



LEGAL COMMITTEE – 35TH SESSION

(Montreal, 6 – 15 May 2013)

Agenda Item 2: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

COMMENTS OF THE INTERNATIONAL UNION OF AEROSPACE INSURERS (IUAI) ON LC/35-WP/2-1 AND THE LEGAL ASPECTS OF THE ISSUE OF UNRULY PASSENGERS

(Presented by IUAI)

1. INTRODUCTION

1.1 IUAI considers that the approach adopted by the Sub-Committee to the draft protocol (the “Protocol”) to amend the Tokyo Convention 1963 (“the Convention”) in the Appendix to LC/35-WP/2-1 represents substantial progress in developing a Protocol to address issues that have emerged since the original Convention was drafted. We set out below our comments on the substantive issues addressed in the draft.

2. JURISDICTION

2.1 As presently drafted, the State of Registration of the aircraft is the State with jurisdiction over offences committed on board aircraft in the Convention.

2.2 This has meant that numbers of offences have gone unpunished for lack of jurisdiction of the state of landing which is clearly undesirable.

2.3 IUAI echoes the comments of IATA in its submission as to the position expressed by courts and believes the judicial comment quoted by IATA:

“Signatories to the Tokyo Convention will be astute in seeking the extradition for prosecution of those who commit offences aboard their registered or controlled aircraft. Failing this “crime” committed aboard aircraft may go unchecked”

is to be commended.

2.4 Given the recognition by many states of the sensitivities of others to unilateral extensions of the jurisdiction of domestic courts, IUAI believes it important to make clear in the Protocol that such an exercise of jurisdiction is encouraged and endorsed by treaty.

2.5 IUAI supports option 2 as set out in the Appendix to LC/35-WP/2-1 with particular reference to the State of Landing and the State of the Operator as being desirable to give practical effect to the intentions of the Council.

3. LIST OF OFFENCES

3.1 IUAI shares with IATA the view that it is desirable for there to be a clear understanding of the nature of the offences intended to be covered by the Convention. It will, of course, be a matter for each State to apply the Convention and enforce its provisions in accordance with its own domestic criminal law so that while the broad thrust of the definition merits attention, it must also be important to avoid excessive prescription in the detail.

3.2 Given that the offences committed by unruly passengers are at least equally directed to fellow passengers as to flight crew, IUAI would also wish to recommend that the scope of offences be enlarged to include assaults of all persons on board an aircraft.

3.3 IUAI would also wish to suggest that the Protocol reflect the authority not only of the commander of the aircraft but also of cabin crew given that in an emerging situation it is entirely foreseeable reflected in experience that cabin crew are placed in the position of having to give instructions to unruly passengers without reference to the commander of the aircraft in cases of urgency.

3.4 Accordingly IUAI recommend that draft Article VI is amended as follows:

“Each Contracting State shall ensure that the following acts are made punishable by appropriate criminal or administrative penalties when committed by a passenger on board an aircraft in flight: (a) physical assault or a threat to commit such assault; (b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander or by the cabin crew for the purposes set out in Article 6.

2. Nothing in this Convention shall affect the right of each Contracting State to introduce, according to its national legislation, appropriate penalties in order to punish other unruly or disruptive acts committed on board by passengers.”

4. TEMPORAL SCOPE

4.1 IUAI supports the recommendation of IATA with regard to the period of applicability of the Protocol, in particular with reference to the period during which the powers of the commander of the aircraft come into effect and supports the recommendation of the adoption of the proposed text of the Appendix to LC/35-WP/2-1.

5. RIGHTS OF RECOURSE

5.1 The potential recourse against passengers outlined in the comments of IATA are reinforced by the distinct possibility that such recourse may go further than those outlined in paragraph 5.1 of IATA’s submission and could, for example, include the potential for damage to aircraft and injury to passengers caused by unscheduled landings in circumstances of extreme unruliness jeopardising the safety of the aircraft. Those expenses could well fall to Insurers to pay in those circumstances. IUAI supports IATA’s recommendation that there be express recognition in the Protocol of the right of recourse and for this purpose, IUAI would recommend an extension to the language proposed by IATA in paragraph 5.4 to read:

“When (or if) an aircraft commander disembarks or delivers a person pursuant to the provisions of Articles 8 or 9 respectively, the operator shall be entitled to recover from such person any damages suffered by the operator or other passengers injured as a consequence of assault by such person or disobedience to the lawful instructions given for the purposes set out in Article 6, paragraph 1(a) or (b)”.

6. IMMUNITY FROM SUIT

6.1 IUAI believes that a watertight immunity provision is essential for the smooth operation of the Protocol and the willingness of the crew to take effective preventive action during flight. In that respect, IUAI supports the recommendation of IATA to amend Article 10 in order to prevent the evaluation of the commander’s behaviour or, indeed, that of the crew with the benefit of hindsight. IUAI recommends consideration be given to the proposal that the conduct of the commander and flight crew should be immune from any claim so long as the actions of the commander or crew are neither arbitrary nor capricious with the burden of proving that such behaviour is arbitrary or capricious resting on the claimant.

7. CONCLUSION

7.1 IUAI requests the legal committee to note the concerns identified in this Working Paper.

7.2 IUAI supports the adoption of a Protocol to amend the Convention as discussed above in the confidence that this will produce tangible and uniform solutions to the issues which have been identified in relation to the Convention since its adoption in 1963.

— END —