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INTERNATIONAL CONFERENCE ON AIR LAW

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COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE

(Presented by the McGill University Institute of Air & Space Law)

1. INTRODUCTION

1.1 This memorandum addresses Articles 23-26 of the Draft Convention on Compensation for Damage to Third Parties resulting from Acts of Unlawful Interference Involving Aircraft.

2. ARTICLE 23.3

2.1 Article 23.3 creates a presumption of non-liability under Article 23 for an operator who shows it had a system to ensure compliance with the applicable regulatory requirements. Discussion at the plenary session seemed to indicate that applicable regulatory requirements was interpreted by some delegations to include at least all Annex 17 safety standards. However, these are not the applicable requirements; Annexes of the Chicago Convention do not have direct effect and do not bind airlines which are not parties to ICAO nor subject to its jurisdiction. ICAO has jurisdiction over Member States. However standards are not even absolutely binding on Member States given that the Chicago Convention Article 38 reserves the privilege for States to file a difference from the Standards. An operator should not be denied an Article 23.3 reversal of presumption where it has complied with all national security regulation, but its home State standards validly differ from those of Annex 17. As a result, and as expressed in the text of Art. 23.4, the only party competent to audit compliance with national standards is the home State of the operator involved in the unlawful interference. No other audit verifies airline compliance with applicable national regulatory standards.

3. ARTICLES 24 & 25

3.1 Articles 24 and 25 exclude a recourse action by either the operator or the supplemental compensation mechanism until all claims by victims have been finally settled and satisfied. This creates a major barrier without time restriction for an action by the operator. Although Article 35 establishes a single limitation period, this is to be computed according to 35.3 by the lex *fora*. In many jurisdictions the limitation period is interrupted by an incapacity to act, one cause of which may be mental shock. Therefore it is almost impossible to assess when all victims claims have been settled since a further victim may validly file suit even after the expiration of the *prima facie* limitation period. Moreover the article does not specify whether it intends the final settlement and satisfaction of victims claims to be those directed against the operator or the perpetrator and thus must be interpreted cumulatively in the current

articulation. This again is a major barrier for action by the operator against parties involved in the interference since any action by individual victims against the perpetrator will necessarily engage a lengthy procedure.

4. ARTICLE 26.1

4.1 Article 26.1 contains an absolute exclusion of any action against an owner, lessor, or financier retaining title or holding security in an aircraft. A literal reading of this would therefore exclude an action against these persons even where they participated in the act of terrorism. The exclusion of an action against a manufacturer of an aircraft, its engines or component parts in relation to an approved design fails to incite manufacturers to incorporate best anti-terrorism technology into their designs. This Convention is overly burdensome on airlines to the exclusion of liability of other corporate bodies who play a vital role in preventing or limiting the effects of unlawful interference involving aircraft.

5. ARTICLE 26.2

5.2 Article 26.2 prevents the operator from bringing a recourse action against a third party under Article 24.2 where that third party could not reasonably have covered that damage by insurance. It is unclear why the air transportation sector should be liable – to a cap – either through the operator or the supplementary compensation fund for the damages arising from acts of unlawful interference involving aircraft irrespective of fault, and yet the liability of other parties is subordinate to the reasonable insurability of the risk. The term “reasonable” is unclear and lends itself to widely varying subjective interpretations.

6. ARTICLE 26.3

6.1 Article 26.3 creates an absolute prohibition against recourse of the operator for amounts for which he is liable under Article 23. Although where the comportment of the operator is so abhorrent as to engage Article 23 liability, it is just that the victims should be able to claim full damages from the operator, there is no justification for excluding an action by the operator against the perpetrator of the act of unlawful interference, which, even in the presence of recklessness on the part of the operator. remains the primary cause of damage. The Convention thus effectively creates an absolute limit of liability for the perpetrators of terrorism at the sum of the SCM (subject to the paragraph below).

6.2 Article 26.3 also creates an asymmetry with respect to the rights of insurance companies to claim any sum which they may have covered and which was payable under Article 23. In jurisdictions where the insurance company has an independent action in its own name (via subrogation), then it is not excluded from bringing recourse against third parties for sums which it may have paid under Article 23, whereas in jurisdictions where the insurer may bring its claim only in the name of the operator or is required to accept all of the restrictions on the rights of the insured to bring recourse suit, recourse shall be excluded.

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