



## INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

### **DRAFT CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT, AND DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES**

(Presented by the United Arab Emirates (UAE))

#### **1. BACKGROUND**

1.1 The 33rd Session of the International Civil Aviation (ICAO) Legal Committee (LC), which was held in Montreal from 21 April through 2 May 2008, recommended that the ICAO Council convene a Diplomatic Conference to examine two proposed draft conventions on third party surface damage, namely the *Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft* (Unlawful Interference Convention) and the *Convention on Compensation of Damage Caused by Aircraft to Third Parties* (General Risks Convention).

1.2 The first text covers damages arising out of terrorist acts and the second from the normal course of aircraft operations. These conventions are intended to replace the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952 (Rome Convention). The proposed texts are the results of the work of the LC and a Special Working Group (SWG) as part of the so-called “Modernization of the Rome Convention” project.

1.3 On 23 June 2008, at the sixth meeting of its 184th Session, the ICAO Council considered a report prepared by the Secretariat on the outcome of the 33rd Session of the Legal Committee on this issue and decided to convene a Diplomatic Conference to finalize and adopt both draft conventions.

1.4 This paper reflects the view the UAE with respect to both drafts being presented for the consideration of the Diplomatic Conference (DC).

#### **2. UNLAWFUL INTERFERENCE CONVENTION**

2.1 The UAE commends ICAO, the LC, and the SWG for the valuable and novel work that has been produced for the consideration of the DC. Notwithstanding, the UAE considers that the concept of placing the aircraft operator strictly liable for acts of terrorism that are beyond its control should be thoroughly examined.

2.2 In exchange for accepting the counter-intuitive three-pillar structure of the proposed convention (strict liability of the operator, limitations on the right of recourse and an exclusive remedy provision), and although recognizing that substantial work has already been accomplished, the UAE believes that the following amendments are needed:

2.3 To align the definition of “event” with the title of the proposed convention, the term should be defined as follows: An “event” occurs when damage to third parties results from an act of unlawful interference involving an aircraft. This change would reflect the actual and primary cause of the accident.

2.4 The definition of “third party” should not serve as the basis to provide a windfall for compensation recovery both under this convention and the Montreal Convention of 1999. In line with this position, the UAE would propose that “third party” would be defined as follows: “Third Party” means a person other than the operator, passenger or consignor or consignee of cargo; in the case of collision, “third party” also means the operator, owner and crew of the other aircraft.

2.5 The definition of “senior management” of Article 1 of the proposed convention should be tightened to include only those in top management positions and operational decision-makers of a sufficient level of seniority having a direct impact on aviation security. Member States should bear in mind that a large number of jurisdictions permit the aircraft operator to exonerate its liability for acts of terrorism.

2.6 The definition of “person” under Article 1 of the proposed convention should be maintained as it currently stands. It is the view of the UAE that the term “person” should not only include the concepts of natural and legal persons, but it should also retain the notation that the “State” could also be a “person” under the terms and conditions of the proposed convention.

2.7 The concept of “mental injury”, as introduced in Article 3 paragraph 3 of the proposed convention, constitutes a significant departure from internationally-accepted standards set out in the Montreal Convention of 1999. The UAE sees no justification for this deviation.

2.8 The square brackets of Article 4 of the proposed convention should be removed and the figures maintained.

2.9 The Supplementary Compensation Mechanism (SCM) should be an entity under the auspices and subject to the control of the International Civil Aviation Organization (ICAO). Under the current international financial crisis, the UAE contends that it would be unwise to create another independent and autonomous international entity for the sole purpose of compensating potential third party ground victims of acts of unlawful interference. This would only add extra costs and promote inefficiencies. Furthermore, the proven experience and leadership of ICAO can significantly facilitate the execution of the SCM’s duties. This should be expressly recognized in Article 8 of the proposed convention.

2.10 To avoid market distortions and undesirable competition effects, transit traffic should be expressly excluded from the contributions to the SCM. This should be spelled out in Article 12 of the proposed convention.

2.11 The DC should analyze the possibility that entities – whose liabilities are being expressly exonerated - other than aircraft operators can also contribute to the SCM.

2.12 The DC should adopt a 100% pre-funding mechanism for the SCM in the context of Article 14 (“Period and Rate of Contributions”), paragraph 2.

2.13 The contributory negligence standard set out in Article 20 of the proposed convention imposes on the aircraft operator the obligation to prove intent or recklessness with knowledge that damage would probably result on part of the victim, in order to wholly or partially exonerate or alleviate its liability. This is a higher standard than that of Article 20 of the Montreal Convention of 1999. The UAE has failed to find justification for this departure. Consequently, the UAE would suggest that the latter standard be adopted for this proposed convention

2.14 In practice, Article 23 on “Additional Compensation” delineates the required standard that would trigger the breakability of the operator’s cap, as set out in Article 4. The UAE is of the view that since this proposed convention has been envisioned as a compensation scheme, as opposed to a regular international liability instrument, this standard cannot be regular negligence of the aircraft operator, its servants or agents. Should the latter be the case, the proposed convention could not adopt the unconventional and untested concepts of limitation on the right of recourse and the exclusive remedy. These are the three pillars under which this scheme has been built upon. Only intentional and deliberate acts of senior management should break the liability cap of the aircraft operator. Within this context the notion of “servants and agents”, as mentioned in paragraph 5 of Article 23 should be completely eliminated.

2.15 The so-called moral obligation of States should be expressly recognized in the proposed convention. In this respect, the UAE would like to propose that the following language be included in a special and separate article within the convention: “Art. \_\_\_ Moral Obligation of States Parties. Nothing contained in this Convention shall prevent member States from directly compensating third parties that have sustained damages as a result of an act of unlawful interference”.

2.16 Although the UAE would be in a position to support industry-agreed standards on the right of recourse, we have failed to find justification on delaying the exercise of the right of recourse, of both the aircraft operator and the SCM, against the intentional offender (terrorist) until all claims from persons suffering damage have been finally settled and satisfied. As these provisions currently stand (Art. 24 paragraph 1 second sentence, and Article 25, paragraph 1, second sentence), all they do is to protect the assets of terrorists. Therefore, the UAE would suggest eliminating them.

2.17 The UAE considers that the assistance to an aircraft operator whose principal place of business is in a State Party for damages caused in a State non-party must be mandatory and automatic, and not solely a prerogative and subject to the discretion of the Conference of Parties. This is so because in this situation the aircraft operator has contributed to the SCM, and, therefore, it should avail itself of its funds to compensate victims. This should be reflected in Article 28 of the proposed convention.

2.18 As indicated above, the introduction of the exclusive remedy provision, as envisaged in Article 28 of the proposed convention, whereby liability is solely and exclusive channeled through the aircraft operator may be problematic under some legal systems. Having said this, the UAE would only be in a position to support it, if the DC were to retain a quasi-unbreakable liability cap of the aircraft operator.

2.19 The single jurisdiction concept of Article 31 should be kept. This would serve two purposes. First, it would contribute to the avoidance of unnecessary litigation. And second, it would facilitate prompt and adequate compensation to victims.

2.20 The statute of limitation of Article 35 should be reduced from three to two years. This in line with the Montreal Convention of 1999 (Article 35) and the Warsaw Convention of 1929 (Article 29). In addition to aligning this provision with previous international air law instrument highly accepted by the international community, a two-year limitation period should be sufficient time for a victim to file a claim for compensation.

2.21 The proposed convention should not enter into force, if the SCM is not fully funded. The exclusive remedy and limitation on the right of recourse are exceptional concepts – thus far not previously seen in the aviation context - and could only be supported if the SCM enjoys the necessary funds to carry out its objective. If not, all burden will be unjustly shifted to aircraft operators. Thus, its coming into being should be subject to two key conditions. First, thirty-five States or more must become party to the convention. This is in line with Article 84 of the Vienna Convention on the Law of Treaties and has already been proposed by Uruguay in Doc. No. 11. Second, in addition to first requirement, the total number of passengers departing from airports in States that have ratified the convention must be at least 750,000,000. The rationale of this amount is found in the fact that the SCM needs to acquire SDR 3 billion over a cycle of four years to adequately fulfill its mission.

### 3. GENERAL RISKS CONVENTION

3.1 The UAE believes that the proposed convention is a valuable attempt to harmonize and unify international law with respect to damages caused to third parties on the ground. It is in fact a remarkable achievement as compared with its immediate predecessor. However, a number of amendments should be introduced in order for the proposal to achieve a great degree of acceptability from the international community. In this respect, the UAE would like to propose the following:

3.2 The definition section of Article 1 of the proposed convention should contemplate a definition of the term “event”, which is already incorporated in the draft Unlawful Interference Convention. Similarly, the definition of “third party” should not serve as the basis to provide a windfall for compensation recovery both under this convention and the Montreal Convention of 1999. In line with this position, the UAE would propose that “third party would be defined as follows: “Third Party” means a person other than the operator, passenger or consignor or consignee of cargo; in the case of collision, “third party” also means the operator, owner and crew of the other aircraft.

3.3 The concept of “mental injury”, as introduced in Article 3 paragraph 3 of the proposed convention, constitutes a significant departure of internationally-accepted standards set out in the Montreal Convention of 1999. The UAE sees no justification for this departure.

3.4 As already contemplated in Article 5 of the Rome Convention of 1952, this convention should exclude from recoverable damages war risks and civil disturbances. This exclusion is justified on the basis that it is a typical *force majeure* event. An additional paragraph should be added in Article 3 of the propose convention to capture this amendment.

3.5 The two-tier liability regime set out in Article 4 of the proposed convention should be maintained. This scheme does in fact allow limitless compensation recovery for ground damage victims, a significant improvement with respect to the national domestic systems of a large number of ICAO member States. Unlike the Rome Convention of 1952 (Article 12), the victim need not prove the intention or deliberate act on part of the aircraft operator to avail himself / herself of compensation in excess of the liability cap. It is up to the aircraft operator to meet the *onus probandi* requirements as set out in Article 4 paragraph 2 of the proposed convention to stay within the liability cap. However, in Doc. No. 5 a proposal has been submitted to this DC to introduce a limitation of the liability of aircraft, engine and component

manufacturers which could only be broken in case senior management of the manufacturer acted with the intent to cause damage or recklessly and with knowledge that damage would probably result. The UAE is of the opinion that this proposal would unnecessarily and unjustifiably limit the liability of certain entities that are thus far not subject of the scope of the proposed convention. If accepted by the DC, the breakability standard of the proposed liability cap would impose an onerous burden on ground damage victims.

3.6 The square brackets of Article 4 of the proposed convention should be removed and the figures maintained.

3.7 Under Article 9 aircraft operators are required to maintain adequate insurance or guarantee covering their liability under the proposed convention. Although insurance has always been available for this type of damages, this provision, however, does not address a potential unavailability of aviation insurance as a result of i) a market failure; ii) multiple losses; or iii) acts of unlawful interference that may severely affect the market. To effectively respond to this hypothetical scenario, the UAE would like to propose that if an aircraft operator is not able to aviation insurance on a per event basis, the insurance requirements mandated by the proposed convention could be complied with by presenting evidence of insurance or other guarantee on an aggregate basis.

3.8 The contributory negligence standard set out in Article 10 of the proposed convention imposes on the aircraft operator the obligation to prove intent or recklessness with knowledge that damage would probably result on part of the victim, in order to wholly or partially exonerate or alleviate its liability. This is a higher standard than that of Article 20 of the Montreal Convention of 1999. The UAE has failed to find justification for this departure. Consequently, the UAE would suggest that the latter standard be adopted for this proposed convention.

3.9 As contemplated in Article 13 of the proposed convention, the UAE believes that entities retaining title or holding security of an aircraft but with no operational interest should not be held liable for damages.

3.10 As envisaged in the draft Unlawful Interference Convention, this proposed convention should adopt the concept of single jurisdiction to avoid unnecessary and unwanted litigation. Therefore, the UAE would suggest that the phrase in between square brackets of Article 16, paragraph 1, of the proposed convention is removed.

3.11 The statute of limitation should be reduced from three to two years. This in line with the Montreal Convention of 1999 (Article 35) and the Warsaw Convention of 1929 (Article 29). In addition to aligning this provision with previous international air law instruments highly accepted by the international community, a two-year limitation period should be sufficient time for a victim to file a claim for compensation.

3.12 As proposed by Uruguay in Doc No. 11, this convention should only enter into force when thirty-five States, or more, become party thereto. This is in line with Article 84 of the Vienna Convention on the Law of Treaties.

3.13 The final clauses of the proposed convention should address the issue of its relationship with other relevant international air law instruments. In this respect, the UAE would suggest that the rules of this convention should prevail over any rules which apply to ground damages between States parties to this convention and the i) the Rome Convention of 1952; ii) the 1978 Protocol to amend the Rome Convention of 1952, and iii) the Montreal Convention of 1999. A similar formula has already been adopted in Article 55 of the Montreal Convention of 1999.

4. **CONCLUSION**

4.1 The UAE is of the view that the proposed amendments set out in this paper could significantly increase the chances of a higher number of ratifications for both of the proposed conventions submitted for the consideration of the DC, thereby serving the purpose of unifying and harmonizing international law. Thus, the UAE strongly urges ICAO member States to take into account these proposals.

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