International Civil Aviation Organization

WORKING PAPER

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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

(Presented by the Latin American Association for Aeronautical and Space Law – ALADA)

1. After seven years of hard and constant work at multiple formal and informal meetings, the international aeronautical community now has two draft conventions, in the process of modernizing the Rome Convention of 1952 and its Additional Protocol of Montreal of 1978, on damage caused by foreign aircraft to third parties on the surface.

2. ALADA has followed the process with great interest, and participated at many of such meetings as an observer, stating its opinion based on legal solutions provided by legislation and court decisions in its member Latin American countries.

3. In this order of ideas, on repeated occasions ALADA has given its opinion on the desirability of not separating the way of approaching the matter of damage, and supported it not only for methodological reasons, but also by understanding that the third party – who deserves protection of its rights to the fullest possible extent – is not concerned with the classification of sources of the damage that affected its person or property. In order to contribute to such efforts, ALADA accompanies the majority view as regards the treatment of *"general or ordinary hazards"* independently from *"acts of unlawful interference"*, which has given rise to two draft conventions submitted for review by the Legal Committee (LC/33-WP/3-1 Appendices B and C).

4. With this clarification, due to the progress made in preparing the two draft conventions, ALADA makes the following comments with respect to certain matters contemplated in both draft conventions:

a) **With respect to the draft *Convention on compensation for damage caused by aircraft to third parties***

i) The new location of the scope of *"damage"* in Chapter II (Article 3, paragraph 6) referred to *Liability of the Operator and Related Issues*, is considered a feasible alternative. In this way it would include *emotional harm***,** subject to psychiatric examination determining an illness, as a consequence of a bodily injury or a reasonable fear of exposure to death or bodily injury.

[1] English and Spanish versions provided by ALADA.

(6 pages)

This formula, which follows a restrictive and strict criterion, would have overcome such interpretation difficulty, and shows the purpose of encompassing all damage involving lawful interests of a person as a subject under the law, and discards equivocal items of damage that result from subjective criteria.

Once more, ALADA recalls that the courts in Latin American countries acknowledge a movement that tends to provide the harmed party legal protection in order to achieve equitable distribution of damage, which specifically includes emotional harm.

ii) As regards Article 2 (*Scope),* as said before, in order to maintain a good level of legislative technique, it would be advisable to include the current Articles 18 and 19 in Chapter V (*Applicability of the Convention)*, after Article 2 under the label **Exclusions from the Scope**, cases where other specific rules would apply and not the rules in the convention, such as government aircraft and nuclear damage. Besides, ALADA agrees with the solution that eliminates any reference to the condition of employees contractually associated to the responsible operator, because there could be damage – as has already happened in fact – caused by parties who appeared to have a contractual relationship with the damaging agent, and for this reason were not received the related redress for their damage.

iii) Chapter II (*Liability of the Operator and Related Issues)*
The formula selected to regulate the operator's liability is quite similar to the formula used in the Montreal Convention of 1999 for a contractual situation, and is subject to the same comments made by the applicable authority.

In cases such as those regulated by the draft convention, creating a strict liability system is unquestionable. Domestic legislation in Latin American countries follows the same risk principle to allocate liability.

This strict liability theory adapts to the requirements of justice in the case of damage caused to third parties. In principle, it determines strict liability by providing that the operator is liable to third parties, subject only to the damage having been caused by an aircraft in flight, within the broad meaning of such operation in the draft.

It should be construed that the operator's compensation obligation is limited to the amount of 250,000 SDRs or such as may result after being determined at the diplomatic conference.

Up to this point there would be no further comments to make, unlike Article 3, second paragraph, which refers to a type of subjective liability, which formula may apply where damages exceed the amount between square brackets.

According to this solution, in order for an operator not to be liable it should first demonstrate a negative event, i.e. that the damage was not attributable to any negligence or to any other wrongful act or omission by itself or its employees or agents. The following paragraph contemplates the matter of

evidence, of a positive fact in this case, such as the other person's negligence or other act or omission.

No doubt that, in the first case, the operator will have to demonstrate to the courts a positive event, i.e. that the damage was due either to an act of God or an event of *force majeure*, so the damage was not due to any negligence or other wrongful act or omission of itself or any agents or employees thereof, a negative evidence that is quite difficult to produce.

Thus, we cannot understand the reason for including this mixed formula that is not consistent with the nature of what should be regulated, which is nothing else than tort liability based on *created risk* or *benefit risk*, which arises in such situations where the third party has no contractual connection whatsoever to the operator, who finally benefits from the development of the aircraft activity.

Strictly speaking, the draft creates a strict liability, but to the exclusion of an act of God, an event of *force majeure* or a third party action, under a subjective liability system. To this we should add another exclusion consisting in any act or omission of the plaintiff or person from whom the plaintiff's claim arises, under Article 8, so the situation of the party causing the damaging event is not at all difficult, if we also take into account the compensation limits provided for its benefit.

iv) Article 4 (*Events involving two or more operators or other persons)*, determines joint and several liability of the aircraft operators, and makes the liability action lie with the allegedly responsible parties within the limits of their liability and contribution to cause the damage. Likewise, and briefly, it provides for the notion of a collision, the solution of which is a highly complex matter. This policy agrees with the suppression of the phrase "on the surface" from the convention, and with the meaning given to a third party in the definitions, which includes the operator, owner, crew, passenger, consignee of goods on board of the other colliding aircraft.

v) Another notion taken from the Montreal Convention of 1999 is that of advance payments (Article 6), which is commendable because it contemplates humanitarian reasons. However, in the same way as Article 28 of that Convention, it provides that the payment is subject to the national legislation of the place were the damage occurred.

As we have said in other occasions, we would have preferred that this major legal principle be mandatory, and adopted the provisions in the relevant European Regulation on the matter, in order to remove any uncertainty that may arise in its implementation.

vi) Chapter IV, Article 10 (*Exclusive Remedy)*, should adopt the solution in Chapter VII, Article 27 (*Exclusive Remedy)*, which appears in the other draft convention on extraordinary risks, as it adopts fairness principles, especially where it disregards the applicability of the convention to any acts of an individual who incurred in unlawful behavior in the causing of the damage.

As the compensation limits provided in the draft convention do not apply, in any cases resulting from a deliberate act or omission of the operator or employees thereof, with intent to cause damage, compensation is subject to the national legal systems.

This would be a commendable solution because the penalty applied to malicious behavior would be fair, as it gives rise to different regulations, by distinguishing it from any behavior where there was no deliberate intent to cause harm.

Article 7 relates to an important matter, *insurance*. Unlike the Rome Convention of 1933, which provided for mandatory guarantees, the Rome Convention of 1952 which chose to provide a detailed regulation on guarantees and insurance, the draft preferred the solution of Article 50 of the Montreal Convention of 1999, i.e. providing that the Party States shall require an operator to maintain suitable insurance or sufficient guarantee to cover its liability under the convention.

b) **Draft *Convention on Compensation for Damage caused by Aircraft to Third Parties, in case of Unlawful Interference***

i) Comments on the location of the definition of "damage", and the methodological reasons claimed to support relocation of Chapter VIII immediately after the scope of applicability, and likewise the provisions for cases where two or more operators or other persons are involved, advance payments and insurance, among other situations, have already been addressed in our comment on the draft convention discussed above, and which also apply to the draft on extraordinary risks.

ii) Chapter II *(Liability of the Operator and Related Issues)* determines a strict liability system provided that the damage has been caused by a flying aircraft within the wide scope contemplated in the draft convention. Other possible sources of damage, such as falling persons or things, are eliminated.

The clarifications in the other four paragraphs of this provision are commendable, such as the rule providing that the damage must be a direct consequence of its originating event, that the damage to the environment is compensated under the legislation of the jurisdiction where the damage occurred, and stressing that compensation has not a punitive, exemplary effect but a compensatory one, and also the conceptual scope of emotional harm, which we have referred to above.

In the opinion of ALADA, an objection may be made to the compensation limit due from the operator for each aircraft and event, by reference to the aircraft weight, given by the maximum certified mass of the aircraft at takeoff. It should be recalled that all compensation limits are desirable for their beneficiary, but not to the party who sustained the damage. By reason of the limit, the operator may or not risk property of higher value than the property used in the business. Many times the damage caused is not redressed, a limit implies transferring costs from one sector to another, a displacement of risk. This limit conceals a protectionist rule that has no legal

basis, although it has a political basis. Limiting liability violates essential rights established by the international community, such as the right to equal treatment, because it is provided for the benefit of only one of the parties, to the detriment of the parties harmed by the event.

For this reason, we would have preferred comprehensive redress, which is the rule in more than one modern aeronautical legislation in Latin American countries, not subject to any limits, as difficulties could arise from the fact that greater damage could result from a small or medium-sized aircraft falling in a place of high population density, as compared to a large aircraft flying over a water mirror or a desertic location. However, pursuant to the purpose of contributing to obtain a high number of ratifications of the draft conventions, which has been much insisted upon, we support the opinions stated in the process of preparing the drafts, and cannot agree with those who wish the limits to be definitive, as this is not consistent with elementary legal principles embodied in the constitutions of different countries in Latin America.

It is thus that we are pleased to see the solution described in Article 24 (*Additional Compensation).* Even under exceptional circumstances, the compensation limits can be exceeded, and the three situations contemplated would involve gross negligence equivalent to malice, which the draft has tried to overcome by reason of inconsistency with various common law and continental law legislations.

iii) The *Supplementary Compensation Mechanism (SCM),* is described in detail in Chapter III of the draft, which includes eleven articles, and Chapter IV and the rest address the making of compensation formulae and other procedural concepts.

There is an independent inter-governmental organization consisting of a Conference of Parties formed by representatives of the ratifying countries, a Secretariat led by an elected Director who manages the fund and settles any claims made, with the primary purpose of compensating any person sustaining damage on the territory of a member State, and at the same time providing financial assistance in cases where an operator from a member State causes damage in a non-member State.

On one part, it would serve as a supplementary compensation fund, and on the other, in a very special case, as a financing fund.

The source of this mechanism is the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971/1992, but unlike this Convention, it has not included the Executive Committee of 15 member countries, who is responsible for control and solution of convention management matters, its structure and operation has been much simplified by trying to avoid bureaucratic increases with the establishment of the new institution, so it is commendable to provide that it will operate at the ICAO headquarters, and that the secretariat of the international organization will provide assistance to the SCM.

It should be understood that the SCM will be involved in certain especially significant incidents or in special circumstances such as those described in the same draft convention.

This mechanism contemplates compensation by contribution by the user of the international or domestic air transport, if the relevant member State so determines. Article 12 provides that the share contributions to the SCM **shall be mandatory amounts collected with respect to each passenger and each ton of cargo leaving a State airport**. It could be interpreted that, in any case, the required contribution will be transferred to the user or, if not, if it will be fully absorbed by the operator. There is some doubt where it determines that the operator collects the mandatory amounts and sends them to the SCM. That is, it is not the operator who makes the contribution, because indirectly this will be done by the users, which does not seem fair. This is not a voluntary contribution fund.

The same objections that were made by developed countries to the creation of an International Aeronautical Fund some years ago, could be valid for this type of mechanism. More still if we take into account that it is not the passengers or the cargo senders who have to do with this type of damage to third parties. It seems more fair to determine the contributions on the basis of the maximum mass, as in the maritime conventions, which refer to the tonnage of the ship.

5. COURSES OF ACTION FOR THE LEGAL COMMITTEE

5.1 ALADA praises the work done by the different sectors who have participated in the preparation of the two draft conventions, and at the same time wishes to cooperate by suggesting that the Legal Committee consider the above comments.

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