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

(Presented by Germany)

1. INTRODUCTION

1.1 The 33rd Legal Committee had submitted the Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft even though there was no consensus found on basic pillars of the Convention. Several States have voiced their concerns, as can be noted in the minutes of the 33rd Legal Committee (LC/33-WP/8-6; LC/33-WP/8-7 and LC33-WP/8-9). Three of the heavily disputed issues will be presented within this paper:

- the financing concept of the **Supplementary Compensation Mechanism** (SCM) is inoperable (see 2);
- the nearly **unbreakable cap** on the operator's liability contradicts fundamental principles of law (see 3); and
- the vast **exoneration** of other service providers disregards the victim's interest (see 4).

1.2 Additionally the general question arises, whether it is appropriate to address an international agreement at the sole risk of a perverted use of an aircraft as a weapon in the dimension of 9/11 which might never occur again.

2. THE SCM

2.1 At the time being, the German delegation does not approve of the establishment of a Supplementary Compensation Mechanism as foreseen in the current draft.

2.2 The reasons are as follows:

2.2.1 The issue of the functionality of the fund appears to be completely unclear. Such a voluminous construct involving unmanageable financial and administrative expenses for all the parties concerned can in no case be established without detailed expert analysis and preparation. Especially the level of the contributions to be paid would have to be laid down in an appropriate form in the text of the

agreement (e.g. maximum limit); this however requires technically well-founded calculations by economic experts. Without such calculations the whole construction would be purely speculative, unreliable, and therefore unacceptable.

2.2.2 In addition, the establishment of a fund could result in a non-estimable administrative burden for air carries. This is especially problematic against the background of the current global economic situation. With regard to the current draft, the German air carriers find that the assumed administrative burden associated with the payment obligation to the fund is not reasonably commensurate with the advantages resulting from its establishment.

3. BREAKABILITY OF THE LIMITS TO THE OPERATOR'S LIABILITY

3.1 The current draft

3.1.1 In the current draft Article 3 deals with the liability of the operator and Article 4 states the limitations thereto. Pursuant to the latter provision, the operator's liability is limited to 700 million Special Drawing Rights (SDR) at the maximum (first layer). Beyond these limits a fund (Supplementary Compensation Mechanism, SCM) will compensate damage. It is limited to 3 billion SDR (second layer).

3.1.2 Additional compensation is granted according to the requirements of Article 23 (third layer). This provision restricts additional compensation and therefore a breakability of the limits stated in Article 4 to cases in which the senior management acted with intent or recklessly. The act or omission that contributed to the event also has to fall within the regulatory responsibility and actual control of the operator and has to be – other than the act of unlawful interference – the primary cause of the event. The burden of proof is upon the victim. The senior management of the operator shall be presumed not to have been reckless, if it proves that a system to ensure compliance with applicable regulatory requirements has been established and the system was applied in relation to the event. Article 23, paragraph 4, provides for States to opt-in for accepting the certificate for implementing a certain standard as proof that the operator has not been reckless. The operator is not liable, if servants or agents have negligently contributed to the event. If a servant or agent committed the act of unlawful interference the operator is not liable if it proves that an effective selection and supervision system has been installed and was applied in relation to the respective servant or agent.

3.1.3 The right of recourse of the Supplementary Compensation Mechanism with regard to the operator depends on the same requirements as the breakability of the limits. Above that the right of recourse is restricted to cases where the event could not reasonably have been covered by insurance.

3.2 Concerns

3.2.1 Under the current draft the operator does not have to pay any compensation in most cases in which it contributed to the damage by fault: In the first layer its insurance will step in and insurance up to this amount is currently available on the market. The Supplementary Compensation Mechanism is liable in the second layer. In the third layer the operator has to assume liability only in very exceptional cases.

3.2.2 This liability concept causes serious concerns. It does not strike a fair balance between the interests of the victims and the interests of the airlines. The protection of the victim is not sufficient and lowers the current level of victim protection as provided by national law in numerous States.

— In cases where the operator, its senior management or its servants or agents caused or contributed to the damage by fault it is impossible to justify that operators benefit from the limitation of liability and victims do not receive any compensation exceeding 3 billion SDR although the operator is perfectly able to effect payments.

— The current liability concept does not set incentives to improve security measures and in the worst case could prompt operators to reduce security measures as well as the costs spent on those measures.

— For the same reasons a right of recourse – irrespective of the question, if the fund is exhausted – seems necessary. It is not justifiable why the fund should be refilled by contributions of all those who have not contributed to the damage, whereas the one who acted negligently or with intent is absolved from responsibility.

— For various States a limited liability in case of intent or gross negligence, regardless of the operator's, its senior management's or its servant's and agent's fault, would also raise serious constitutional concerns and might constitute an obstacle to ratification. Furthermore the whole concept contradicts basic principles of tort law.

— In addition, the factual abandonment of taking responsibility for the acts of agents and servants is not in line with the general concept of liability in international law. There is no reason to depart in this respect from the standards of the Montreal Convention which, in Article 22, paragraph 5, also refers to servants and agents of the carrier.

3.3 **Proposal**

3.3.1 Germany proposes (1) that there shall be no limitation to the liability if the operator or its senior management is at fault and that (2) in case that the servants or agents are at fault, there shall be exceptions to the limitation of liability only in those cases where the senior management has not complied with supervision duties or did not select its servants and agents properly.

3.3.2 There is no justification for the fact that the operator or its senior management should not be held liable for its own mistakes, but with regard to its servants and agents it has to be taken into account, that they cannot be controlled the whole time. Therefore, the operator should however not be held liable beyond the limits of Art. 4 for acts or omissions of servants/agents, if it can prove that it has done everything in its sphere to prevent the occurrence of the damage. The third party would never be able to prove something which is in the sphere of the operator.

3.4 **Consequences of the proposal**

3.4.1 If the damage occurs without negligence or intent on the part of the operator or its senior management its liability will be limited to 700 million SDR at maximum. The same limits apply if a servant or agent acted with intent or negligently, but the operator proves that it has complied with its selection, supervision and controlling duties.

3.4.2 The scenario will be profoundly different though where the operator, its senior management or its servant or agent has acted negligently or with intent and the operator cannot prove that the senior management has complied with proper selection, supervision and controlling duties. In these cases, the liability of the operator will be unlimited and thus the third party may claim damages from the operator exceeding 700 million SDR (second layer) as well as 3 billion SDR (third layer). In the second layer the operator and the SCM will be liable jointly and severally.

3.4.3 If the SCM compensates the third party it has the right to recourse against the operator, but subject to the full compensation of the third party in the third layer. The suggested breakability of the limitations of the operator's liability is also vital for the right of recourse of the SCM dealt with in Article 25[1].

3.5 **Wording**

3.5.1 Therefore Germany recommends some changes to **Article 23** which would then read:

"**1. To the extent the total amount of damages exceeds the limits applicable according to Articles 4 and 18 paragraph 2, a person who has suffered damage may, in accordance with this Article, claim compensation from the operator. Compensation in accordance with this Article may also be sought if the Supplementary Compensation Mechanism is unable to pay.**

2. The operator shall be liable for such additional compensation if 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 or negligently.

3. Where a servant or agent of the operator has committed an act of unlawful interference or has contributed to the occurrence of the event by an act or omission done with intent or negligence, the operator shall be liable, unless it proves that a system to ensure effective selection of servants and agents has been established by its senior management and that such system provides for a prompt response to security information concerning such servants and agents and was applied in relation to the relevant servant or agent.

4. If a State Party so declares to the Depositary, an operator shall conclusively be deemed that a system to ensure effective selection of servants and agents has been established, in respect of an event causing damage within the territory of that State Party if, as regards the relevant areas of security, it proves that a system to ensure compliance with such commonly applied standard as has been specified by that State Party in its declaration has been established and audited. The existence of such a system and completion of such an audit shall not be conclusive if, prior to the event, the competent authority in that State Party has issued a finding that the operator has not met all applicable security requirements established by that State."

[1] As a consequence Article 25 paragraph 2 would have to be adjusted. This change concerns mainly the question of channelling the claims onto the operator, therefore the issue and the complete changes concerning Article 25 are treated within point 4 of this paper on the exoneration of other service providers.

4. VAST EXONERATION OF OTHER SERVICE PROVIDERS

4.1 The current draft

4.1.1 The Draft provides in Article 28 that the claim against the operator under the Convention is an exclusive remedy and therefore shields other entities, which could have contributed to the damage, from their liability. Additionally Articles 24 and 26 exclude almost any recourse of the operator liable for third party damage to anybody else who contributed to the damage. This complete exclusion of liability is granted to the other entities without obliging them to contribute to the SCM and regardless of the basics of tort and contract law.

4.2 Concerns

4.2.1 This "channelling" of claims onto the operator is especially critical concerning entities that are involved in operational areas of air traffic and therefore constitute severe risks for the operators' safety, such as air navigation service providers, airports, security providers and ground handling service providers:

- in cases where the other entity has acted with fault and has thus contributed to the damage it is not justifiable that it benefits from the exclusion of liability – without even having contributed to the SCM – whereas the victims risk not receiving any compensation if the resources of the SCM are exhausted or if the operator is insolvent. The other entity however is perfectly able to effect payments;
- additionally it can hardly be considered fair if the operator, which is held strictly liable in case of an incident, should not have a right of recourse against those which actually caused or contributed to the damage;
- the current exoneration concept does not set incentives to improve security measures and could prompt service providers to reduce security measures and the costs involved, since there would be no liability in case of damage; and
- such a general exclusion of liability would encompass manufacturers of aircraft as well. This however contradicts European Community law on product liability and must prevent EC Member States from ratifying the Convention.

4.3 Proposal

4.3.1 Therefore Germany proposes to grant exoneration only to those entities which are not involved in the operational process, such as owners of aircraft or lessors and financiers of aircraft, but to maintain exposure to liability of those who are involved in the operational process and therefore can contribute to damage. Furthermore Germany proposes to grant the right of recourse according to **national law** to the operator and to the SCM.

4.3.2 To this end Germany recommends the following changes:

- **Article 28** should be deleted; and
- a new **Article 4 *bis*** should be inserted, reading as follows:

  "**Without prejudice to Articles 3, 4, 5 and 24 owners, lessors and financiers of aircraft shall not be obliged to pay compensation for damage covered by this Convention**."; and

— finally, **Articles 25 and 26** should be deleted and **Article 24** should be replaced by the following new Article:

"**Article 24 – Right of Recourse**

"1. Nothing in this Convention shall prejudice the question whether an operator liable for damage has a right of recourse against any other person.

2. Nothing in this Convention shall prejudice the question whether the Supplementary Compensation Mechanism has a right of recourse against any person. However, the Supplementary Compensation Mechanism shall only have a right of recourse against the operator, if the operator is liable for additional compensation according to Article 23.

3. The right of recourse is subject to the full compensation of all third parties."

— END —