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(English only)

INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

DIPLOMATIC CONFERENCE (MONTREAL, 20 APRIL TO 2 MAY 2009) TO ADOPT A CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES (GENERAL RISKS CONVENTION)

(Presented by the Aviation Working Group)

1. INTRODUCTION

1.1 Members of the Aviation Working Group (the **AWG**) manufacture and lease or finance a substantial majority of the world's modern commercial aircraft and engines.

1.2 The AWG has been actively involved in the negotiation of the draft Convention on Compensation for Damage to the Third Parties (the **General Risks Convention**) since the inception of work on the text.

1.3 The development and negotiation of the General Risks Convention took place in many sessions of the Study Group for the Modernization of the Rome Convention, as well as at two meetings of the Legal Committee. The subject has been on the Work Programme of the Legal Committee since 2000.

1.4 Yet in May 2008, at the last working session, the 33rd Session of the Legal Committee, and with little debate, a fundamental change was introduced into the texts. That change placed a cap on the aggregate limit of an operator's liability (see Art. 4(1)). The main reason for the lack of debate was an absence of instructions for many delegations, given the unexpected, seismic change embodied in the operator's cap.

1.5 The late introduction of the operator's cap fundamentally changed the balance of liability exposure between affected parties. Prior to that change, an operator was potentially liable to all third parties, with a broad recourse against other parties. Following that change, absent fault (for example, in a weather-related incident) an operator would be exonerated from liability above the cap.

1.6 This late change has the effect of shifting liability and settlement risk to manufacturers in a number of cases. It is a zero-sum change, with significant, if unintended, potential adverse and unjust consequences.

2. PROPOSAL

2.1 At the above-noted meeting of the Legal Committee, the AWG made a proposal to address this problem. It is recorded verbatim in paragraph 3:204 of the Report of that meeting. As noted

in paragraph 3:205 of that Report, the proposal was supported by some delegations (including two states with large manufacturing sectors). While others preferred not to accept the proposed text 'at this stage', it was decided to note the text in full for purposes of further study.

2.2 The proposed text is set out in paragraph (1) of Article 4 *bis* below. It would establish a cap of liability under applicable law at the same financial level as the airline's cap. After extensive deliberation, and with a view towards securing a sensible agreement on the matter, the AWG has added, as paragraph (2) of proposed Article 4 *bis*, a clause that would permit the breaking of that cap. We have included an associated definition (senior management).

2.3 We therefore propose the inclusion of Article 4 *bis*, the definition of senior management, and a consequential change to the right of recourse, Article 11 (collectively, the ***Proposal***), as follows:

Article 4 bis

"1. Any liability under applicable law of the manufacturer of an aircraft or its engines or components for damage sustained by third parties which is caused by an aircraft in flight shall not exceed in the aggregate the limit for such aircraft specified in Article 4, paragraph 1.

2. The limitation in Article 4 bis, paragraph 1 shall not apply where the senior management of a manufacturer acted with the intent to cause damage or recklessly and with knowledge that damage would probably result."

Definition of Senior Management

"'Senior management' means members of a manufacturer's supervisory board, members of its board of directors, or other senior officers of the manufacturer who are responsible for making decisions regarding the overall management of the manufacturer's activities or manufacturing process."

Consequential Amendment to Article 11 (underscored)

"Subject to Articles 4 bis and 13, nothing in this Convention shall prejudice the question whether a person liable for damages in accordance with its provisions has a right of recourse against an person."

3. RATIONALE

3.1 The operators' cap addresses the problem of unbounded, unquantifiable, and potentially uninsurable exposure in the context of third party liability. To the extent that this is a problem for operators, it is also a problem for manufacturers. While some delegations would, on grounds of simplicity, prefer to limit the protections in this regard to operators, the results of that would be unjust, leading to adverse economic consequences. These consequences fall on states with large manufacturing sectors, that is, unlike the case of operators, the treatment of manufacturers is of direct interest to a relatively small number of states.

3.2 In most litigation arising from air accidents, the principal defendants are the operator and the manufacturer. Capping the liability of the former but not the latter is simply a risk and liability transfer.

3.3 We have considered other possible approaches to this problem – such as a) the removal of the proposed airline cap (which would preserve the existing operator–manufacturer risk allocation)*, and b) expanding the exclusive remedy clause (Article 12) such that all actions must brought against operators, with operators then having recourse in accordance with Article 11 (which would be novel but may establish a new approach to the operator–manufacturer relation, and simplify litigation, assisting victims). While one of these approaches might well produce a satisfactory result, and we reserve the possibility of raising them at the Diplomatic Conference, we believe the Proposal is more appropriate.

3.4 The Proposal starts with an implicit acknowledgement that, unlike the case of operators, there is a wide range of legal norms applicable to manufacturers' liability and the conflict of law rules applicable to that liability. In addition, the effectiveness of the current liability regime is generally perceived as being satisfactory in the context of General Risks (the problems only arise given the proposed operators' cap). Thus any effort to develop a harmonized system of manufacturers' liability would be exceptionally difficult, unnecessary, and, given the schedule of the Diplomatic Conference, impractical. Accordingly, the Proposal starts in Article 4 *bis* paragraph (1) by retaining liability under applicable law (which includes conflict of laws). It simply and cleanly caps that liability, subject to paragraph (2). The latter provides a means to break the cap, with a recklessness-type standard found in several international air law instruments and which is being proposed by industry in the unlawful interference convention. That recklessness standard would be applicable to senior management, namely, those with responsibility for the company or its manufacturing process. That, too, is in line with the industry proposal in the unlawful interference convention.

— END —

* At the last Legal Committee meeting, efforts were made, without success, to further restrict the breakability of the operators' cap, including by placing the burden of proof on the plaintiffs. We assume such efforts will continue at Diplomatic Conference. Any such restrictions would compound the problems noted in this paper.