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WORKING PAPER

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, IN CASE OF UNLAWFUL INTERFERENCE

EXCEPTIONS TO THE LIMITATIONS OF THE OPERATOR'S LIABILITY ("BREAKABILITY")

(Presented by Germany)

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. PROPOSAL

4.1 Taking into consideration the difficulties mentioned above and the request of the Council, the liability regime of the draft needs to be changed. To solve this problem Germany proposes the introduction of **exceptions to the limitation of liability in cases where the senior management has not complied with its supervision duties or did not select its servants and agents properly.**

This concept makes allowance for the fact that the operator needs servants and agents in order to provide his services. Since the operator is the one deciding on the organisation of the business, selecting servants and agents and controlling them, he is responsible for mistakes occurring in this context and therefore has to accept liability in this respect. On the other hand, it is obviously impossible for the operator to control the behaviour of every single servant/agent at any time. Therefore the operator should not be held liable for acts or omissions of servants/agents if he proves that he has done everything in his sphere to prevent the occurrence of the damage. The third party would never be able to prove something which is in the sphere of the operator.

4.2 The consequences of the introduction of the concept described above are the following:

If the damage occurs <u>without</u> negligence or intent on the part of the operator or its senior management, its liability will be limited to 700.000.000 SDR at maximum. The same limits apply if a servant or agent acted with intent or negligently, but the operator proves that he has complied with his selection, supervision and controlling duties. If the SCM is exhausted the third party will not be compensated for damages exceeding 3.000.000.000 SDR.

The scenario will be profoundly different when the operator or his servant or agent has acted negligently or with intent and the operator cannot prove that the senior management has complied with proper selection, supervision and controlling duties. In these cases, the liability of the operator will be unlimited and thus the third party may claim damages from the operator exceeding 700.000.000 SDR (first layer) as well as 3.000.000.000 SDR (second layer). In the second layer the operator and the SCM will be liable jointly and severally.

5. WORDING

5.1 Germany recommends inserting a new Article 4, paragraph 2 which would read as follows:

> **"2. The limits of liability in paragraph 1 shall not apply where damage is caused by negligence or other wrongful act or omission of the operator and his senior management. If the damage was caused by negligence or other wrongful act or omission of a servant or agent of the operator, the limits of liability in paragraph 1 shall only apply if the operator proves that he and his senior management have taken appropriate action to avoid the damage. Proof has to be brought forward as to the establishment and implementation of and compliance with an effective [qualifying] selection and supervision system."**

5.2 In addition Article 19 paragraph 1 should be specified by adding a new third sentence:

> **"[…] In cases referred to in Article 4 paragraph 2, the Supplementary Compensation Mechanism and the operator are liable jointly and severally for any damage suffered by a third party. […]"**[1]

5.3 Article 24 should be deleted.

– END –

[1] If the SCM compensates the third party it has the right to recourse against the operator, but subject to the full compensation of the third party in the third layer. The suggested breakability of the limitations of the operator's liability is also vital for the right of recourse of the SCM dealt with in Article 25 paragraph 2. Only the breakability of the limitations of the operator's liability will give rise to a claim in the second layer which the SCM should be able to assert. As a consequence Article 25 paragraph 2 would have to be adjusted and would then read:

> *"2. Nothing in this Convention shall prejudice the question whether the Supplementary Compensation Mechanism has a right of recourse against any person. However, the Supplementary Compensation Mechanism shall only have a right of recourse against the operator, if the limits of Article 4 paragraph 1 do not apply. The right of recourse of the Supplementary Compensation Mechanism is subject to the full compensation of all third parties."*

This change concerns mainly the question of channelling the claims onto the operator, therefore the issue and the complete changes concerning Article 25 are treated within the scope of the working paper on the exoneration of other service providers submitted by Germany.