



## **LEGAL COMMITTEE – 35TH SESSION**

(Montréal, 6 – 15 May 2013)

### **Agenda Item 7: Report on work done at the Session**

#### **DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 35TH SESSION**

1. The attached paragraphs 2:72 to 2:89 of the draft Report of the Legal Committee relate to Agenda Item 2.

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2:72 The Chairman announced the composition of the **Friends of the Chair Working Group on IFSOs** as follows: Canada, Chile, Colombia, France, Jamaica, Japan, Lebanon, Mexico, the Russian Federation, Singapore, South Africa, and the United States, to be chaired by France. The mandate of the group was to specify in greater detail the roles and functions of IFSOs.

2:73 The Chair of the **Friends of the Chair Working Group on the reformulation of Article 15 bis** presented the group's report which is attached as **Appendix D** to this Report. The group made two recommendations in an effort to achieve harmonization: first, a re-draft of Article 15 *bis* for the reasons stated in its report, and second, that a Diplomatic Conference, if/when convened, adopt a resolution calling upon ICAO to update Circular 288 to include a list of unruly acts commonly occurring on board aircraft and in respect of which States would be encouraged to take criminal or administrative action under their national laws. With regard to the first recommendation, the Chair of the working group highlighted the salient points behind the group's re-draft of Article 15 *bis*, namely, to prevent overlap between the offences in the draft Article with those in other aviation security instruments; to achieve a compromise between those States which prefer a list of offences and those which do not; and to replace the obligatory language in the Article's chapeau with permissive language in order to encourage States to initiate criminal or administrative proceedings especially for those offences and acts mentioned in paragraphs 1 (a) and 1 (b). The Chair clarified that the group opted to maintain "crew member" over "any person" at Article 1 (a) so as to preserve a link with the safety impact to civil aviation. With regard to the second recommendation, the group decided not to categorize the six proposed offences for Circular 288, deferring instead to the internal legislation of States to do so.

2:74 The Chairman of the Legal Committee requested comments on the impact and formulation of the group's revisions to Article 15 *bis*. One delegation opposed the inclusion of paragraph (1) of Article 15 *bis* in the Tokyo Convention, and supported the removal of the square brackets from paragraph (2) in order to maintain the discretion of States to introduce, according to their national legislation, appropriate penalties/measures to punish unruly or disruptive acts committed on board an aircraft. One delegation stated that it supported in substance the re-formulation but queried whether the expression "is encouraged to" in the chapeau to paragraph 1 is usual terminology in treaties, and suggested that the word "may" would be more appropriate. Another delegation suggested that the words "or the crew" be inserted after "the aircraft commander" at paragraph 1 (b) to clarify who gave the instruction. It was understood that the text of Article 15 *bis* as re-formulated by the Group would be referred to the Drafting Group for consideration, which would also take into account the abovementioned drafting proposals.

2:75 There was no opposition to the second recommendation, with one delegation suggesting a tightening of the language in relation to disruption of peace and quiet / disturbance of any person on board, so as to avoid capturing, for example, waking someone up in order to exit one's seat. In response to one delegation seeking clarification on the procedure contained in the second recommendation, the Chairman, in consultation with the Secretary, confirmed that the Committee would recommend to the ICAO Council that the Diplomatic Conference should adopt a resolution calling upon ICAO to update Circular 288.

2:76 One delegation, supported by another, wishing to re-visit the issue of jurisdiction, expressed deep concern with regard to the Committee's approach thus far of maintaining certain provisions in square brackets where there had been no consensus, for example the provisions on IFSOs and Article 15 *bis*, while the square brackets had been removed from other provisions which also had no clear consensus, that is with respect to the mandatory State of landing and State of the operator jurisdictions. This delegation requested that the square brackets be put back for the mandatory jurisdiction and that the optional jurisdiction be re-introduced, also in square brackets. The supporting delegation further emphasized the importance of optional jurisdictions in order for States to have flexibility in the introduction and implementation of these jurisdictions and to better enable a new instrument to be successful and widely ratified. This delegation

stressed that putting both options in square brackets is a point of order and a question of consistency in the work of the Legal Committee.

2:77 The Chairman responded to the abovementioned concern and stated that where there was a preponderance of support in one direction, as was the case with the key mandatory State of landing and State of the operator jurisdictions, he had ruled that the square brackets be removed in order to progress the issues and to demonstrate to the Council that the Committee had made progress. The Chairman further stated that it was late in the proceedings to re-open substantive issues and his preference was not to re-open the discussion or to put back the square brackets. The proposing delegation, while not wishing to re-open the discussion, wanted it on record that it could not agree with submitting mandatory State of landing and the State of the operator jurisdictions to a Diplomatic Conference, and that both the mandatory and optional draft provisions should be submitted in square brackets with a view to improving the likelihood of successful negotiations at the Conference.

2:78 The Chairman then asked the Chairperson of the Sub-Committee to present the subject of **restitution and recourse as embodied in Article 18 bis** at Article VII of the draft Protocol. In referring the Committee to paragraph 8.6 of the Report on LC/SC-MOT/2, the Chairperson pointed out that a number of Sub-Committee members were of the view that draft Article 18 *bis* could serve as a deterrent to unruly behavior, while others felt that the Tokyo Convention was not the appropriate place to address this issue and that such a provision could in fact violate the rights of passengers, such as the right to continue their journey under Article 15 of the Convention. The Chairperson noted that paragraph (1) of draft Article 18 *bis* is a discretionary provision in that an operator “shall not be precluded” from recovering damages, which is contingent on the law of the jurisdiction of a State which must allow for such action. Paragraph (2) is somewhat obligatory in that when a contract of carriage is terminated in accordance with national law, the operator shall not be liable for any damages sustained by that person as a result of the termination of the contract of carriage following disembarkation/delivery.

2:79 The delegations were divided in their views on draft Article 18 *bis*, paragraph (1). Of those who supported its inclusion, one delegation, in referencing Article 37 of the Montreal Convention of 1999, proposed adding the wording “pursuant to provisions contained in national legislation as contained in paragraph (2)”. Another delegation, in supporting the previous delegation, stated it could in fact live with mandatory language in paragraph (1) given that an action which is not specifically prohibited would be permitted in Latin American civil law jurisdictions. Another delegation supported paragraph (1) with great conviction to ensure the best possibility of success in operators’ actions against unruly passengers and to avoid that recourse provisions in contracts of carriage be struck down as abusive by courts. This delegation, along with several others, stressed the importance of having the possibility of such recourse in an international legal instrument which would carry more weight. Several delegations expressed their support for paragraph (1) as being just and fair.

2:80 One observer, supported by another observer, in citing the reasons expressed in LC/35-WP/2-2, paragraphs 5.1 to 5.4, opined that although the right of recourse against unruly passengers may be covered in an operator’s contract of carriage, that this right was not always effective due to the differences in domestic law and in contractual interpretation.

2:81 Of the delegations that opposed the inclusion of Article 18 *bis*, paragraph (1), one delegation viewed the paragraph as a “solution in search of a problem” in that it did not see clear evidence of a concrete problem which could not be successfully addressed elsewhere, i.e. preferably in the contract of carriage. Several delegations shared this view, some further stressing that the matter would be more appropriately handled by a State’s domestic law. In contemplating this reasoning, a delegation which had supported inclusion of the provision during the LC/SC-MOT/2, stated that it could accept its deletion. One delegation

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stated that Article 18 *bis* was unnecessary for the purposes of its jurisdiction given that its courts would, in any case, sanction compensation for damages, subject to the accused's exoneration.

2:82 In his **summation**, the Chairman, in pointing out that the views on Article 18 *bis*, paragraph (1) were evenly divided, directed that they be maintained in square brackets.

2:83 The Committee thereafter considered draft Article 18 *bis*, paragraph 2, pertaining to the termination of the contract of carriage.

2:84 A number of delegations stated that they favoured the inclusion of a clause giving the carrier the right to terminate the contract of carriage, two of them expressing the view that the clause should remain optional by using the word "may". One of the delegations which supported the inclusion stated that the contract of carriage should be terminated in the event of an unplanned landing due to a serious offence. One observer delegation stated that the air carrier should be automatically released from the obligation to transport the unruly passenger to his onward destination unless the national law provided for the contrary; it called for this treaty based stipulation in order to prevent denied boarding claims. Another observer stated that airlines should not be civilly responsible for complying with their public law obligations.

2:85 A fair number of delegations expressed their reluctance to incorporate the clause into the Tokyo Convention. They regarded this to be an issue of contract law and freedom to contract, best left to be addressed in the contract or conditions of carriage. One of these delegations expressed the sentiment that there existed already now no bar under the Tokyo Convention to end the contract of carriage in accordance with its terms. One delegation, positing that in most cases an unruly passenger would be restrained and transported to the intended destination, expressed the view that the State where a diverted aircraft landed should not be burdened with the costs of arranging the onward journey of the person concerned. In relation to this latter point, it was explained that the decision whether or not to divert an aircraft ultimately vested with the aircraft commander.

2:86 In his **summary** on this subject, the Chairman noted that the opponents to the inclusion of the clause outnumbered the supporters by a fair margin. It was thus **decided** to suppress draft Article 18 *bis*, paragraph 2.

2:87 The Committee thereafter turned its attention to the **definition of the term "in flight"** found in Article II of the Appendix to LC/35-WP/2-1. In this context, the Chair of the Legal Sub-Committee recalled that the current Tokyo Convention contained two different definitions of the term (one in Article 1, paragraph 3 and one in Article 5, paragraph 2) and that the proposed definition utilized the wider expression taken from Article 5, paragraph 2, of the Tokyo Convention.

2:88 In the ensuing discussion, one delegation observed that in line three of the proposed text the expression "of this Chapter" would need to be substituted in order to ensure that the definition applied for the whole Convention. This point was echoed in other interventions, and it was decided to refer this matter to the Drafting Committee on the understanding that there was otherwise no opposition regarding the inclusion of the definition.

2:89 As regards the proposals for the definition of **"State of the operator" and "State of registration"**, several States expressed the view that the definitions were not needed, two of them stating that the Tokyo Convention had left these expressions undefined with no problems encountered. Other delegations were of the opinion that that an inclusion of these definitions would be useful, in particular as it relates to the "State of operator". In light of the opinions expressed, the Committee **agreed** to retain the proposed definitions regarding the two terms in square brackets.