



ASSEMBLY — 36TH SESSION

LEGAL COMMISSION

Agenda Item 45: Progress report on compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

MODERNIZATION OF THE ROME CONVENTION OF 1952

(Presented by the International Air Transport Association (IATA))

EXECUTIVE SUMMARY

The objective of modernizing the Rome Convention is to provide compensation to victims on the ground as a result of aircraft damage caused by terrorism, whilst protecting the viability of the air transport industry.

Action: The Assembly is invited to recognize the concerns expressed by the industry regarding the importance of an unbreakable cap on liability of aircraft operators and instruct ICAO to take these into account when drafting the revised Convention concerning terrorism risks.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective F: Rule of Law – Strengthen law governing international civil aviation
<i>Financial implications:</i>	N/A
<i>References:</i>	N/A

1. INTRODUCTION

1.1 The Special Group on the Modernization of the Rome Convention of 1952 (SG-MR) has held five meetings to develop a draft instrument that could be brought to the ICAO Council for a determination of the suitability of holding a diplomatic conference. A sixth meeting occurred on June 26-29 in Montreal.

1.2 The meetings have produced a draft text that is based on the philosophy of channelling liability through operators for aircraft accidents caused by terrorism that produce third party damage to victims on the ground. (A separate text related to general accidents only has been prepared but it is not the subject of this paper.)

¹ All language versions provided by IATA.

1.3 The draft text contemplates providing compensation to third party victims to the extent that insurance coverage is not available and/or liability coverage limits have been exceeded. Such compensation would come from a mechanism funded by the users of air transport--passengers and shippers. Once the limits of the fund, called a Supplementary Compensation Mechanism (SCM) are reached, State solidarity would be relied upon. The challenges of combining the concept of channelling liability through the aircraft operator with traditional principles of liability are discussed below.

2. DISCUSSION

2.1 Terrorist acts are directed at States or societies, not against individual airlines. It is generally accepted that it is to no one's benefit to destroy an airline because of its inability to pay for terrorist acts directed at a State. But, because strict liability laws exist in many jurisdictions, and because airlines are now less able to secure insurance coverage for this terrorist exposure, a disaster equivalent to that of 9/11 is likely to result in collapse of the affected airline/s.

2.2 In 2005 and 2006, insurance coverage was effectively withdrawn for damage to the aircraft hull caused by weapons of mass destruction (WMDs). On the liability side, the availability of insurance coverage for WMDs is soon expected to be restricted. As a result of this reduction in cover, airlines are forced to absorb the responsibility themselves for exposure of their aircraft to acts of terrorism unless governments step in to relieve them this responsibility. With strict liability regimes in effect in many jurisdictions, airlines are accountable to third parties in cases of terrorist-caused incidents, with or without insurance cover.

2.3 A partial solution proposed by the SG-MR to protect victims as well as the air transport industry is intended to afford operators with certainty as to the maximum amount of their exposure. This certainty is essential to mitigate the effect of combining strict liability with a channelling approach. Operators and their shareholders need to know that they will not be subjected to unlimited claims pursued by various parties for unlimited amounts of damage, particularly if they agree to assume strict liability via a revised convention. It is therefore essential that operators' liability is capped at a certain amount and that the cap cannot be broken. If the cap is breakable, the limits are illusory. Unbreakable limits are the most significant component of a revised Convention, and if not achieved will result in a Convention that is not ratifiable.

2.4 Reaching consensus on the issue of breakability has been IATA's fundamental concern during the course of drafting of a revised Convention.

3. CONCLUSION

3.1 In order to produce a viable Convention, the final draft must contain an **unbreakable cap on liability**. In addition, a revised draft must also encompass the following points, as outlined in submissions to the SGMR:

- exonerate and/or otherwise protect non-operators;
- provide that the capped liability in the treaty and recourse to the fund are the exclusive remedies, thus ensuring finality of claims;
- limit actions for compensation to the jurisdiction where physical damage occurs;

- limit damage payments from the operators and the fund to annual aggregates; and
- address ground rules for operation of the fund, including drop-down when insurance is unavailable or exhausted.

— END —