国 际 民 用 航 空 组 织

工 作 文 件

LC/33-WP/3-5
11/4/08

法律委员会 — 第 33 届会议

（2008 年 4 月 21 日 — 5 月 2 日，蒙特利尔）

议程项目 3：在非法干扰行为或一般风险情况下航空器对第三方造成损害的赔偿

关于在发生非法干扰情况下航空器对第三方造成损害的赔偿的公约草案

运营人责任限额的例外
（“可突破性”）

（由德国提交）

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 nearly unbreakable cap on the operator’s liability.

2. THE CURRENT DRAFT: UNBREAKABLE CAP DISREGARDS INTERESTS OF VICTIMS

2.1 The Draft Convention comprises a system of strict (Article 3), but capped (Article 4) liability of airlines and binds them to maintain insurance for this liability. It adds a fund as a second layer for victims’ compensation (Supplementary Compensation Mechanism (SCM)). According to Article 4, the operator’s liability is limited to a maximum of 700.000.000 Special Drawing Rights.

Additional compensation is granted according to the requirements of Article 24. This provision restricts additional compensation and therefore a breakability of the limits set out in Article 4 to cases in which the victim proves that the operator’s senior management contributed to the event and acted with intent or with disregard of a known, probable and imminent risk. The senior management of the operator shall be deemed not to have disregarded such a risk, if it adopted the applicable industry standard and holds a respective certificate. This means that there are practically no cases in which the limit would be breakable, even if an employee of the operator acted with intent, as long as the operator holds the relevant certificate.

2.2 This liability concept causes serious concerns:

- The concept does not strike a fair balance between the interests of the victims and the interests of the airlines.

- In cases where the operator caused or contributed to the damage negligently or with intent it is impossible to justify that:

  a) operators benefit from the limitation of liability;

  b) victims do not receive any compensation exceeding 3.000.000.000 SDR although the operator breaching due care or acting intentionally is perfectly able to effect payments.

Under the current draft the operator does not have to pay any compensation: in the first layer its insurance will step in. The SCM is liable in the second layer; however, the contributions to the SCM will not be effected by the operators themselves, but by the passengers and cargo shippers. In the third layer there is no liability at all.

- The current liability concept does not set incentives to improve security measures; on the contrary, it could prompt operators to reduce security measures as well as the costs spent on those measures.

- This sort of general exculpation because of the existence of a certificate as foreseen in the Draft cannot do justice to each single case and its details.

- For the same reasons a right of recourse in cases where the resources of the fund are not exhausted seems necessary. It is not justifiable why the fund should be refilled by contributions of all those who have not contributed to the damage, whereas the one who acted intentionally or negligently is absolved from responsibility.

2.3 Apart from the fact that the unbreakable limit on the operator's liability puts the victims in a bad position, the unbreakable limit is very likely to constitute an obstacle to the ratifiability of the Convention. In various States the Constitution grants a right to property. This mostly encompasses the duty of the legislator to provide a legal framework which ensures that property rights exist and are executable, within certain limits. A limited liability in case of intent or gross negligence, regardless of the operator's and his senior management's fault, would indeed raise serious constitutional concerns and could prevent States from ratifying the Convention. Furthermore the whole concept contradicts basic principles of tort law.

2.4 In addition, the factual abandonment of taking responsibility for the acts of agents and servants is not in line with the general concept of liability in international law. There is no reason to depart in this respect from the standards of the Montreal Convention which, in Article 22, paragraph 5, also refers to servants and agents of the carrier. A departure from this concept would lower the standard of victim protection considerably and would therefore contradict the Council decision which emphasizes the need to pay attention to the protection of the victim's interests.

3. DISCUSSIONS IN THE SPECIAL GROUP

3.1 The Special Group has evolved into discussion on how to find a wording for breakability, because it is also important to guarantee a limit on liability in cases where the operator has done everything to prevent the occurrence of damage. In order to be able to define the limitations, the concepts of “gross negligence” or “recklessness and with knowledge that damage would probably occur” were examined as exceptions to the limitation of the operators’ liability. These expressions gave rise to many discussions, because apparently the liability concepts associated with them are not compatible with all national jurisdictions. To avoid this problem a Sub-Group of the Special Group met in Berlin in June 2007 and acknowledged the merits of a new concept, which includes liability for negligence and intent of the senior management as well as its servants and agents, but at the same time provides the operator with the possibility to exonerate himself. This approach limits breakability to cases in which the senior management of the airline did not comply with its supervision duties or did not select its servants and agents properly. It therefore focuses on the senior management’s very own tasks. Unfortunately this proposal was not discussed in the Special Group. Therefore Germany presents this new proposal, which was considered interesting by the Sub-Group on breakability, to the Legal Committee.

4. 提案

4.1 考虑到上述困难和理事会的要求，需要对草案的责任制度做出修改。为解决这个问题，德国提议引入**责任限额的例外情况，即高级管理层未履行其监督职责或未适当甄选其雇员或代理人的情况**。

这一概念照顾到了这样的事实，即运营人需要雇员和代理人来提供服务。由于运营人是对业务组织安排做出决策的人，由他来甄选雇员和代理人并对他们进行控制，他对在此情况下发生的错误负责，因此，他得接受在此方面的责任。另一方面，显然运营人不可能在任何时候都控制每一个雇员/代理人的行为。因此，如果运营人证明他已在其权能范围内竭尽其所能来防止损害的发生，那么，他就不应对雇员/代理人的作为或不作为承担责任。第三方绝不可能证明在运营人权能范围内的事。

4.2 引入上述概念的结果如下：

如果发生的损害不涉及运营人或其高级管理层的疏忽或故意的情况，那么，其责任将限制在最多700.000.000 特别提款权。如果雇员或代理人的行为是故意的或有疏忽，但运营人证明他已履行了其甄选、监督和控制的职责，那么，亦适用同样的限额。如果补充赔偿机制用尽，那么，对第三方超出 3.000.000.000 特别提款权的损害将不做赔偿。

当运营人或其雇员或代理人的作为有疏忽或是故意的，而运营人不能证明高级管理层已履行了适当的甄选、监督和控制责任，那么，情况将大不相同。在这些情况下，运营人的责任将是无限的，因此，第三方向运营人要求的损害索赔既可以超出 700.000.000 特别提款权（第一层），也可以超出 3.000.000.000 特别提款权（第二层）。在第二层，运营人和补充赔偿机制将承担连带责任。

5. 措辞

5.1 德国建议插入新的第四条第二款，案文如下：

“**2.** 当损害是由运营人及其高级管理层的疏忽或其他过错行为或不作为引起时，则不应当适用第一款的责任限额。如果损害是由运营人的雇员或代理人的疏忽或其他过错行为或不作为引起，则只有在运营人证明他及其高级管理层已采取适当行动避免损害时，才应当适用第一款的责任限额。需提出证据，证明已建立、执行和遵循一个有效的[合格的]甄选和监督制度。”

5.2 此外，第十九条第一款应增加一个新的第三句予以指明：

“[……]在第四条第二款所述的情况下，补充赔偿机制和运营人对第三方遭受的任何损害承担连带责任。[……]”[1]

5.3 应删除第二十四条。

— 完 —

[1] 如果补充赔偿机制对第三方做出赔偿，则对运营人享有追索权，但须以在第三层对第三方做出充分赔偿为限。建议的运营人责任限额的可突破性对于第二十五条第二款所规定的补充赔偿机制的追索权也至关重要。只有运营人的责任限额的可突破性才会导致补充赔偿机制应能承担的第二层的索赔，因此，需要对第二十五条第二款进行调整，案文如下：

> “2. 本公约任何条款均不妨碍补充赔偿机制对任何人有无追索权的问题。然而，如果第四条第一款的限额不适用，则补充赔偿机制只应当对运营人享有追索权。补充赔偿机制的追索权须以所有第三方获得充分赔偿为限。”

这一修改主要涉及到把索赔导向运营人的问题，因此，关于第二十五条的问题和完整的修改，在德国提交的关于其他服务提供者的免责的工作文件范畴内做了阐述。