

Notes on meeting of ICAO Special Group on the Modernization of the Rome Convention of 1952

The group met from 10th to 14th January in Montreal, mandated by the Council of ICAO to further the work of the Legal Committee and to prepare a text for submission either to the Legal Committee or, if felt appropriate, to the Council of ICAO itself. In the event, the group has produced the essential elements of a draft Convention deemed by most members to have the potential of ratifiability, whilst leaving some further work to be done in preparing a final draft.

Earlier drafts concentrated on victim protection and paid little attention to the need to reflect the fact that the primary impulse for a new Convention came from the post 9/11 experience of the need for the insurance industry to preserve itself and the withdrawal of war risk insurance, followed by the subsequent reintroduction of war risk insurance with lower limits and other restrictions including those shortly to be implemented. The imposition of strict liability on carriers for risks that were uninsurable, with the inevitable consequence that the compensation goals of the draftsmen would be unrealised in the face of the bankruptcy of the carrier, seemed non-negotiable in earlier meetings due to the inability of governments to modify current domestic strict liability statutes to the disbenefit of consumers, regardless of whether the liabilities so imposed were ever likely to be satisfied for example in the context of a terrorist attack using nuclear weapons.

The Special Group started with echoes of these attitudes but after some days of discussion, and explanations by representatives of the IUAI, IATA and LMBC, the Chairman produced a list of draft points of agreement seeking to set the basis for modifications to the text. The central focus of the document is on the need to balance the demands of victim protection with the need to acknowledge the importance of the air transport system and to protect it by avoiding threats to its financial status and taking into account the availability of insurance cover. The impossibility of doing this within the constraints of the current system is acknowledged by the group. It is accepted that a suspension of insurance obligations was not sufficient to solve the problem and that a supplementary funding mechanism for the protection of the civil aviation sector could bridge the gap between an adequate level of victim compensation and protection of the industry as well as ensuring the durability of the system. The nature and modalities of the proposed funding system need further study – an acceptance of the fact that government delegates had no authority to go further with regard to a funding system without explicit authority from their political masters.

Against the background of the points of agreement which were themselves debated at some length before reaching a final form, the group proceeded to review again the draft Convention. The final draft text contains a number of provisions in square brackets signifying the group's inability to reach agreement or the need for more time to be spent on discussion of the issues. These provisions include the suspension of the rights and obligations of the Convention in the event of a major terrorist act, which the group were advised by Industry representatives would not affect any decision by Insurers as to the

proper measures for them to take, and that any such decision would be taken before the Council could act.

The current state of the draft is that strict liability remains for surface damage with a cap per person of an amount suggested to be between 250,000 and 500,000 SDRs if the operator can prove the accident occurred with no fault on its part. It was suggested by a sub group including the Union that the liability should be only for bodily injury and mental injury consequent on it or on the victim having been in the vicinity of the event and having reasonably feared that he would be physically injured. That issue is likely to be debated further. Where the damage is caused by terrorism, there is a proposed weight-based cap, with figures in brackets, because the possibility of a breakable cap was accepted by several delegates to be unrealistic in the light of the limited resources that would be available to pay compensation, particularly for damage caused by a terrorist event. There was considerable debate as to whether any cap should be capable of being broken by an act of severe negligence on the part of the operator. The Union representative stressed that there was no such legal concept in common law countries so that the courts would treat the test as simple negligence. This view was echoed by a number of delegations but opposed principally by Germany, its original proponent, which resisted the Union's alternative of "recklessness with knowledge that damage would probably result" as being less onerous on operators.

Other matters which were refined included the treatment of mid air collisions, which were resisted by several delegates. The Legal Committee had endorsed the inclusion of mid air collisions and the group revised the text so that all those who contribute to such a collision should bear responsibility according to the measure of their negligence. An attempt by some States to reintroduce the State where the operator has its head office as a potential forum for litigation was resisted by some delegates on grounds of practicability. The Legal Committee had suggested a dual time limitation for the commencement of claims of two years extendable to three years in certain circumstances, but the group led by the Union recommended the imposition of an unbreakable two year period as with the Montreal Convention.

On the final day of the meeting the Australian delegate introduced a paper on a possible funding mechanism based on the International Oil Pollution Fund. This contemplates States imposing a levy either on passengers or flights and using the proceeds to compensate victims for their losses to the extent that those losses are not covered by private insurance, so that payments would be made where there was no cover or where the limit of such cover was exceeded. The funds so raised would be held by the fund, and would be available for settlement of claims arising from events in States that agreed to participate, leaving the option open to States which did not to address claims arising from events in their territories in their own way. The scheme requires considerable refinement and one obvious problem is that it is designed partly to protect civil aviation. An individual State will be most interested in protecting its own carriers. If the State where the event occurs does not participate in the scheme, the threat to the foreign carrier's assets would be unprotected by the scheme. Thus unless there is more or less global

uptake of the scheme, it may not perform the necessary function of protection of civil aviation.

The Chairman of the group was authorised to sign off on the report of the progress made so far by the group, and his report is expected in the next few weeks. His report will detail a number of issues requiring further discussion. These will include:

- a) Should there be a global limit per event,
- b) Whether mid air collision should be covered,
- c) Should there be one Convention or two with one addressing only the terrorist issues
- d) The establishment of a fund
- e) Whether the Convention should exclude possible liability of the manufacturer (as proposed by the Aircraft Working Group)
- f) The definition of “adequate” in respect of the invitation to States to require operators to have adequate insurance,
- g) The determination as to whether the Convention should be fault based, imposing liability as a consequence of the comparative fault of the operator, or a channelling Convention designed principally to be a vehicle to deliver compensation through the medium of the operator and its Insurers, leaving them with the right to pursue other parties with a responsibility for the event.

It seems likely there will be another meeting of the group this year, by when States will have had the opportunity to obtain political support for the direction being taken.

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