NOTA DE ESTUDIO

COMITÉ JURÍDICO — 33º PERÍODO DE SESIONES

(Montreal, 21 de abril – 2 de mayo de 2008)

Cuestión 3 del orden del día: **Indemnización por daños causados a terceros por aeronaves a raíz de actos de interferencia ilícita o riesgos generales**

PROYECTO DE CONVENIO SOBRE LA INDEMNIZACIÓN POR DAÑOS CAUSADOS A TERCEROS POR AERONAVES A RAÍZ DE ACTOS DE INTERFERENCIA ILÍCITA

EXONERACIÓN DE OTROS PROVEEDORES DE SERVICIOS

(Nota presentada por Alemania)

Debido a las limitaciones presupuestarias, sólo se ha traducido la medida propuesta de enmienda del proyecto de Convenio.

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 vast exoneration of other service providers.

2. THE CURRENT DRAFT: VAST EXONERATION DISREGARDS INTERESTS OF VICTIMS AND AIRCRAFT OPERATORS

2.1 The Draft provides in Article 27 that the claim against the operator under the Convention is an exclusive remedy and therefore shields other entities, which could have contributed to the damage, from their liability. Additionally, Article 25 excludes almost any recourse of the operator liable for third party damage to anybody else who contributed to the damage. This complete exclusion of liability is granted to the other entities without obliging them to contribute to the SCM and regardless of the basics of tort and contract law. In consequence victims may well remain uncompensated, e.g. if the SCM is exhausted, whereas those who have contributed to the damage are protected by the Convention and continue to operate.

2.2 This "channelling" of claims onto the operator is especially critical concerning entities that are involved in operational areas of air traffic and therefore constitute severe risks for the operators' safety, such as air navigation service providers, airports, security providers and ground handling service providers. In cases where the other entity has acted with fault and has thus contributed to the damage it is not justifiable that it benefits from the exclusion of liability – without even having contributed to the SCM – whereas the victims risk not receiving any compensation if the resources of the SCM are exhausted. The other entity however is perfectly able to effect payments. Up to that point it has not touched its financial means since the first layer is borne by the operator's insurance and the second layer by the passengers, who have contributed to the SCM.

Additionally, it can hardly be considered fair if the operator, who is held strictly liable in case of an incident, should not have a right of recourse against those who actually caused or contributed to the damage.

Another issue to be taken into account is that the current exoneration concept does not set incentives to improve security measures and in the worst case could prompt service providers to reduce security measures as well as the costs spent on those measures, since there would be no liability in case of damage.

Apart from that, it cannot be neglected that such a general exclusion of liability would encompass manufacturers of aircraft as well. This however contradicts European Community law on product liability and must prevent EC Member States from ratifying the Convention.

The vast exoneration of entities and persons contributing to the damage in connection with the limited liability of the airlines puts the victims at a disadvantage that is by no means justifiable, clearly contradicts the aim of the Convention and makes it impossible for policymakers to implement such a system.

3. **PROPUESTA**

3.1 Por lo tanto, Alemania propone que se exonere únicamente a aquellas entidades que no participan en el proceso operacional, como los propietarios de aeronaves o arrendadores y financistas de aeronaves, pero que sigan expuestos a responsabilidad civil los que participan en el proceso operacional y que, por lo tanto, pueden contribuir a los daños. Además, Alemania propone que se conceda al MIS y al operador el derecho de acción regresiva conforme a la legislación nacional.

En este sentido, Alemania recomienda los siguientes cambios:

– Debería suprimirse el Artículo 27.

– Debería incorporase el texto siguiente como nuevo Artículo 4 *bis*:

  "Sin perjuicio de lo dispuesto en los artículos 3, 4, 5 y 25, los propietarios, arrendadores y financistas de aeronaves no estarán obligados a pagar indemnización por daños prevista en este Convenio".

– Finalmente, deberían suprimirse los párrafos 1 y 2 del Artículo 25, y sustituirse por el siguiente texto:

“1. Nada de lo estipulado en el presente Convenio afectará a la cuestión de si una persona civilmente responsable por daños conforme al presente Convenio tiene derecho de acción regresiva contra persona alguna. El derecho de acción regresiva está sujeto a la plena indemnización de todo tercero.

2. Nada de lo estipulado en el presente Convenio afectará a la cuestión de si el Mecanismo de indemnización suplementario tiene derecho de acción regresiva contra persona alguna. No obstante, el Mecanismo de indemnización suplementario tendrá derecho de acción regresiva contra el operador únicamente si no se aplican los límites contemplados en el párrafo 1 del Artículo 4. El derecho de acción regresiva del Mecanismo de indemnización suplementario está sujeto a la plena indemnización de todo tercero”.

— FIN —