LC/33-WP/8-6
28/4/08

LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 8: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 33RD SESSION

The attached paragraphs 3:91 to 3:115 of the draft Report of the Legal Committee relate to Agenda Item 3.

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(5 pages)

Agenda Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

3:91 The Committee resumed its review of **Article 19, paragraph 3.** The Chairman recalled the Committee's earlier discussion on this point which had shown a divergence of views regarding the issue as to whether or not to provide for an automatic and mandatory drop-down mechanism.

3:92 One delegation supported the notion of a mandatory drop-down mechanism in cases where the standard set out in paragraph 3 was fulfilled. This delegation invited the Committee to consider in this context Flimsy No. 2 and explained that an amendment to the text was nevertheless necessary in order to address the situation when a particular operator was not in a position to obtain insurance coverage. One observer, who had argued in favour of the automatic drop-down feature, was of the opinion that the proposal advanced by the delegation had merit. This sentiment was echoed by another observer who advised the Committee that an automatic drop-down was needed in situations similar to those of the 9/11 events when two or more aircraft of the same operator were the subject of an act of unlawful interference. In such a situation, the aggregate insurance coverage available to that operator could otherwise be exhausted to not even cover the compensation in the first layer.

3:93 One delegation fully supported an automatic drop-down mechanism and mentioned in this context that it behoved on States to ameliorate the situation of the carrier in this type of circumstance, as the act of unlawful interference was principally addressed against the State. Acknowledging that multiple acts of unlawful interference directed against the same operator represented a particular problem that needed to be addressed, one delegation expressed the view that it was sufficient to leave this matter to the discretion of the Conference of Parties. To do otherwise and provide for a mandatory drop-down would run contrary to existing European Community rules on insurance and would prevent ratification by a number of States. To the extent the operator concerned had procured all insurance as required under the Convention, it was however fair to offer some kind of financial assistance in certain circumstances, similar to the notion that is described in Article 26, this delegation stated. Remarking that Flimsy No. 2 had correctly identified the issue of the unavailability of insurance coverage for a particular operator as a distinct problem, the Chairman stated that some States would presumably find some comfort in the fact that it remained within the discretion of the Conference of Parties to address the drop-down , as there could always be cases of an incurious airline with a bad reputation for implementing security measures. One delegation was of the view that this matter required further consideration, particularly as regards the conditions and length of the drop-down in relation to events effecting the same operator. Based on this intervention, the Chairman supported the creation of an additional Friends of the Chairman Group (No. 3), comprised of the delegations of France and Japan and the observers of AWG, IATA and LMBC. The group was requested to complete its review in the most expeditious manner.

3:94 The Committee thereafter turned its attention to **Article 20** (Advance Payments and other measures). One delegation invited the Committee to consider the provision at hand together with **Article 6** (Advance Payments) and to clarify the situation so as to avoid the potential for double payments to a natural person. In relation to this point, the Chairman of the Council Special Group explained that in principle the primary obligation with respect to advance payments rested with the operator; if the operator made the payment there would be no longer the immediate economic need to make the payment under Article 20. The latter provision was put in place to address the drop-down situation where the payment would be made by the SCM, subject to a decision of the Conference of Parties and the Compensation Guidelines. Certain clarifications on this point may nevertheless be required, it was stated. In this respect, one observer mentioned that the compensation guidelines envisaged a liaison between the insurers and the SCM which would easily identify any double payments.

3:95 With respect to advance payments and compensation to be paid by the SCM, one delegation proposed to clarify that such payments ought to be exempted from any currency or transfer restrictions. Noting that this issue may be sensitive in certain jurisdictions, the Chairman invited this delegation to produce a flimsy for consideration by the Committee. On this basis, the Committee agreed on **Articles 6 and 20**.

3:96 **Article 21** (Acts or omissions of victims) was accepted without discussion.

3:97 **Article 22** (Court Costs and other Expenses), which was imported from Article 22, paragraph 6 of the Montreal Convention, was adopted by the Committee.

3:98 The Committee continued its deliberations and commenced with its review of **Article 23** (Reduced Compensation). In relation to this article, the Committee recalled its earlier deliberations on the subject of "mental injury" as separate heads of damage. While one observer reiterated its arguments against the recognition of such type of injury, several delegations expressed the view that in light of the earlier discussions "mental injury", to the extent recognized under the Convention, ought to receive the same priority as "death and bodily injury" insofar as the priority over property damage was concerned. The Chairman tasked the Drafting Committee to adequately accommodate this point. In addition, the Committee agreed to clarify in line two of Article 23 that reference should be made to "Articles 4 and 19, paragraph 2".

3:99 As further regards Article 23, one delegation invited the Committee to consider the proposal for an amendment as set out in the Appendix to LC/33-WP/3-16. Commenting thereon, another delegation regarded the gist of the proposal suitable in the context of maritime law. This delegation noted however that the proposal could have implications for the forum provisions in the Convention. On account of this latter intervention, the Chairman remarked that the proposed amendment may not be suitable in the context of aviation. On this basis, the Committee concluded its consideration of Article 23.

3:100 The Committee thereafter turned its attention to **Article 24** (Additional Compensation). One delegation expressed its concerns regarding this provision and suggested to the Committee to consider its submissions which were contained in LC/33-WP/3-5. This delegation recalled its main objections against the draft text. In the view of this delegation, the proposal prevented the victim from receiving additional compensation from the carrier even if the carrier was in a position to effect payment, not having to use its own funds for neither the first nor the second layer. The draft text ran counter to fundamental principles of tort law, raised constitutional issues and effectively provided no incentive for the air carrier to live up to its moral responsibility and to comply with security measures. An unbreakable cap despite fault-based actions was not compatible with fundamental legal principles, the delegation noted. It invited the Committee to consider its proposal set out in paragraph 4 of the aforementioned working paper, which called for exceptions to the limitation of liability in case where the senior management has not complied with its supervisory duties or did not select its servants and agents properly.

3:101 The Rapporteur remarked that a hard cap on liability was considered essential for the operators as a *quid pro quo* for accepting a strict liability regime, noting that this feature remained at the same time a controversial element. He referred the Committee to the considerations contained in paragraphs 3.15 and 4.6 of the Rapporteur's Report. He stated that in case the liability cap was easily breakable, the new instrument would no longer mainly serve as a mechanism for a speedy victim compensation but would instead invite litigation on the subject of the carrier's behaviour.

3:102 In the ensuing discussion, four delegations stated that they fully shared the concerns of the delegation which had spoken earlier.

3:103 One delegation, supported by several others, was of the view that the current draft reasonably catered to the core interests of the victims. This delegation expressed some concern regarding the proposal contained in paragraph 4 of LC/33-WP/3-5 and the notion of joint and several "liability" of the SCM. Another delegation recalled that the purpose of the Convention was one of risk management and risk allocation while ensuring victim's compensation. It regarded the feature of a hard cap as essential to the success of the entire project. Another delegation suggested to see these interventions in the context of a paradigm shift which has occurred, particularly in a situation where airlines were innocent victims. In the rare cases where the airline partially had contributed to the damage, it remained necessary to resort to tort law principles; any deviations thereto ought to be reasonable so as to remain ratifiable, this delegation stated. The delegation recalled that it had submitted working paper LC/33-WP3-21, which suggested to consider in tandem Article 24 and Article 27, and which contained a proposal for the broadening of situations under which additional compensation could be sought.

3:104 Another delegation expressed the view that the operator should only be exonerated when there was no intention on his part and that the concept of senior management should include all persons who took binding decisions on behalf of the operator, a notion which was supported by another delegation. As regards the burden of proof in paragraph 2, two delegations expressed the view that it should be placed on the operator instead of the victim. One delegation submitted for consideration to place the burden of proof on the SCM.

3:105 One observer, as did several delegations, regarded Article 24 as the keystone of the entire Convention and stated that the outcome regarding this point would determine whether the instrument could be supported by the industry. The observer remarked that in terms of compensation the victims would have more funds available than under a normal tort system, in the form of insurance and the SCM. In addition, prompt compensation was ensured due to the imposition of strict liability on the part of the airlines. Regarding the point of moral responsibility, it was stated that the airlines had every incentive to avoid an act of unlawful interference and that they took their responsibility in terms of security requirements very seriously. This sentiment was echoed by one delegation which remarked that security matters in aviation were highly regulated not only by Annex 17 but also through best industry practices.

3:106 Two other delegations expressed the view that a cap of liability was required. In their view, the current draft sought to achieve a balance regarding the interests of the operator and the victims while ensuring that the operator would not be overburdened.

3:107 One delegation, which had initially shared similar concerns regarding a departure from traditional tort law principles, remarked that it had attained a better understanding of the underlying principles and ideas contained in the current text of Article 24. Once these principles were embraced, one ought to realize that the Convention no longer represented a traditional tort law regime. This delegation was willing to accept this new structure and was mindful of the concerns expressed by others, which were made from a different perspective. It was thus imperative for the Committee to find a common perspective, as the project would otherwise fail. This delegation invited the Committee to move beyond the vision to regard what was proposed as being simply another tort law regime and move towards a vision which focused on the sharing of the risks and costs in the case of extraordinary events. Some details regarding paragraphs 2 and 3 of Article 24 nevertheless needed to be addressed, as the level of behaviour required for breaking the cap and some conditions remained too narrow. This delegation invited the Committee to constructively discuss these paragraphs on this basis. In a similar vein, another delegation expressed the view that the rationale behind the innovative philosophy of Article 24 justified the consideration of new solutions.

3:108 A proposal to delete Article 24 was not approved. Instead, the Committee decided to retain it and proceed with its discussion.

3:109 During the ensuing discussion, one delegation proposed to replace the term “person claiming compensation” appearing in the chapeau of paragraph 2 by “Supplementary Compensation Mechanism”, and another delegation proposed to reverse from the victim to the operator the burden of proof provided for in paragraph 2. The Committee did not approve either of these proposals.

3:110 One delegation asked clarification on the legal value of the “applicable industry standard” referred to in paragraph 3. An observer explained that what IATA does is to check whether their member airlines follow the applicable legal standards, be those established by ICAO or otherwise, like national laws and regulations, which are reflected in the so-called IATA Standards used to audit its member airlines. If an airline follows such standards, it could not be found in gross-negligence if some unlawful act occurs, although there might be other grounds for airlines to claim non-gross-negligence.

3:111 One delegation, referring to concerns expressed in relation to breaking the cap of liability, was of the view that such possibility is almost inexistent. The only case would be when the carrier is the perpetrator of the act. As regards the use by the carrier of the industry standard argument to avoid a break of the cap, the delegation considered that it is a practical solution because this is regarded as the industry best practice and is, therefore, where one would normally look at for the purposes of paragraph 2 b).

3:112 One delegation proposed that, if Article 24 was to be retained as the Committee had decided, the following changes should be made thereto: the term “servants and agents” should be added to “senior management” in the chapeau of paragraph 2, and the term “disregard of a known, probable and eminent risk” in paragraph 2 b) iii) should be replaced by “recklessness and knowledge that damage will probably result”.

3:113 With respect to the first proposal, two delegations expressed support. One of them explained that because of the increasing practice of outsourcing services, including the security field, airlines may lose control of outsourced activities. However, four delegations and one observer expressed disagreement with this proposal, explaining that it would upset the system as it had been designed and that the adoption of any wording that could lead to breaking the liability cap would likely open the door to bankruptcy of airlines with serious social consequences. Hence this proposal was rejected.

3:114 As regards the proposed change to paragraph 2 b) iii), and taking into account the linkage of this provision to paragraph 3 where the reference to “applicable industry standard” had raised concerns during previous discussion, it was decided to continue with the consideration of this issue in the next meeting.

3:115 The Chairman then invited Sweden to introduce Flimsy No. 1 containing the Report of the “Friends of the Chair, Group 2” regarding a revised text for Article 7 on insurance. The revised text was approved as proposed without discussion.