



INTERNATIONAL CONFERENCE ON AIR LAW

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CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

ADDITIONAL COMPENSATION AND EXCLUSIVE REMEDY

(Presented by Japan)

1. ADDITIONAL COMPENSATION (ARTICLE 23)

1.1 Concerns

1.1.1 Current draft paragraph 2 of Article 23 provides that the limit of the operator's liability will be breakable when the damage resulted from operator's act or omission done with intent or recklessly and with knowledge that damage would probably result. However, there are two conditions further added on: a) that such act or omission falls within the regulatory responsibility and actual control of the operator, and b) that such act or omission is, other than the act of unlawful interference, the primary cause of the event.

1.1.2 The concept of "recklessly and with knowledge that damage would probably result" is quite limiting in itself, and the situation is hardly imaginable where an act or omission which does not meet the conditions set out in a) and b) of paragraph 2 of Article 23 would nevertheless be deemed as reckless. In that sense, the conditions a) and b) are redundant. By leaving such conditions, it may give an impression that they are further limiting the scope of "recklessly and with knowledge" provision, which is not justifiable. Therefore, conditions a) and b) should be deleted, and this would not result in increase of operator's obligation.

1.1.3 In addition, regarding condition b), while "primary" has a meaning "more important than anything else", there is a room for interpretation that, if there was a third party who made a gross negligence in relation to the damage, then the liability of the operator who also acted recklessly may be exempted. However, it is not justifiable to exempt the operator who has acted recklessly. To avoid such interpretation, the condition b) should be deleted.

1.1.4 According to paragraph 2, it must be proved that the senior management of the operator has contributed to the event by an act or omission done with intent or recklessly and with knowledge. It should be further clarified whether the operator shall, based on this provision, be liable when there was a problem in selecting or supervising its employees etc. who have been actually engaged in security services. If necessary, the text should be accordingly modified.

1.1.5 According to paragraph 5, which handles the case where a servant or agent has committed an act of unlawful interference, the operator will not be liable if it proves, among others, that a system to ensure effective selection of servants and agents has been established by its senior management. If such fact is proved, then the operator will be exempted from liability even in the case where the operator has acted recklessly and with knowledge that damage would probably result in selecting its servants and agents. This paragraph should therefore be deleted.

1.2 **Proposal**

1.2.1 Paragraph 2 of Article 23 should be amended as follows:

2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result ~~and which:~~

- a) ~~falls within the regulatory responsibility and actual control of the operator; and~~
- b) ~~is, other than the act of unlawful interference, the primary cause of the event.~~

1.2.2 Paragraph 5 of Article 23 should be deleted.

2. **EXCLUSIVE REMEDY (ARTICLE 28)**

2.1 **Concerns**

2.1.1 Current draft Article 28 provides that the third party will be exempted from being liable for the damages and the claims for compensation may only be brought against the operator. However, it is not justifiable to exempt the third party who has contributed to the damage recklessly. Therefore, the third party who has acted recklessly should be added in paragraph 2 of Article 28 and, consequently, the third party should also include legal person.

2.1.2 In addition, regarding paragraph 1 of Article 28, the victim should be allowed to claim compensation not only to the operator but also to the SCM.

2.2 **Proposal**

2.2.1 Paragraphs 1 and 2 of Article 28 should be amended as follows:

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage due to an act of unlawful interference, however founded, whether under this Convention or in tort or in contract or otherwise, can only be brought against the operator or the Supplementary Compensation Mechanism and shall be subject to the conditions and limits of liability set out in this Convention. No claims shall lie against any other person for compensation for such damage.

2. Paragraph 1 shall not apply to an action against ~~an individual who has intentionally committed an act of unlawful interference~~ any person who has contributed to the occurrence of the event by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.