



## INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

### REPORT OF THE DRAFTING COMMITTEE ON THE DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

#### COMMENTS ON THE DRAFTING COMMITTEE REPORT

(Presented by the Air Crash Victims Families Group)

#### 1. INTRODUCTION

1.1 The Drafting Committee is to be complimented for its expeditious work within the short time available and for its comprehensive presentation.

#### 2. DISCUSSION

2.1 The purpose of this Convention is to make its text acceptable and ratifiable in all or at least in the majority of the Member States.

2.2 In order to make the Convention ratifiable in all and/or at least in the majority of the Member States attention has to be given of the laws governing the public rights and privileges that exist already in those individual Sovereign States and/or Regional Communities because once ratified the Convention becomes the prevailing Law of the land.

2.3 No international Convention can be ratified if it reduces the rights already available or interferes with the already existing National or State Laws.

#### 3. CONCLUSION AND PROPOSAL

##### 3.1 **Article 4 – Limit of the operator’s liability**

3.1.1 Article 4.1. **limits** the carriers liability and is in conflict with

3.1.2 (EC) No 785/2004 that requires **minimum** insurance cover

3.1.3 By removing the brackets from article 4.1. as to valuation the liability limits and or minimum amounts are frozen at the level originally introduced in 2004.

3.1.4 In Article 15 – **Review of limits** starts only “since the date of entry into force of the Convention”.

3.1.5 A Convention comes into force after the ratifications of the stated minimum of States have been deposited (example 1999 Montreal – 30 States – 2003 – four years).

3.1.6 This means that valuations originally in bracket since 2004 – now part of the Convention Draft – would still be applicable in 2013 – ten years after they have first been introduced. This would be in conflict with the intent of article 15 (Review of limits).

3.1.7 Present day value of the mandatory liability cap (and/or underlying insurance coverage available to pay victims' damages at the time the Convention would be seriously reduced.

3.1.8 The carrier's liability limit in this Convention would also be short of the insurance coverage already being offered to them in the market (DCCD Doc No. 12 – presented by the IUAI) for damages caused in the highest bracket – \$ 2 bio (see IUAI at 3.4.) is already in excess of the caps in Article 4.

3.1.9 The liability cap has to be breakable (see 1929 Warsaw (Article 25)/1999 Montreal (Article 21).

### 3.1.10 **Proposal**

3.1.10.1 The valuation brackets to be restored

3.1.10.2 A sentence be added to Article 4 stating that the final valuation would be “present day value” at the time of the Convention coming into force or available insurance coverage, whatever is higher.

## 3.2 **Article 5 – Order of priority of compensation**

3.2.1 Article 5 is a logical follow up from carriers' **liability cap in Article 4.**

3.2.2 However, Article 5 cannot be enforced – and is harmful to victims/claimants because:

- a) nobody would know how many claims by what parties would be filed until the statute of limitation (Article 19) has expired in 2 years (Article 19);
- b) the amount of total claims;
- c) the total amount of settled damages;
- d) the total amount of court adjudicated damages which are payable “in toto” per Article 17 – and create a conflict with Article 5);
- e) the time it takes to resolve differences in the appeals judicial process (Example: 1929 Warsaw – KAL 007 – 1983-1996 judicial proceedings, including three issues before the US Supreme Court. Damages were determined and paid out starting only in 1995 – 12 years after the tragedy occurred (Beck vs. Korean Airlines United States Federal Court Southern District of New York – widow with two children);
- f) Article 5 would conflict with State's laws and courts procedures regarding the settlements/adjudications and disposition of post air crash damages.

3.3 **Proposal**

3.3.1 Article 4 be amended from carrier's liability being **limited** to list or maximum available insurance coverage, whatever is higher.

3.3.2 Breakability of cap.

3.3.3 Article 5 and article 13 be stricken.

3.4 **Article 8 – Advance payments**

3.4.1 While this text conforms to the 1999 Montreal Convention.

3.4.2 Advance payments do not take into account (EC) No 889/2002 (succeeding (EC) 2027/97) item 7 Article (5) (2).

3.4.3 They do not contain implementation, penalty and enforcement provisions.

3.5 **Proposal**

3.5.1 Enforcement, implementation, penalty provisions be added.

3.6 **Article 13 – Exclusion of liability**

3.6.1 This article would interfere with the rights of victims/claimants to “due process” by exonerating in advance a group of potential responsible or co-responsible parties.

3.6.2 Today, owners, lessors and financiers have multiple functions – As owners they may also may bankers and financiers (see General Electric, Boeing, Airbus, Bombardier, Banks with leasing interests (Fleet Boston Business Credit Corporation, etc).

3.6 **Proposal**

3.6.1 Article 13 be stricken.

3.7 **Article 10 – Exonerations**

3.7.1 This exoneration conflicts with article 13 – Exclusion of liability – because:

- a) if the operator has to burden of proof that he is not liable while the parties under article are not liable by fiat.
- b) The victim would be left empty handed – damages yes – no liable person to get them from.

3.8 **Proposal**

3.8.1 Article 13 be stricken.

3.9 **Article 16 – Forum**

3.9.1 The suitable Forum may be the State where the tragedy occurred, but this limitation strays considerably from 1999 Montreal (Article.....).

3.9.2 The determination of damages should also take into consideration the State where the victim has his prime residence according to 1999 Montreal Convention (Fifth Jurisdiction article 33 (2)) to determine the restitution of damages incurred.

3.9.3 If the damages are not determined according to the prime residence of the victim the Convention creates an inequity, because in countries with low incomes or very restrictive laws the damages awarded would be low and vice versa high for victims in higher Income/law countries (Kowalski vs. Gol – German scientist working with indigenous Indians in the Amazon Forest in Brazil – Liu vs, Korean Airlines – Taiwanese ship engineers residing in Taiwan- jurisdiction in the US through purchase and payment of ticket).

-----

## APPENDIX

### 1. **Article 4 – Limit of the operator’s liability**

1.1 *The minimum liability in respect to third parties per accident and per aircraft arising under article 3 and article 9 must be – either the amounts stated in the table hereunder or the available insurance coverage, whichever amount is higher.*

Followed by table.

1.2 *The value of the liability in each category under (1) shall be determined at the time the Convention enters into force.*

Paragraphs 2 and 3 become paragraphs 3 and 4.

### 2. **Article 5 – Order of priority of compensation**

*Delete*

### 3. **Article 8 – Advance payments**

**Add:** 2. *The carrier shall make advance payments not later than fifteen days after the Identity of the natural person has been established or his death has been otherwise Certified.*

3. *The minimum amount of advance payments shall be one yeas income but no less then SDR 25,000 for fatalities or SDR 15,000 for injured survivor.*

4. *Advance payments shall be made annually until the final damages are determined and actually paid.*

5. *In case of delay to make advance payments the carrier cannot deduct such payments from the final settlement.*

6. *In case the carrier does not make any advance payments but is held to do so the payment amount is to be tripled.*

### 4. **Article 13 – Exclusion of liability**

*Delete*

### 5. **Article 16 – Forum**

**Add:** 4. *Damages must be awarded under the law of domicile of the victim.*

— END —