



## INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

### 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 Article 23(2) 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, that is, such act or omission (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.

1.1.2 The concept of "recklessly and with knowledge that damage would probably result" is quite limited by itself, and the situation is hardly imaginable that an act or omission which does not meet the conditions set out in Article 23(2) (a) and (b) would nevertheless be deemed as reckless. In that sense, the conditions (a) and (b) are redundant. However, these conditions 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 In terms of servants and agents, the fact that an act or omission of servants and agents done with intent to cause damage or negligently has resulted in damage does not necessarily mean operator's liability for such damage. However, if the operator was reckless in terms of selection and supervision of its servants and agents, then it should be liable for the damage caused by the act or omission of its servants or agents. Such conclusion will be derived from interpretation of Article 23(2), regardless of whether Article 23(5) is provided or not.

1.1.5 The provision of Article 23(5) raises problem that, if an operator proves the establishment and application of certain security system, then the operator will conclusively not be liable even in the case the operator has acted recklessly in terms of selection and supervision of servants and agents. It is not justifiable to exempt the operator who as acted recklessly, and therefore, Article 23(5) should be deleted.

## 1.2 **Proposal**

1.2.1 Article 23(2) 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 Article 23(5) 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 in relation with the victims, and the claim for compensation may only be brought against 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 Article 28(2) and, consequently, the third party should also include legal person.

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

### 2.2 **Proposal**

2.2.1 Article 28(1) and (2) 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 and 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~~ 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.