2.5.1 The “Supplemental Compensation Mechanism” would be exposed to earlier assistance to cover damages in excess of operators insurance – although third parties may be liable or jointly liable, but will thus be exonerated in advance under the terms of those two Conventions.
 - 2.5.2 Both victims and the SCM would be deprived of an important source of contributions to the payment of damages.
 - 2.5.3 The operator would be solely liable without determination of possible joint liability.
 - 2.5.4 Victims would be deprived of due process against possible liable, or joint liable, parties.
- 2.6 Advance exoneration also raises another issue because liability law must not only aim at a fair compensation – **but even more at preventing the creation of liability claims by taking all reasonable measures to avoid the damage in the first place.**
- 2.7 General exoneration (creating immunity) of third parties from liability before an event has even occurred, would mean:
 - 2.7.1 encouragement to lower the level of care and attention to produce safe equipment,
 - 2.7.2 reduction in rendering full reliable services,
 - 2.7.3 relaxation in screening out potential lessors that may commit terrorist acts,
 - 2.7.4 financing the operation of rogue companies, possibly involved in unlawful activities,
 - 2.7.5 allow murky owners that can cause damage to become operators,
 - 2.7.6 reduce the quality and proper supervision/screening of air support services,
 - 2.7.7 as well as lower the high quality level of air traffic, airport safety and security operations.

3. CONCLUSION

- 3.1 To modify general liability rules is not the task of this Convention.
- 3.2 The modification of general liability rules would impede or even prevent ratification of the Convention in the States, most important to the sourcing of funds for the SCM.
- 3.3 Advance exoneration of third parties would put a heavy financial burden on the operators and on the SCM.
- 3.4 Advance exoneration would deprive victims and their families of “due process” and

3.5 generate costly, lengthy litigation.

4. **ACTION SUGGESTED**

4.1 STRICT LIABILITY (GENERAL RISKS) CONVENTION: **STRIKE ARTICLE 10 *bis***

4.2 UNLAWFUL INTERFERENCE CONVENTION: **STRIKE ARTICLE 27**

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