WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

A35-WP/118[1]
LE/10
03/09/04
English and Spanish only

ASSEMBLY — 35TH SESSION

LEGAL COMMISSION

Agenda Item 34: Progress report on the modernization of the Rome Convention of 1952

PROGRESS REPORT ON THE MODERNIZATION OF THE ROME CONVENTION OF 1952

(Presented by the Latin-American Association of Aeronautical and Space Law (ALADA))

INFORMATION PAPER

1. PRELIMINARY CONSIDERATIONS

1.1 The Latin-American Association of Aeronautical and Space Law (ALADA) has participated actively, if indirectly, in the development of the Draft Agreement by the Working Group through its General Secretary, Dra. Marina Donato, and directly as Observer in the 32nd Session of the ICAO Legal Committee, and has filed a paper summing up its point of view.

1.2 The Association has submitted a working paper stating the position of its members on one of the key issues of aeronautical liability, which is the liability of carriers for damages caused to third parties on the surface.

1.3 At the last ALADA Meeting, held for the first time in Europe, in Rome, the conclusions on the new project designed to replace the 1952 Rome Agreement and the 1978 Additional Montreal Protocol were unanimously approved. Both these instruments did not have significant worldwide repercussions since few countries have ratified them.

2. SPECIFIC REVIEW OF THE AIR CARRIERS' LIABILITY SYSTEM

2.1 Since the Council, at its sixth meeting of its 172nd Session (May 2004) decided to set up a Special Group to make the required adjustments to the Draft Agreement before submitting it to a Diplomatic Conference, it is extremely important that the various views of the international aeronautical legal community regarding the legal principles included in the draft agreement be given due consideration.

(3 pages)
A.35. WP.118 .wpd

[1] Spanish version provided by ALADA.

2.2 In this connection, ALADA notes that it is very reasonable to draft a new agreement dealing comprehensively with non-contractual liability, whose scope should include the largest possible number of reasons creating liability for the air carrier, including terrorist actions and "abnormal noise", compared with the alternative of adding a further protocol which would only create confusion and make the work of construing the agreement more difficult for judges charged with enforcing it. The draft agreement is thus highly commendable.

2.3 This paper will not deal with other elements already reviewed in the paper submitted to the 32nd Session of the Legal Committee (March 15-21, 2004) but ALADA would like to underscore its position with respect to the key issue in drafting the new instrument: the liability system for the air carrier, involving a radical change in the modernization of the system, since the current system is complex and based on the weight of the aircraft as set forth in its airworthiness certificate.

2.4 The limitation of the liability of the air carrier is not consistent with the new trends in liability matters, which are based on social considerations and on the level of maturity of the air transport industry. ALADA accordingly considers that this solution of providing for comprehensive redress or unlimited liability for the carrier is based on a strictly equitable principle, as it provides proper protection for the victims on the ground, who are unrelated to air transport operations.

2.5 The new trend in domestic legislation in Latin America is to provide for a system of comprehensive redress, known as "unlimited liability". Recent laws enacted in Venezuela (2001), Guatemala (2000), Perú (2000), the preliminary draft of the Argentine Aeronautical Code prepared by the Assistant Secretary for Commercial Air Transport in Argentina (2001) and the recently submitted draft (2004) bear witness to this. In all these cases, the operator or other party causing damage to third parties on the ground will be unlimitedly liable. This is really the classic formula which awards the amount of the damages caused, as assessed by the third party suffering such damage. In the event of dispute, the amount will be assessed by the court, assisted by three experts.

2.6 Thus, a system similar to the one adopted in the 1999 Montreal Agreement would be inadequate to redress the damages caused to third parties on the ground, who are not related to the operator of the aircraft by any contractual provision.

2.7 ALADA understands the serious implications of the cancellation of war risk insurance following the September 2001 attacks, which led ICAO to draft a resolution providing for war risk insurance, whereby each Contracting State would participate in a non-profit entity. However, these exceptional events should not lead us to underestimate the capacity of the insurance industry to adapt to new market conditions and achieve the profitability levels which were the norm before the terrorist attacks. Accordingly, the arguments against comprehensive or unlimited redress should be properly assessed, given their potential repercussions on the market.

2.8 ALADA believes that providing separately for damages caused by unlawful interference and acts of war, including terrorist acts, by establishing liability based on the weight of the aircraft as set forth in its airworthiness certificate is an obsolete formula which has been abandoned in more modern legislation. This is because, *inter alia*, it does not provide for damages caused by medium-sized aircraft to more densely populated areas, which could exceed the damages caused by wide-body aircraft overflying less populated or desert areas. It therefore considers it far more advisable to set a high limit for this kind of damage, instead of the proposed formula.

3. LATEST POSITION OF ALADA

3.1 The following was the position of ALADA at the 28th Meeting of the Latin American Association of Aeronautical and Space Law (Rome, Italy, March 29-April 1st, 2004).

3.2 The following conclusions were unanimously adopted by the members present:

"1. It is essential that liability for damages to third parties on the surface caused by aircraft be regulated at international level. The 1933 and 1952 Conventions should only be used as historical precedents, without taking into account, in most cases, the principles set forth therein, since the passage of time and the evolution of civil aviation have made them obsolete, and they are seldom used any more.

2. The idea of updating the 1952 Convention through a Protocol should be abandoned. This would cause a serious international dispersal and would in all likelihood not be successful.

3. The basic issue of the new Convention to be drafted is undoubtedly the issue of liability. Should comprehensive redress be granted for damages suffered by third parties on the ground, who are entirely unrelated to the accident by providing for unlimited liability? Should the objective principle be adopted, requiring only that the damaged party prove that the damages were caused by an aircraft in flight or its effects? To decide this issue, we need to determine whether unlimited and strict liability also covers damages caused by terrorist acts or acts of war, as well as any other damages caused, even if not as a result of the direct crash of the aircraft or a fall from the aircraft. If that is the case, it might be advisable, despite legal obstacles, to provide for two separate spheres of liability: one of entirely strict liability and the other of unlimited and assumed liability, subject to furnishing of the required evidence.

4. Guaranteeing the rights of the parties suffering these damages requires a valid insurance system and establishing the courts where the damaged parties can enforce their rights. Given the magnitude of the liability insured, ICAO should consider the possibility of managing such insurance itself or causing it to be managed by other organizations which would guarantee its effectiveness."

— END —