Organisation de l'aviation civile internationale

NOTE DE TRAVAIL

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Point 3 : Réparation des dommages causés aux tiers par des aéronefs suite à des actes d'intervention illicite ou à des risques généraux

CONVENTION RELATIVE À LA RÉPARATION DES DOMMAGES CAUSÉS AUX TIERS PAR DES AÉRONEFS, EN CAS D'INTERVENTION ILLICITE

Note de travail présentée par l'industrie

(Association du transport aérien international, Civil Air Navigation Services Organisation, Conseil international des aéroports, Groupe de travail aéronautique, London Market Insurance Brokers Committee et Union internationale des assureurs aéronautiques)

1. CONTEXTE

1.1 Le 11 septembre 2001, des terroristes ont pris en otage quatre avions qu'ils ont transformés en armes de destruction massive en les naviguant vers des bâtiments civils, ainsi provoquant la mort de milliers de victimes innocentes — dans une tentative d'influencer la politique étrangère.

1.2 Depuis peu de temps après le 11 septembre, l'Organisation de l'aviation civile internationale a commencé à élaborer un nouveau traité destiné à assurer l'indemnisation des victimes de terrorisme aérien, tout en protégeant l'industrie aérienne de la menace de se retrouver exposée à des risques juridiques et financiers injustifiés, où les biens et services de l'industrie ne seraient que les instruments par lesquels ce type d'acte criminel de terrorisme serait commis.

1.3 Le Groupe Spécial sur la modernisation de la Convention de Rome de 1952 s'est déjà réuni à six reprises afin d'élaborer un projet de Convention relative à la réparation des dommages causés aux tiers par des aéronefs en cas d'intervention illicite (« **Convention sur le terrorisme aérien** »).

2. DISCUSSION

2.1 Cette note de travail a pour but de présenter la position commune des organisations ci-dessus mentionnées concernant la Convention sur le terrorisme aérien et, ainsi, représente l'approche générale et uniforme de l'industrie en la matière.

2.2 Nous confirmons notre soutien pour la Convention sur le terrorisme aérien, à condition que les modifications suivantes soient apportées au texte :

[1] Les versions anglaise et française sont fournies par l'industrie.

2.2.1 Que l'intitulé de l'instrument soit modifié pour refléter la cause principale du dommage, plutôt que les moyens par lesquels celui-ci s'est produit (Intitulé; voir aussi l'Article 3) ;

2.2.2 Que la Convention soit applicable à tous les vols, internationaux et internes (voir Articles 2 et 12) ;

2.2.3 Que les dommages dus à une lésion psychologique soient exclus (voir Article 3) ;

2.2.4 Que les obligations d'assurance obligatoire tiennent compte du mécanisme «de la descente au premier niveau » dit « drop-down » (Article 7) ;

2.2.5 Que les contributions au Mécanisme de dédommagement supplémentaire (« **MDS** ») prévoient un traitement égal des passagers en transit et voyageant par vols directs (Article 12) ;

2.2.6 Que des limites globales à l'indemnisation réglée par le MDS ainsi qu'aux contributions perçues par le MDS soient fixées (Article 13) ;

2.2.7 Qu'il existe une cohérence entre la responsabilité limitée de l'exploitant et la disponibilité de l'assurance au travers d'un mécanisme de « drop-down » obligatoire (Article 19.) ;

2.2.8 Que la limite de la responsabilité de l'exploitant soit essentiellement infranchissable (Article 24) ;

2.2.9 Que le droit de recours entre les acteurs de l'industrie aérienne soit déterminé par rapport à une norme agréée par l'industrie (que nous proposons dans l'Annexe), et qui reflète les réalités des arrangements contractuels dans l'industrie, les questions pratiques en matière d'assurance, et une attribution appropriée des risques dans ces circonstances (Article 25) ;

2.2.10 Que le paiement des fonds du MDS aux personnes dans les États non-parties soit soumis au respect des termes de la Convention (Article 26) ;

2.2.11 Que le délai de prescription soit de deux ans (Article 34) ; et

2.2.12 Que la responsabilité pour dommage nucléaire non assurable soit exclue (Article 37).

2.3 Vous trouverez ci-joint dans l'Annexe nos commentaires spécifiques portant sur la Convention sur le terrorisme aérien.

2.4 La Convention sur le terrorisme aérien, si elle est adoptée avec les modifications exposées dans l'Annexe, fournirait un cadre juridique certain pour traiter des conséquences du terrorisme aérien, qui, selon la terminologie employée dans d'autres textes juridiques, sont désignés comme des « actes d'intervention illicite». La Convention traiterait toutes les victimes du terrorisme aérien plus équitablement que les différentes législations nationales pour les raisons suivantes :

2.4.1 Pour les tierces victimes au sol, les avantages comprendraient la certitude d'une indemnisation sûre, prompte et conséquente - « sûre » parce que les sommes dues en vertu des polices d'assurance des transporteurs aériens et du MDS seraient payées aux tierces victimes sur la base d'une responsabilité stricte ; « prompte » parce que ces victimes n'auraient pas à engager de longues et coûteuses procédures judiciaires afin d'établir la négligence de la part des exploitants ou d'autres parties ; et « substantielle » parce que la combinaison entre les sommes dues en vertu des polices d'assurance d'un exploitant et du MDS est probablement supérieure aux avoirs de n'importe quel exploitant dont l'appareil aurait été utilisé par des terroristes pour infliger des dommages immenses aux tiers.

2.4.2 Les exploitants qui sont victimes d'actes de terroristes bénéficieraient d'un plafond de responsabilité essentiellement infranchissable pour les dommages qui dépassent leur police d'assurance (le premier niveau d'indemnisation).

2.4.3 Les autres grands acteurs dans le secteur aérien seraient protégés de la menace d'être exposés à des risques juridiques et financiers injustifiés résultant d'une telle activité criminelle grâce à la structure d'un traité qui canalise la responsabilité financière vers ceux qui peuvent le plus effectivement fournir l'indemnisation, c'est à dire l'exploitant assuré et le MDS, et qui définit une norme agréée par l'industrie qui détermine l'étendue du droit de recours de l'exploitant.

2.5 Les trois éléments ci-dessus résumés sont essentiels et interconnectés. Ils sont exprimés et reliés d'une manière qui permet d'atteindre les objectifs de haut-niveau décrits ci-dessus exposés. Par ailleurs, ces éléments devraient permettre la ratification du texte, les gouvernements se concentrant sur les faits et les exigences uniques d'un système qui s'adresse au terrorisme. Sans le **plafond de responsabilité essentiellement infranchissable** (Article 24), l'article sur le **recours exclusif** (Article 27), et une **norme agréée par l'industrie sur les voies de recours** (Article 25, selon la modification proposée dans l'Annexe, qui n'a pas d'impact sur la protection des victimes), la Convention sur le terrorisme aérien ne peut être soutenue par l'industrie.

2.6 La Convention sur le terrorisme aérien, avec les modifications contenues dans l'Annexe, optimiserait matériellement la capacité pour les marchés globaux d'assurance de proposer des garanties contre le terrorisme et d'absorber plus efficacement les dommages assurés.

2.7 Les concepts contenus dans la Convention sur le terrorisme aérien ont été mis à l'examen. Ils sont présents dans d'autres traités portant sur des risques massifs et non-quantifiables. Bien que ces concepts modifient les règles générales en matière de responsabilité, ils sont nécessaires dans ce contexte particulier.

3. CONCLUSION

3.1 Nous demandons vivement au Comité Juridique de modifier la Convention sur le terrorisme aérien selon avec les recommandations énumérées dans l'Annexe ci-joint, et par la suite de recommander au Conseil de l'OACI qu'une conférence diplomatique soit conviée afin d'adopter le texte ainsi modifié.

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ANNEX

SPECIFIC COMMENTS ON AVIATION TERRORISM CONVENTION

The following are our specific comments on the draft Aviation Terrorism Convention. After a short comment on each point, suggested drafting is provided, marked against the current text. Articles and paragraphs that are not included and marked would remain as drafted.

We reserve the right, individually and collectively, to make supplemental comments relating to the points below and those not addressed, including, in particular (i) on whether there should be an annual aggregate limit for an individual operator's liability under Article 4, with the SCM paying compensation in the event that limit is exceeded, and (ii) in respect of the SCM generally, a topic not addressed in detail below.

Title

Comment: The title of the instrument should reflect the primary cause of the loss, not the intermediate victims of terrorist actions.

Drafting: Convention on Compensation for Damages to Third Parties caused by Acts of Unlawful Interference involving Aircraft ~~to Third Parties, in the case of Unlawful Interference~~

Article 2 — Scope

Comment: The convention should apply to domestic as well as international flights. If that were not the case (i) victims would be compensated differently based on the nature of the flight, which raises a basic fairness point in this context, (b) the SCM would be under-funded or the fees would be twice as high; (c) industry would not be protected in the domestic context; (d) the reality of global insurance policies would be disregarded; (e) EU internal market requirements would give rise to issues of compatibility with EU law; and (f) the Convention would not address the factual scenario which gave rise to 9.11, the primary reason for development of the Convention. Terrorism is an international problem, as are many of its causes and consequences. There is aviation precedent for a functional concept on the connecting factor needed to trigger application of a treaty, thus avoiding the need to employ a traditional internationality standard in this specific context.

Drafting:

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight as a result of an act of unlawful interference when the operator of the aircraft has its principal place of business, or if it has no such place of business, its permanent residence, in that State Party or in another State whether or not a State Party. This Convention shall also apply to such damage that occurs in a State non-party as provided for in Article 26.

~~2. If a State Party so declares to the Depositary, this Convention shall also apply to such damage which occurs in the territory of that State Party when the operator of the aircraft has its principal place of business, or if it has no such place of business, its permanent residence, in that State Party.~~

Article 3 — Liability of the Operator

Comment: The provision establishing the principle of the operator's strict liability should reflect the proposed amended title of the instrument.

Drafting:

1. The operator shall be liable for damages sustained by third parties upon condition only that the damage was caused by the unlawful interference with an aircraft in flight.

Comment: In line with the parallel provision (Article 17(1)) in the Convention for the Unification of Certain Rules for International Carriage by Air ("**Montreal Convention**"), damages should exclude mental injury. The policy reasons for that exclusion (including risk of large scale unsubstantiated claims) are at least as strong in this context.

Drafting:

5. Damages due to death and~~,~~ bodily injury (excluding mental injury) and damage to property shall be compensable. ~~Damages due to mental injury shall be compensable if caused by a recognisable psychiatric illness resulting either from bodily injury or from a reasonable fear of exposure to death or bodily injury.~~

Article 7 — Insurance

Comment: To the extent that the drop-down applies under Article 19(3), an operator's liability should be reduced. *See infra* Article 19. Correspondingly, mandatory insurance requirements to cover liability under the Convention should be reduced in such case to that extent.

Drafting:

~~Having regard to Articles 4 and 19, paragraph 3,~~ States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention, taking into account any reduction of liability under Article 19, paragraph 3.~~.~~ An operator may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators.

Article 12 — The Contributions to the Supplementary Compensation Mechanism

Comment: The final setting and mechanics of contributions should not disadvantage transit passengers compared to those flying direct routes. In view of our comment on Article 2, the distinction between international and domestic flights should be removed.

Drafting:

The contributions to the Supplementary Compensation Mechanism shall be the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on a~~n international~~ commercial flight from an airport in a State Party. Such contributions shall ensure equal treatment between passengers flying transit and direct routes. ~~Where a State Party has made a declaration under Article 2,~~

~~paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party.~~ The operator shall collect the mandatory amounts and remit them to the Supplementary Compensation Mechanism.

Article 13 ─ Aggregate limit on collection of contributions

Comment: There should be an aggregate limit on compensation paid by the SCM as well as an aggregate limit on contributions. Otherwise, the SCM's liability would carry over between periods, which, in effect, would result in the operator's funding obligation being carried forward. With this revision, the provision would address the duration of contribution as well as the amount. If damage exceeds the amount specified in this Article (three times the maximum compensation payable under Article 19(2)) during a two-year period, then the third layer of compensation, namely, State solidarity, should apply. Finally, there should be a limit on the SCM's administrative costs.

Drafting: The title should be revised as follows: **Aggregate limits relating to the Supplemental Compensation Mechanism ~~on collection of contributions~~**. The text should be revised as follows:

The total amount of contributions collected, and the total compensation paid, by the Supplementary Compensation Mechanism within a period of two consecutive years shall not exceed three times the maximum amount of compensation according to Article 19, paragraph 2, of this Convention. The annual administrative costs relating to the Supplementary Compensation Mechanism shall not exceed [X].*

Article 19 — Compensation

Comment: The drop-down mechanism is critical to the overall balance of interests under the Convention. It should be employed on a mandatory basis. The current wording sets an unreasonably high standard, and, moreover, is discretionary. That is the *quid pro quo* for requiring contributions to the SCM. If employed, the SCM should assume liability, rather than provide financial support. The latter approach results in the operator having an uninsured liability, and in its dependence on the mechanism and funding (including in the risky multiple loss scenario) to ensure solvency. That is not proper from a legal, financial, or policy perspective. Finally, a conforming change is needed to Article 11(1)(d).

Drafting:

3. ~~If~~To the extent insurance in respect of the damage covered by the Convention is ~~wholly or partially~~ unavailable with respect to amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport, ~~the Conference of Parties may decide that~~ the Supplementary Compensation Mechanism shall assume the operator's liability to pay damages under ~~in respect of future events causing damage compensable under this Convention, provide financial support to operators for the payment of damages for which they are liable according to~~ Articles 3 and 4. The Conference of Parties may decide on a fee, the payment of which, for the period covered, shall be a condition to such assumption of liability.~~for access to the protection given by such decision.~~

Article 24 ─ Additional Compensation

Comment: The liability cap must be substantially unbreakable. That is the *quid pro quo* for the operator's counter-intuitive strict liability for criminal acts of terrorism. In particular, the action of

* To further maximize funds available to compensate victims, the SCM should be organized and structured to ensure that its proceeds are tax exempt. Accordingly, the brackets in Article 8(5) should be deleted.

individual employees or agents, or the specific facts relating to a terrorist event, must not break the liability cap. The only exception should be intentional acts by senior management (meaning executives, not pilots or managers). We accept the terms of Article 24(2)(a).

We believe Article 24(2)(b) should be deleted, as being outside the above-noted *quid pro quo*. Any retention of it, on which we expressly reserve our position, is predicated upon revisions that ensure an exceptionally high standard centered on the intentional acts of senior management, coupled, critically, with a corporate safe-harbor based on adoption of an agreed industry standard, which is objective, certifiable, and, with that certification, provides an absolute defense under the Convention against any attempt to break the liability cap. Accordingly, we have placed Article 24(2)(b) – (3) in square brackets.

Drafting:

2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has

a) intentionally committed an act of unlawful interference; or

[b) contributed to the event by an act or omission, which:

i) falls within the regulatory responsibility and actual control of the operator;

ii) is, other than the act of unlawful interference, the primary cause of the event; and

iii) is done with the intent to cause damage, or recklessly and with knowledge that such damage would probably result~~disregard of a known, probable and imminent risk~~.

3. For the purposes of paragraph 2 b) iii), the senior management of an operator shall be conclusively deemed not to have acted with the intent to cause damage, or recklessly and with knowledge that such damage would probably result if~~disregarded a risk where, as regards the relevant area of security,~~ the operator has adopted ~~the~~an applicable industry standard[*] and, at the time of the incident, held a valid evaluation certificate relating thereto. The foregoing does not limit other grounds on which the senior management may establish that it has not disregarded such risks.]

Article 25 — Right of Recourse

Comment: The right of recourse is an inter-industry allocation of risk and insuring responsibility. That allocation, in turn, is impacted by cross-indemnities, which themselves reflect the structure and economics of the air transport industry. In light of the foregoing, we propose revisions to Article 25. These revisions have no impact on victim protection issues under the Convention.

Drafting:

1. Subject to paragraphs 2 and 3 of this Article, neither an operator nor the Supplementary Compensation Mechanism shall have a right of recourse against any person, except if that person or, if it is a legal person, its senior management, has intentionally committed an act of unlawful interference.

[*] Without limitation, an applicable industry standard would include the IATA Operational Safety Audit standard (IOSA) or a comparable program that applies exclusively to security standards.

2. The Supplementary Compensation Mechanism shall have a right of recourse against the operator for compensation subject to the conditions set out in Article 24, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 24, paragraph 1, have been completed.

3. Nothing in this Convention shall prejudice any right of an operator or its insurer to pursue a recourse claim under applicable law against a third party with an operational interest, but only to the extent of:

(a) such third party's relative percentage of the total fault of all persons causing damages in connection with an event; and

(b) the insurance maintained by such third party against such damages at the time of the event and which would be payable to the operator or its insurer in connection with that recourse claim.

For purposes of the foregoing, a "third party with an operational interest" means a person other than the operator who provides operational services relating to an aircraft, and, without limitation, excludes (i) lessors and financiers of an aircraft, its engines, or other component parts, and (ii) the manufacturer of the aircraft, its engine or other component parts to the extent of any claims relating to the approved design of an aircraft, its engines or other component parts or any design warning relating to such aircraft, engines or components.

Under no circumstances shall the foregoing permit a recourse claim for amounts above the liability limits set out in Article 4.

4. The applicable law referred to in paragraph 3 of this Article shall be that agreed between an operator and a third party, whether or not that law has a connection with the parties or with an event, and, absent such an agreement, shall be the law selected by the courts with jurisdiction over the recourse claim. The courts of a State Party chosen for this purpose by an operator and a third party have jurisdiction in respect to any claim brought under paragraph 3 of this Article, whether or not the forum has a connection with the parties or with an event. Such jurisdiction shall be exclusive unless otherwise agreed between the parties. Any such forum selection agreement shall be in writing and concluded in accordance with the formal requirements of the law of the chosen forum.

~~3~~5. Any amount recovered under paragraph 2 of this Article shall, in the first instance, be used to provide compensation for damages resulting from the event which gave rise to the recourse action, which exceed the maximum amount specified in Article 19, paragraph 2.

Article 26 — Assistance in case of events in States non-party

Comment: SCM support in the case of damage in a State non-party should be based on the principle that victims and industry have substantially the same rights as if the damage occurred in a State party. Beyond general fairness, any other approach would provide a disincentive to ratify the Convention.

Drafting:

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-party, the Conference of Parties may decide, on a case by case basis, that the Supplementary Compensation Mechanism shall provide financial support to that operator. Such support may only be provided in respect of damage that would have fallen under the Convention if the State non-party had been a State Party, and if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the terms and conditions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of the Parties. The financial support shall not exceed the maximum amount for compensation set out in Article 19, paragraph 2. If the solvency of the operator liable is threatened even if support is given, such support shall only be given if the liable operator has sufficient arrangements protecting its solvency.

Article 34 — Period of Limitation

Comment: In line with the parallel provision (Article 35(1)) in the Montreal Convention, the period of limitation should be two years.

Drafting:

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within two~~three~~ years from the date of the event which caused the damage.

2. The right of compensation according to Article 19 shall be extinguished if an action is not brought, or a notification pursuant to Article 31, paragraph 3, is not made, within two~~three~~ years from the date of the event which caused the damage.

3. The method of calculating such two~~three~~ year period shall be determined by the law of the court seized of the case.

Article 37 — Nuclear Damage

Comment: Insurance is not available for liability for nuclear damage. As aviation insurance policies have a complete exclusion for nuclear damage, the economic logical of having operators strictly liable does not apply to this risk.

Drafting:

No liability shall arise under this Convention for damage caused by a nuclear incident~~ if the operator of a nuclear installation is liable for such damage under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or addition thereto which is in force~~.

— END —