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(English and Russian Only)

INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

ADDITIONAL COMMENTS RECEIVED ON THE TWO DRAFT CONVENTIONS

(Presented by the Secretariat)

ADDENDUM NO. 1

Comments on the two draft conventions have been received from the Russian Federation and are reproduced in Appendix I hereto.

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APPENDIX I

RUSSIAN FEDERATION

1. GENERAL COMMENTS ON DRAFT CONVENTION NO. 1 AND DRAFT CONVENTION NO. 2

1.1 We propose that the definition of "Operator" in the relevant paragraphs of Article 1 in both draft conventions be expanded to include a reference to the need for the existence of a legal basis for the use of the aircraft at the time the damage was caused.

1.2 Based on the definition of an aircraft "in flight" in Article 1 c) of draft Convention No. 1 and Article 1 b) of draft Convention No. 2, the scope of the Conventions does not cover situations in which the damage is caused at the time of passenger embarkation/disembarkation. We feel that the definition of an "aircraft in flight" needs to be expanded to cover the time from the start of passenger embarkation to the completion of passenger disembarkation.

1.3 The language in Article 2 – Scope of the draft conventions, is not clear with respect to air carriers- operators of leased aircraft. Leased aircraft may be registered in a State other than the State of Registry of the air carrier. However, neither draft convention stipulates how the operator will fall within the scope of the convention (according to the State in which he is registered, the State in which he has his main place of business, the State of Registry of the aircraft, etc.). We recommend that a link be established to the State in which the air operator certificate was issued (without a link to the State of Registry of the aircraft).

1.4 Mental injury should be deleted as a form of damage in Article 3 – Liability of the Operator, paragraph 3, of the draft conventions, in the light of the fact that this type of damage is open to wide interpretation and is difficult to determine (difficult to establish the link between cause and effect). The existence of this type of damage increases the probability of unwarranted increases in insurance premiums. Furthermore, compensation for this type of injury is not covered in either the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, dated 7 October 1952 (hereafter, "Rome Convention") or the Convention for the Unification of Certain Rules Related to International Carriage by Air, dated 28 May 1999.

1.5 We recommend deletion in the draft conventions of Article 3 paragraph 5, which provides for compensation for environmental damage, insofar as such compensation is provided for under the law of the State in the territory of which the damage occurred. Given the different levels of development of environmental legislation in different countries, for such an issue to be regulated solely by the national legislation of individual States is, to our mind, inadmissible. Accordingly, a single, uniform mechanism should be developed for all States Parties to the Conventions. In other words, the rules relating to compensation for environmental damage should be unified in these conventions or in a separate convention.

1.6 Since Article 7 in draft Convention No. 1 and Article 9 in draft Convention No. 2 apply not only to insurance but also to the maintenance of a guarantee to cover operator liability, we propose that either the heading of the Articles be amended to read "Coverage of Operator Liability" or that a new Article entitled "Coverage of Operator Liability by Means of a Guarantee" be added. Such an Article would cover the different types of and minimum requirements for the issuance of the guarantees.

1.7 In Article 7 of draft Convention No. 1 and Article 9 of draft Convention No. 2 the term "adequate", which is subjective by nature, is used to qualify liability insurance. Given the subjectivity of this concept and the ambiguity surrounding the type of insurance and type of guarantee (state, bank, insurance company, legal person, natural person) available to States Parties to the Conventions, as well as the requirements for the issuance of a guarantee (document form and content), we propose that all issues related to operators maintaining adequate liability insurance be regulated. This should fall within the competence of States Parties to the Conventions and Articles 7 and 9 in the draft conventions should be expanded as follows:

> "Adequate insurance means that an insurance agreement has been concluded with a company which is authorised to provide liability insurance to aircraft operators pursuant to the legislation of the State of Registry of the insurance company and that the terms of the insurance agreement do not limit the scope of liability for damage and the conditions under which the damage was caused as stipulated in this Convention."

1.8 We feel that the reference to the type of fault in Article 20 of draft Convention No. 1 and Article 10 of draft Convention No. 2 – Acts or omissions of victims – should be deleted since even the innocent actions of third parties are beyond the control of the operator and more often than not, cannot be prevented by him. We also feel that the list of persons should be expanded to include the servants and agents of the victims, as is the case in the Rome Convention.

1.9 In accordance with the principles of State sovereignty, Article 30 in draft Convention No. 1 and Article 15 in draft Convention No. 2 – Review of Limits – should stipulate that revisions shall only become effective in respect of those States which have not registered their disapproval.

1.10 Furthermore, we would like to draw your attention to certain inconsistencies in the translation of a number of phrases and terms in Russian, as follows. In Article 18 paragraph 3 of draft Convention No. 1 the word "покрытие" should be replaced by "возмещение в связи с наступлением ответственности". In Article 21 of draft Convention No. 1 and Article 7 of draft Convention No. 2 the word "покрытие" should be replaced by "возмещение". In Article 31, paragraph 2 of draft Convention No. 1 the term "произошел инцидент" should be replaced by "произошло событие". In Article 16 paragraph 2 of draft Convention No. 2 the word "событие" should be replaced by "причинение ущерба".

2. DRAFT CONVENTION NO. 1

2.1 Article 1 f) in draft Convention No. 1 should read as follows:

> "Operator" means the person, in possession of a document legally entitling him or her to make use of the aircraft, who was making use of the aircraft for flight purposes at the time the damage was caused. Moreover, if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, (in this case, the owner of the aircraft) that person shall be considered the operator.
>
> A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.
>
> The operator shall not lose its status as operator by virtue of the fact that another person commits an act of unlawful interference."

2.2 In Article 7 of draft Convention No. 1 the words "их покрытие" should be replaced by "возмещение в связи с наступлением их ответственности".

2.3 In draft Convention No. 1 we need to ensure that victims can make claims of strict liability against the persons who have committed acts of unlawful interference. Currently under the Rome Convention the person who has wrongfully taken an aircraft may also be deemed to be strictly liable (Article 12 paragraph 2). However under the proposed draft Convention No. 1 the operator, while maintaining his right of recourse against the person who has committed the act of unlawful interference, is the only person who has unlimited liability. Such exoneration of terrorists from strict liability hardly seems justified.

2.4 **Supplementary Compensation Mechanism**

2.4.1 Draft Convention No.1 provides for the establishment of a specialized fund – the Supplementary Compensation Mechanism (hereafter, "SCM") – which is recognized by States Parties to the convention as a legal person. Under the terms of the Convention, the SCM enjoys a wide range of privileges including tax exemptions and immunity from legal and administrative actions.

2.4.2 At the same time, draft Convention No. 1 does not set the conditions for acquiring and disposing of the respective funds in the territories of the States Parties to Convention No. 1 nor are the Mechanism and arrangements for investing the accumulated funds regulated.

2.4.3 The proposed configuration of the fund does not take into account the specificity of the aviation world. In particular, it is not clear what deductions would apply to those cases when an aircraft performs a flight without a commercial load (positioning of the aircraft, air ferry, training and test flights), in other words, without a commercial load on board.

2.4.4 Procedures for setting up the SCM funds, as provided for in draft Convention No. 1, may only be introduced once a reliable and transparent mechanism has been established to identify the sources for compiling factual data on the carriage of passengers/cargo, the means of verifying such data and the manner in which it is to be made available to States Parties of Convention No. 1. We propose, accordingly, that alternative options (criteria) for replenishing the SMC fund be considered. Draft Convention No. 1 is not clear on the issue of what is to be done in the case of compensation for damage to third parties on the surface, when their movable and immovable property is already covered under other types of mandatory/voluntary insurance.

2.4.5 Article 8 paragraph 7 of draft Convention No. 1 is predicated on the SCM and its bodies making use of a wide range of immunities from administrative and legal actions which could lead to abuse of authority and have other negative implications. We feel that the provisions on immunity should be deleted or amended to cover a wider range of ramifications. In principle, however, the idea should be maintained.

2.4.6 Article 11 in draft Convention No. 1 should be expanded to include a list of powers of the Director in accordance with the procedure for review of limits of authority set down in Article 30.

2.4.7 From the point of view of liability for possible damage, the terms “operator” and “carrier” are not synonymous. An operator is liable for (any) damage caused when an aircraft is used (operated) for flight purposes whereas a carrier is only liable for damage caused during the carriage of passengers and cargo under an air transport agreement.

2.4.8 Article 15 of draft Convention No. 1 refers to Regulations governing the establishment by the Conference of Parties of a mechanism for the collection and remittal of contributions. These Regulations are not defined earlier in the text and their establishment/development does not fall within the terms of reference of the Conference of Parties as defined in Article 9 of draft Convention No. 1. Article 9 b) in draft Convention No. 1 provides for the establishment of the SCM regulations by the Conference of Parties. It is necessary, therefore, to align these provisions or to define conclusively what is meant by “Regulations of the Supplementary Compensation Mechanism” and “Regulations”.

2.4.9 Article 23 in draft Convention No. 1 contains a series of terms and requirements, which are not sufficiently clear or which could be interpreted in different ways. For example, Article 23 paragraph 5 in draft Convention No. 1 contains a provision for the effective selection of an air carrier’s personnel. Criteria for such “effective “ selection are extremely difficult to establish.

2.4.10 Article 25 in draft Convention No. 1 should not provide for a right of recourse of the Supplementary Compensation Mechanism against the operator if the terrorist act was committed by his associate and the operator was not to blame. In this case the carrier is also a victim of an act of unlawful interference.

2.4.11 Chapter VII in draft Convention No. 1 needs to be expanded by adding an Article on “Exoneration of Status Liability” before Article 28, along the lines of Article 13 in draft Convention No. 2.

"Neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party".

2.4.12 Chapter VIII in draft Convention No. 1 needs to be expanded by adding an Article on "Nuclear Damage" after Article 37, along the lines of Article 22 in draft Convention No. 2 and delete Article 3 paragraph 6 in draft Convention No. 1.

3. DRAFT CONVENTION NO. 2

3.1 Amend Article 1e) in draft Convention No. 2 as follows:

"Operator" means the person in possession of a legal document entitling him or her to make use of the aircraft, who was making use of the aircraft for flight purposes at the time the damage was caused. Moreover, if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, (in this case the owner of the aircraft), that person shall be considered the operator.

A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority."

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